ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

REPORT
AND
SELECTED DOCUMENTS
OF THE
THIRTY-THIRD SESSION
TOKYO, JAPAN
(17-21 January, 1994)

THE AALCC SECRETARIAT

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Preface

The Thirty-third Session of the Asian-African Legal Consultative Committee (AALCC) was held in Tokyo (Japan) from 17th to 21st January 1994. The Session was attended by Ministers and high ranking officials from the Member States of the AALCC. Observer delegations from non-Member countries also participated in the session. The representatives of the United Nations, its subsidiary bodies, the specialized agencies and various other international and regional organisations actively participated in the deliberations.

The Tokyo Session received a message from the United Nations Secretary-General Dr. Boutros-Boutros Ghali which was read out by Dr. Gerold Hermann, Secretary of UNCITRAL. The message lauded the role played by the AALCC in supporting the UN initiatives in such fields as human rights, question of refugees, the use of international waterways, the Law of the Sea, Environment and Development, Desertification, International Trade Law, the Agenda for Peace and the UN Decade of International Law.

The Government of Japan attached great importance to the work of the AALCC as was evident by the fact that it played host of the AALCC Session for the Fourth time. The Tokyo Session was held in the middle of the UN Decade of International Law which gave it special significance.

While in the 1970s the AALCC had made a significant contribution in the field of the 'Law of the Sea' it had recently played an active and constructive role in the context of the United Nations Conference on Environment and Development, the World Conference on Human Rights and in coordinating a concerted approach among the Member States at these conferences.

In the context of the ongoing trend of national economies turning towards a more market-oriented system, AALCC's initiative of organizing a Special Meeting on Privatization at the Tokyo Session had been considered as timely.

Most of the subject items on the Agenda were taken up for discussion at the Tokyo Session. The present Report gives in detail, the background information,

deliberations of the Thirty-third Session, the decisions adopted and the following selected studies prepared by the AALCC Secretariat for the Session:

1. Report on the Work of the International Law Commission at its Forty-fifth Session

At the Tokyo Session a report containing the progress made at the Forty-fifth Session of the Commission held from 3rd May to 23rd July 1993 was placed before the Committee. During that Session, there were as many as four substantive topics on the Agenda. All these items are at different stages of work. The topics are as follows:-

(i) State Responsibility;

(ii) Draft Code of Crimes Against the Peace and Secruity of Mankind;

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

(iv) International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law.

2. Status and Treatment of Refugees

(i) AALCC's Model Legislation on Refugees:

The AALCC Secretariat and the Office of the United Nations High Commissioner for Refugees jointly organised a Workshop on International Refugee and Humanitarian Law in the Asian-African region from 24 to 26 October 1991.The Workshop had recommended that the AALCC should consider the possibility of preparation of a Model Legislation in co-operation with the office of the UNHCR, with the objective of assisting Member States in enacting appropriate national legislation on refugees.

In pursuance of the mandate received at the Thirty-first Session, the Secretariat prepared a preliminary study which analysed the shortcomings of the 1951 Convention and its 1967 Protocol. It also discussed whether the definition of "refugee" provided for in the 1951 Convention satisfies 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 Committee at its Thirty-second Session held at Kampala directed the Secretariat to continue to study the preparation of a Model Legislation in close cooperation with the UNHCR and the Organization of African Unity (OAU). The brief prepared for consideration at the Tokyo Session examines the complexities of a generally acceptable definition of

refugees and displaced persons with a view to further its work on the proposed model law.

(ii) Establishment of Safety Zones for displaced persons in their country of origin

The Thirty-first Session mandated the Secretariat not only to update its study on the establishment of Safety Zones but also to analyse the legal implications of recent attempts to establish such Zones in either war-stricken countries or areas of conflict compounded by natural calamities like drought. At the Thirty-second Session, the Committee decided to study further the concept of Safety Zones and to analyse the role played by the UN in general and the UNHCR in particular in the recent past in that regard. The brief prepared for the Tokyo Session seeks to fulfil that mandate.

3. The Law of International Rivers

The study on this topic proposes to examine two aspects of freshwater resources: one, its limited availability and the extensive uses to which it is being put; second, the necessity to sustain freshwater resources in the light of its reckless use. In order to achieve this contrasting objectives, the study proposes certain ideas which are basically drawn from the normative approaches inherent in the various international legal conventions and municipal legislative measures. At the outset, the study draws its basic arguments from the principles and standards set by the Agenda 21 of the United Nations Conference on Environment and Development (UNCED).

4. Law of the Sea

Matters relatable to the work of the Preparatory Commission for the International Sea-bed Authority and for the International Tribunal for the Law of the Sea.

The Secretariat of the AALCC has continued to monitor the progress of work in the PREPCOM and presented reports to the successive sessions of the Committee. The report for the Tokyo Session contains a brief account on the progress of work at the last session of the Prepcom (22nd March — 2nd April 1993) held in Kingston, Jamaica, in which the draft provisional final report of the Commission was adopted. The list of the pending issues which are annexed to the provisional report indicates that the existing pattern of meeting would not be continued and instead, the focus will be on the informal consultations organised by the U.N. Secretaray-General which are now open-ended. The Secretariat of the AALCC in compliance with its mandate has monitored the debates and the

developments in the Informal Consultations and has prepared a brief report on the progress and outcome of the three meetings held during the year 1993.

The report takes into account the contents of the Information Note of the UN Secretary-General dated 5th April 1993 and analyses the procedural approaches on reflecting any agreement that might be reached in the Informal Consultations in a legally binding manner to come into effect simultaneously with the entry into force of the Law of the Sea Convention. It also reviews the possible scenarios for the establishment of the International Sea-bed Authority and the draft texts governing the regime for deep sea-bed mining. The report refers to the different views on the decision-making and voting in the Council and the functions of the Enterprise during the Interim Regime and the Definite Regime.

5. United Nations Conference on Environment and Development (UNCED)-Follow-up

The Secretariat, while monitoring the progress of work in the PREPCOM of UNCED, took into account the ongoing parallel negotiations on the Climate Change and Biodiversity Conventions. At the Kampala Session (1993) the Committee directed the Secretariat to actively involve itself in the negotiations concerning elaboration of an International Convention on Combating Desertification.

The Commission on Sustainable Development, established pursuant to a recommendation made at the Rio Summit, held its first session in June 1993 in New York. The AALCC Secretariat prepared a Note containing a review of the progress in this session. This Note has been placed for consideration at the AALCC's Legal Adviser's Meeting in New York. The Secretariat updated this Note in the light of discussions at that Meeting as well as at the forty-eighth session of the General Assembly. This Note formed the background document for consideration at the Tokyo Session of the AALCC.

The Framework Conventions on Climate Change and Biodiversity were expected to come into force in early 1994. The AALCC Secretariat prepared short notes on the prompt start arrangements being pursued in the context of these two Conventions. The Inter-governmental Negotiating Committee (INC-D) established pursuant to Genreal Assembly resolution 47/188 has been entrusted with the task of elaboration of an International Convention to Combat Desertification in those countries experiencing serious drought and/or desertification, particulary in Africa. During its last two substantive sessions the INC-D has made good progress in identifying the relevant issues and chartering the course of action for its future sessions. It is the intention to complete the elaboration of the Convention by June 1994. The AALCC Secretariat has prepared an overview of the progress

made at the two sessions. The AALCC Legal Advisers Meeting in New York considered this item and in the light of the views expressed, the Secretariat updated its Note and placed it before the Tokyo Session.

6. The United Nations Decade of International Law

In order to gather specific proposals for the programme for the Decade and on 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 organisations 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 constituted and charged with the preparation of a generally acceptable programme for the United Nations Decade of International Law.

The General Assembly of the United Nations at its Forty-seventh Session, adopted a programme for the activities for the second term (1993-94) of the United Nations Decade of International Law. The Committee at its Kampala Session (1993) mindful of the U.N.G.A. resolution 47/32 of 25 November 1992 *inter alia* directed the Secretariat to continue its efforts towards the realization of the objectives of the United Nations Decade of International Law.

The brief prepared for the Tokyo Session includes the report of the AALCC Secretariat forwarded to the office of the Legal Counsel of the United Nations in pursuance of the above resolution.

7. World Conference on Human Rights : Follow-up

In view of the importance of the World Conference on Human Rights, the Committee, at its Thirty-first Session held in Islamabad in February 1992, decided to mandate its Secretariat to monitor the preparatory process of the Conference, focussed on the issues with legal implications and to make necessary studies.

At Kampala Session an open-ended Working Group was established to prepare a draft Declaration on Human Rights. The draft Declaration, entitled "Kampala Declaration on Human Rights", was formally adopted by the Committee on 6 February 1993, which was then submitted to the Fourth Session of the Prepcom for the World Conference.

While adopting the Kampala Declaration, the Committee further approved the Work Programme concerning the World Conference proposed by the Secretary-

General and decided to put the item "World Conference on Human Rights and its Follow-up" on the agenda of its Thirty-third Session.

For the consideration of the Committee at its Tokyo Session, the Secretariat prepared a comprehensive brief on the subject item. Deliberations on the item focussed on the assessment of the final outcome of the World Conference, *inter alia* its legal implication, including the promotion of the universal acceptance of international conventions on human rights, and on the major outstanding issues such as the creation of a High Commissioner for Human Rights.

8. International Trade Law

(i) Legal Aspects of Privatization

The AALCC had been taking up at each of its annual sessions Trade Law Matters in a Standing Sub-Committee on International Trade Law which usually met concurrently with the Plenary sessions. However, for the Tokyo Session the Trade Law Sub-Committee did not meet. In its place a Special Meetings on 'Developing Institutional and Legal Guidelines for privatization and post-Privatization Regulatory Framework' was convoked from 18 to 20 January 1994 as an integral part of the Tokyo Session in view of the topical importance of this subject for developing countries.

Special Meeting on "Developing Institutional and Legal Guidelines for Privatization and post-Privatization Regulatory Framework" 18 to 20 January 1994:

It had been proposed that the AALCC as a wider forum of Afro-Asian cooperation should take the initiative of arranging a Special Meeting on Privatization to provide the forum for interaction between the invited experts and legal advisers and other offficials of the AALCC Member States handling privatization programmes in their respective countries. The aim was to develop legal and institutional guidelines for privatization and post-privatization regulatory framework so as to provide an added impetus to the process of privatization in Africa and Asia.

The work Programme of the Special Meeting was as follows:

1. Macro-economic and legal issues involved in privatization;
2. Privatization strategies and techniques;
3. Legal reform procedure for restructuring and privatization of public sector undertakings;
4. Post-privatization regulatory framework; and

5. Preparation of institutional and legal guidelines for privatization and post-Privatization regulatory framework.

At the Special Meeting a resolution was adopted which is reproduced in this chapter.

(ii) Legislative Activities of the United Nations and other International Organizations concerned with International Trade Law:

The Secretariat presented a report on the recent legislative developments in the field of international trade law. The purpose of preparing such reports is to keep the Member Governments abreast with the recent developments in the field of international trade law. The organizations covered include UNCTAD, UNCITRAL, UNIDO, UNIDROIT and the Hague Conference on Private International Law.

(iii) Debt Burden of Developing Countries

The study prepared for the Tokyo Session proposes to examine the recent developments in the area of debt reduction strategies and the appropriate plans needed for an efficient debt management programmes.The study, at the outset, looks into the roots of the debt burden problems, especially taking into account the economic and political realities of Asian-African countries, it also refers briefly to the outcome of the various international initiatives proposed by industrialized countries and other international agencies. In the overall context of the international economic relations, the study identifies the changing nature of strategies adopted for the alleviation of debt burden.

The emphasis in the work programme of the U.N. Decade of International Law has encouraged the AALCC to publish its studies on the basis of which the various topics are discussed and debated. To attain the objective of encouraging study, dissemination and wider appreciation of international law, the Committee has been bringing out the Study-oriented Reports of its annual session for the last few years.

It is the belief that this Report would be useful to the international lawyers and researchers all over.

New Delhi,
1st May, 1994

Frank X. Njenga
Secretary-General

CONTENTS

I. Asian-African Legal Consultative Committee

(i) Introduction

The Asian-African Legal Consultative Committee, an inter-governmental organization was constituted in November, 1956 by the Governments of Burma (now Myanmar), Ceylon (Sri Lanka), India, Indonesia, Iraq, Japan and Syria. The Committee has at present a membership of forty-four countries,[1] comprising almost all the major States from Asia and Africa. The Committee's annual sessions are attended by more than 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. The aim 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 been broadened from time to time keep pace with the requirements of its member governments. The Committee as the only organization at governmental level embracing the two continents of Asia and Africa has also oriented its 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 many other inter-governmental organizations. The Committee holds its annual sessions in its member countries

1. Arab Republic of Egypt: Bahrain, 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; Maruitius; 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 Republic of Yemen; Botswana is an Associate Member.
Australia and New Zealand have the status of Permanent Observers.

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.

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.

Membership of the Committee is open to Asian and African countries 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. This communication 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.

Activities of the Committee

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

During the first ten years of the Committee's establishment its main functions centered on consideration of international legal question 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 Transaction; 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 emphasis of the Committee's work has been on rendering 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 and the World Conference on Human Rights held in Vienna in 1993.

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 Session 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 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.

For a few recent years the Committee's activities have been devoted to the field of economic relations and trade law. In this area the Committee has been working closely with the UNCTAD and UNCITRAL as a participating inter-governmental organisation. 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 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 legal aspects of privatization; 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 members governments; Training Programme; Rendering of assistance by the Committee's Secretariat to a Member Government on any topic of particular interest to that government upon request.

International Seminar on the Palestinian Question, New Delhi 1992

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 provided an occasion to celebrate the International Day of Solidarity with the Palestinian People. 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.

Election of the Secretary-General

The term of the present Secretary-General, Mr. Frank X. Njenga will be expiring on the 9th May 1994. The matter 'Election of the Secretary-General' was discussed at a meeting of the Heads of Delegations at the Tokyo session Mr. Tang Chengyuan, Deputy Director-General Department of Treaty and Law, Ministry of Foreign Affairs of the People's Republic of China was unanimously elected as the next Secretary-General of the AALCC. His three-year term begins on the 10th May 1994.

(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 strenthen 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 the following specific areas: 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.

Cooperative framework

Consultations are 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.

Representation at meetings and conferences

The AALCC 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 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, the United Nations Conference on Environment and Development (UNCED) and the World Conference on Human Rights 1993.

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

For the commemoration of the fortieth anniversary of the United Nations, the AALCC Secretariat 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. 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).

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. 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.

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.

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

The 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 Commission 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."

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 going on.

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 a further 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 AALCC secretariat included the topic 'Legal Aspects of Privatization on its agenda in 1991 and has since then been able to prepare 'Legal Guidelines for Privatization Programmes'. During the Tokyo session a special meeting on Privatization was convened with the assistance of the World Bank.

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.

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 General Assembly of its resolution 36/38 and the AALCC decision at its Tokyo (twenty-second) session in 1983. 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-firth 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 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. The concept of establishing safety zones for the displaced persons in their country of origin has also been taken up.

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 context 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 instruments 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.

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.

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 had 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 Israel 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 and thirty-third sessions, held in Islamabad and Kampala and Tokyo 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 sub-regional 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 Rights 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. At the Tokyo session a study highlighting the outcome of the World Conference on Human Rights and its follow-up had been discussed.

(iii) AALCC's Legal Advisers Meeting, New York 1993.

For several years now it has become the practice to convene meetings of the AALCC Legal Advisers in New York during the Sessions of the General Assembly. Such meetings have assumed great importance. Apart from the legal advisers of Member States, a large number of Legal Advisers from Non-member States and the representatives of United Nations, International Law Commission and other United Nations Agencies participate at these meetings. The recent meeting was held on 27th October 1993 at the United Nations Headquarters and was quite successful. The then President of the Committee Mr. A.K. Mayanja, the Third Deputy Prime Minister, Minister of Justice and Attorney-General of Republic of Uganda presided over the Meeting.

The following Member States attended the Meeting: Bangladesh, Botswana, China, Cyprus, Egypt, India, Indonesia, Iraq, Japan, Kenya, Libyan Arab Jamahiriya, Mongolia, Myanmar, Nepal, Nigeria, Qatar, Saudi Arabia, Senegal, Sierra Leone, Singapore, Sri Lanka, Sudan, Syrian Arab Republic, Turkey, Uganda, United Arab Emirates, Tanzania and Yemen. The Non-member States

who were represented included Algeria, Australia, Canada, Cameroon, Holy See, Mozambique, New Zealand, Romania, South Africa, Sweden and Tunisia.

The Meeting was also attended and addressed by the Under-Secretary General for Legal Affairs; the Legal Counsel of the United Nations Dr. C.A. Fleischhauer, the Executive Director of UNEP, Madam Dowsdell, the Chairman of the International Law Commission, Mr. Julio Barboza, the Chairperson of the Sixth Committee, Madam Maria del Luijan Flores, the Chairman of the Fourth Committee and the Chairman of the Ad Hoc Committee on Indian Ocean as a Zone of Peace. Mr.Stanley Kalpage and the Chairman of the Working Group on United Nations Decade of International Law Mr. Sanil Mohammad, Mr.Andrey Vasilyav, representing Mr. Nitin Desai, the Under-Secretary General for Sustainable Development and Co-ordination and the representative of Ambassador El-Araby, the Chairman of the Working Group on the Agenda for peace. The representatives of the International Red Cross Mrs. Huang T. Huynh and the European Community's Ms. A.Kung also attended the Meeting.

The Agenda of the Meeting set out three items namely: (i) A review of the World Conference on Human Rights; (ii) the outcome of the Second Session of the Intergovernmental Negotiating Committee for the Elaboration of an International Convention to Combat Desertification in those countries Experiencing Serious Drought and/or Desertification, particulary in Africa, held in Geneva from 13 to 24 September 1993 and (iii) An Agenda for Peace : Preventive Diplomacy and Peace-Keeping.

The Chairman, Mr. A.K. Mayanja stressed the importance of the items placed on the Agenda of the Legal Advisers Meeting.

The AALCC Member States who made statements on various items were : Bangladesh, China, Egypt, India, Indonesia, Japan, Kenya, Myanmar, Nigeria and Sri Lanka. The observer delegate from Sweden Mr. Hans Corell also addressed the Meetings. A summary of the observations is as follows :

The delegate of *China* noted the important role of the AALCC in the gradual development of the international law and the coordination of the practices of various countries. In his view the study "Agenda for Peace" would have positive impact on the UN capabilities of maintaining world peace and promoting development in all countries in the new world situation. Noting the emergence of unprecedented opportunities for the UN Peace-Keeping Operations, he expressed the hope that such operations would reflect the spirit of the UN Charter and be in accordance with the purposes and principles of the Charter. In his view, such operations should facilitate political settlement of disputes and conflicts rather than overemphasizing the means of U.N. Military intervention and the indiscriminate use of enforcement methods. The U.N. Peace-Keeping operations

and other actions should be taken within the financial and material resources of the organization and accord full recognition of the role of the parties concerned and the relevant regional organizations.

With regard to the negotiations on the Convention on Prevention of Desertification, the delegate of China addressed the following crucial issues : (a) the scale of the desertification problem as a global issue and according at the same time priority attention to Africa; (b) utilization of regional agencies; (c) new and additional financial resources; (d) regional annexes or protocols to be part of the Convention and (e) support to the position taken by the Group of 77.

The Delegate of *Indonesia* echoing the views of the Non-Aligned countries on the topic "Agenda for Peace" stated that "..... resort to preventive diplomacy could be pursued through early identification of political conflicts, engagement in peace-keeping where conflict occurs, preservation of post-conflict peace through peace-keeping and assistance in the implementation of agreements achieved, post-conflict peace building as well as the adoption of measures to redress the political and social and economic causes of conflicts."

Referring to the World Conference on Human Rights he termed it as "a watershed event in the international effort to promote and protect the inalienable and fundamental rights of men, women and children". In his view unlike other areas of human rights, the right to development had yet to receive a United Nations mechanism for proper monitoring and for guiding its implementation. He noted with satisfaction certain positive outcomes of the World Conference on Human Rights such as the consideration of the establishment of the U.N. High Commissioner for Human Rights. He briefly outlined the work undertaken by NAM in this regard. In his view, rather than establishing such a new body, it would be more beneficial to work within the existing mechanisms in such a way as to provide technical support for developing countries. Further, human rights and their protection and promotion should be based on national legislations which reflected the cultural, historical and religious background of respective States.

He reaffirmed his country's readiness to participate in the negotiating process of Desertification Convention. He referred to the NAM's positive approach in this regard and noted that the lasting solution to global environmental problems should be considered from the angle of the concept of sustainable development. In conclusion, he called for the support of developing and NAM countries for the effective role played by AALCC in these fields for last 36 years.

The delegate of *India* referred mainly to the issues concerning "desertification" and 'agenda' for 'peace'. He expressed the view that the draft Convention concerning desertification prepared by the AALCC Secretariat was very important and contemporary. It is a topic of concern and interest to member states in Asian-

African region. He hoped that it would be studied with great interest by the experts in his country who were dealing with these topics and participating in the negotiations. While referring to the AALCC study on 'desertification' as an "excellent presentation of issues" he preferred to lay special emphasis on the question of careful working out of the commitments in the ensuing formal negotiations. As regards other ideas and principles he made a particular reference to "the sovereignty of the individual states to exploit their own resources pursuant to their environment and development policies and the conditioning of this principle by a complementary responsibility to ensure that activities within their jurisdiction were controlled and cause no damage to the environment on other states". According to him the topic concerning liability was yet to evolve taking into consideration all these aspects and he particularly pointed out to the work being done under the auspices of International Law Commission.

The ideas and principles enunciated in the "Agenda for Peace" the delegate noted, were discussed in one way or the other extensively, such as the involvement of the UN in conflict situations and the powers and the functions of the UN to promote International Peace and Security. These issues, the delegate of India pointed out, would clash with issues of sovereignty, issues of independence, territorial integrity, internal laws, constitutional laws and ultimately at what point of time the UN should set itself to get involved and at what point of time it would determine there was a breach in international peace and security. While returning to the Chapter VII of the UN Charter and its implications, he pointed out "..... Chapter VII will come into play only when there is a real threat to peace and act of aggression has taken place and prior to that differences are there, conflicts are there, a lot of exchange of ideas on a given issue can take place between states and states do disagree on various matters as neighbours, politically, economically and otherwise". So, in his view these were not necessarily the occasions for the UN to get involved. And at the level of material resources, he was of the view that the UN lacked the kind of men and material to be very effective. In his view, "Peace building" was beyond the scope of UN activities in which it was presently structured. He referred to Chapter VI which provided for concilliatory and adjudicatory proceeding to resolve a conflict. According to the scheme of the UN Charter, the delegate pointed out, "UN did not have a mandatory power to get involved legitimately unless there was a serious threat to international peace and security".

The delegate of *Japan* viewed the ideas expressed in the document "Agenda for Peace" prepared by the Secretariat as interesting and felt that it called for examination so as to make the peace-keeping function of the UN more effective. In his view, the concepts of peace enforcement unit and preventive diplomacy had financial implications. The concept of peace enforcement unit, the delegate

pointed out, marked a step forward especially in the notion of the use of force from the traditional concept of peace-keeping force. In his country's view, the time-tested principles concerning peace-keeping operations should be respected, limiting the use of force to self-defence purposes. He mentioned Cambodia as a good example in the recent times and the contribution made by Japan in this regard. He was agreeable to an exception in certain situations in which case these concepts elicited some validity; for example, where the authority of the Central Government was completely destroyed.

The delegate of *Myanmar* recalled his country's long-standing association with the AALCC. He emphasized the AALCC's role in the area of international law and stressed that AALCC needed to be selective in its focus in a way which serve the common interest of the region.

The delegate of *Kenya* briefly touched upon the orientation of AALCC programmes and its ability to serve the Member States. He also laid emphasis on the need to conduct extensive training programmes by the AALCC so as to maintain its high degree of profile and professionalism.

The delegate of *Sri Lanka* referred to the item 152 on the agenda of the Sixth Committee concerning Protection of International Personnel engaged in Peace Keeping operations. He observed that there were two drafts under considerations which deserved to be examined particularly in regard to the scope of the application of the proposed Convention. In his view, the applicability of a regime of individual criminal responsibility to the type of peace enforcement operations that were becoming common today was a crucial issue on which there was no common understanding. The other issue was the range of persons who should be covered, whether it should be confined to the "blue helmets" or whether it should even extent to NGO personnel and if so under what sort of safeguards should they have formal linkage to the United Nations. These two issues, were related to state responsibility and should be examined from the legal point of view. He was confident that the Sixth Committee and the AALCC could make a serious study before the next intersessional meeting on this subject was convened.

Mr. Hans Corell Legal Adviser of Sweden who is also the current Chairman of the Council of Europe, Committee of Legal Advisers on Public International Law, asked for the views of the Legal Advisers particularly from the NAM countries on the proposed Peace Conference in 1999 and the development of new instrument on Peaceful Settlement of disputes. These issues were discussed among the Legal Advisers in Europe.

The delegates of *Bangladesh* underscored the importance of exchange of

ideas between the AALCC Member States and the Council of Europe on Public International Law Matters.

The Legal Adviser of *Sweden* welcomed this suggestion and said that the basic purpose was to create collectivity among the legal advisers on important international legal issues.

II. The United Nations Decade of International Law

(i) Introduction

An item entitled "The United Nations Decade of International Law" was placed on the agenda of the Twenty-ninth Session of the Asian-African Legal Consultative Committee held in Beijing in 1990 following upon the adoption by the General Assembly of resolution 44/23 declaring the Decade of the Nineties as the United Nations Decade of International Law. The main objectives of the Decade are:

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

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

(iii) to encourage the progressive development and codification of International Law; and

(iv) to encourage the teaching, study, dissemination and wider appreciation of International Law.

Introducing the item at the twenty-ninth Session of the Committee the Secretary-General observed, *inter alia,* that it was appropriate that the Committee--a unique regional organization whose very *raison d' etre* is the progressive development and codification of international law--address itself to and respond to the resolution 44/23 of the General Assembly. The Committee at its twenty-ninth session after due consideration mandated the Secretariat to prepare a comprehensive study on the United Nations Decade of International Law. Subsequently, the Secretariat prepared and forwarded to the Office of the Legal Counsel of the United Nations its observations and

views on the Decade which were reproduced in the Report of the Secretary-General of the United Nations on the item "The United Nations Decade of International Law". At that session the Committee had also decided to include the item on the agenda of its thirtieth session. The item has thereafter been considered at each successive session of the Committee as well as at the meetings of the Legal Advisers of the Member States of the Committee.

Introducing the item at the thirty-first Session of the Committee held in Islamabad in 1992, the Assistant Secretary-General *inter alia* noted 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. 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 General Assembly in New York. In May 1992 the AALCC Secretariat 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.

The matter was thereafter discussed at the thirty-second Session of the Committee held in Kampala in 1993. Introducing the item the Assistant Secretary-General stated *inter alia* that General Assembly Resolution 46/53 had invited all international organizations to provide information on the activities that they had undertaken in the implementation of the objectives of the Decade, and that the AALCC Secretariat had accordingly furnished to the Office of the Legal Counsel of the United Nations some notes and comments in that regard. At that session the Committee reaffirmed the importance of strict adherence to the principles of international law as enshrined in the Charter of the United Nations and requested the Member States to continue to give serious attention to the observance and implementation of the Decade. The Committee accepted the offer of the Government of the State of Qatar to host an international conference under the auspices of the AALCC on the implementation of the principles of the new international law within the new international order and decided to place the item "United Nations Decade of International Law" on the agenda of its thirty-third session.

It may be recalled that the General Assembly by its resolution 47/32 entitled "U.N. Decade of International Law", adopted the programme of

activities to be commenced during the second term (1993-94) of the Decade. That resolution had *inter alia* invited all States and international organizations and institutions referred to in the programme to submit to the Secretary-General interim or final reports for transmission to the General Assembly at its forty-eighth Session or, at the latest, its forty-ninth session; and requested the Secretary-General to submit, on the basis of such information, a report to the General Assembly at its forty-eighth session on the implementation of the programme. The AALCC was among the international organizations which were requested to submit information on the implementation of the programme and views on possible activities for the next term of the Decade.

It may be recalled also that paragraph 3 of Section V of the "Programme for the activities for the second term (1993-94) of the United Nations Decade of International Law" as adopted by General Assembly Resolution 47/32 had directed the United Nations Secretariat to draw up a preliminary plan for a possible United Nations Congress on public international law, based on the proposal that the congress should be held in 1994 or 1995, and submit it to the Sixth Committee for consideration by general agreement at the forty-eighth Session of the General Assembly. Paragraph 7 of the aforementioned resolution called upon the Secretary-General to submit to the Assembly at its forty-eighth Session a report containing the above-mentioned plan. Pursuant to that request informal consultations were held with the members of the Sixth Committee on a draft preliminary operation plan for a possible United Nations Congress on public international law and a report thereon was submitted by the Secretary-General to the General Assembly at its forty-eighth session. The Report of the Secretary-General on a preliminary operational plan for a possible United Nations Congress on public international law has been given in the Section iii, "Secretariat Brief" of this chapter.

The AALCC Secretariat proposes during the year ahead, apart from making its contributions to the International conference on International Legal Issues Arising Under the United Nations Decade of International Law to be hosted by the State of Qatar in March 1994, to continue its modest endeavours to contribute to the attainment of the objectives of the United Nations Decade of International Law. It proposes to promote the acceptance of and respect for the principles of international law by undertaking an empirical survey of the ratification of key multilateral international conventions with a view to assisting Member States who have not already done so to accede to or ratify those conventions. Simultaneous with this endeavour the Secretariat proposes to undertake a study of the reservations, where applicable, which the Member States of the Committee may have with regard to these multilateral instruments. It may be stated in this regard that

the International Law Commission had at its Forty-fifth Session decided, subject to approval of the General Assembly, to include in its programme of work an item entitled "The Law and Practice Relating to Reservations to Treaties".

Thirty-third Session: Discussions

Introducing the item at the thirty-third session the *Secretary-General* said that the item entitled "The United Nations Decade of International Law" had been on the work programme of the Secretariat of the Asian-African Legal Consultative Committee since its twenty-ninth Session held in Beijing in 1990 and had thereafter been considered at successive sessions.

At its thirty-second Session held in Kampala (Uganda) in 1993 the Committee reaffirmed the importance of strict adherence to the principles of international law as enshrined in the Charter of the United Nations and requested the Member States to continue to give serious attention to the observance and implementation of the Decade. The Committee accepted the offer of the Government of the State of Qatar to host an International Conference, under the auspices of the AALCC, on the Implementation of the Principles of the New International Order.

Thereafter in pursuance of General Assembly Resolution 47/32 entitled the "United Nations Decade of International Law" which adopted the programme of activities during the second term i.e. 1993-94 of the Decade of International Law, the Secretariat of the AALCC forwarded to the office of the United Nations Legal Counsel its observations on the second term of the Decade.

The Secretary-General observed that the General Assembly Resolution 47/32 had directed the United Nations Secretariat to draw up a preliminary plan for a possible United Nations Congress on Public International Law based on the proposal that the Congress should be held in 1994 or 1995, and submit it to the Sixth Committee for consideration by general agreement at the Forty-eighth Session of the General Assembly. The Report of the UN Secretary-General on a preliminary operational plan for a possible United Nations Congress on International Law is also annexed to the Secretariat brief, which has been reproduced in this chapter. He stated that the Sixth Committee had recommended a Congress on Public International Law to be held in 1995.

The Secretary-General further stated that the Secretariat of the AALCC proposed, for the year ahead, apart from making its contribution to the International Conference on International Legal Issues Arising Under the

United Nations Decade of International Law to be hosted by the State of Qatar in March 1994, to continue its modest endeavours to contribute to the attainment of the objectives of the United Nations Decade of International Law. It was also proposed to promote the acceptance of and respect for the principles of international law by undertaking an empirical survey of the ratifications of key multilateral international conventions with a view to assisting Member States who had not already done so, to accede to or ratify those Conventions. Simultaneously with this endeavour the Secretariat proposed to undertake a study of the reservations, where applicable, which the Member States of the Committee might have with regard to these multilateral instruments. In this regard the International Law Commission had at its Forty-fifth Session decided, subject to approval of the General Assembly, to include in its programme of work an item entitled "the Law and Practice Relating to Reservations to Treaties".

The *Delegate of Japan* observed that in view of the new challenge arising from the end of the cold war the importance of observing the principles of International Law in order to establish a peaceful international community needed to be recognised. It was necessary that all members of the Committee shared the view of the importance of the Decade. The delegate stated that his Government had undertaken various activities for the promotion of understanding of International Law which included the invitation and preparation of this session of the Committee. These efforts were based on the belief that the activities of the Committee as an organ to provide legal assistance and make recommendations to participating States would help Asian and African countries to strengthen their ties in promoting the rule of law in Asia and Africa.

With regard to the promotion of means and methods for the peaceful settlement of disputes between States, which was one of the important pillars of the Decade of International Law, his delegation appreciated the initiative taken by the Secretary-General of the United Nations in establishing the Trust Fund to assist States in the settlement of disputes through the International Court of Justice. The Government of Japan had made a contribution of US $ 25,000 for 1993.

He welcomed the decision of the General Assembly of the United Nations to convene a United Nations Congress on Public International Law in 1995. The chief purpose of the Congress should be the dissemination of international public law through free exchange of views among the various participants. Towards this end, it was desirable that, as far as possible, the Congress should be an informal one. In the view of his delegation the

Congress should not aim at producing a declaration or any other kind of formal or binding document. As for the specific timing of the Congress in 1995, his delegation supported the view that convening of the congress should be determined in such a way that maximum possible participation is assured with minimal cost involved.

The *Delegate of China* stated that according to the Programme of Activities for the Second Term annexed to the General Assembly resolution 47/32, there were still a lot of issues to be discussed and to be decided upon. One of the most important of these was the United Nations Congress on Public International Law, which was debated in the working group of the Sixth Committee General Assembly last year. His delegation believed that the Congress, which would mark the 50th Anniversary of the United Nations, would have a profound effect on strengthening the role of the United Nations and in promoting the development and dissemination of international law in the world, especially in the developing countries. Thus the congress itself would be a milestone in the history of the development of international law.

His delegation had noted that differences among countries on the agenda items of the Congress still existed and needed more time for further discussion and co-ordination. Without a properly negotiated agenda the significance of the Congress would be weakened. He further stated that government had always thought highly of and fully supported the activities of the United Nations Decade of International Law. His delegation would like to see the Decade concluded with tangible results in strengthening the role of International Law, world peace and security.

The *Representative of Sweden* stated that he would like to address two particular items under the heading "United Nations Decade of International Law". viz. regional cooperation and the United Nations Conference on International Law in 1995.

With regard to regional cooperation as a necessary phenomenon he stated that it was obvious that the United Nations could not deal with each and every matter that happened in the world and that there were many regional matters that were amply solved at the regional level and needed not to reach the level of the United Nations. But at the same time there were certainly many issues that did come on the agenda of the United Nations and it was increasingly important that those matters were studied at the regional level also and that sufficient preparation was made at that level in order to enhance the work of the United Nations. The AALCC was in his view an organization which underscored the importance of regional co-operation. He

observed that there were sub-regional groups within the AALCC, such as the South Asian Association for Regional Cooperation (SAARC).

He stated that the Council of Europe had for many years tried to harmonize the legislation in various fields. There were two Committees assisting the Member States of the Council of Europe in this respect. One of them dealt with criminal law matters, the other with private law matters. He added that the Committee for Legal Advisers on Public International Law (CAHDI) was established a few years ago and meets twice a year. The members of the CAHDI under the Council of Europe liked to see themselves as a professional and technical legal forum. The Committee dealt with matters of legal co-operation in the field of public law. One significant feature of the committee is that it has no general debate and confines itself strictly to legal matters, as general statements in that group would touch upon matters that would be of a political nature and belong to other fora, which is not within the mandate of CAHDI. The mandate of the CAHDI is to discuss matters of public international law and to advise the Committee of Ministers of the Council of Europe. This also means that it never adopt any resolutions although it may take a decision to order.

Among the matters which are discussed are co-ordination of positions on items on the agenda of the United Nations General Assembly. They also discuss matters on the agenda of the Conference on Security and Co-operation in Europe (CSCE). One item which has been on their agenda for the last meeting is what happens after the dissolution of the Soviet Union, the dissolution of Czechoslovakia, the dissolution of Yugoslavia?

In his view the kind of collegiality that a forum of this kind generated was important if there was a dispute between two Member States. It was perfectly legitimate for states to have disputes. In fact, the closer the contacts between two states, the more likely it is that a dispute might occur between them. The important thing is that this dispute is solved in a peaceful manner, be it by negotiations, arbitration or whatever. In situations of this kind the heads of the legal departments of the Ministries of Foreign Affairs are the persons most likely to deal with the dispute, if these persons are well acquainted, they are in a better position to represent their countries.

As regards the United Nations Congress on International Law to be held in 1995 he opined that it was important that careful study of the matters, would be taken up during the conference. It was important that one made ones views known to colleagues in other regions of the world.

The *Delegate of India* in his intervention emphasized the significance of

the topic and said that mutual interaction between international lawyers and co-operation at such fora as meetings of the Legal Advisers, the annual sessions of the AALCC etc. would promote the rule of law in international relations. In his view the functioning of the AALCC, the briefs prepared by the Secretariat of the Committee and its annual sessions contributed to the realization of the objectives of the UN Decade of International Law.

(ii) Decisions of the Thirty-third Session (1994) Agenda item: "The United Nations Decade of International Law"

Adopted on January, 21, 1994

The Asian-African Legal Consultative Committee at its Thirty-third Session:

Having taken note of the Report of the Secretary-General on the United Nations Decade of International Law contained in Doc. No. AALCC\XXXIII\Tokyo\94\9.

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 rule of law;

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

1. *Requests* Member States to continue to give serious attention to the observance and implementation of the Decade;
2. *Requests* the Secretary-General to apprise the Secretary-General of the United Nations of the initiatives taken by the Committee in this regard;
3. *Decides* that the item be given serious attention and that it be placed

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-ninth Session of the General Assembly;

Notes with appreciation the efforts of the Government of Qatar to convene an International Conference on the International legal Issues Arising under the United Nations Decade of International Law and strongly recommends that all the Member States participate at high level;

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-fourth Session.

(iii) Secretariat Brief
The United Nations Decade of International Law

The present report has been prepared pursuant to General Assembly Resolution 47/32 of November 25, 1992 entitled "United Nations Decade of International Law" whereby the Assembly *inter alia* invited all States and International Organizations and institutions referred to in the programme for activities to be commenced during the second term (1993-94) of the United Nations Decade of International, to undertake the relevant activities mentioned therein and to submit to the Secretary-General reports for submission to the General Assembly at its Forty-eighth Session.

Following upon the adoption of the United Nations Decade of International Law-the Asian-African Legal Consultative Committee has considered this item at successive sessions since 1990 and proposes to do so at its thirty-third session to be held in Tokyo, Japan-in early 1994. Besides the Secretary-General of the Asian-African Legal Consultative Committee proposes to hold consultations, as in the preceding years, with the legal advisers of member States of the Committee.

The Secretariat of the AALCC is actively co-operating with the Government of Qatar to organize an International Conference on the International Legal Issues Arising under the United Nations Decade of International Law. The Conference proposed to be held in March 1994 is designed and expected to promote the objectives of the United Nations Decade of International Law.

During the Second term of the United Nations Decade of International Law the AALCC proposes to continue to urge Member States which have not already done so to consider ratifying or acceding to multilateral

conventions. The Secretariat of the AALCC in fulfillment of its advisory functions would continue its endeavours to promote the acceptance of and respect for the principles of international law by urging that they ratify or accede to such international instruments as the Convention on the Law of the Sea 1982, the Basal Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal 1990, the Bio-diversity Convention 1992 the Refugees Convention 1951 and 1967 Protocol thereto, to name but a few.

The AALCC shall continue to furnish assistance to Member States of the Committee to facilitate their participation in the process of multilateral treaty making, their adherence thereto and the implementation of multilateral treaties in accordance with their national legal systems. The modest endeavours of the Secretariat to render assistance in preparing for the Second International Conference on Human Rights may be mentioned in this regard.

The AALCC attaches great significance to the cardinal principle of the peaceful settlement of disputes and shall during the second term of the Decade of International Law *inter alia* undertake an in-depth study and detailed consideration of the proposals of the United Nations Secretary-General contained in his report entitled "Agenda for Peace". The Secretariat of the AALCC is working in close collaboration towards organizing an International Conference on International Law in Doha during March 1994. At the proposed International Conference an item entitled "the Peaceful Settlement of Disputes" shall be considered at length by representatives of Member States of the AALCC and other participants. The said Conference may, perhaps, adopt a recommendation or resolution in that regard.

The Committee at its thirty-second session held in Kampala (1993) *inter alia* appointed an open ended Working Group with a core membership of Egypt, China, Ghana, India, Indonesia, Japan, Nigeria, Qatar, Saudi Arabia, Tanzania and Uganda to consider and advise the Secretariat in the preparation of a study based on the recommendations of the United Nations Secretary-General as set out in his report entitled "Agenda for Peace".

The Secretariat of the Committee has been closely following and, from time to time commenting on, the work of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization. The Secretariat proposes to continue to monitor the work of the Special Committee with regard to the peaceful settlement of disputes. As regards the ways and means of encouraging wider use of the role of the International Court of Justice and its wider use in the peaceful settlement of disputes the Secretariat of the AALCC proposes to update and expand its

preliminary study on the role of the International Court of Justice in the settlement of environment disputes.

With respect to disputes stemming from international economic and trade law matters the Secretariat of the AALCC shall during the second term of the Decade continue to exhort and urge Member States to resolve their differences in accordance with the arbitration and/or conciliatory rules framed by the UNCITRAL. The Committee shall also endeavour to expand and enlarge the activities of its Regional Centres of Arbitration functioning at Cairo and Kuala Lumpur. Steps would also be taken to make operational similar centres at Lagos and Tehran.

The Secretariat of the AALCC shall continue to study the progress of work of the International Law Commission and to comment thereon as part of its modest contribution to the progressive development and codification of international law. The Committee attaches great significance to the items currently on the agenda of the ILC as they are of particular relevance/ significance to its members. Earlier at its Kampala session the Committee had adopted a Declaration on Human Rights which has since been distributed as a Working Paper of the PREPCOM of the Conference on Human Rights.

In the matters relating to environment and Development the Secretariat while engaged in the analysis of the international instruments adopted by UNCED at Rio in June 1992 now proposes to undertake the study of the legal aspects of prevention and reversal of desertification. The Secretariat of the AALCC proposes to convene conjointly with the UNEP a meeting of group of legal experts to consider this matter.

During the second term of the UN Decade of International Law the Secretariat of the AALCC expects to make further progress in its study on the legal aspects of privatization of State Owned Enterprises which, while serving the interest of its Member States, it is hoped would contribute to the development of the law on that subject. In the field of refugee law the Secretariat's work on model legislation on refugees aimed at enlarging the definition of the term "refugee" to conform to fresh perceptions and existing realities shall be intensified and, perhaps, completed during the present term of the Decade of International Law. The Secretariat of the AALCC is working in close co-operation with the office of the UNHCR and the Organization of African Unity in this matter.

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 and the verbatim records thereof. Recently

the Secretariat published a combined report of its annual sessions held between 1987 and 1991. A noteworthy feature of that volume is that the research studies prepared by the Secretariat of the Committee on some select agenda items have been reproduced in that report. In this the report has made a departure from the past practice and the report is Secretariat-study oriented rather than focussing on the deliberations thereon at the annual session of the Committee.

The AALCC Secretariat is of the view that the International Conference on International Law proposed to be held in Doha in March 1994 and the proposed publication of papers, presented there would *inter alia* promote the objective of the study, dissemination and wider appreciation of international law. The Secretariat's in-house training programme under which junior and medium-level officials of member states are imparted in-house training would also lend support to this objective.

Finally, it may be stated that the Secretariat of the AALCC shall continue to liaise and co-operate with other competent regional organizations and specialized agencies of the United Nations in the fulfillment of its proposed activities and programme of work aimed at realizing the objectives of the United Nations Decade of International Law.

United Nations Decade of International Law

Report of the Secretary-General on a Preliminary operational plan for a possible United Nations congress on public international law*

I. Introduction

On 25 November 1992, the General Assembly adopted resolution 47/32 entitled "United Nations Decade of International Law", to which was annexed, as an integral part thereof, the "Programme for the activities for the second term (1993-1994) of the United Nations Decade of International Law". Section V, paragraph 3, of the Programme reads as follows:

> "The Secretariat, on the basis of informal consultations with the members of the Sixth Committee, should draw up a preliminary operational plan for a possible United Nations Congress on Public International Law, based on the proposal that the congress should be held in 1994 or 1995, and within existing resources and assisted by voluntary contributions, and submit it to the Sixth Committee for consideration by general agreement at the forty-eighth session of the General Assembly."

Furthermore, in paragraph 7 of the resolution, the General Assembly requested the Secretary-General to submit to the Assembly at its forty-eighth session a report containing the above mentioned plan.

Pursuant to these requests, informal consultations were arranged on 14 and 27 May 1993 with members of the Sixth Committee on a draft preliminary operation plan for a possible United Nations Congress on Public International Law.

The present preliminary operational plan takes into consideration the relevant provisions of General Assembly Resolution 47/32 and views expressed during the said informal consultations. It is designed to assist the Sixth Committee in the consideration of this question at the forty-eighth session of the General Assembly.

II. Purpose of the Congress

While the precise theme of the Congress would have to be decided by the General Assembly, upon the recommendation of the Sixth Committee,

* Reproduced from UN Doc. No. A/48/435 of 29 September 1993.

the fact that the Congress would take place within the framework of the United Nations Decade of International Law indicates that its purpose would be the promotion of the role of international law in international relations. The Congress should be organized in such a way as to ensure that all major legal systems, all regions and all segments of the international legal profession would have an opportunity to be heard and to be represented.

In making its decision on the theme of the Congress, the General Assembly may wish to consider that the Congress might address both theory and practice of international law, and take into account the fact that the teaching and dissemination of international law is of great importance, in particular to States that have recently joined the international community.

III. Timing of the Congress

The Congress should be convened at United Nations Headquarters, in New York, not earlier than 1995, in order to allow sufficient time for its preparation. The General Assembly, upon the recommendation of the Sixth Committee, would have to take a decision as to the timing and the duration of the Congress. The following possibilities could be envisaged as to the precise timing of the Congress

(a) The Congress could be held in conjunction with a session of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization;

(b) The Congress could be held in conjunction with a regular session of the General Assembly (Sixth Committee);

(c) The Congress could be held at a time independent from any other planned meeting.

If the Congress was to be held in conjuction with a session of the Special Committee on the Charter, as suggested by some delegations during the informal consultations, or in conjunction with a regular session of the General Assembly (Sixth Committee), as also suggested by other delegations, the following considerations, *iter alia*, would need to be taken into account in deciding between these two options : the extent of the presence in New York for the purpose of the session in question of members of delegations who would also attend the Congress; the extent of financial assistance provided for delegations from the least developed countries with respect to participation in that session; the other meetings and activities taking place at that time; and

the availability of large conference rooms, in particular the General Assembly Hall, and other conference services.*

The duration of the Congress should not exceed five working days; it should not be less that three working days since the subjects to be covered are too vast to be addressed meaningfully in a shorter period of time, and since a shorter period of time would not justify the travel by many participants to the Congress to New York.

IV. Organization of Work

The General Assembly, on the recommendation of the Sixth Committee, would have to take a decision on the specific topics to be discussed at the Congress.

Each day of the congress could be divided into either two plenary meetings, i.e., one in the morning (10 a.m. — 1 p.m.) and one in the afternoon (3 p.m. — 6 p.m.); or a plenary meeting in the morning and one or more consecutive, not simultaneous, working group meetings on specific issues in the afternoon. All the necessary services and facilities (conference rooms, including the General Assembly Hall, simultaneous interpretation from and into all official languages of the United Nations, recording of the proceedings, distribution of documents, etc.) would have to be available.

It is suggested that, during each plenary meeting, a number of selected speakers would lead the discussion on specific topics. This could be followed by interventions from the floor (comments, questions and answers).

In view of the importance of the Congress an opening and closing statement may be made by a high-ranking individual, who is well-known in the field of public international law.

The Congress would also benefit from a properly organized coverage of its work by the mass-media, including television, newspapers and magazines. Publishing the materials of the Congress for distribution to various educational, research, governmental, judicial and public institutions throughout the world could also be considered, but would depend on the availability of resources.

V. Issues Regarding Participation in the Congress

A. Participants

Participation in the Congress would be broadly-based and it should be

* The use of the General Assembly Hall for the purpose of the Congress during a session of the Assembly would require special arrangements.

open to all those interested in international law, both in theory and in practice, and particularly to the following:

(1) Members of the International Court of Justice;

(2) Members of the International Law Commission;

(3) Diplomats/delegates to the Sixth Committee;

(4) Officials from the legal offices of the ministries of foreign affairs and of the ministries of justice;

(5) National judges;

(6) Members of Parliament;

(7) Professors of public international law and of related subjects (for example, political science, international relations and international organizations);

(8) Officials from legal offices of international organizations, including regional organizations;

(9) Representatives of non-governmental organisations active in the area of public international law and which have consultative status with the Economic and Social Council;

(10) Representatives of the media dealing with issues of international law on a regular basis.*

B. Notice to participants

The best way of reaching the participants under categories (3) to (7) would be by a note verbal to the Permanent Representatives, requesting them to inform their Governments about the Congress. The Governments would, in turn, be requested to publicize and transmit the information to all prominent individuals under categories (3) to (7). A background note containing information about the Congress and promoting its purposes and relevant activities could be prepared by the Secretariat and attached to the note verbal. The Governments could also be requested to publicize the background note, without cost to the Secretariat. Letters of invitation could be sent from the Secretariat to the members of the International Court of Justice and the International Law Commission. Similar letters would be sent to the other categories of participants (categories (8) to (10) in para 14 above). An

* A decision could also be taken to allow a limited number of observers from the general public, which might be interested in attending the meetings of the Congress.

appropriate procedure would need to be devised to widely publicize the Congress, such as notices in leading journals of public international law.

C. Decisions regarding admission

It is important to avoid an unbalanced regional representation of the participants in the Congress. It would therefore seem helpful to require advance registration for the Congress, which, except for members of the International Court of Justice and the International Law Commission, should be in the form of a request for admission. If provisional limits were to be put on the number of participants from a particular region or country, they would have to be readjusted in light of the results of the registration process. The "first come first served" principle should, in this context, be taken into account. In the case of countries with a very large number of interested individuals, any other criterion would not be workable. It should be borne in mind that the congress is not intended only for persons who have achieved international recognition. The final decision as to admission could rest with either of the following:

(a) the Sixth Committee, possibly through the regional groups;

(b) the Secretariat.

The total number of participants would of course depend on the capacity of the conference rooms available at the time of the Congress.

D. Selection of speakers

The selection of speakers for the Congress should also meet the requirements of balanced regional representation and of expertise of the speakers in each of the particular topics of discussion. For practical considerations, once the General Assembly has decided on the topics to be discussed at the Congress, the selection of the speakers should be made by the Secretariat, in consultation with the members of the Sixth Committee.

VI. Financing of the Congress

As indicated above, General Assembly resolution 47/32 provides that the Congress should be held within existing resources and be assisted by voluntary contributions. Since it would still involve programme budget implications, however, and involve commitment of United Nations resources, it would be necessary for the Secretary-General to submit a statement of programme budget implications of any draft resolution on the holding of a Congress. In view of the financial restrictions placed on the Congress, preparations

would be dependent to some extent on the availability of extra-budgetary resources.

It is anticipated that staff resources for substantive preparation of the Congress and for substantive servicing of its meeting could be accommodated from within the staff resources of the Office of Legal Affairs. The other major costs arising would relate to conference servicing, public information coverage and travel and subsistence of at least some of the participants.

A. Conference servicing and public information coverage

On a theoretical full cost basis, all three options for the timing of the Congress described in paragraph 6 above would have the same financial implications for conference services. However, under options (a) and (b) and provided the length of the session of the Special Committee on the Charter or of the Sixth Committee was reduced accordingly, resources from within the entitlement of either one of those organs could be used to service the Congress, in which case no actual additional costs would be involved for meeting services. As to option (c), the pattern of the biennial schedule of meetings is such that from mid-January to the end of July all permanent resources are fully utilized. Unless the Congress were to be held either in the first two weeks of January or the first two weeks of August, financial costs for the recruitment of free-lance conference servicing still would be involved.

A substantial component of conference servicing costs, however, consists of the processing, translation, and printing, of documentation. If the documentation for the Congress is kept to a minimum (for example, limited to the Congress programme, a list of participants and compilation of summaries of main statements), it is anticipated that the costs of conference servicing can be absorbed within existing resources.

As regards public information coverage of the Congress, it is not anticipated that requirements could be absorbed within existing resources. Depending on the nature and degree of coverage, and the regular demands on services of the Department of Public Information, additional resources would be required.

B. Travel and subsistence

The participation of designated speakers would be one of the prerequisites of the Congress. In order to ensure that financial considerations do not constitute an obstacle to their participation in the Congress, it is crucial that travel costs and subsistence for the period of their participation in the Congress be covered.

The travel and subsistence cost of speakers could not be borne by the United Nations within existing resources. They would thus have to be borne through financing from external sources, such as voluntary contributions, or directly by the Government of each speaker. Participation may thus depend on the availability of extra-budgetary resources or contributions in kind. It is hoped that the travel and subsistence costs of speakers will be borne by their respective Governments.

C. Possible external sources of financing

In its decision to hold the Congress, the General Assembly may wish to include an invitation to Governments and non-governmental institutions, including non-governmental organizations, to make voluntary financial contributions towards the financing of the Congress, or to cover particular costs, such as the travel and subsistence costs of speakers (see paras, 21-23 above), and to authorize the Secretariat to solicit contributions from non-governmental sources. In accordance with the Financial Regulations and Rules of the United Nations, a trust fund would have to be established by the Secretary-General for receiving financial contributions. It will not be possible to estimate the extent of financing that might be available from voluntary contributions until approaches are made to possible donors.

With respect to non-governmental sources, and with the authorization of the General Assembly, voluntary contributions could be solicited, for example, from individuals by means of general solicitations (for example, in relevant journals or publications). In addition, private-sector corporations and enterprises (for example, legal publishers), as well as major foundations and philanthropic institutions, could be approached to make contribution, or to undertake to cover particular types of costs. Contributions could also be solicited from professional and academic associations, and non-governmental organizations concerned with international law.

It should be underscored that, as stated in paragraph 18 above, unless such financial issues are settled, no activity relating to the convening of the Congress can be set in motion.

III. The Law of the Sea: The Work of the PREPCOM and The U.N. Secretary-General's Informal Consultations (1993)

(i) Introduction

The item "Law of the Sea" has been on the agenda of the Asian-African Legal Consultative Committee since its Colombo Session (1971) and the AALCC has played a significant role in the negotiations culminating in the UN Convention on the Law of the Sea. The United Nations Convention on the Law of the Sea, 1982 is the culmination of over 14 years of work involving participation by more than 150 countries representing all regions of the world, all legal and political systems, and all degrees of socio-economic development. These countries convened for the purpose of establishing a comprehensive regime "dealing with all matters relating to the law of the sea — bearing in mind that the problems of ocean space are closely interrelated and need to be considered as a whole." The elaboration of the Convention represents an attempt to establish true universality in the effort to achieve a just and equitable international economic order governing ocean space.

The Committee at its twenty-fourth session held in Kathmandu (1985) decided that the item "Matters relatable to the work of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea" (hereinafter called the PREPCOM) would be on the agenda of the Annual Session of the AALCC. The Secretariat of the AALCC has thereafter continued to monitor the progress of work in the PREPCOM and has presented reports to the successive sessions of the Committee.

The PREPCOM was established when the United Nations Conventions on the Law of the Sea was adopted in 1982. It was entrusted, *inter alia* with

the task of elaborating rules and regulations for the various organs of the proposed Internatinoal Sea-Bed Authority which is to organise and control activities in the International Sea-Bed Area, described as the "Common Heritage of Mankind". The PREPCOM was also given the mandate to pave the way for the early and efficient establishment of the Enterprise — the Sea-Bed Mining arm of the Authority, to draw and adopt a mining code, to study and tackle the problems of land-based producer States likely to be most seriously affected by the Sea-Bed production, and to formulate regulations for the International Sea-Bed Tribunal. All these tasks were to be carried out in various organs of the PREPCOM including the General Committee, the Plenary and the four Special Commissions.

On 2nd April, 1993, the Preparatory Commission, after eleven years of protracted negotiations and assiduous work adopted its draft provisional final report. The list of pending issues which are annexed to the provisional final report indicates that the effort to resolve them in PREPCOM will not be continued and the existing pattern of meeting would stop. Instead, the focus will be on the informal consultations organised by the U.N. Secretary-General which are now open ended. The Secretariat of the AALCC in compliance with its mandate monitored the progress of work in the PREPCOM during its eleventh session held in Kingston (Jamaica) from 22nd March to 2nd April, 1993, and also the developments in the Informal Consultations which held three meetings in 1993.

Thirty-third Session: Discussions

The Assistant Secretary-General, Mr. Asghar Dastmalchi, while introducing the subject "Law of the Sea" stated that the Brief prepared by the Secretariat set out a report on the work of the Preparatory Commission for the Internatinal Sea-Bed Authority and for the International Tribunal for the Law of the Sea, as well as a report on the United Nations Secretary-General's Informal Consultations on the UN Convention on the Law of the Sea. He pointed out that an item entitled 'Progress of the Work of the PREPCOM has been included in the programme of work of the Secretariat following upon a decision of the Committee at its twenty-third Session held in Tokyo in 1983 and the Secretariat has since then been monitoring the progress of work in the PREPCOM and the item has been considered at successive sessions of the Committee since its twenty-fourth Session held in Kathmandu in 1985. It was last considered at the thirty-second Session of the Committee held in Kampala in 1993.

The Assistant Secretary-General observed that at the summer meeting of its Tenth Session held in New York in August 1992 the PREPCOM had

decided to complete the task of adoption of its final report in the course of its next meeting. The purpose of the meeting of the Eleventh Session of the PREPCOM was, therefore, limited. The spring session was not intended to be a negotiating session but a session for adopting the various reports of the PREPCOM. In his opening statement at that Session, the Chairman Mr. Jose Luis Jesus, clearly stated that following consultations in the General Committee of the Preparatory Commission it had been agreed that the draft final reports would not be Negotiating instruments" but a summary of the PREPCOM's discussions over the last eleven years. He had therefore proposed that the discussions be focussed only on correcting inaccuracies and should not include substantive statements.

As regards the future work of the Preparatory Commission, the Assistant Secretary-General stated that the PREPCOM had *inter alia* decided: (a) not to hold any meetings in the course of this year; (b) to make provision every year for the United Nations servicing of a two-week annual session of the PREPCOM until the entry into force of the Convention; (c) that the need for the effective holding of the annual session of the PREPCOM will be decided by the Chairman of the PREPCOM in consultation with the Chairmen of the Reginoal Groups and interest Groups. The Chairman of the PREPCOM will also decide the precise date for such a meeting and (d) The General Committee, acting on behalf of the PREPCOM as its executive organ for the implementation of resolution II, will meet for the two or three days annually to consider matters related to the implementation of resolution II and to continue the monitoring of the implementation of the obligation of the registered pioneer investors.

He pointed out that when it became clear that a solution to problems with certain aspects of the deep sea-bed mining provisions of the Convention on the Law of the Sea inhibited the industrialized States from ratifying or acceding to it, or even signing it, the Seretary-General of the United Nations took the initiative, in July 1990, of convening informal consultations with a view to promoting a dialogue to address the issues in question. The Secretary-General of the AALCC participated in two rounds of the informal consultations held during the last year. The brief prepared by the Secretariat incorporates the report of the Secretary-General's participation at the consultations convened in April and November 1993.

The Secretary-General's Note proposed the establishment of an initial Authority whose function would be restricted primarily to continue with the functions being carried out by the PREPCOM with respect to pioneer investors including training programmes and receiving and processing of new

applications. It would also implement the decisions of the PREPCOM, monitoring and receiving the trends of development relating to the deep sea-bed mining activities including the protection of the marine environment and setting up of regulations covering activities related to deep-seabed mining and monitoring their implementation. The Initial Authority would also have the function of contracting with investors or other entities, establishment of necessary subsidiary bodies and continuing consultations on resolutions of such issues which would be pending after the United Nations Secretary-General's Informal Consultation or at the time of entry into force of the Convention. Although this possible structure received widespread support from most of the delegations, the industrialized countries continued to work for restricting even further the functions of the Initial Authority to the minimum. During the three rounds of the consultation the same tussle prevailed especially on the subjects like Initial Enterprise, the structure and composition of the organs of the Initial Authority, the Secretariat, the expenses of the Initial Authority, etc.

He observed that the discussion on the "Draft texts governing the Regime for Deep Sea-bed Mining" clearly indicated the existence of divergency among the developing and the industrialized countries. While the former continued to advocate the principle of common heritage of manking and the provisions of the Convention on decision-making in the various organs of the Authority, the latter insisted on changing and amending the provisions of the Convention to conform to their needs with the realities of the present world market economy. They emphasized on chamber voting procedure for decision making in the Council which would guarantee virtual veto in all decisions in the Council and very limited functions for the Enterprise. They were also against mandatory transfer of technology, and rejected the idea of compensation for economic loss arising from new minerals from the area as unrealistic. They were opposed to transfer of technology and a review conference.

During the August Meetings, an anonymous paper called 'The Boat Paper', purported to have been prepared by representatives of several developed and developing States was circulated among the delegations as a contribution to the process of consultations. It is clear that majority of the developing countries could not have been parties to it and were neither consulted nor supported its content.

At the November consultations, the representative of Sierra Leone, introduced a new paper referred to as the "Non-Paper" which was said to have been prepared by the representatives of the delegations primarily from the Group of 77. The paper underscores difficulties of achieving the major

amendments incorporated in t e "Boat Paper" representing the position of industrialized counties which would make radical changes to part XI of the Convention. Such changes would take a long time to be negotiated with the Group of 77. In the meantime, now that the Convention is about to enter into force, it was necessary to make provisional measures for the interim period before commercial exploitation of the minerals becomes feasible so as to avoid the existence of a vacuum during which dual regime would exist — the Convention regime and the traditional high sea freedoms regime.

He also pointed out that the United Nations Convention on the Law of the Sea, 1982, having received the Sixtieth instrument of ratification on 16th November 1993 is now poised to enter into force on 16th November 1994, in accordance with Article 308, paragraph 1 of the Convention. The entry into force of the Convention is expected to have a marked impact on the practice of States, in particular those which are parties to the Convention, and the activities of a number of international organizations competent in the fields of ocean affairs. The entry into force of the Convention would, among other things, consolidate and reinforce the provisions which have already received general acceptance. It needs however to be emphasized that the establishment of the date of entry into force of the Convention affects the programme of work of the PREPCOM. As the Secretary-General of the United Nations has pointed out in his report the Commission would *inter alia* have to

(a) Convene the Group of Technical Experts, established in accordance with the Statement on the implementation of Resolution II, "*within three months*" from 16 November, 1993 to review the state of deep seabed mining and to make an assessment of the time when commercial production may be expected to commence, pursuant to the decision of the Commission. If, as a result of the review and the assessment, the Group of Technical Experts concludes that commercial production will not take place for an extended period of time, the PREPCOM shall recommend to the Authority that the annual fixed fee payable under Annex III, Article 13, paragraph 3 be waived for a relevant time;

(b) Submit its final report on all matters within mandate, except those relating to the International Tribunal for the Law of the Sea, to the Assembly of the International Sea-Bed Authority at its first session, to be held "*on the date of the entry into force*" of the Convention.

(c) Submit the report regarding practical arrangements for the establishment of the International Tribunal for the Law of the Sea meeting of States Parties to the Convention, to be convened within "six months" from 16 November 1994; and

(d) Transfer its property and records to the International Sea-Bed Authority and dissolve itself at the conclusion of the first session of its Assembly.

The Assistant Secretary-General stated that the Committee might wish to consider these matters. Consideration needed to be given not only to the question of effective participation of the Member States in the Informal Consultations but also to the issues related to the implementation of the Convention on the Law of the Sea now that its entry into force was a foregone conclusion. Member States who had not already done so, might wish to consider ratifying or acceding to the Convention at an early date. Some Member States might perhaps require some assistance in the drafting of a municipal legislation to give effect to and implement the Convention on the Law of the Sea. The Secretariat proposed to actively collaborate with international institutions competent in the field of marine and ocean affairs such as the FAO, UNEP, IOMAC, and the IMO in this regard.

The *Delegate of Sri Lanka* called upon the States to consider the situation in the post Sixtieth ratification scenario. Emphasising the importance of preserving the universality of the Convention he said the efforts of the developing countries must focuss on the immediately realizable benefits from areas of national jurisdiction, while the prospects before the deep seabed mining operations were receding. He called upon the AALCC to concentrate on this and said that it was for this reason that Sri Lanka had in 1981 proposed the establishment of the IOMAC. He said that greater emphasis needed to be laid on regional initiatives as it was only through such regional cooperation, with support of the industrialized countries and international organization, that developing counties could attain practical benefits.

The Delegate of *Indonesia* stated that since the Convention would enter into force on the 16th November 1994 in accordance with Article 308 paragraph 1, it was imperative that the Member States of the AALCC fully utilized this period to secure universal adherence to the Convention. Such an achievement was in the interest of the entire international community.

He recalled that many of the provisions in the Convention were the result of the codification of rules of general customary law like the provisions governing territorial sea, innocent passage through the territorial sea, continental shelf and contiguous zone. The Convention also reflected the international legal regimes as those applicable to the exclusive economic zone, archipelagic state, protection and preservation of the marine environment, transit passage through strait, mandatory provisions of the settlement of dispute and sea-bed mining. All these provisions in light of the entry into force of the Convention, would need to be consolidated and further strengthened.

The delegate further stated that Indonesia as an archipelagic state, attached utmost importance to a unified legal regime of the sea to its national ocean policy in particular the part relating to archipelagic states. Indonesia in implementing the provision of the Convention, had concluded several bilateral agreements with its neighbours on the delimitation of maritime boundaries, including an agreement on provisional arrangements. There were several other provisions which his government considered important, namely those dealing with the Exclusive Economic Zone (EEZ) and the continental shelf. The legal regime on EEZ had now become a part of customary international law as evidenced by state practice; he added.

Recalling the timely adoption of Agenda 21 by the United Nations Conference on Environment and Development (UNCED) he stated that it set out a programme for "the Protection of the Oceans, all kind of seas, including enclosed and semi-enclosed seas, and coastal areas and the protection, rational use and development of thier living resources". There was a compelling need that a follow-up action and measures should be taken expeditiously in order to stem further deterioration of the oceans and especially its vast resources. His delegation was therefore gratified by the various follow-up actions to Agenda 21. This included establishment of an Administrative Committee on Coordination Sub-Committee on Ocean and Coastal Areas by inter-Agency Committee and sustainable development and other follow-up action taken by United Nations Organizations and Agencies.

His government, the delegate stated, had taken some legal measures for the protection and preservation of its marine environment. This law would serve as a basis for further regulations in different aspects of environmental management.

Pointing out that it was after long and protracted negotiations this unique document became the subject of near universal agreement, he was of the view that all states should ratify the Convention.

The *Delegate of Japan* stated that the Convention on the Law of the Sea was adopted after more than 10 years of marathon negotiations beginning with the Committee on the Peaceful Uses of the Seabed and the Ocean Floor. The Convention is now expected to enter into force on 16th November, 1994.

The efforts initiated by the United Nations Secretary-General were on to accommodate the view of developed countries as well as new political and economic conditions that have emerged after the adoption of the Convention and are essential in ensuring the universal application of the Convention. He drew attention to the fact that a decade after adoption, there seems to be apprearing an erosion, in some parts of the Convention. Unilateral legislation

has been introduced by an increasing number of States which apparently attempt to incorporate only the beneficial parts of the Convention while neglecting other parts, particularly those which impose duties upon States. In this sense, a successful conclusion of the Secretary-General's informal consultations is essential not only for the sake of Part XI itself but also ensuring the universal legal order of the sea for the entire international community.

In spite of its historical significance, the States which had ratified or acceded to the Convention represented only a part of the global community in terms of geographical distribution, despite efforts to gain the broadest possible representation.

He called upon the AALCC to regard the deposition of the sixtieth instrument of ratification as an opportunity to renew efforts to ensure the universal application of the Convention. International society still had nearly one year to improve Part XI so that when the Convention entered into force it would be a document that had the support of the international community as a whole.

His country as a maritime State having a big stake in the stability of the legal order of the sea, has been proud of playing an active role throughout the negotiations. In the negotiations at the Third United Nations Conference on the Law of the Sea, Japan worked tirelessly for the adoption of a most widely acceptable Convention.

His delegation believed that the United Nations Convention on the Law of the Sea when seen in its entirety, deserves positive appraisal despite its shortcomings related to Part XI, and that the Convention as a whole would serve the long-term as well as comprehensive interest of maritime States such as Japan. He emphasized that the Convention would bring an end to serious legal disorders which were resulted from the unilateral extension of jurisdiction by coastal states in the past and provide instead an integrated legal basis on the use of the sea by the international community.

Japan had actively participated in the consultations and is fully prepared to further contribute to their successful outcome. It is gratifying to note that, reflecting enhancing awareness of participating States in the consultations by the UN Secretary-General on the need for the universal application of the Convention, certain general agreements seem to have emerged with regard to a future deep seabed mining regime.

With regard to the work of the Preparatory Commission, several unresolved issues remain due in part to the global political and economic changes that have occurred since the Convention was adopted.

Referring to the registration in 1987 of the first group of pioneer investors, namely, India, France, Russia, and Japan, the Preparatory Commission held a series of informal consultations reviewing the manner in which the registered pioneer investors were to fulfill their obligatoins. Since the adoption of the Understanding on the Fulfillment of Obligations by the Registered Pioneer Investors and their Certifying States, Japan and Japanese pioneer investors, Deep Ocean Resources Development (DORD) had faithfully implemented their obligations. Among the obligations set forth in the Understanding is provision for a training programme. At its tenth session, convened in Kingston in 1992, the Preparatory Commission adopted the Japanese training programme, and in the resumed tenth session held in New York three candidates from Thailand, Iran, and Republic of Korea were nominated for training which commenced in May 1993. Each trainee is currently taking a ten-month course in his respective field, namely geology, geophysics and electronic engineering, under the auspices of the Deep Ocean Resources Development and Geological Survey of Japan, within the framework of technical cooperation by Japan International Cooperation Agency (JICA). The three trainees are expected to play a central role in the future Enterprise.

He reiterated that these next eleven months would be the most crucial period in the history of the law of the sea negotiations that had been underway ever since the Committee on the Peaceful Uses of the Seabed and the Ocean Floor was established and expressed the hope that the consultations held at the initiative of the Secretary-General would be conducted in a spirit of compromise and mutual understanding.

The Delegate of *Kenya* recalled the active role played by his delegation in the negotiations of the Law of the Sea Convention by introducing the concept of the Exclusive Economic Zone. He stated that the Convention, particularly Part XI, represented a compromise between the developed and developing countries. While supporting the informal consultations convened by the Secretary-General of the United Nations his Government was of the view that that forum had no mandate to discuss amending the Convention. In his view only the PREPCOM, prior to entry into force of the Convention had the mandate to discuss any such issues and the informal consultations could only make recommendations. He pointed out that the Convention itself provided provisions for a review of the Convention. He pointed out that the weakness of the provisions of the Conventions could not be tested until they were implemented. He expressed the view that problems relating to the issue of decision making would arise when the Convention entered into force. How the industrialized countries would participate in the work of the Authority if they did not become parties to the Convention, remains a major concern.

He accepted and supported the need for regional cooperation for promoting the interest of developing countries as in the instances of the IOMAC whose training programme had benefitted many countries in the Indian Ocean region.

The Delegate of *China* stated that the United Nations Convention on the Law of the Sea is a great achievement of the international community in the field of codification and progressive development of international law. It establishes a new legal regime for the seas and oceans. Although it has some defects, the Convention is the most comprehensive international legal instrument on the management of the seas and oceans.

His delegation was happy to notice that the sixtieth instrument of ratification was deposited with the UN Secretary-General on 16 November 1993 and that the Convention would enter into force on 16 November 1994. Welcoming this development, he hoped that the largest possible number of countries would become parties to the Convention. Most of them were not yet in a position to do so. The effectiveness of the Convention would be damaged if the industrialized countries stood outside. The changed economic and political situations particularly the fact that deep sea-bed mining still remained far from reality, have made it necessary to adjust the relevant provisions of Part XI of the Convention.

Appreciating the efforts of the present Secretary-General of the United Nations and his predecessor to convene the informal consultations on outstanding issues relating to the deep sea-bed mining provisions of the Convention he said that States must make full use of the period before the Convention enters into force so as to find a satisfactory solution to outstanding issues thus allowing the Convention to be accepted as widely as possible.

In the view of his delegation the PREPCOM had completed its work related to the preparation of draft rules, regulations and procedures for the functioning of the Authority and to the practical arrangements for the establishment of the International Tribunal of the Law of the Sea. He further stated that the procedures and mechanisms for the registration of the pioneer investors and the modality of the implementation of the obligations of the six registered pioneer investors and their certifying states were established. This was a clear evidence of successful implementation of Resolution II of the Third United Nations Conference on the Law of the Sea, he added.

Finally, with respect to the forthcoming session of the Prepcom, he expressed the hope that it will touch upon the issues that may arise from the entry into force of the Convention, and make practical arrangements.

The Delegate of *Republic of Korea* stated that his delegation was pleased to note that the sixtieth ratification of the Convention by the Government of Guyana would bring UN Convention on the Law of the Sea into force in November 1994. He pointed out that the Universality of the Convention remained to be secured. Expressing his appreciation for the informal consultations convened by successive Secretaries-General of the United Nations he said that these had provided a fora in which to bridge differences on outstanding issues relating to the deep-sea-bed mining. While satisfied with the progress made during the last round of consultations in November 1993 his delegation expressed the hope that the informal consultations would produce a successful outcome this year. He offered his delegation's support for success of the informal consultations and the achievement of universality of the convention.

He also said that his Government submited to the PREPCOM its application for registration as a pioneer investor and for the allocation of a pioneer area in accordance with resolution II of the Third UN Conference on the Law of the Sea. He affirmed that the Government of the Republic of Korea was prepared to lend its full support for the development of the new international legal regime for the oceans with the entry into force of the UN Convention on the Law of the Sea.

The *Delegate of India* stated that the coming into force of the UN Convention on the Law of the Sea, 1982 is a historic event and would require all those States who had not already ratified the Convention to review their position. He expressed the hope that the ongoing informal consultations, convened by the Secretary-General of the United Nations, would result in the emergence of a consensus which could be introduced into the Convention on the Law of the Sea through its existing machinery. That in his opinion would ensure the due and effective role of each and every State in the Ocean regime. He expressed the view that States which had made singular investments in the oceans would ensure the protection of the principle of the common heritage of mankind.

(ii) Decisions of the Thirty-third Session (1994) Agenda item: "The Law of the Sea"

(Adopted on January 21, 1994)*

The Asian-African Legal Consultative Committee at its Thirty-third Session:

Having Considered the Secretariat Brief on "The Law of the Sea: Progress of the Work of the PREPCOM and the United Nations Secretary-General's Informal Consultations" contained in document number AALCC/XXXIII/TOKYO/94/6 and having heard the comprehensive statement made by representative of the Secretary-General;

1. *Expresses* its appreciation to the Secretariat of the Asian-African Legal Consultative Committee for the comprehensive Brief and for

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* The *Delegate of Turkey* expressed the following reservation to the decision:

"Turkey supported the international efforts directed to establish a regime of the Law of the Sea which has to be based on the principle of equity and which can be accepted by all States. However, the Convention on the Law of the Sea does not contain the adequate provisions for special geographical zones and situations and as a consequence cannot succeeded to establish a satisfactory balance between the conflicting interests. Furthermore the Convention contained no provision for reservation on specific clauses. These are the main reasons to prevent Turkey from approving the Convention on the Law of the Sea. Although the Convention is about to enter into force, it is still far from getting universal acceptance. As the distinguished delegate of Sri Lanka mentioned in his statement, lack of the equitable regime between the conflicting interest is the source of the informal negotiation conducted with the help of the Secretary-General of the UN."

"We do not want to create an obstacle for the decision to be taken by the Committee but, my delegation would like to reserve its position on the issue and express clearly that its silence cannot be interpreted as an approval to the resolution which is supposed to be adopted by consensus"

its participation in international meetings related to the Law of the Sea;

2. *Notes with Great Satisfaction* that the United Nations Convention on the Law of the Sea having been ratified by the requisite sixty States shall enter into force on 16 November 1994;

3. *Urges* the Member States who have not already done so to consider ratifying the Convention on the Law of the Sea;

4. *Urges* the full and effective participation of the Member States in the Informal Consultations convened by the Secretary-General of the United Nations so as to ensure and safeguard the legitimate interests of the developing countries;

5. *Reminds* Member States to give timely consideration to the need for adopting a common policy and strategy for the Interim Period before the commercial exploitation of the deep seabed minerals becomes feasible;

6. *Urges* Member States to cooperate in regional initiatives for the securing of practical benefits of the new ocean regime;

7. *Directs the Secretariat* to continue to cooperate with the international organizations and with such international organizations competent in the fields of ocean and marine affairs and to consider assisting Member States in the formulation and adoption of municipal legislation for the exploration and exploitation of the natural resources of the Exclusive Economic Zone;

8. *Decides* to inscribe on the agenda of its Thrity-fourth Session an item entitled "Implementation of the Law of the Sea Convention, 1982".

(iii) Secretariat Brief

The Law of the Sea: The Work of the PREPCOM and the UN Secretary-General's Informal Consultations (1993)

Progress at the Eleventh Session of the Preparatory Commission

The Preparatory Commission held its Eleventh Session in Kingston, Jamaica (22nd March to 2nd April 1993). The Secretary-General of the AALCC participated during the first week of the Conference from 22nd to 26th March 1993. The PREPCOM at its tenth session in August 1992 in New York had decided to complete the adoption of the final report at the Kingston Session. The purpose of the Session therefore was fairly limited and it was not meant to be a negotiating session but for adopting the various reports prepared by the respective Chairmen. Thus, at the opening statement of the Commission on 22nd March 1992, the Chairman of the Preparatory Commission clearly stated that following consultations of the General Committee of the Preparatory Commission it had been agreed that the draft final reports would not be "negotiating instruments" but a summary of the Preparatory Commission's discussion over the past eleven years. The discussions he proposed would be only focussed on correcting inaccuracies and should not include substantive statements. Similar statements were made by each of the Chairmen of the other Special Commissions.

Apart from the draft provisional final reports of each of the four Special Commissions, were voluminous annexes representing all the previous reports of each of the Special Commissions which were however not for discussion but for record. It should thus be clear that the Kingston Session was a rather low key affair.

Informal Plenary of the Preparatory Commission for the Sea-bed Authority and for the International Tribunal for the Law of the Sea

It would be recalled that the informal plenary was assigned the following functions:

(a) Preparation of rules, regulations and procedures on the administrative, financial, and budgetary matters pertaining to the various organs of the Authority (resolution I, para 5(g);

(b) Implementation of resolution II governing preparatory investment in pioneer activities relating to polymetallic nodules (resolution I, para 5(h);

(c) Preparation, consideration and adoption of the final report referred to in paragraph 11 of resolution I incorporating therein the results of deliberations on all matters within its exclusive competence and on all matters within the competence of its special commissions and other subsidiary bodies as contained in the reports submitted to it by them for the presentation of the final report by the Chairman to the first session of the Assembly of the International Seabed Authority;

(d) the general conduct of business; coordination of work of the organs and subsidiary bodies; and upon the recommendation of the General Committee, all questions of organization of work;

(e) Presentation of the report of the Preparatory Commission through its Chairman on the arrangements for the establishment of the International Tribunal for the Law of the Sea to the meeting of States Parties convened for the purpose;

(f) All matters not specifically assigned to the special commissions or other subsidiary bodies.

The informal plenary had been working on all these issues since the commencement of the deliberations in 1983. The draft provisional report prepared for the Kingston Session was an updated version of the report presented during the summer session. It was on the whole a factual document narrating in essence what work had so far been done on the implementation of resolution 2 of the Third United Nations Conference on the Law of the Sea. This was intended to protect the substantial investments made in the development in the sea-bed mining technology, equipment and expertise. It gives an account of the procedures followed for registration of pioneer investors and the carrying out their obligations including training of personnel for the authority.

The informal plenary was also responsible for the preparation of draft rules of procedure for the organs of the Authority and substantive progress has been made over the years on this score which is reflected in the report. However, a number of "hard core" issues of financial and budgetary matters, decision-making and elections remain outstanding since no substantial progress could be achieved during all these sessions. The Plenary was also charged with the preparation of draft agreements concerning the relationship of the Authority, the United Nations, the host countries and parties to the Convention on the Law of the Sea and agreement has been reached on these issues.

The third major item which was the responsibility of the Informal Plenary was the submission of recommendations concerning administrative arrangements of the Authority, its initial financing and secretariat requirements as well as staff and financial regulations of the Authority. As the report indicates, substantial progress has been made in this field, but the details of the general Principles agreed upon would have to be elaborated at a later date. During the discussions some suggestions were made to reflect the result of the work of the Commission in a more balanced manner particularly by the European Community and their allies. There were also some factual corrections that were suggested to the text. No substantive amendments however were admissible.

In his statement at the conclusion of the Conference the Chairman of the Preparatory Commission indicated the amendments that had been accepted which would be incorporated in the final report to be circulated later. However, though the Special Commission has been said to have gone as far as it can, the list of the pending issues which are annexed to the report is such that one can hardly consider that the mandate of the Commission has been accomplished. These issues as identified in the annex to the report were as follows:

1. **Provisions in the rules of procedure of the Authority relating to financial and budgetary matters:**

Assembly—rule 104 (proposed annual budget); rule 106 (Contributions).

Council—rule 31 (Submission of the annual budget); rule 34 (Estimate of expenditures); rule 81 (Finance Committee).

2. **Provisions in the rules of procedure of the Authority relating to decision-making:**

Assembly—rule 71 (Decisions on the questions of substance); rule 72

(Decisions on amendments to proposals relating to questions of substance); Rule 107 (method of amendment).

Council—rule 53 (Decisions requiring two-thirds majority); rule 54 (Decision requiring three-fourths majority); rule 58 (Procedures for reaching a consensus); rule 70 (Approval of plans of work submitted by applicants other than the Enterprise); rule 71 (Approval of plans of work submitted by the Enterprise); rule 92 (Method of amendment).

Legal and Technical Commission—rule 38 (Reconsideration of the proposals); rule 41 (Decisions on questions of substance).

Economic Planning Commission—rule 38 (Reconsideration of the proposals); rule 41 (Decisions on questions of substance).

Finance Committee—section on decision-making.

3. Provisions in the rules of procedure of the organs of the Authority relating to elections:

Assembly—rule 28 (Elections); rule 83, paragraph 3 (Restricted balloting for one elective place); rule 94 (Nominations); rule 95 (Order of elections); rule 100 (Elections).

Council—rule 75 (Equitable geographical distribution and the representation of special interests).

Legal and Technical Commission—rule 14 (Election of Chairman and the Bureau).

Economic Planning Commission—rule 14 (Election of Chairman and the Bureau).

Finance Committee—section on elections.

4. Provisions in the rules of procedure of the organs of the Authority relating to the issue of observers:

Assembly—rule 93, paragraphs 2-6 (observers).

Council—rule 73 (Participation by observers).

Legal and Technical Commission—rule 56 (Participation by observers).

Economic Planning Commission—rule 55 (Participation by observers).

5. Provisions in the rules of procedure of the organs of the Authority relating to subsidiary organs:

Assembly—rule 87 (Composition).

Council—rule 83 (Composition).

6. Preparation of detailed recommendations concerning administrative arrangements of the Authority, its initial financial and secretariat requirements, as well as staff and financial regulations of the Authority.

Special Commission I on Land-based Producers

Special Commission I is mandated to recommend measures to assist developing countries, land-based producers of minerals whose economies will be adversely affected by the deep sea-bed mining of those minerals. Like other Commissions, this Special Commission was also established under the UN Conference on the Law of the Sea, 1982, Resolution I.

In the course of discussions, some progress has so far been achieved, but substantial differences of views still remained on some hard core issues. The draft provisional report of the Commission as contained in document LOS/PCN/SCN.1/1992/CRP.22 and its four addenda is an attempt to reflect as clearly as possible what has so far been achieved and it was not supposed to be for the purposes of negotiations. However, some specific suggestions to the report were made and those that received general agreement had to be incorporated in the final report. The European Economic Community in particular made detailed proposals, some of which were accepted and others taken note of. It should be pointed out however that the mode of assisting land-based producers of those minerals who are likely to be adversely affected has not been fully resolved and negotiations on some of the issues are the subject of the on-going informal consultations organised under the auspices of the Secretary-General.

Special Commission II on the Enterprise

The mandate of the Special Commission II is to prepare for the early and effective operations of the Enterprise after the Convention comes into force. The Special Commission for the Enterprise was established in accordance with Resolution I para 8 of United Nations Convention on the Law of the Sea which in para 8 entrusts the Enterprise with the task of:

a) Taking all measures necessary for the early entry into effective operation of the Enterprise; and
b) Performing the functions referred to in paragraph 12 of Resolution II.

Para 12 of the Resolution II referred to above deals with the objective of ensuring that the Enterprise is able to carryout the activities in the area in such a manner as to keep pace with other entities.

The draft report summarises the deliberations of the Special Commission II on such issues as the organisational structure of the Enterprise, the development of policies and feasibility studies in preparation for the early operation of the Enterprise in the operational options for the Enterprise. An annex to the draft report contains annotation of those provisions of the United Nations Convention on the Law of the Sea that relate to the structure and organization of the Enterprise. In introducing his report the Chairman of the Special Commission Mr. Lennox Ballah (Trinidad and Tobago) stated that he had attempted to present a summary of the Committee's discussions on all the areas. In his view the report reflected a fair representation and record of the discussions. The comments thereto will be reflected in the report which he would submit at the end of the Session.

By and large the representatives of developing countries and most other delegations agreed with him. The European Community were however of the view that the report did not reflect the state of discussions in the Special Commission on certain issues. They therefore represented a long list of amendments which in their view should ensure that apart from the report constituting a record of agreed provisions, it should also indicate clearly the differences that remained at this stage. The Chairman however pointed out that since this was not a negotiating session, only amendments which were agreed by all States could be incorporated in the body of the report. Otherwise such amendments could only be added to the report as separate annexes.

Eventually, the Chairman was entrusted with the responsibility to hold further consultations with the delegates representing different points of views and reflect the outcome if any, for final adoption. He held these consultations during the Session and in his final statement presented to the Plenary at the conclusion of the session, he has reflected all the views that were expressed and specific amendments that had been agreed to. These will be incorporated in the texts of the final document to be issued and circulated to all delegations.

Special Commission III on Sea-bed Mining Code

The Special Commission III which has been charged with the tasks of preparing rules and regulations to govern the exploitation of the deep sea-bed, had before it a draft final report and an addendum. The report, like reports of other Commissions, was an account of what the Special Commission has so far done over the last ten years in the preparation of sea-bed mining code. The addendum itself contains detailed provisions on draft regulations on prospecting exploration and exploitation of polymetallic nodules in the area and has a working paper presented by the Secretariat on labour, health

and safety standards aspects. It also has various documents presented by States and interests groups as amendments to the draft regulations on prospecting exploration and exploitation of polymetallic nodules in the area. As the other reports presented by other Commissions, the report was not meant for negotiations but only for indicating what has so far been achieved.

The report contained details of the discussions of the Special Commission on such issues as administrative procedures relating to prospecting exploitation of the area, transfer of technology to developing countries, protection and preservation of marine environment from activitities in the area and labour, health and safety standards for deep sea bed mining operations. During the discussion, some of the amendments proposed were found to be generally acceptable and these were reflected in the statement of the Chairman of the Special Commission at the conclusion of the session. It was pointed out that although some issues remain to be resolved, some provisions of the draft mining code have met with the approval of all the representatives. The revised conclusions state that the present report reflected the progress made till now by the Special Commission in the consideration of various documents comprising the draft mining code. It also sheds light on issues that require further consideration. Thus issues requiring further consideration will be the subject of the on-going informal consultations organised by the U.N. Secretary-General.

Special Commission IV on the Tribunal for the Law of the Sea

It will be recalled that a Special Commission was mandated to make practical arrangements for the establishment of International Tribunal for the Law of the Sea in Hamburg, Germany. The Special Commission has over the years been involved in the discussion of various aspects of the establishment of the tribunal. The draft final report of the Preparatory Commission covers a broad range of topics, such as judicial procedure including recommendations on the draft rule of the tribunal, international agreements including the head-quarters agreement between the Tribunal and Germany; and the relationship agreements including recommendations on arrangements between the Tribunal and the United Nations, International Sea-Bed Authhority and the International Court of Justice. The report also contains recommendations and administrative arrangements including those on the initial financing and budget of the tribunal.

Similar to the other reports, the document was examined only to determine whether it accurately reflected the work of the Special Commission. In many respects this particular Special Commission can be said to have completed its task.

Future Work of the Preparatory Commission

During the concluding Session, the Chairman of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea, Mr. Jose Luis Jesus (Cape Verde) made some proposals as to the future work of the PREPCOM. He made a reference in particular to the possibility that the final solution of the pending issues should be sought at the appropriate time and in his view negotiations should be focussed on negotiating a "Framework Agreement" before the entry into force of the UN Convention on the Law of the Sea. In his view, Part XI of the Convention on the Sea-bed mining regime, is a source of practical difficulties for several States and many of the pending "hard core" issues arise from those practical difficulties. The efforts of the Secretary-General in the open-ended informal consultations on the Law of the Sea are precisely aimed at dissolving these hard core issues to enable the Convention to obtain universal acceptance and ratification.

Nevertheless it is doubtful whether a so called "Framework Agreement" which would in effect mean a new treaty would be acceptable. The PREPCOM itself has not even managed to complete the work assigned to it by the Convention in the eleven years that it has been engaged in these negotiations. It is highly unlikely that a Framework agreement can be negotiated in the near future. Certainly it should not hold up the ratification process bringing into force the 1982 Convention which involves far more than Part XI.

On the recommendation of the General Committee, the Commission decided not to hold any more meetings in the course of this year. Since the Preparatory Commission was established with the mandate extending to the coming into force of the Convention, it could not adopt definitively its reports and therefore only took note of them. However, the existing pattern of meetings would not be continued as the Preparatory Commission has substantially completed the work it could realistically be expected to accomplish. On the recommendation of the General Committee the following future programme of work was approved:

a) not to hold any more meetings in the course of this year;

b) to make provision every year for the United Nations servicing of a two-week annual session of the Preparatory Commission, until the entry into force of the Convention;

c) the need for the effective holding of the annual session of the Preparatory Commission will be decided by the Chairman of the Preparatory Commission in consultation with the Chairman of the Special Commissions, the Chairmen of Regional Groups and interest groups. The Chairman of the Preparatory Commission will also decide, on the basis of such consultations, the precise date for such a meeting;

d) the General Committee, acting on behalf of the Preparatory Commission as its executive organ for the implementation of Resolution II, will meet for two or three days annually to consider matters related to the implementation of Resolution II and to continue the monitoring of the implementation of the obligations of the registered pioneer investors.

It is clear now that as the negotiations on the outstanding issues are concerned, the focus will be on the open-ended informal consultations organised by the Secretary-General. Already there have been several such consultations, the last of which were held from 8th to 12th November 1993 and produced significant results.

Report on the UN Secretary-General's Informal Consultations

The Secretary-General of the AALCC participated at the Tenth round of the informal consultations organised by the Secretary-General of the United Nations on 27th and 28th April 1993.[1] These consultations chaired by H.E. Dr. Carl August Fleischhauer, Under Secretary-General and Legal Counsel were based on an Information Note dated 5th April 1993 prepared by the United Nations Secretariat as an informal document largely based on the work done in the previous sessions particularly those held in 1992.

The document was divided into two parts. Part A deals with the consideration of procedural approaches of reflecting any agreement that might be reached in the informal consultations in a legally binding manner to come into effect preferably simultaneously with the entry into force of the Convention. It should be pointed out that the 1982 Convention has already obtained 55 ratifications and thus requires only four more ratifications and subsequently a period of one year[2] before it enters into force. Hence the

1. As these informal consultations are being accepted and they are open-ended, the Secretary-General of the AALCC, in his report on the consultations, expressed the hope that as many of the AALCC Member States as possible would be represented by *their experts* in the next round of negotations. It was far from satisfactory, as has been the case in past negotations, merely to assign some officials from the Permanent Mission to represent the States in what are highly complicated negotations with far-reaching results.

2. The Convention has been ratified by Angola, Antigua and Barbuda, Bahamas, Bahrain, Belize, Belgium, Botswana, Brazil, Cameroon, Cape Verde, Cote d' Ivoire, Cuba, Cyprus, Djibouti, Dominica, Egypt, Federated States of Micronesia, Fiji, Gambia, Ghana, Grenada, Guinea, Guinea-Bissau, Iceland, Indonesia, Iraq, Jamaica, Kenya, Kuwait, Mali, Malta Marshall Islands, Mexico, Namibia,

urgency of these consultations which hopefully will pursuade the industrialised countries to ratify the Convention which until now has been ratified almost exclusively by developing countries.

The second part of the Information Note, Part B, deals with the formalization of the result of the consultations and arrangements subsequent to the entry into force of the Convention and during the interim period before the commencement of commercial exploitation. This is predicated on the assumption that there will be an initial period which may last for twenty years or more between the entry into force of the Convention and the commencement of commercial production of minerals from deep sea-bed, an assumption which now seems to be generally accepted.

Consideration of Procedural Approaches

As many delegations pointed out, the Procedural approaches should be considered only after the agreement has been achieved on substantive issues already identified during the previous consultations. Nevertheless the Legal Counsel was of the view that if these procedural issues were discussed as early as possible they would facilitate discussions and finalization of the consultations. Significant achievements have already been reached on several substantive issues during the informal consultations. How these results are to be reflected becomes important since some States have already gone through the procedural ratification process. It is generally agreed that they should not be expected to go through the whole procedure again to reflect these changes assuming that they were acceptable to them.

As the UN Secretary-General has clearly pointed out the purpose of the consultations is to provide practical solutions to the difficulties that industrialized countries have expressed about Part XI on deep seabed mining in what they claim are changed circumstances since the Convention was negotiated. It is not the intention to re-negotiate Part XI which remains an integral part of the Convention. As was pointed out in the discussions, including Part XI, was meticulously negotiated as a package deal by consensus and should therefore remain an integral whole.

In the Information Note, the Secretary-General proposed four possible procedural approaches for reflecting the results in a legally binding manner, which however are not meant to be mutually exclusive, and contain elements which might possibly be merged to achieve acceptable formulations.

Nigeria, Oman, Paraguay, Philippines, Saint Lucia, Senegal, Seychelles, Sao Tome and Principle, Somalia, Sudan, Togo, Trinidad and Tobago, Tunisia, Uganda, United Republic of Tanzania, Yemen, Yugoslavia, Zaire and Zambia.

I. The first alternative proposed is that the result of the consultations could be included in a *contractual instrument such as a Protocol* which formally amends Part XI of the Convention, both with respect to the interim period and with respect to the future deep sea-bed mining regime. As the Information Note points out, this approach would be inconsistent with the procedure for amendment as provided for in Part XI of the Convention in Article 154 and Article 314 dealing respectively with periodic review after entry into force of the Convention and the Review Conference relating to activities in the Area. Nevertheless, such a procedure could in fact be legal under Articles 39 and 40 of 1969 Convention on the Law of Treaties, but only by agreement between the parties of the Convention. In this case, however, the agreement would be required not only from the parties to the Convention but non-parties to the Convention including those States which have signed but not ratified the Convention and those who have not even signed it.

During the discussions there was very little support for this procedure because it would clearly amount to partial re-negotiations of Part XI and there is no mandate for such negotiations. Many delegations particulalry those from developing countries rejected this approach out of hand and it is unlikely to form the basis for solution.

II. The second alternative is predicated on the assumption that the negotiations currently under way constitute few changes in the actual text of the Convention but primarily reflect understandings on the interpretation of application of particular provisions of the Convention. It is therefore proposed as an alternative in the Information Note that the result of the consultations could be made operational in a simple and yet legally binding form as an *agreement containing authoritative interpretations of the provisions concerned.* Those States which have already ratified the Convention would merely give implied consent to the agreement without the necessity of formally adopting them unless they decide to do so within a period of time.

This approach attracted considerable support during the discussions. It nevertheless has the disadvantage that some of the issues which are subject of ongoing informal negotiations, particularly with respect to decision-making and Review Conference procedures and voting in the Council and the Commission involve substantive changes of the provisions contained in Part XI and could not in any way be considered as mere interpretations but substantive amendments.

III. The third approach proposed in the Information Note would consist of *an interpretative agreement on the establishment of an Initial Authority and an Initial Enterprise for the duration of the interim period,* i.e. before commercial production becomes feasible, *to be followed by a procedural arrangements for the convening of a Conference to establish a definitive regime for commercial production of deep sea-bed minerals before commencement of commercial production.*

This approach found favour particulalry from the industrialized countries and indeed from a few representatives of the developing countries. However, it was strongly opposed by a significant number of the developing countries who were concerned that the acceptance of such a proposed conference would in effect amount to acceptance of re-negotiation of Part XI in a manner not consistent with the provisions of the Convention. Part XI is considered as an integral part of the Convention which envisages only the possibility of Review Conference subsequent to commencement of commercial production.

Moreover, the only safeguard anticipated with respect to Part XI is that

"....The Conference shall ensure the maintenance of the principle of common heritage of mankind as well as the implementation of the results of consultations".

Thus the door to whole-scale revision of the fundamental principles concerning the exploration and exploitation of the Area now contained in Part XI would be wide open. Nevertheless from what is proposed in the latter part of Informal Note of the Secretariat this seems to be the approach favoured for reflecting the results of the informal consultations. Essentially what this approach does is to postpone the immediate changes of the substantive provisions of the Convention until after commercial exploitation becomes feasible. If this proposal is accepted the result of the consultations would be adopted in a document emanating for instance from a resolution of the General Assembly, with the consent of all States, to be annexed to the Convention as an integral part of it.

IV. The fourth approach, which emanated from a proposal made earlier by a delegation, would constitute the *conclusion of an agreement additional to the Convention which would become an integral part of and enter into force together with the latter.* That agreement would incorporate the results of the consultations and constitute the guiding framework for the action of the Authority, the structure, functions and composition which would also be provided for in the

agreement. While such an approach may be attractive to industrialised countries it would be generally unacceptable to the developing countries, and in the view of AALCC Secretariat, would be impracticable to achieve. It would in any case involve a whole new process of ratification to come into force and this would be unacceptable particularly to those States which have already ratified the Convention.

It is therefore clear that no generally accepted procedure for reflecting the agreement has yet emerged from the informal consultations. Based on the discussions, however, it is expected that an attempt will be made (by the UN Secretariat) before the next round of informal consultations to combine various elements of the respective approaches to achieve a compromise though this will not be an easy task.

Formulation of the results of the Consultations

As mentioned earlier, the previous consultations had concentrated on some specific aspects of institutional arrangements which may be adequate in the interim period subsequent to the entry into force of the Convention and before commercial exploitation becomes practical. In the Information Note prepared by the Secretariat, an attempt was made to put on paper specific ideas giving possible scenarios for the establishment of the International Sea-bed Authority with the limited structure.

The Note proposes the establishment of an Initial Authority whose functions would be restricted primarily to continue the functions being carried out by the Preparatory Commission with respect to pioneer investors including the training programmes and receiving and processing of new applications. The Initial Authority would also have the function of implementing the decisions of the Preparatory Commission, monitoring and reviewing the trends of development relating to the deep sea-bed mining activities including the protection of the marine environment and setting up of regulations covering activities related to deep sea bed and monitoring the implementation. It would also have the function of contracting with investors or other entities, establishment of necessary subsidiary bodies and continuing consultations on resolutions of such issues which would be pending after the United Nations Secretary-General's informal consultations or at the time of entry into force of the Convention.

While this possible structure received widespread support from most of the delegations, a trend emerged with the preference of industrialised countries for restricting even further the functions of the 'initial authority' to the

minimum function, largely restricted to monitoring activities. The excuse or explanation for this was that since there would be no commercial production and because of the need to reduce the costs to the State parties, only the bare minimum functions should be performed by the Authority during the interim period.

On the other hand, it was pointed out by the developing countries representatives that whatever new developments that have taken place, and which have been given as the reason for restricting the scope of Part XI, they had no bearing on many of the functions now spelt out in Part XI, since it would not be feasible to exploit the resources of the Area in the foreseable future. It was therefore pointed out by them that the interim regime should be empowered to exercise all the functions given to the Authority in the Convention except those that it cannot exercise because of the changed economic and political situation. These functions would include such activities as are related to marine scientific research, protection of marine environment and of human lives, disposal of archaeological finds and coordination between sea-bed mining related activities in the area and other oceans uses and between activities in the area and coastal States.

It was further pointed out by several participants that the reference to interim "Initial" Authority or "Initial" Enterprise was unacceptable because it would give the impression that such institutions are to be created afresh and are not the same as those already provided for in the Convention. Consequently it was suggested that it would be better to refer to the initial functions of those institutions to dispel this impression. It would appear that this suggestion will be taken up when the Informal Note is revised.

Concerning the structure and composition of the organs of the Initial Authority, the Note suggested that there shall be an Assembly composed of all States parties with non-parties participating fully in the deliberation as observers but not entitled to participate in the taking of decisions. There is also a provision for a General Committee as the executive organ of the Initial Authority until the Council is established. The General Committee is a body not foreseen in Part XI and while supported by several industrialised countries it was criticised by many developing countries' representatives who could not see the advantage of establishing such a General Committee instead of establishing the Council as provided for in Part XI. Also provided for in the Note is the establishment of a Group of Technical Experts which would perform relevant functions of the Economic Planning Commission and Legal and Technical Commission until the need to establish such organs has been determined. A Finance Committee has also been proposed.

This structure was on the whole not very controversial though some representatives who were in favour of limiting the functions of the Assembly saw no need for establishing the Initial Enterprise or Group of Technical Experts whose work they claimed could effectively be carried out or performed by the Secretariat. There was however general understanding that the functioning of these bodies will be based on an evolutionary approach and on cost effectiveness and their meetings would be streamlined to the maximum extent possible to reduce costs.

A Provision has been made for the establishment of a Secretariat of the Initial Authority which would consist of a Secretary-General and a limited number of professional and general service staff. It might however be argued that the functions of such a Secretariat could easily be performed by the existing Secretariat in the UN which services the PREPCOM. This would be particularly appropriate towards reducing the costs.

On expenses of the Initial Authority, alternative proposals were made in the Note i.e. either for such costs to be covered by the regular budget of the United Nations or through assessed contributions by members of the Authority. Most developing countries, with the exception of Cape Verde, were in favour of the cost being covered by the regular budget of the United Nations, particularly since all States parties and non parties would be entitled to participate fully in the work of these organs. Many industrialised countries however expressed the view that the administrative expenses should be borne on the basis of assessed contributions of only the members i.e. the States parties which have ratified the Convention. This may consider to be a mean reflection of the attitude of industrialised countries. Their concerns have necessitated these informal consultations and they have since obtained, or hope to obtain, far reaching concessions from developing countries without giving much, if anything in return.

It should also be pointed out that the Information Note contains an Annex on Preliminary estimated of expenses of the Initial Authority which indicates that a Self-Administrered Secretariat of the Initial Authority would cost US $ 3.3-4.5 million while a United Nations linked Secretariat of the Initial Authority would only cost US $ 2.3-3.0 million. While these amounts are modest, there is no reason why they should be borne by developing countries alone which have the least capacity to bear them.

There is also a proposal to establish an Initial Enterprise with a limited structure whose functions would be restricted to analysis of world market condition and metal prices, trends and protections, collection of information

on the available technology, assessment of the State of knowledge of deep-sea environment and assessment of criteria and data relating to prospecting and exploration. While most of the delegations were prepared to accept these proposals, some industrialised countries considered that such an Enterprise would be premature. According to them, the Enterprise should only be established when it became necessary. This in the view of the AALCC Secretariat is further unnecessary tampering with the institutions provided for in the Convention.

Section 2 of Part B also contains an article dealing with the determination of the time when commercial production of deep sea-bed minerals becomes feasible. There is a proposal to provide that such determination shall be based upon recommendation by a group of technical experts. It was however pointed out by several speakers that such a determination ought to be based on the decision of prospective investors and their assessment of viability of commercial production and thus their application for licence to go for commercial production. This latter view has considerable merits.

Section 3 of the Information Note deals with the proposed conference to establish a definitive regime for commercial production on deep sea-bed minerals. As pointed out earlier, this proposed conference is based on the acceptance of the third alternative proposed by the Secretary-General. But that procedure of implementing the conclusion attracted wide scale criticism as in effect it would amount to advance acceptance of the Fourth Law of the Sea Conference and whole scale revision of Part XI. One particular paragraph in this section, para 21, attracted widespread criticism from many representatives from developing countries as it would in effect allow for a dual or parallel regime. This para provides:—

> "21. States which have not yet ratified or acceded to the United Nations Convention on the Law of the Sea, may, when becoming parties to the Convention, replace their consent to be bound by Part XI and the related annexes by the agreement to participate in the Initial Authority and the Initial Enterprise and in the Conference".

The Legal Counsel Dr. C.A. Fleischhauer in summing up explained that it was not the intention of the Secretariat to create a dual regime and this paragraph is likely to be revised in the final version.

At the eleventh round of consultations from 2nd to 6th August 1993, Part B-II of the Information Note, "Draft Texts Governing the Regime for Deep

Seabed Mining" were discussed.[3] Dr. Fleischhauer expressed the hope that the meeting would take a step further towards achieving the goal of universality of the Convention and warned that the failure of the efforts would be a major setback to the maintence of the law and order in the Sea. So, he suggested that the Informal Consultations should be concrete, productive and face to face discussions. The Representative of Argentine, as the Chairman of the Group of 77, welcomed the initiative for the face to face negotiations and expressed the Group's belief that "the dialogue should lead us to accommodation of specific issues of disagreement based on Part XI not on the assumption of the Initial Authority to change the Convention."

On the question of cost effectiveness and evolutionary approach, as a general rule applicable to all institutions, it was recognised that when commercial production of deep sea-bed minerals became feasible, the establishment and operations of the institutions provided for in the UN Convention on the Law of the Sea should continue to be based on cost-effectiveness and on evolutionary approach. The regime and the institution shall evolve on the basis of actual requirements and possibilities of deep sea-bed mining. There was however disagreement on the need to establish the institutions and bodies of the Convention.

The Information Note suggests that "No institution shall be established if its need has not been formally recognized." Views were expressed that instead of deciding about the establishment of the institution it could be decided as to when an institution or body of the Convention has to be activated. Any formulation for cost effectiveness should not be discriminatory. The principle of consistency and non-discriminatory approach in the establishment and operations of the bodies of the Convention should guide the Meeting. Cost effectiveness is related to the functions and should be measured in the context of the UN operations. For instance, the functions of the Authority in the interim period were referred to. Questions were raised as to whether it may carry out marine scientific research as has been stipulated in the Convention. The time should come when the Authority should acquire the necessary technology and scientific knowledge. Prospecting also is one of the early envisaged functions of the Authority. This however and some

3. During the April round of negotiations there was no time to deal with the Draft Texts concerning the Definitive Deep Sea-Bed Mining Regime as proposed in Section II of Part B of the Information Note. These proposals are based on the previous negotiations particularly those negotiations which took place in 1992. Nevertheless, it should not be assumed that they are generally agreed provision as the negotiations then were on the whole been of a limited character and most of the developing countries did not take part in the negotiations. The draft proposals should therefore form part of the future negotiations of these consultations.

other functions have not been listed as its functions in the interim period. The significant question is as to who will decide whether to exercise these functions. It is clear that the developing countries do not want the Authority to become hostage to the decisions of the Council. The issue is whether the function of the Authority in early stage will be limited to the ones that have been enumerated in the Information Note or they should build up over time. How the Authority shall acquire the technology is another issue. Resources must be available to it, if it is to start its functions. Training Programme and the pioneers obligations for providing finances are all intended for smooth progressive build-up of the capacity of the Authority. The industrialized countries however took the position that the cost effectiveness and evolutionary approach to implementation of the Convention are the basic guidelines, and therefore it was appropriate to combine some functions or technical bodies.

The functions of the Authority in the Interim period for new applicants such as "receiving and processing any new applications, monitoring the implementations of their obligations as agreed upon by the Authority..." were discussed in detail. The need was expressed for clarity concerning the obligations of the pioneer investors and the new applicants. Some industrialized countries proposed that, taking into account the various levels of new applicants and that of the pioneer investors with regard to different stages of the activities in the Area and the investments on the study, and exploration, the Authority should recognize the principle of non-discrimination, so that no additional financial burden will be imposed on the newcomers so as to safeguard their interest in the system. A distinction can be made between two categories—registered pioneer Investors and New Applicants in the exploration of mine site. It was suggested that the Authority in the interim period should continue the functions already being carried out by the Preparatory Commission concerning the implementation of their obligations. Some delegations were of the view that the one million dollar exemption granted to pioneer investors should also be granted to new applicants until the commercial production of deep sea-bed minerals commences.

On the third day of the Informal Meeting, an anonymous draft dated 3 August 1993 was circulated consisting of a draft resolution for adoption by the General Assembly of an Agreement relating to the implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea and two annexes. The paper referred to as the "August paper" or the "boat paper" (from the sketch on the front page) was prepared by the representatives of several developed and developing States as a contribution to the process of consultations relating to outstanding issues of Part XI of the Convention.

Annex I of the paper entitled "Agreed Conclusions of the Secretary-General's consultations" has the following sub-titles: Cost to States parties and institutional arrangements; The Enterprise; Decision-making; Review Conference; Transfer of Technology; Production Policy; Economic Assistance; and Financial Terms of Contract. Annex II under the title of Consequential Adjustment, identifies those provisions of the Convention which have been modified, amended or deleted.

It was suggested that the August paper could be utilized along with the Secretariat Information Note for further constructive discussions but the Information Note will be the basic text for deliberations. The new paper's merit and substance were not discussed, but in the course of examination of the Information Note references were made by several delegations to the similar provisions of the new text. It was however noted by some developing countries that the August Paper had the privilege of being tabled by the developed countries, so at least, it indicated what they really wanted of these consultations and it required careful study and consideration by the developing countries.

A new proposal was introduced by the Delegations of France to provide for the possibility for States to have provisional membership in the Convention and the Authority for a period of five years. States which have not ratified the Convention, would thus participate and assume all duties and rights of membership, pending the process of ratification of the Convention (and the new agreement would be initiated by them). Provisional members would be required to fulfill all their obligations including financial contributions. Although this proposal was advanced orally, it received support particularly from among the developed countries. The Delegate of France stated that there is a similar provision in the GATT. Some other delegates expressed their willingness to study the new concept as a provisional arrangement prior to ratification. Consequently, the concept will be elaborated further on financial contribution aspects, decision-making and its conformity with the Law of Treaties. Such provisional membership however should not be long and it should only be acceptable if it was a process of ratification. The Chairman at the end of discussion recognised the importance of the idea of provisional membership, its technicality and inherent dangers.

The composition of the Council and Voting was the most contentious subject. The Information Note prepared by the Secretariat explains that the composition of the council

> "...shall reflect the major categories of interests and these categories shall be treated as Chambers for the purposes of decision-making".

In case voting in the Council is necessary, decisions on questions of procedure shall be taken by a majority of members present and voting and decisions on questions of substance shall be taken by a two-thirds majority of members present and voting provided that such decisions are not opposed by a majority in any one of the chambers. A special procedure for the approval of a plan of work has been envisaged to the effect that "...the Council shall approve a recommendation by the Legal and Technical Commission for approval of a plan of work unless by a two-thirds majority of its members present and voting, including a majority of members present and voting in each of the chambes of the Council, the Council decides to disapprove a plan of work".

Most of the developing countries had difficulties with the chamber system. They argued that in Article 161 of the Convention the balance of interests has been maintained. System of Chamber voting would impede the progress of the work of the Authority. This is an indication of distrust on the majority, and it might be preferable to follow the system of consensus. It was pointed out that while the Chamber system's aim is to counter the "tyranny" of the majority it applies dual standard. For instance, for the assistance to developing countries is treated as a matter of substance, while the approval of a plan of work needs special treatment guaranteeing almost automatic approval. It is however the incorporation of the veto system in the Convention which is most objectionable. The industrialized countries referring to the composition and voting of the Council as the heart of the matter, insist that decisions in Council should not be taken against the will of some concerned States and the Information Note has touched upon this concern. In their view, since decision-making in the organs of the Authority shall be based on consensus, there is no ground to regard the Chamber voting as veto system. In view of one delegation from developed country "...if we rely on the consensus, everyone can block the decision-making". Another delegation asserted that "...the principle of the common heritage of mankind is the guideline for the activities of the Authority and its organs, but in the meantime we should recognize the interests of the States, the investors, the consumers and the producers. By approving the system of chambers voting, we have incorporated a system based on the balance of the interests". In the view of the AALCC Secretariat if the chamber system is adopted it will lead to total paralysis in decision-making and only those decisions in favour of developed countries and their entities will be possible. What then will be the **content** of the common heritage of mankind.

On defining the categories of member States in the Chambers, the delegate of the USA raised the question concerning States who have not applied to be pioneer investors. It was pointed out that the 'August Paper' had

modified the provisions of Article 161, paragraph (A), in which the category (b) has provided "four members from States parties which have made investments in preparation for, and in the conduct of, activities in the Area, either directly or through their nationals." It should be noted that category (d), i.e. six members from among developing States parties, representing special interests has been deleted. The Convention provides that the special interest to be represented shall include States with large populations, States which are landlocked or geographically disadvantaged, States which are exporters of the categories of minerals to be derived from the Area, States which are potential producers of such minerals and least developed States. In the new paper the categories (d) and (e) of the Article 161, have been merged as category (d) with twenty-four members elected according to the principle of ensuring an equitable geographical distribution of seats in the Council as a whole. Decision-making in the Council, eliminates the veto power given to the Chamber from these 24 members. In fact, contrary to the Convention, the new August paper has recognized only three major interest groups of States; the investors, the consumers and the producers.

The delegate of Cape Verde was of the view that the six members, from among developing States parties, representing special interests are not similar to other developing States. They have great interest in common heritage of mankind and therefore the provisions of the Convention regarding five categories of interests must be retained. The delegates of China and India favoured the retention of the composition as stipulated in the Convention. India stated that the decision-making by chamber system with blocking right does not facilitate the organization of the work. Indonesia rejected the chamber of four categories and insisted on the Chamber of five categories as being more democratic.

On decision-making, the August or the boat Paper, has stipulated a new formulae, in which, it is the Council which effectively makes rules and regulations and decides upon the conduct of the Enterprise. Para 3 and 10 on Decision-making read as follows:—

3. "Decisions of the Assembly on any matter for which the Council also has competence on any administrative, budgetary or financial matter shall be based on the recommendations of the Council. If the Assembly does not accept the recommendation of the Council on any matter, it shall return the matter to the Council for further consideration. The Council shall reconsider the matter in the light of the views expressed by the Assembly.

10. The Council may decide to postpone the taking of a decision in

order to facilitate further negotiations whenever it appears that all efforts at achieving consensus on the question have not been exhausted."

The Issue was raised as to whether the formulae was to give disproportionate voting power to the Council and in other words to a few States. This would be contrary to the principle of the common heritage of mankind which should not be vested within the jurisdiction of any group of States however powerful.

Relationship between the Council and the Assembly on Decision-making and the question of *renvoi* is of great importance and one of the "hard-core" issues. If the Assembly is the supreme body in the decision-making process or for the sake of consistency in that process between the Assembly and the Council, a *renvoi* should be applied in sense that if the Assembly wants to disagree with a decision of the Council, it shall send its recommendations back to the Council and the Council shall reconsider the matter in the light of the recommendations made by the Assembly. The industrialized countries have justified the *renvoi* system by the argument. Since the developing countries have two-thirds majority in the Assembly, it is necessary to establish a check and balance system. In their view if the Assembly is the supreme power, the process of negotiations amongst interests groups will be meaningless. The object of the *renvoi* is to encourage negotiations. While in principle there was no objection to *renvoi* procedure by the developing countries, they insisted that there should be the possibility to a conclusion of the process of decision taking. One should not forget that all members of the Authority are expected to fulfil in good faith the obligations assumed by them, and that the Assembly should not be a rubber stamp of the Council's decisions.

On the Economic Planning Commission and Legal and Technical Commission, the application of the principle of cost effectiveness was reiterated and one delegation even proposed that the Council may decide to decrease the size of either Commission.

The August Paper has stipulated that the functions of the Economic Planning Commission provided for in the Convention shall be performed by the Legal and Technical Commission until such time as the Council decides otherwise. Some delegations rejected the idea of combining the functions of these two commissions and argued that the Economic Planning Commission's function is to assist developing countries, while Legal and Technical Commission has a different task. The representative of the United States of America favoured the combination of the Commissions functions in one Commission or giving the mandate to the Council to decide.

The composition and functions of the Finance Committee received divergent views. On the one hand, some participants supported the idea of having a Financial Committee to consider and check all the expenditures of the Authority and make recommendations on the assessment of contributions of members to the administrative budget of the Authority. It should also draft financial rules, regulations and procedures of the various organs of the Authority and on financial management and internal administration of the Authority. On the other hand, some developing countries argued that the Finance Committee should not be empowered to take control of all the activities of the Authority. The August paper, proposes that decisions by the Council and the Assembly on many issues shall be made based on recommendations of the proposed Finance Committee. It was however pointed out by several delegations that if the operation of the Authority and its organs shall be based on the principle of cost effectiveness and evolutionary approach, it is difficult to see the need for a Finance Committee.

The August paper provides that "...the Finance Committee shall be composed of 15 members. Until the Authority is self-financing, the Committee shall include the five largest financial contributors". Some representatives preferred the provision in the Secretariat's Informal Note which gives due account to the representation of States Parties with the highest contribution to the administrative budget of the Authority.

The Information Note envisaged a very limited structure for the Enterprise whose functions in effect would be to wait and see when commercial production of deep seabed minerals becomes feasible. Thereafter, the Enterprise shall begin its operation through joint ventures, while the States parties would not be any longer under an obligation to fund a mining operation of the Enterprise. It is also stated "... the obligation of mandatory transfer of technology to the Enterprise shall not arise since the Enterprise shall begin its operations through joint ventures and is free to engage in this type of operation at any time thereafter. The availability of technology shall be a part of the joint venture arrangements." Most of the developing countries, were not satisfied with the provisions on functions assigned in the Information Note for the operations of the Enterprise or the provisions on the transfer of technology. They view this as the evolutionary emasculation of the Enterprise which commenced in the process of negotiations in the PREPCOM and continued in the informal consultations of the UN Secretary-General. The concept of Common Heritage of Mankind which was adopted by the General Assembly and the UN Convention on the Law of the Sea without dissent, in order to preserve the Area and its resources for the generations to come and to ensure that the benefits of the exploitation accrue to all mankind and in

particular to the developing countries, has dramatically changed in the new political and economic order. The Enterprise as the organ of the Authority designed to carry out activities in the Area for the benefit of mankind has been reduced to a casual body, incapable of carrying out any operation.

The delegate of Trinidad and Tobago pointed out that the form should follow the function. If the Enterprise has no function to perform there is no justification to establish it. The delegate of Indonesia criticized the provision in which, the Council shall decide upon the commencement of the functioning of the Enterprise. This in effect would mean that the Enterprise will never come into existence. Thus the achievements of the past twenty years of hard work, are going to be obliterated. He stated "...Although, we in the PREPCOM have recognized the changed situations, and incorporated them in the provisions of the rules, regulations on procedures, but at last there is no assurance that the Enterprise can survive."

The industrialized countries in response argued that the Enterprise should not be a debt burden organisation and as it is a costly one, it could be one of the main obstacles in the process of ratification for some countries. The only viable solution is the operation through joint ventures, and the Enterprise should be looked at on the basis of economic realities and market forces, not from ideological approaches. They will not subsidize the Enterprise which would result in discrimination against the other operators.

At the end of the meeting the Legal Counsel Dr. Carl August Fleischhauer, expressed the view that the talks had advanced further and hoped that in the next meeting the consultations would enter into a more precise and focussed discussion to solve specific issues. He went on to say that the deliberations took place in a very professional manner and were fruitful. The passionate exchange of views proved that the main question of divergency has to be clarified and this shows the magnitude of the work involved. He stated that there is no need for new Information Note from the Secretariat. A short and factual report of what had happened would be prepared for the delegations.

Examination of the papers (the Information Note and the August Paper) will be completed thus clearing the way for the conclusion of negotiations.

The General Assembly in its resolution 47/65 called upon States to take appropriate steps to promote universal participation in the Convention, including through dialogue aimed at addressing the issues of concern to some States.

The Secretariat of the AALCC is of the view that the Convention is one of the most significant achievements in the field of progressive development

of international law and its codification. The universality of the Convention is of great importance for the mainteance of peace, justice and progress of all peoples of the world. So it is necessary that the integral character of the Convention and related resolutions adopted therewith should be safeguarded, and applied in a manner consistent with that character, object and purpose. The Convention, including Part XI, was meticulously negotiated as a package deal by consensus and should therefore remain an integral whole. The United Nations Secretary-General's informal consultations on outstanding issues relating to the deep seabed mining provisions of the Convention have entered into a productive stage and it is expected that a face to face dialogue between the concerned States brings an accepted formula by which the Area and its resources as the common heritage of mankind would be reaffirmed.

The Secretariat of the AALCC recognises that there will be a prolonged period after the entry into force of the Convention in which there will be no deep seabed mining. This interim period will be followed by a period during which the Convention will be in force and commercial production of deep seabed minerals will commence as envisaged in Part XI of the Convention. However, Part XI is of relevance not only to the second phase, but also to the first one, that is, the interm period. The institutional arrangements in the interim period, should be based on cost-effectiveness and on an evolutionary approach. But if the Interim Regime is not effective, any cost, even the very modest one, would be a total waste. The Interim Regime must be expowered to exercise all the functions given to the Authority under the Convention, except those that it cannot exercise because of the changed situations. The transition from Interim Regime to the Definite Regime must take place smoothly in order to enable the Authority and the Enterprise to utilize and build on the experience of the Interim Regime. An "Initial Enterprise" with its hands tied and its functions limited to "monitoring developments" can never be transformed into an Enterprise that "keeps pace" with the commercial investors. In other words, if the Enterprise shall ever be able to carry out its functions in the Area, from the beginning it must work in joint venture with the pioneer investors, in exploration, in technology development and in development of human resources.

REPORT ON UN SECRETARY-GENERAL'S INFORMAL CONSULTATIONS ON SEABED MINING PROVISIONS OF THE UN CONVENTION (PART XI) ON THE LAW OF THE SEA

8—12 November 1993

As agreed at the conclusion of the Informal Consultations held from 2-6 August 1992, the continuation of these Consultations on the issues relating

to the provisions on seabed mining provisions of Part XI of the 1982 Law of the Sea Convention took place during the 48th Session of the General Assembly from the 8-12 November 1993. This was a deliberate effort to assure the widest participation, since all States were represented at the regular meetings of the General Assembly. The meetings of the Sixth Committee were suspended for that week to enable all the legal representatives to participate at the Informal Consultations.

The Consultations were inaugurated on 8th November 1993 by the Secretary-General H.E. Dr. Boutros-Boutros Ghali. In his opening remarks the Secretary -General observed that the Informal Consultations had assumed very important role due to the imminence of the entry into force of the Convention on the Law of the Sea, after its ratification by 59 Member States. During these consultations which followed previous consultations instituted by his predecessor, he pointed out that some 96 Member States have so far participated, indicating the interest of Member States to overcome difficulties experienced by some industrialised countries with Part XI of the Convention on the deep sea bed mining provisions which have so far made it difficult for them to ratify the Convention.

In his view, significant achievements have so far been made during the Informal Consultations but so far no definite results have been achieved. It was however necessary that concrete results should be achieved before the entry into force of the Convention which was expected within a period of a year.

It will be recalled that during the Informal Negotiations held in New York from 2-6 August 1993, discussions were held based on an Information Note prepared by the Secretary-General on outstanding issues. During those consultations views had been exchanged on the issues concerning the Assembly, the Council, the Economic Planning Commission, the Legal and Technical Commission and the Finance Committee in face to face negotiations. The Enterprise was also specifically addressed.

The intention therefore for the consultations held from 8-12 November 1993 was to address in the same manner the remaining issues in the Information Note which included the following—

—Transfer of Technology

—Review Conference

—Production Limitation

—Compensation Fund

—Financial Terms of Contracts

Other Negotiating Papers : The "Boat Paper"

It will be recalled that during the August discussions, an anonymous paper purported to have been prepared by representatives of several developed and developing States was circulated among the delegations as a contribution to the process of consultations. In the process of the discussions it became difficult to establish the authors of this paper which is now referred to as the "August 1993 paper" or with reference to a boat depicted on its cover page as the "Boat Paper". From its contents, however, it is clear that majority of the developing countries could not have been parties to it and were neither consulted nor support its content. The 'Boat Paper' is annexed to this report for ease of reference (Annexure B).

THE "NON-PAPER"

During the formal inauguration of the Informal Consultations, the Representative of Sierra Leone Ambassador, Abdul G. Koroma, introduced a new paper referred to as the "Non-Paper" which was said to have been prepared by the representatives of the delegations primarily from the Group of 77. The Paper underscored the difficulties of achieving the major amendments incorporated in the 'Boat Paper' representing the position of industrialised countries which would make radical changes to Part XI of the Convention. Such changes would take a long time to be negotiated with the Group of 77. In the meantime, since the Convention was about to enter into force, it was necessary to make provisional measures for the interim period before commercial exploitation of the minerals became feasible so as to avoid the existence of a vacuum during which dual regime would exist—the Convention regime and the traditional high sea freedoms regime. In his introductory statement Ambassador Koroma stated the following:—

> "The importance of the fact that 59 instruments of ratification have so far been deposited, that the Convention will enter into force in about 12 months from now, cannot be over emphasized. As stated in the preamble of the paper, the drafters are convinced that the progressive implementation of the Convention is essential for the attainment of sustainable development as envisaged by Agenda 21 of the United Nations Conference on the Environment and Development and its follow-up activities; for the unity of ocean space and for the close inter-relationship of the problems of ocean space which must be considered as a whole, necessarily requires the full participation of all States. As we all know, when the sixtieth instrument of ratification is deposited, there will be a time limit of

one year for the Convention to come into force. The broadest possible participation must, therefore, be achieved before the Convention enters into force".

It should be noted that since these consultations were held the Convention has received the sixtieth instrument of ratification on 16th of November 1993. It will therefore come into force on that date in 1994. This proposal therefore should be read in that context though it was hardly discussed during the Informal Consultations in New York. Essentially it involves the transformation of the Preparatory Commission into the implementing machinery of the Convention and allows for provisional membership of those States which have not yet ratified the Convention. As has been the case so far the cost of the Preparatory Commission would be met from the regular budget of the General Assembly. Consequently no extra expenses would be necessary for either the ratifying States or for the others. The "Non-paper" is appended to this Report as Annexure A.

Meeting of the Group of 77 prior to the commencement of the Negotiations with informal consultations

After the formal inauguration, the Group of 77 under the Chairmanship of the representative of Argentina, held a meeting to agree on its strategy, particularly with respect to the 'Boat Paper'. During these discussions, it was pointed out that the 'Boat Paper' involved very extensive amendments to the Convention and it was therefore important to have a clear understanding of all its implications if it was going to be adopted as a negotiating document. It was necessary to have a clear picture as to where the developing countries were being requested to proceed in these consultations. The 'Boat Paper' made very significant and far-reaching amendments to the Review Conference, technology transfer, production policy, with respect of which the industrialized countries had indicated their dissatisfaction. The implications of these proposed changes require very careful examination.

With respect to the Review Conference, the 1982 Convention provided for a Review Conference after 15 years subsequent to the entry into force which would consider the operation of the regime of Part XI. Significant safeguards however were introduced with respect to some fundamental principles and the Convention made provisions as to the adoption of amendments which would be accepted either by consensus or by three-fourth majority. The Secretariat paper—The Information Note—had suggested a two-third majority to be required for adoption of amendments as the Review Conference, subject to their ratification by at least 60 States and a majority in each of the Chambers envisaged in the Council. The 'Boat Paper' on the

other hand provides for total elimination of the Review Conference as unnecessary and any subsequent amendments would only be in accordance with the provisions provided in Article 314 on Amendment, Article 315 on Ratification and Article 316 on Entry into Force of such amendments.

It was also emphasised in the Group of 77 that it has always taken the position that there should be no amendments to the Convention before it comes into force and such amendments should be consistent with the provisions provided for in the Convention. Some delegations observed that the so called 'Boat Paper' would involve fundamental amendments to the Convention and if the Group of 77 was willing to accept such amendments they should carefully examine the manner and methodology of their adoption in view of the need to avoid substantive changes before the Convention enters into force. In this regard particular attention was drawn to the proposed composition of the membership of the Council and the introduction of the Chamber voting system which constitutes fundamental changes and involves the introduction of what amounts to veto power which would allow as few as three Member States in some of the proposed chambers to block any future amendments not to their liking.

Negotiations in the Informal Consultations

These negotiations were very ably chaired by the distinguished Legal Counsel Dr. C.A. Fleischhauer, the Under Secretary General. At his suggestions, the discussions systematically followed the outstanding items as outlined earlier. It should however be underscored that even though many delegations from developing countries participated in these consultations they were largely a dialogue between industrialised countries with very few delegations from developing countries taking an active part. This is an indication of the reluctance if not a rejection of the proposals currently being made particularly in the so called 'Boat Paper' and also to some extent the paper prepared by the UN Secretariat, which equally involved some very significant changes in the Convention with respect of Part XI.

Transfer of Technology

On Transfer of Technology, the developing countries were opposed to the provision of the Information Note regarding the restricted Enterprise as is the case in para 36 on joint ventures. However industrialised countries are against the mandatory transfer and would like to see only voluntary transfer and don't accept Annex III of the Convention. They also insist that the obligation of sponsoring States to co-operate with the Authority in the acquisition of technology by the Enterprise or the joint venture on fair and

reasonable terms and conditions, if the technology in question was not available in the open market, should be deleted. They argue that since it is not the State which is the possessor of the technology such obligation is unreasonable. But what happens if the operator refuses to heed the invitation to co-operate in the transfer of technology? The argument that since the Enterprise would operate on the basis of joint ventures and thus obtain technology is unconvincing because the new proposals both in the Information Note and the "Boat Paper" don't give any advantagte to the Enterprise which would attract potential viable joint venture partners.

Review Conference

With respect to Review Conference there is a provision in the Convention for review after a period of 15 years after commercial production begins. Amendments accepted therein would be by consensus or three-fourths majority intended to become binding on all States whether they ratify or not. In the Information Note two-thirds majority is required provided they are approved by the majority in each Chamber and ratified by at least sixty States. According to the "Boat Paper", Article 155 of the Convention would not be applicable and the Review Conference is ruled out. Only the provisions in Article 314 on Amendment, Article 315 on Ratification and Article 316 on Entry into Force for those who have ratified would apply. There is a basic flaw here since the jurisdiction for the present negotiations is that the economic and political climate has changed since the adoption of the Convention. Who can say what the situation will be in 30 years or so when economic exploitation becomes feasible?

In the course of discussions, it became clear that the industrialized countries preferred the amendments based on the provisions of the "Boat Paper" to that of the Information Note. While Germany supported the provisions in the Information Note, the United States saw no need for a Review Conference since there was no foreseeable commercial mining and insisted that it could not accept any provision which would provide for advance express commitment and hence preferred the provisions of the "Boat Paper" which would freeze the situation. Austria suggested that the amendments should become effective only if adopted by consensus. However this might be impossible if ratification by all States Parties was necessary. Consequently the system in the Information Note would be preferable. This however should not also rule out the possibility of Review Conference as was the case in the "Boat Paper". Canada recognised that the Authority should be given powers to hold a Review Conference if it deemed it necessary.

The developing countries who actively participated in the discussions

expressed the view that it was necessary to hold the Review Conference. China stated that the provision on the Review Conference in the Convention should be retained. The Information Note has provided different aspects including the adoption by majorities of the Council in chambers to be established which however have not been agreed upon. Such issues should thus be deferred. Trinidad and Tobago argued that the nature of such composition of Chamber voting is undemocratic and to a large extent excludes developing countries. Jamaica strongly favoured the retention of the provisions or the Review Conference procedure and rejected the Boat Paper provision which would eliminate the need for review. Any future amendments could be blocked by three States in one of the Chambers. India also evaluated the Chamber voting procedure as a provision for veto by as few as three States.

The Legal Counsel concluded that there was no common ground to reach consensus on the proposal on the Review Conference. He stated that in due course it might be necessary to assess whether such problems as suggested by the industrialized countries really existed. Indeed many Conventions including the UN Charter, FAO, WHO among others contained similar provisions on possible review. The safeguard was to take into consideration the possibility of a State withdrawing if an amendment unacceptable to it was adopted. This provided adequate safeguard against unacceptable amendments.

Production Limitations

On production Limitation Policy, the principles of non-subsidization of minerals from deep seabed and non-discrimination between minerals from land and from deep seabed and production schedule for the plan of work approved by the Authority were generally acceptable. Some suggestions were made for clarification. For instance, Argentina proposed that distinction should be made with respect to State responsibility and responsibility of the contractors for accepting subsidization. Indonesia viewed the sweeping replacement of several paragraphs of the Convention in the "Boat Paper" as unacceptable.

Compensation Fund

On the question of Compensation Fund or Economic Assistance, no agreement was reached. The Legal Counsel recognised the necessity for further negotiations on the substance. The developing countries opposed the provision of leaving the determination of the compensation or Economic Assistance to the Council and insisted that the Authority should decide the modalities. On the other hand the developed countries rejected the idea of

compensation for economic loss because of new minerals as unrealistic. They saw the compensation principle as offensive provisions to free market philosophy which should be removed. Some of these States favoured the provisions in the "Boat Paper"which give the Council the power to determine from time to time on a case by case basis, upon the recommendation of the Finance Committee on economic assistance to developing countries affected.

Financial Terms of Contract

The issue of Financial Terms of Contract was very controversial as both sides had stuck fast to their positions. The industrialized countries and the pioneer investors were determined that US $1 million annual fee should be waived and only be required when economic exploitation becomes feasible as otherwise it would be a disincentive and an obstacle to ratification. Provision in the "Boat Paper" for breaking down the applications fee for exploration and exploitation to US $250,000 for each stage would in their view be logical instead of the present US $4500,000 and this would be a matter of deferment. The developing countries however were not satisfied with the logic and reasons of other side. Indonesia for instance referred to landbased mines for which the annual fixed fees were payable right from the exploration. Hence waiving the US $1 million fees would be prejudicial. Expenses before registration should not be confused with diligence fees since they have already been rewarded by registration.

The Legal Counsel while summing up the discussions on this topic recognised the following:-

—In general on rules and regulations and procedures of contract, there was no basic disagreement.

—On the question of splitting the fees for exploration and exploitation there was also no major disagreement.

—The problem exists however in relation to annual fixed fee of US $ 1 million and whether it refers to exploration and exploitation or whether it should be paid at all and also concerning the diligence fees and measures.

Finance Committee

On the Finance Committee as a subsidiary body anticipated by the PREPCOM, disagreements were on the composition of the Committee and its decision-making procedures. It was difficult to accept that the decision of the supreme organ such as the Council or the Assembly should only be based on recommendations of the Finance Committee. This was particularly pertinent

bearing into consideration that "...until the Authority is self-financing, the Committee shall include the five largest financial contributions."

The Legal Counsel concluded that there was basic agreement on the need for a Finance Committee but discussions had brought out various difficulties. The issue should therefore be revisited and he encouraged any group to reformulate the provision in the light of the debate.

THE 'BOAT PAPER'

A reference was made above to a paper purported to have been prepared by representatives of several developed and developing States and circulated among the delegations as a contribution to the process of consultations. A revised version of that 'Boat Paper' was circulated during the November round of the informal consultations. This section sets out the salient features of the revised text of that paper.

The "Boat Paper" comprises of a draft resolution expected to be adopted by the General Assembly, an Agreement relating to the implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea and the Annex thereto. The draft of the resolution expected to be adopted by the General Assembly comprises nine preambulatory paragraphs and five operative paragraphs. The operative part of the proposed resolution in adopting the Agreement relating to the Implementation of Part XI and related provisions of the Convention would require that future ratification or formal confirmations or accessions to the Convention on the Law of the Sea should imply acceptance of the Convention together with the Agreement. The Resolution also calls on States to act in accordance with the objectives and purposes of the Agreement.

The text of the Agreement included in the "Boat Paper" comprises of four preambulatory paragraphs and eight articles. The opening paragraph of the preamble to the Agreement recognises the contribution of the Convention on the Law of the Sea to the maintenance of peace, justice and progress for all peoples of the world. A reference is thereafter made to both the report of the Secretary-General of the United Nations on the Informal Consultations held since 1990 on outstanding issues relating to Part XI and related provisions of the Convention and note is taken of the political and economic developments affecting the implementation of the provisions of Part XI of the Convention so as to facilitate universal participation in the Convention.

The corpus of the Agreement comprising Eight Articles then goes on to deal with the following issues:

I. Implementation of Part XI (Article 1);

II. Relationship between this Agreement and Part XI (Article 2);
III. Accession (Article 3);
IV. Simplified procedures (Article 4);
V. Entry into force (Article 5);
VI. States parties (Article 6);
VII. Depositary (Article 7); and
VIII. Authentic Texts and Depositary (Article 8).

The revised text of the Agreement in the Boat Paper circulated in November 1993 does not deviate from the August 1993 text of the paper except in respect of proposed Article 2 dealing with the relationship between the Agreement and the Part XI. Paragraphs 1 and 2 of the latter i.e. August 1993 text have been amalgamated and reformulated as paragraph 1 of draft article 2. It is not necessary for now to go into details of the other provisions since they involve no alteration or change from the original ideas in August 1993.

Paragraph 2 of the article 1 of the proposed Agreement entitled "Implementation of Part XI" stipulates that "The Annex forms an integral part of this Agreement". The Annex addresses itself to several key questions and issues considered during the Informal Consultations convened by the Secretary-General of the United Nations and is divided into nine sections.

A comparative reading of the provisions of the new sections of the Annex of the two texts shows that the November 1993 text has undergone several changes mostly of a drafting and syntactical nature. In section I dealing with the Costs to the States Parties and institutional arrangements, for instance, a provision has been included to provide for the competence of the Authority on acquisition of scientific knowledge and the monitoring of the development of marine technology relevant to the activities in the Area. A reading of the two text indicates that the phrase "acquisition of the scientific knowledge" has been added to the earlier text. Similarly in paragraph 6(j) of Section I the competence of the Authority to elaborate rules, regulations and procedures for exploitation has been qualified by the term "timely". Praragraph 7(a) (iii) and paragraphs 8, 10 and 11 of Section I incorporate new provisions. Amendments have also been effected to paragraph 12(b), paragraph 14(a) and paragraph 16. Paragraphs 14(b)(ii), (c), and (d) are the other fresh new provisions in this Section. Old paragraphs 14 and 4 have been deleted.

While there are no changes in paragraphs 2 and 3 in the original proposal additions and alterations have been effected in paragraphs 1,4,5 and 6. In paragraph 1 it is now stipulated that the Enterprise shall commence its functioning upon the issuance of a directive by the Council pursuant to

Article 170, paragraph 2 of the Convention. The August 1993 text had merely stated that the Council shall decide upon the Commencement of the functioning of the Enterprise. The new formulations reflect an improvement of the earlier text. Para 6 of the same section also reflects similar improvement in providing that Article 170, paragraph 4, Annex IV and other provisions of the Convention relating to the Eneterprise shall be interpreted and applied in accordance with this Part. The earlier provision read "sub-section E of sub-section 4 Part XI, Annex 4 and other provisions relating to the enterprise shall be modified by this Part".

Section 3 of the Annex to the proposed Agreement dealing with decision-making appears to have been recast. By and large, barring paragraphs 7, 14 and 16 the phraseology and language of the earlier text have been retained. In paragraph 7 it has been expressly stipulated that the principle of rotation shall not apply to the two States specifically referred to in paragraph 14(a). Paragraph 14 of Section 3, deals with the composition of the Council. It is envisaged that the Council shall consist of 36 members of the Authority elected by the Assembly. Allied to the question of the composition of the Council is the issue whether the system of chamber voting in Council should extend to the category of developing States representing special interests viz. land-locked or geographically disadvantaged States, island States, States with large populations and States which are major importers of the minerals to be derived from the Area. Finally a new paragraph 15 stipulate that the "provisions of Article 161, paragraph 1 of the Convention shall not apply."

Section 4 of the Annex addressed one of the most keenly debated issues namely, Review Conference has been modified. The provision of this section has been toned down in as much as only the non applicability of the provisions of paragraphs 1, 3 and 4 of Article 155 of the Convention is expressly stipulated therein and the revised text goes on to prescribe the applicability of the principles, regime and other terms of paragraphs 2 of Article 155 and to leave unaffected the rights referred to in paragraph 5 of that Article. It is however clear that the provisions of paragraphs 2 and 5 of Article 155 would remain unaffected and applicable only where the proposed amendment of Part XI is in accordance with the provisions of Articles 314 315 and 316 of the Convention. Sub-paragraph (b) of the Section which reads "amendments shall enter into force on a date determined by the Council by a three-fourths majority of the members present and voting, including a majority of members of each chamber of the Council at that time" remain applicable. Consequently the objections made to the provision earlier remain unchanged.

The Section on Transfer of Technology dealt with in Section 5 of the

Annex provides that the transfer of technology, for the purposes of Part XI, shall be governed by the provisions of Article 144 of the Convention. The Enterprise shall take measures to obtain the technology required for its operations on the open market or through its joint venture arrangements. It also provides that if the technology is not available on the open market, the Authority may invite all or any of the contractors or their respective sponsoring State or States to cooperate with it in facilitating acquisition of technology or its joint venture on fair and reasonable commercial terms and conditions including effective *protection of intellectual property rights.* The reference to the effective protection of intellectual property rights did not appear in the August edition of the Boat Paper and is thus a new provision in so far as its proposals are concerned. The matter has of course been raised in the past and the reservations of the developing countries in respect of transfer of technology in the "Boat Paper" have already been expressed. The revised version of the Boat Paper also envisages the inclusion of an explicit provision that the stipulations of article 5 of Annex III of the Convention shall thereafter be inapplicable.

The section on Production Policy has also been revised. In substance the provisions are similar to those contained in the earlier issue of the Boat Paper. A notable exception, however, is paragraph 1(d) which now requires that the plan of work for exploitation approved by the Authority in respect of each mining area shall indicate an anticipated production schedule which shall include the estimated maximum amounts of minerals that would be produced per year under that plan of work. This section in our view is an improvement if it is intended to regulate production in the area to prevent wrecking of land based production from developing countries.

Section 7 of the Annex endeavours to find solutions to the vexing question of economic assistance to developing countries which suffer serious adverse effects on their export earnings or economies resulting from a reduction in the price of an affected mineral, or in the volume of exports to the extent that such reduction is caused by activities in the Area. Here too the November edition of the "Boat Paper" does not substantially change from its August version.

The section on the Financial Terms of Contract proposes that the fee for processing applications for the approval of a plan of work limited to one phase, either the exploration or exploitation phase shall be US $50,000. This reduces the said fee for processing applications by half the amount that was listed in the original version.

Finally the last Section dealing with the Finance Committee has four

provisions which may be said to differ from those incorporated in the initial issue of the Boat Paper. Paragraphs 4, 5 and 6 of this section dealing with matters relating to the membership of the proposed finance committee are new provisions. Paragraph 8 may require consideration as it envisages that the recommendations of the finance committee shall where necessary, be accompanied by a summary of the range of opinions in the Committee.

Conclusion

The UN Convention on the Law of the Sea after the sixtieth ratification on November 16, 1993 needs a period of one year before it enters into force. Hence the urgency of these consultations should persuade the industrialized countries to accommodate their interests with that of the developing countries so as to smoothen the path for the universal acceptance of the Convention. So long as their demands remain unrealistic and excessive this will not happen. A spirit of mutual understanding and cooperation and realism on all sides is necessary particularly since commercial exploitation of the area in question is not imminent. In the circumstances, as these consultations progress, it is necessary that more attention to the "Non-Paper" which offers practical solution for the interim period should be given. The time for grand standing dire threats to the viability of the Convention if only small developing countries become parties is now well over.

(NON-PAPER)

Agreement on the implementation of Part XI and Annexes III and IV of the United Nations Convention on the Law of the Sea.

The General Assembly

Recognizing the historic significance of the United Nations Convention on the Law of the Sea, 1982, (hereinafter referred to as "the Convention") as a *unique contribution to the maintenance of peace, justice and progress for all peoples of the world.*

Reaffirming the principle of the common heritage of mankind codified in that Convention;

Convinced, therefore, that the *implementation and progressive development of the Law of the Sea as embodied in the Convention is essential for the attainment of sustainable development* envisaged by the United Nations Conference on Environment and Development and its follow-up activities;

Aware that the *problems of ocean space are closely interrelated* and must be considered as a whole, and that this requires the full participation of all States whatever their stage of economic development;

Bearing in mind that the *prospects of commercial exploitation or deep seabed mineral resources have receded* into the future, generating an *interim period* between the coming into force of the Convention and the beginning of commercial seabed mining,

To this end desiring to embody the results of the consultations and negotiations organized by the Secretary-General of the United Nations in order to promote the universal acceptance of the Convention in accordance with the mandate given by the General Assembly of the United Nations.

Expresses its consent by the present resolution to adopt the Agreement contained in the Annex attached to the present resolution.

Agreement on the Establishment of an Interim Regime from the Coming into Force of the Convention to the time When Seabed Mining becomes Feasible

The General Assembly has agreed as follows:

to extend the mandate of the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea (hereinafter referred to as the Commission) *for the interim period* from the coming into force of the Convention to the time when commercial seabed mining becomes feasible.

to authorise the Commission to exercise all the initial *functions of the Authority and the Enterprise* in accordance with the Convention, in an evolutionary manner, during this interim period.

to convene a review Conference at the time when commercial seabed mining is about to begin.

Ratifying States may make a declaration, in accordance with Article 310 of the Convention, that they reserve their right to denounce the Convention in accordance with Article 317, should their rights not be properly protected when seabed exploitation will commence.

A. OBJECTIVES

Article 1

1. The present Agreement shall be based for *the functioning of the operations by the Commission on cost-effectiveness,* taking into account the needs to discharge effectively its responsibilities.

2. The present agreement shall apply to the Area as defined in the Convention and *shall translate into operational terms the principle of common heritage of mankind.*

3. The present agreement shall *form an integral part of the Convention* and is concluded in order to facilitate the implementation of Part XI and Annexes III and IV of the Convention. *Subject to this agreement the provisions of Part XI and Annexes III and IV shall apply as appropriate.*

4. The present Agreement and the provisions of the Convention *shall be read and interpreted together as one single instrument.*

B. INSTITUTIONAL ARRANGEMENTS

Article 2
Participation

1. In order to give time to States and entities entitled to become parties to the Convention, such *States and entities may, upon notification to the depositary of the Convention, become parties to the Convention on a provisional basis for a period not exceeding three years.* After three years, such States and entities shall ratify or acceede to the Convention.

2. During this period, States and entities which have become parties on a provisional basis *shall fulfil all duties and obligations, and enjoy all rights of Parties to the Convention,* subject to the limitations inherent to the interim nature of the regime.

Article 3
Powers and Functions

In accordance with Paragraph 6 of Resolution I, the *Commission shall continue to have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes* as adjusted to this interim regime.

Article 4
Organs

1. For the duration of the interim period, *the plenary of the Commission shall perform the functions of the Assembly of the Authority.* Each Party shall have one vote. The Rules of Procedure of the Commission shall continue to apply.

2. For the duration of the interim period, *the General Committee of the Commission shall perform the functions of the Council of the Authority.* Each party shall have one vote. The Rules of Procedure of the Commission shall continue to apply. Upon the coming into force of the Convention, the General Committee shall be renewed through election by the Assembly.

3. For the duration of the interim period, the Secretariat may be drawn initially *from staff members of the Secretariat of the United Nations.*

4. For the duration of the interim period, *the Group of Technical Experts and the Training Panel established by the Commission, shall perform the functions of the Economic Planning Commission and the Legal and*

Technical Commission, with such adjustments as may be considered necessary.

5. For the duration of the interim period, *the Secretariat of the Authority shall perform the preparatory functions necessary for the commencement of the functioning of the Enterprise*. These shall include the monitoring of developments in the deep seabed mining sector, in particular the prevailing conditions in the world metal market, developments in deep seabed mining technology, and data and information on the environmental impact of the activities in the Area.

6. As far as pioneer investors are concerned, *their rights and obligations shall be governed by the provisions of Resolution II and the related understandings.*

7. As far as the applicants referred to in Resolution II, paragraph 1, (a), (ii) are concerned, *approval of an application for pioneer activities shall be facilitated provided that they assume the same obligations as those of the applicants referred to in the understanding on the implementation of Resolution II* contained in LOS/PCN/L. 41/ Rev. 1 (Annex of 11 September 1986).

8. The requirements contained in Resolution II, paragraph 7 (b) and 8, shall be waived with respect of any applicant for pioneer activities.

Article 5
Financial Arrangements

1. In accordance with paragraph 14 of Resolution I, the *expenses of the Commission shall continue to be met from the regular budget of the United Nations, subject to the approval of the General Assembly of the United Nations.*

2. The Commission may raise additional funds for specified activities as they may evolve.

Article 6
Review Conference

1. *Upon notification to the Commission from a pioneer investor of his intention to commence commercial exploitation within three years, a Review Conference shall be convened.*

2. *The Review Conference shall review those provisions of Part XI and the relevant Annexes which govern the system of exploration and exploitation of the resources of the Area in the light of the scientific, technological,*

and economic reality of that future time and in consideration of the experience, the methodologies developed, and the activities conducted in an evolutionary manner during the interim regime.

Article 7
Dispute Settlement

The question of adjustment of the Seabed Dispute Chamber of the International Tribunal for the Law of the Sea, during the Interim Regime, pending the feasibility of commercial seabed mining, *should be determined by the State Parties at the Meeting to be convened pursuant* to Article 4 of Annex VI to the Convention.)

ANNEXURE B
November 1993

(THE BOAT PAPER)

The original version of this document was prepared in August 1993 by representatives of several developed and developing States as a contribution to the process of consultations relating to outstanding issues in Part XI of the 1982 United Nations Convention on the Law of the Sea. The document has been revised in the light of discussions during the Secretary-General's informal consultations held in November 1993.

DRAFT RESOLUTION FOR ADOPTION BY THE GENERAL ASSEMBLY

The United Nations Convention on the Law of the Sea

The General Assembly

Recalling resolution (48/....of....December 1993) on the Law of the Sea.

Recalling that Part XI and related provisions of the 1982 United Nations Convention on the Law of the Sea (the Convention) established a regime for the international seabed area ("the Area") and its resources Reaffirming that the Area and its resources are the common heritage of mankind,

Recognizing that political and economic changes, including in particular a growing reliance on market principles, show the need to re-evaluate some aspects of the regime,

Noting the initiative of the Secretary-General since 1990 to promote dialogue aimed at achieving universal participation in the Convention,

Welcoming the report of the Secretary-General pursuant to General Assembly resolution (48/....) and, in particular, the results of the Secretary-General's informal consultations set out in paragraphs ( ) of the report.

Taking note of the report of the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea,

Considering that the objective of universal participation in the Convention may best be achieved by the adoption of an agreement relating to the implementation of Part XI and related provisions of the Convention and to give effect to the results of the Secretary-General's informal consultations,

1. *Endorses* the results of the Secretary-General's informal consultations set out in paragraphs (.....) of the report of the Secretary-General;

2. *Adopts* the Agreement relating to the Implementation of Part XI and related provisions of the Convention ("the Agreement"), the text of which is attached to this resolution;

3. *Consider* that future ratifications or formal confirmations of or accessions to the Convention should be taken to relate to the Convention together with the Agreement;

4. *Calls* on States and other entities referred to in Article 3 of the Agreement to act in accordance with the object and purpose of the Agreement pending its entry into force;

5. *Requests* the Secretary-General to transmit certified copies of the Agreement to the States and the other entities referred to in Article 3 thereof, with a view to facilitating universal participation in the Convention together with the Agreement.

AGREEMENT RELATING TO THE IMPLEMENTATION OF PART XI OF THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

The States Parties to this Agreement,

Recognizing the significant contribution of the 1982 United Nations Convention on the Law of the Sea ("the Convention") to the maintenance of peace, justice and progress for all peoples of the world;

Having considered the report of the Secretary-General of the United

Nations on the results of the informal consultations held from 1990 to 1994 on outstanding issues relating to Part XI and related provisions of the Convention ("Part XI");

Wishing to take account of important political and economic developments affecting the implementation of those provisions, in order to facilitate universal participation in the Convention;

Considering that an Agreement relating to the implementation of the Part XI would best meet that objective;

Have agreed as follows:

Article 1
Implementation of Part XI

1. The States parties to this Agreement undertake to implement Part XI in accordance with this Agreement.

2. The Annex forms an integral part of this Agreement.

Article 2
Relationship between this Agreement and Part XI

1. The provisions of Part XI and this Agreement shall be interpreted and applied together as one single instrument. In the event of any inconsistency, the provisions of this agreement shall prevail.

2. Articles 309 to 319 of the Convention shall apply to this Agreement as they apply to the Convention.

3. After the adoption of this Agreement, any instrument of ratification or formal confirmation of or accession to the Convention shall represent also an accession to this Agreement.

Article 3
Accession

This agreement shall be open for accession by those States and other entities referred to in Article 305 of the Convention which have ratified, formally confirmed or acceded to the Convention or which are simultaneously ratifying, formally confirming or acceding to the Convention and this Agreement. Accession by the entites referred to in Article 305, paragraph 1 (f) of the Convention shall be in accordance with Annex IX of the Convention. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 4
Simplified Procedure

A State or entity which has deposited before the date of the adoption of this Agreement an instrument of ratification, formal confirmation or accession in respect of the Convention shall be considered to be a party to this Agreement if that State has not notified the Depositary within (.....) months of the adoption of this Agreement that it is not having resources to the simplified procedure set out in this Article. In the event of such a notification being made, accession to this Agreement shall take place in accordance with Article 3.

Article 5
Entry into force

1. This Agreement shall enter into force on the day of deposit of the (.....) instrument of accession to this Agreement, provided at least (.....) of those instruments have been deposited by States to which paragraph 1 (a) (i), (ii) or (iii) of Resolution II of the Third United Nations Conference on the Law of the Sea ("Resolution") applies.
2. For each State acceding to the Agreement after its entry into force, the Agreement shall come into force on the date of deposit by such State of its instrument of accession.
3. States which have recourse to the simplified procedure in Article 4 shall be regarded as having acceded upon expiry of the period of (.....) months specified in that Article, or upon entry into force of this Agreement in accordance with paragraph 1, whichever is later.

Article 6
States Parties

For the purposes of this Agreement, "States Parties" means States and entities which have consented to be bound by this Agreement and for which it has entered into force.

Article 7
Depositary

The Secretary-General of the United Nations shall be the depositary of this Agreement.

Article 8
Authentic Texts and Depositary

The original of this Agreement, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the Secretariat of the United Nations.

SECTION 1. COSTS TO STATES PARTIES AND INSTITUTIONAL ARRANGEMENTS

1. The Authority is the organization through which States Parties to the Convention shall, in accordance with the regime for the international seabed area ("Area") established in Part XI and this Agreement, organize and control activities in the Area, particularly with a view to administering the resources of the Area. The powers and functions of the Authority shall be those expressly conferred upon it by the Convention. The Authority shall have such incidental powers consistent with the Convention, as are implicit in, and necessary for, the exercise of those powers and functions with respect to the activities of the Area.

2. In order to minimize costs to State Parties, all organs and subsidiary bodies to be established under the Convention and this Agreement shall be cost-effective. This principle shall also apply to the frequency, length and scheduling of meetings.

3. The setting up and the operation of the various organs and subsidiary bodies shall be based on an evolutionary approach, taking into account the functional needs of the organs and subsidiary bodies concerned in order that they may discharge effectively their respective responsibilities at various stages of the development of activities in the Area.

4. The functions of the Authority upon entry into force of the Convention shall be carried out by the Assembly, the Council, the Legal and Technical Commission and the Finance Committee, which shall work in accordance with Section 9 of this Annex. The functions of the Economic Planning Commission shall be performed by the Legal and Technical Commission until such time as the Council decides otherwise or until the approval of the first plan of work for exploitation.

5. The Assembly and the Council, as well as their respective subsidiary bodies, shall meet only as frequently as required for the adequate and timely performance of their functions.

6. Between the entry into force of the Convention and the approval of the first plan of work for exploitation, the Authority shall concentrate on:

   (a) processing of applications for approval of plans of work for exploration in accordance with Part XI and this Agreement;

   (b) monitoring of compliance with plans of work for exploration approved in the form of contracts;

(c) implementation of decisions of the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea (Preparatory Commission) relating to the registered pioneer investors and their certifying States, including their rights and obligations, in accordance with the provisions of Article 308, paragraph 5 of the convention and Resolution II, paragraph 13;

(d) study of the potential impact of mineral production from the Area on the economies of developing land-based producers of those minerals which are likely to be most seriously affected, with a view to minimizing their difficulties and assisting them in their economic adjustment, taking into account the work done in this regard by the Preparatory Commission;

(e) promotion and encouragement of the conduct of marine scientific research with respect to activities in the Area and the collection and dissemination of the results of such research and analysis, when available, with particular emphasis on research related to the environmental impact of the activities in the Area;

(f) acquisition of scientific knowledge and the monitoring of the development of marine technology relevant to the activities in the Area;

(g) adoption of rules, regulations and procedures, including those relating to the protection and preservation of the marine environment, necessary for the conduct of activities in the Area as they progress. Notwithstanding the provisions of Annex III, Article 17(2) (b) and (c) of the Convention, such rules, regulations and procedures shall take into account the terms of this Agreement, the changed economic circumstances since the Convention was adopted, the prolonged delay in commercial deep seabed mining and the likely pace of activities in the Area;

(h) monitoring and review of trends and developments relating to deep seabed mining activities, including regular analysis of world metal market conditions and metal prices, trends and prospects;

(i) assessment of available data relating to prospecting and exploration; and

(j) timely elaboration of rules, regulations and procedures for exploitation.

7. (a) The application for the approval of a plan of work for exploration shall be considered by the Council following the receipt of a recommendation on the application from the Legal and Technical Commission. The processing of an application for the approval of a plan of work for exploration shall be in accordance with the provisions of the Convention, including its Annex III, and this Agreement, provided that:

(i) a plan of work for exploration submitted on behalf of a State or entity, or any component of such entity, referred to in Resolution I, paragraph 1(a) (ii) and (iii), other than a registered pioneer investor, which had already undertaken substantial activities in the Area prior to entry into force of the Convention or their successors in interest, shall be considered to have met the financial and technical qualifications necessary for approval of a plan of work, if the sponsoring State certifies that the applicant has expended an amount equivalent to at least US$ 30 million in research and exploration activities and has expended no less than ten (10) per cent of that amount in the location survey and evaluation of the area referred to in the plan of work. If the plan of work otherwise satisfies the requirements of the Convention and any rules, regulations and procedures adopted pursuant thereto, it shall be approved by the Council in the form of a contract, notwithstanding the provisions of Section 3, paragraph 10 of this Annex.

(ii) upon the request of a registered pioneer investor, its plan of work for exploration consisting of documents, reports and other data submitted to the Preparatory Commission before and after registration together with an indication of plans for future activities, if any, shall be approved in the form of a contract by the Council in accordance with Part XI and this Agreement, notwithstanding the provisions of Section 3, paragraph 10 of this Annex. Resolution II, paragraph 8(c) shall not apply and a request for approval of a plan of work for exploration of a registered pioneer investor may be made by a sponsoring State Party or as a provisional member of the Authority pursuant to paragraph 14. The fee to be paid by a pioneer investor upon application for a plan of work, in accordance with the provisions of Resolution II, paragraph 7(a), and Annex III, Article 13, paragraph 2 of the Convention,

shall be deferred until the pioneer investor submits a plan of work for exploitation, taking into account the $250,000 fee paid pursuant to Resolution I, paragraph 7(a), which shall be deemed to be the fee relating to the exploration phase pursuant to Section 8, paragraph 3 of this Annex. The period following entry into force of the Convention within which a registered pioneer investor may request approval of a plan of work pursuant to Resolution II, paragraph 8(a) shall be extended from six months to twenty-four months; and

(iii) in accordance with the principle of non-discrimination a contract with a State or entity or any component of such entity referred to in (i) above, shall include arrangements which shall be similar to and no less favourable than those agreed with any State or entity or any component of such entity referred to in (ii) above. In the case of contracts with the State or entities or any components of such entities referred to in (ii) above, the Council shall make such adjustments, as are equitable, to the rights and obligations assumed by them under Resolution II and the decisions of the Preparatory Commission.

(b) The approval of a plan of work for exploration shall be in accordance with Article 153, paragraph 3 of the Convention.

8. Applications for approval of plans of work shall be accompanied by an assessment of the potential environmental impacts of the proposed activities in accordance with the rules, regulations and procedures adopted by the Authority.

9. Applications for the approval of plans of work for exploration other than those referred to in paragraph 7 shall be processed in accordance with the procedures set out in Section 3, paragraph 10 of this Annex.

10. A plan of work for exploration shall be approved for a period of ten years. Upon the expiration of a plan of work for exploration the contractor shall apply for the plan of work for exploration unless the contractor has received an extension for the plan of work for exploration. Contractors may apply for such extensions for periods of not more than five years each. Such extensions shall be approved if the contractor has made good faith efforts to comply with the requirements of the plan of work but for reasons beyond the contractor's control has been unable to complete the necessary preparatory work for proceeding to the exploitation stage or the prevailing economic circumstances have not justified proceeding to the exploitation stage.

11. The reference in the last sentence of Annex III, Article 10, of the Convention to performance which has not been satisfactory shall be interpreted to mean that the contractor has failed to comply with the requirements of an approved plan of work despite written warning or warnings from the Authority to the contractor to comply therewith.

12. The Authority shall elaborate and adopt, in accordance with Article 162, paragraph 2(o)(ii) of the Convention, rules, regulations and procedures based on the principles contained in Sections 2, 5, 6, 7 and 8 of this Annex, as well as any additional rules, regulations and procedures necessary to facilitate the approval of plans of work for exploration or exploitation, as follows:

(a) The Council may undertake such elaboration at any time it deems all or any of such rules, regulations or procedures are required for the conduct of activities in the Area, or when it determines that commercial exploitation is imminent, or at the request of a State whose national is in a position to apply for approval of a plan of work for exploitation.

(b) If a request is made by a State referred to in subparagraph (a) the Council shall, in accordance with Article 162, paragraph 2(o) of the Convention complete the adoption of such rules, regulations and procedures within two years of such a request.

(c) If the Council has not completed rules, regulations and procedures relating to exploitation within the prescribed time, and an application for the approval of a plan of work for exploitation is pending, it shall nonetheless consider and provisionally approve such plan of work based on the provisions of the Convention and any rules, regulations and procedures that the Council may have adopted provisionally, or on the basis of the norms contained in the Convention and the terms and principles contained in this Annex as well as the principle of non-discrimination among contractors.

13. The Authority shall have its own budget. The administrative expenses of the Authority shall be met (by assessed contributions of its members, including its provisional members, in accordance with Article 173 of the Convention and this Agreement) (through the budget of the United Nations) until such time as the Authority becomes self-financing. The Authority shall not exercise the power referred in Article 174, paragraph 1 of the Convention to borrow funds to finance its administrative budget.

14. States and entities referred to in Article 305 of the Convention which have not established their consent to be bound by it shall be eligible to become provisional members of the Authority on the following basis;

(a) Such membership shall take effect upon notification to the depositary of the Convention by a State or entity of its intention to participate as a provisional member of the Authority and shall terminate two years after the date of entry into force of the Convention or upon ratification or formal confirmation of, or accession to, the Convention and this Agreement by such a State. The Council may, upon request of the State or entity concerned, extend provisional membership by up to two years if the Council is satisfied that the State or entity has been making efforts in good faith to become a party, provided that provisional membership shall not extend beyond four years after the date of entry into force of the Convention.

(b) Provisional members shall apply the terms of Part XI and this Agreement provisionally and shall have the same rights and obligations as other members, including:

(i) the obligation to contribute to the budget of the Authority based on assessed contributions, in accordance with their national laws, regulations and annual budgetary appropriations: and

(ii) the right to sponsor an application for the approval of a plan of work for exploration. In the case of entities whose components are natural or juridical persons possessing the nationality of more than one State, a plan of work for exploration shall not be approved unless all the States whose natural or juridical persons comprise those entities are provisional members or States Parties.

(c) Notwithstanding the provisions of paragraph 10, an approved plan of work for exploration which is sponsored by a provisional member in accordance with subparagraph b(ii) shall terminate if such member ceases to be a provisional member and has not become a State Party.

(d) If the Assembly decides that a provisional member has failed to comply with its obligations in accordance with this paragraph, its provisional membership shall be terminated.

15. The draft rules, regulations and procedures and any recommendations

relating to the provisions of Part XI, as contained in the reports and recommendations of the Preparatory Commission, shall be taken into account by the Authority in the adoption of rules, regulations and procedures in accordance with Part XI and this Agreement.

16. The relevant provisions of Part XI, Section 4 shall be interpreted and applied in accordance with this Agreement.

SECTION 2. THE ENTERPRISE

1. The Enterprise shall conduct its initial operation through joint ventures. It shall commence its functioning upon the issuance of a directive by the Council pursuant to Article 170, paragraph 2 of the Convention.

2. The obligations to fund one mine site of the Enterprise as provided for in Annex IV, Article 11, paragraph 3 of the Convention, shall not apply and States parties to the Convention shall be under no obligation to finance any of the operations in any mine site of the Enterprise or under its joint venture arrangements.

3. The Secretariat of the Authority shall perform the preparatory functions necessary for the commencement of the functioning of the Enterprise. These shall include the monitoring of developments in the deep seabed mining sector, in particular the prevailing conditions in the world metal market, developments in deep seabed mining technology, and data and information on the environmental impact of activities in the Area.

4. The obligations applicable to contractors shall apply to the Enterprise. Notwithstanding the provisions of Article 153, paragraph 3 of the Convention, and Annex III, Article 3, paragraph 5 of the Convention, a plan of work for the Enterprise upon its approval shall be in the form of a contract concluded between the Authority and the Enterprise.

5. A contractor which has contributed a particular area to the Authority as a reserved area shall have priority to enter into a joint venture arrangement with the Enterprise for exploration and exploitation of that area, subject to agreement on the terms and conditions of the joint venture arrangement. If the Enterprise does not commence activities on such a reserved area within ten years of the commencement of its functioning or within ten years of the date on which that area is reserved for the Authority, whichever is the later, the contrractor which contributed the area shall be entitled to apply for a plan of work for that area provided it offers to include the Enterprise as a joint partner.

6. Article 170, paragraph 4, Annex IV and other provisions of the

convention relating to the enterprise shall be interpreted and applied in accordance with this Part.

SECTION 3. DECISION-MAKING

1. The general policies of the Authority shall be established by the Assembly in collaboration with the Council.

2. Decision-making in the organs of the Authority, as a general rule, should be by consensus and there should be no voting until all efforts to reach by a consensus have been exhausted.

3. If consensus cannot be reached, decisions by voting in the Assembly on matters of procedure shall be taken by a majority of States present and voting, and decisions on matters of substance shall be taken by a two-thirds majority of States present and voting, as provided for in Article 159, paragraph 8 of the Convention.

4. Decisions of the Assembly on any matter for which the Council also has competence or on any administrative, budgetary or financial matter shall be based on the recommendations of the Council. If the Assembly does not accept the recommendation of the Council on any matter, it shall return the matter to the Council for further consideration. The Council shall reconsider the matter in the light of the views expressed by the Assembly.

5. Decisions by the Council or the Assembly having financial or budgetary implications shall be based on the recommendations of the Finance Committee.

6. The major categories of interests identified in paragraph 14 (a) to (c) shall be treated as chambers for the purposes of decision-making in the Council. Before electing the members of the Council, the Assembly shall establish lists of countries fulfilling the criteria for the membership in the interest groups identified in sub-paragraphs 14 (a) to (d). If a country fulfils the criteria for membership in more than one interest group, it may only be proposed by one interest group for election to the Council and it shall represent only that interest group in voting in the Council.

7. Each interest group identified in paragraph 14(a) to (d) shall be represented in the Council by those members nominated by that interest group. Each interest group shall only nominate as many candidates as the number of seats that are required to be filled by that group. When the number of potential candidates in each of the categories referred to in paragraph 14(a) to (c) exceeds the number of seats available in each of those respective categories, as a general rule, the principle of rotation shall apply. States members of each of those categories shall determine how this principle shall apply in those categories. This principle however, shall not apply to the two States specifically referred to in paragraph 14(a).

8. Decisions by voting in the Council on questions of procedure shall be taken by a majority of members present and voting, and decisions on questions of substance, except where the Convention provides for decisions by consensus in the Council, shall be taken by a two-thirds majority of members present and voting, provided that such decisions are not opposed by a majority in any one of the chambers referred to above.

9. The Council may decide to postpone the taking of a decision in order to facilitate further negotiation whenever it appears that all efforts at achieving consensus on a question have not been exhausted.

10. (a) The Council shall approve a recommendation by the Legal and Technical Commission for approval of a plan of work unless by a two-third majority of its members present and voting, including a majority of members present and voting in each of the chambers of the Council, the Council decides to disapprove a plan of work. If the Council does not take a decision on a recommendation for approval of a plan of work within a prescribed period, the recommendation shall be deemed to have been approved by the Council at the end of that period. The prescribed period shall normally be 60 days unless the Council decides to provide for a longer period. If the Commission recommends the disapproval of a plan of work or does not make a recommendation, the Council may nevertheless approve the plan of work in accordance with its normal rules of procedure on matters of substance.

    (b) The provisions of Article 162, paragraph 2(j) of the Convention shall not apply.

11. Where a dispute arises relating to the disapproval of a plan of work, such dispute shall be submitted to the dispute settlement mechanism contained in the Convention.

12. Decisions by voting in the Legal and Technical Commission shall be by a majority of members present and voting.

13. Part XI, Section 4, sub-sections B and C shall be interpreted and applied in accordance with this Part.

14. The Council shall consist of 36 members of the Authority elected by the Assembly in the following order:*

(a) four members from among States Parties, each of which, during the last five years for which statistics are available, have either consumed more than 2 per cent in value terms of the total world consumption, or have had net imports of more than 2 per cent in value terms of total world imports of the commodities produced from the categories of minerals to be derived from the Area, provided that the four members shall include one State from the Eastern European region having the largest economy in that region in terms of gross domestic product and the State, at the time of entry into force of the Convention, having the largest economy in terms of gross domestic product, if such States wish to be represented in this category;

(b) four members from among the eight States Parties which have made the largest investments in preparation for, and in the conduct of, activities in the Area, either directly or through their nationals;

(c) four members from among States Parties which, on the basis of production in areas under their jurisdiction, are major net exporters of the categories of minerals to be derived from the Area, including at least two developing States whose exports of such minerals have a substantial bearing upon their economies;

(d) six members from among developing States, representing special interests. The special interests to be represented shall consist of States with large populations, States which are land-locked or geographically disadvantaged, island States, States which are major importers of the categories of minerals to be derived from the Area, States which are potential producers of such minerals and least developed States; and

(e) eighteen members elected according to the principle of ensuring an equitable geographical distribution of seats in the Council as a whole, provided that each geographical region shall have at least one member elected under this subparagraph. For this purpose, the geographical regions shall be Africa, Asia, Eastern Europe, Latin America and Western Europe and Others.

* The issue of whether the system of chambered voting in the Council should extend to the category in sub-paragraph (d) in addition to the categories in sub-paragraphs (a) to (e) requires further discussion.

15. The provisions of Article 161, paragraph 1 of the Convention shall not apply.

16 (a) Decisions on questions of substance in the Council, except decisions governed by Article 161, paragraph 8(d) of the Convention, shall be taken by a two-thirds majority of members present and voting, provided that such decisions are not opposed by a majority of the members in any one of the categories mentioned in paragraph 14(a), (b) or (c).

(b) The provisions of Article 161, paragraph 8(b) and (c) of the Convention shall not apply.

SECTION 4. REVIEW CONFERENCE

In the light of the present Agreement and the changed circumstances in respect of deep seabed mining since the Convention was adopted, and the changes in the approaches to economic issues, the provisions relating to the Review Conference in Article 155, paragraphs 1, 3 and 4 of the Convention shall not apply. Notwithstanding the provisions of Article 314, paragraph 2 of the Convention, the Authority may undertake at any time a review of the matters referred to in Article 155, paragraph 1 of the Convention. Amendments relating to Part XI shall be subject to the procedures contained in Articles 314, 315 and 316 of the Convention, provided that

(a) the principles, regime and other terms of Article 155, paragraph 2 of the Convention shall be maintained and the rights referred to in paragraph 5 of that Article shall not be affected; and

(b) amendments shall enter into force on a date determined by the Council by a three-fourths majority of the members present and voting, including a majority of members of each chamber of the Council at that time.

SECTION 5. TRANSFER OF TECHNOLOGY

1. Transfer of technology, for the purposes of Part XI, shall be governed by the provisions of Article 144 of the Convention and the following principles;

(a) The Enterprise shall take measures to obtain the technology required for its operations on the open market or through its joint venture arrangements.

(b) If the technology in question is not available on the open market, the Authority may invite all or any of the contractors and their respective sponsoring State or States to cooperate with in facilitating acquisition of technology by the Enterprise or its joint venture, or a developing State or States seeking to acquire such technology on fair and reasonable commercial terms and conditions, including effective protection of intellectual property rights. States Parties undertake to cooperate fully and effectively with the Authority for this purpose and to ensure that contractors sponsored by them also fully cooperate with the Authority.

(c) States Parties shall promote international technical and scientific cooperation with regard to activities in the Area either between the parties concerned or by developing training, technical assistance and scientific cooperation programmes.

2. The provisions of Annex III, Article 5 of the Convention shall not apply.

SECTION 6. PRODUCTION POLICY

1. The production policy of the Authority shall be based on the following principles:

(a) The rights and obligations relating to unfair economic practices under the General Agreement on Tariffs and Trade, its relevant codes and successor agreements, shall apply to activities in the Area.

(b) In particular, there shall be no subsidisation of activities in the Area except as may be permitted under the agreements referred to in subparagraph (a). Subsidisation for the purpose of these principles shall be defined in terms of the agreements refered to in subparagraph (a).

(c) There shall be no discrimination between minerals derived from the Area and from other sources. There shall be no preferential access to markets for such minerals or for imports of commodities produced from such minerals, in particular.

(i) by use of tariff or non-tariff barriers; and

(ii) given by States Parties to such minerals or commodities produced by their state enterprises or by natural or juridical persons which possess their nationality or are controlled by them or their nationals;

(d) The plan of work for exploitation approved by the Authority in respect of each mining area shall indicate an anticipated production schedule which shall include the estimated amounts of minerals that would be produced per year under that plan of work.

(e) In the settlement of disputes concerning the provisions of the agreements referred to in subparagraph (a), States Parties which are parties to such agreements shall have recourse to the dispute settlement procedures of such agreements; and

(f) In circumstances where a determnation is made under the agreements referred to in subparagraph (a) that a State Party has engaged in subsidisation which is prohibited or has resulted in adverse effects to the interests of another State Party and appropriate steps have not been taken by the relevant State Party or States Parties, a State Party may request the Council to take appropriate measures.

2. The principles contained in paragraph 1 shall not affect rights and obligations under any provision of the agreements referred to in paragraph 1(a), as well as relevant free trade and customs union agreements, in relations between States Parties which are parties to such agreements.

3. The acceptance, by a contractor, of subsidies other than those which may be permitted under the agreements referred to in paragraph 1(a) shall constitute a violation of the fundamental terms of the contract forming a plan of work for the carrying out of activities in the Area.

4. Any State Party which has reason to believe that there has been a breach of the requirements of paragraph (a) to (d) may initiate dispute settlement procedures in conformity with paragraph 1(e) or (f).

5. The Authority shall develop rules, regulations and procedures which ensure the implementation of the provisions of this Part. This shall include relevant rules, regulations and procedures governing the approval of plans of work.

6. The provisions of Article 162, paragraph 2(g), Article 165, paragraph 2(n), Article 151, paragraphs 1 to 7 and paragraph 9 and Annex III, Article 7 of the Convention shall not apply.

SECTION 7. ECONOMIC ASSISTANCE

1. The policy of the Authority to assist developing countries which suffer serious adverse effects on their export earnings or economies resulting from a reduction in the price of an affected mineral, or in the volume of exports of that mineral, to the extent that such reduction is caused by activities in the Area, shall be based on the following principles;

   (a) Developing land-based producer States whose economies have been determined to be seriously affected by production of minerals from the deep seabed shall be assisted from the economic assistance fund of the Authority.

   (b) The Authority shall establish an economic assistance fund from a portion of funds of the Authority which exceeds those necessary to cover the administrative expenses of the Authority, provided that the amount set aside for this purpose shall be determined by the Council from time to time, upon the recommendation of the Finance Committee. Only funds from payments received from contractors, including the Enterprise, and voluntary contributions, shall be used for the establishment of the economic assistance funds.

   (c) The Authority shall provide assistance from the fund to affected developing land-based producer States, where appropriate, in cooperation with existing global or regional development institutions which have the infrastructure and expertise to carry out such assistance programmes.

   (d) The extent and period of such assistance shall be determined on a case-by-case basis. In doing so, due consideration shall be given to the nature and magnitude of the problems encountered by affected developing land-based producer States.

2. Article 151, paragraph 10 of the Convention shall be implemented by means of measures of economic assistance referred to in paragraph 1. Article 160, paragraph 2(1), Article 162, paragraph 2(n), Article 164, paragraph 2(d), Article 171, paragraph (f) and Article 178, paragraph 2(c) of the Convention shall be interpreted accordingly.

SECTION 8. FINANCIAL TERMS OF CONTRACT

1. The following principles shall provide the basis for establishing rules, regulations and procedures for financial terms of contract:

   (a) The system of financial payments to the Authority shall be fair both to the contractor and to the Authority.

   (b) The rates of financial payments under the system shall be within the range of those prevailing in respect of land-based mining of the same or similar minerals in order to avoid giving deep seabed miners an artificial competitive advantage or imposing on them a competitive disadvantage.

   (c) The system of financial payments may be revised periodically, in view of changing circumstances, however, they shall be applied in a non-discriminatory manner and they may apply retroactively to existing contracts only at the election of the contractor. Any subsequent change in the choice of the systems shall, however, be by agreement of the Council.

   (d) While the system should not be complicated and should not impose major administrative costs on the Authority or on a contractor, consideration should be given to the adoption of a royalty system or a combination of a royalty and profit sharing system. If alternative systems are decided upon the choice of the system applicable to an individual contract shall be at the election of the contractor. However, any subsequent change of system shall be by agreement of the Council.

   (e) An annual fixed fee shall be payable from the date of commencement of commercial production. However such fee may be credited against other payments due under the system adopted in accordance with subparagraph (d). The amount of such fee shall be established by the Council.

   (f) Any disputes concerning the interpretation or application of the rules and regulations based on these principles shall be subject to the dispute settlement procedures under the Convention.

2. The provisions of Annex III, Article 13, paragraphs 3 to 10 of the Convention shall not apply.

3. With regard to the implementation of Annex III, Article 13, paragraph 2 of the Convention, the fee for processing applications for the approval of a plan of work limited to one phase, either the exploration phase or the exploitation phase, shall be $250,000.

SECTION 9. THE FINANCE COMMITTEE

1. There is hereby established a Finance Committee. The Finance Committee shall be composed of 15 members with appropriate qualifications relevant to financial matters. States Parties shall nominate

candidates of the highest standards of competence and integrity. In the election of members of the Finance Committee, due account shall be taken of the need for equitable geographical distribution and the representation of special interests. Until the Authority is self-financing, the membership of the Committee shall include the five largest financial contributors to the administrative budget of the Authority.

2. No two members of the Finance Committee shall be nationals of the same State Party.

3. Members of the Finance Committee shall be elected by the Assembly. Each category referred to in Section 3, paragraph 14(a), (b), (c) and (d) of this Annex shall be represented on the Finance Committee by at least one member. After the Authority becomes self-financing, the election of one member from each category shall be on the basis of nomination by the members of the respective category, without prejudice to the possibility of further members being elected from each such category.

4. Members of the Committee shall hold office for a term of five years. They shall be eligible for re-election for a further term.

5. In the event of death, incapacity or resignation of a member of the Committee prior to the expiration of the term of office, the Assembly shall elect for the remainder of the term a member from the same geographical region or interest group.

6. Members of the Committee shall have no financial interest in any activity relating to matters upon which the Committee has the responsibility to make recommendations. They shall not disclose, even after the termination of their functions, any confidential information coming to their knowledge by reason of their duties for the Authority.

7. Decisions by the Council and the Assembly on the following issues shall take into account recommendations by the Finance Committee:

   (a) Draft financial rules, regulations and procedures of the various organs of the Authority and the financial management and internal financial administration of the Authority.

   (b) Assessment of contributions of members to the administrative budget of the Authority in accordance with Article 160, paragraph 2(e) of the Convention.

   (c) All relevant financial matters including the proposed annual budget prepared by the Secretary-General (Article 172 of the Convention), the financial aspects of the implementation of the programmes of work of the Secretariat.

   (d) The Administrative budget.

   (e) Financial obligations of States Parties arising from the operation of Part XI and its related annexes as well as the administrative and budgetary implications of proposals and recommendations involving expenditure from the funds of the Authority.

   (f) Rules, regulations and procedures on the equitable sharing of financial and other economic benefits and the decisions to be made on that basis.

8. Recommendations of the Committee shall, where necessary, be accompanied by a summary of the range of opinions in the Committee.

9. Decisions in the Finance Committee on questions of procedure shall be taken by a majority of members present and voting. Decisions on questions of substance shall be taken by consensus.

10. The requirement of Article 162, paragraph 2(y) of the Convention to establish a subsidiary organ to deal with financial matters shall be deemed to have been fulfilled by the establishment of the Finance Committee in accordance with this Section.

IV. Status and Treatment of Refugees

(i) Introduction

At the instance of the Government of the Arab Republic of Egypt, the subject 'Status and Treatment of Refugees' was first taken-up for study by the AALCC in 1963. It was observed that the AALCC's views would be invaluable in reflecting upon the refugees problem. Since then the Committee has regularly been taking-up this subject at its annual sessions and discussing the progress of work in this field.

The Thirty-first Session (1992) mandated the Secretariat to commence preparation of a draft model legislation on refugees. The topic was taken-up at the Thirty-second Session held in Kampala (1993). The following two studies prepared in accordance with the mandate were presented for consideration of the Thirty-third Session held in Tokyo in January 1994.

A. Model legislation on the Status and Treatment of Refugees.

B. Establishment of "Safety Zones" for the Displaced Persons in the Country of Origin.

A. MODEL LEGISLATION ON THE STATUS AND TREATMENT OF REFUGEES

The Asian-African Legal Consultative Committee at its Twenty-eighth Session held in Nairobi in 1989 decided to organise a workshop on the refugee problems in Afro-Asian region with the Cooperation of and in association with the office of the United Nations High Commissioner for Refugees (the UNHCR) to commemorate Twenty-Five years of Working relationship between the two organisations. In fulfillment of that mandate the Secretariat of the Committee and the UNHCR conjointly organised a Workshop on 'International Refugees and Humanitarian Law' in the Asian-African Region in New Delhi in October 1991. The Workshop had as its

objectives the promotion of general awareness and wider acceptability, among the member States of the Committee, of the Geneva Convention in Relation to the Status of Refugees, 1951 and the 1967 protocol thereto. Two recommendations were made by that Workshop. The first one urged the Committee "to consider the possibility of preparation of a model legislation with the objective of assisting Member States in the enactment of national laws on refugees". The other recommendation urged the Asian-African States to move a step forward by considering adherence to the 1951 Convention relating to the Status of Refugees and/or the 1967 protocols, thereto.

The Committee at its Thirty-first Session adopted the recommendations of the AALCC-UNHCR Workshop on International Refugees and Humanitarian Law in Asian-African Region held in New Delhi in October 1991 and approved of the suggestion to prepare a model legislation in cooperation with the office of the UNHCR with the objective of assisting Member States in enacting appropriate national legislation on refugees.

At its Thirty-second Session in Kampala, in early 1993, the Secretariat prepared a study entitled "Preliminary Study on the proposed Model Legislation on Refuges". This brief sought to present an overview of the features of contemporary refugees law and also incorporated a draft structure of the proposed model legislation on refugees.

At that Session the representative of the UNHCR observed that the initiative taken by the Committee in preparation of a model legislation on refugees would certainly contribute to the effective implementation of refugee law at this juncture of history of international relations. In his view the incorporation of international standards for treatment of refugees into national law through domestic legislation would be an appropriate method and in some legal systems, perhaps, the only method. He recalled that during the Arusha Conference on Refugees held in 1979 the African States had recommended that the OAU in cooperation with the UNHCR should elaborate a national legislation to serve as a guideline for African States. He also reiterated the UNHCR's offer to cooperate with and assist the Secretariat of the AALCC in the elaboration of a Model Legislation on Refugees.

The Committee at its Thirty-Second Session decided *inter alia* to "continue with the study of the model legislation in close cooperation with the UNHCR and OAU which includes study of various legislations on refugees in the Asian-African region".

Pursuant to that decision the Secretary-General held informal consultations with the representatives of the Organization of African Unity (OAU) as well

as the UNHCR, at Addis Ababa during February 1993. At that meeting it was agreed (i) to reactivate the OAU/UNHCR Working Group on refugees and to include therein the AALCC and (ii) to reactivate the Study of a Model Legislation. Thereafter another round table meeting of the representatives of the AALCC and the UNHCR was held in Geneva in June 1993. The focus of discussions at that meeting was the proposed model legislation on refugees. During that tripartite meeting it was observed that the model legislation would be much more meaningful if it were incorporated into national laws. It is because these are far more effective domestically than international law principles which may lack enforcement procedures. It was also observed that the lack of willingness to accept international standards has been well illustrated by the unfortunate Bosnian example, which has shown that International Protection and non-refoulement has at best been reduced to good intentions. The national legislation would be more respected:

(i) since being law of the land, there were better chances of its implementation;

(ii) also for fear of international criticism; and

(iii) national as well as international public opinion.

The question of incorporation of existing priniciples could be left to the individual states. Therefore, a national legislation, keeping all the factors in mind would also be useful. Of-course, the question of incorporation of the existing principles could be left to individual states.

In the end it was agreed among other things to :

(i) Form an inventory of all the legislations available with the UNHCR CDR division :

(ii) Evolve ways and means of elaborating the 1966 Bangkok Principles; and to

(iii) Continue work on the model legislation which would help states desirous of doing so to incorporate flexible principles on refugees into their existing legal instruments.

The Secretary-General also held consultations with several senior representatives of the office of the UNHCR. At the meeting between the Secretary-General and the representatives of the UNHCR held in Geneva on the afternoon of June 3, 1993 it was agreed to make an inventory of all existing legislation with CDR (Geneva) and if possible to continue to study further the Report of Dr. Faits Abdel Majeed on his mission to Egypt, Lebanon, Jordon, Iraq and Yemen, with the idea of identifying Islamic Law principles which could help in promoting existing principles of refugees.

Thereafter at a meeting held in Divonne (France) between the representatives of the AALCC, OAU, and the UNHCR the view expressed was that it was necessary to update the OAU/UNHCR guidelines on the national refugee legislation prepared in 1980.

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

During the Twenty-fourth session of the AALCC held in Kathmandu (1985), the Delegate of Thailand on behalf of his Government proposed that the AALCC should intimate a study on a closely related aspects namely the possible establishment of safety zones for refugees or displaced persons in their country of origin. The Thai delegate reiterated his request at the Twenty-fifth session held in Arusha (1986) and suggested that the establishment of safety zones for refugees or displaced persons in their country of origin would lessen the burden for the international community and to some extent might alleviate the refugee problem particularly if their safety in their country of origin was guaranteed and their well-being assured by the international community. He proposed that the study might focus attention in particular on the following issues:

(i) The circumstances under which safety zones could be established in the home country of refugees or displaced persons.

(ii) Whether neutral bodies like international organisations should be entrusted with the responsibility for management, food, medical care and security in the safety zones; and

(iii) The status of the safety zones.

The matter has regularly been discussed at successive sessions of the Committee. At the Twenty-eighth Session held in Nairobi in 1989 the Secretariat presented a set of principles which provided a framework for the establishment of Safety Zones. At that session, several delegates expressed the view that since the question of safety zones raised many political, issues the consideration of the item should be deferred to a future date.

During the Thirtieth Session held in Cairo in 1991 the delegate of Thailand suggested that bearing in mind the recent events particularly, the Gulf War the proposal made by his Government on the question of establishment of Safety Zones for the displaced persons in the country of origin should be placed once again on the agenda of the Committee for further consideration. In fulfillment of the mandate of the Thirtieth session the Secretariat presented a further brief, on the topic to the Thirty-first

sesssion of the Committee held in Islamabad. The said brief analysed the status of the persons seeking asylum in the proposed Safety Zones, the issue of domestic jurisdiction and the non-interference in the internal affairs of the State and the current practice of establishing Safety or similar zones. The Representative of the United Nations High Commissioner for Refugees during that session observed that the question of the establishment of Safety Zones for displaced persons in their country of origin was an issue in which a clear distinction between humanitarian and political aspects, and between State sovereignty and its obligations were not easy to delineate. He stated that it would be useful to distinguish three objectives viz. (i) preventive i.e. such zones could help remove the need to flee; (ii) orderly departure i.e. such zones could increase safety during flight; and (iii) that they could facilitate voluntary return by helping remove the causes for the flight. With regard to the preventive aspect of the establishment of the Safety Zones he expressed the view that the Executive Committee of the UNHCR in this regard had in October 1991 recognised the responsibilities of States to eliminate the causes of refugee outflows and had called upon the High Commissioner to explore the preventive strategies in that regard.

During the deliberations at the Thirty-First Session of the Committee a member State representatives observed that the establishment of safety zones for refugees or displaced persons in their countries of origin would lessen the burden of the country which provided temporary shelter. Another delegate emphasized that in considering the establishment of Safety Zones and their Status, due regard to the principle of sovereignty and territorial integrity of the State of origin must be taken into account. At the conclusion of the debate at that session the Committee decided to place the item on the agenda of its thirty second Session.

Consequently for the Thirty-second Session held in Kampla in February 1993, the AALCC prepared a revised study on the topic of Safety Zones. Introducing the paper the Deputy Secretary-General Mr. Toru Iwanami observed that recent developments had made the question of establishment of Safety Zones topical and that the brief prepared by the Secretariat referred to the contemporary practice in various conflict areas as one possible solution for reducing refugee exodus. The Representative of the UNHCR in his statement pointed out that there was no international legal instrument which clearly defined and dealt with the problems of internally displaced persons. Except the four Geneva Conventions of 1949 and the 1977 Protocols applicable in times of war or armed conflicts which provided for a role of the ICRC there was no international agency or organization entrusted with the responsibility of furnishing humanitarian assistance to internally displaced

persons. However the UNHCR had on several occasions been requested by the United Nations, on an ad hoc basis to assist certain groups of persons who were in refugee-like situations or intermingled with refugees or returnees.

During the deliberations one delegate pointed out that whilst international law imposed stringent obligations on receiving States while the State of origin (of the refugees) apparently had no legal obligations. In his view it was necessary to elaborate the "cessation clauses", in a more pragmatic fashion since the solution to the refugee problem lay in addressing the root causes in the State of origin. The establishment of safety zones, in his opinion, could not only reduce the burden of neighbouring receiving States but it also presented an opportunity for settlement and repatriation of displaced persons. He emphasized, however, that the establishment and administration of such Safety Zones should respect the sovereignty and territorial integrity of the State concerned. The resolution which was adopted by the Committee at the Thirty-second Session of the Committee called for closer interaction among AALCC, UNHCR and OAU in undertaking joint studies and in exchanging information on the subject. The UNHCR/OAU working group has been reinforced by the inclusion of the AALCC. A tripartite meeting was held in June 1993 in Geneva and the Secretary-General of the AALCC participated in the discussions.

Thirty-third Session : Discussions

Introducing the item "Status and Treatment of Regfugees" the Deputy Secretary-General Mr. Toru Iwanami stated that the Secretariat had prepared two briefs addressed to two specific aspects of the subject viz. Model Legislation on the Status and Treatment of Refugees and the Establishment of Safety Zones for the Displaced Persons in the Country of Origin. He pointed out that the item 'Model Legislation on the Status and Treatment of Refugees' was placed on the agenda of the AALCC following upon a decision of the Thirty-first Session of the Committee held at Islamabad in 1992. At that session the Committee had adopted the recommendations of the AALCC-UNHCR Workshop on International Refugee and Humanitarian Law in Asian-African Region held in New Delhi in October 1991 and approved of its recommendation to prepare a model legislation in cooperation with the office of the UNHCR with the objective of assisting Member States in enacting appropriate national legislation on refugees.

In pursuance of that mandate the Secretariat had prepared a preliminary study on the proposed model legislation on refugees which presented an overview of the features of contemporary refugees law and also incorporated

a draft structure of the proposed model legislation on refugees. He recalled that the brief prepared by the Secretariat for the Thirty-second Session undertook a comparative study of the definitions incorporated in the existing international instruments viz. the Refugee Convention of 1951 and the 1967 Protocol thereto; the OAU Convention of 1969; the Cartagena Declaration of 1984 as well as the Committee's Bangkok principles of 1961 and Addendum I of 1970 thereto. That Brief made a case for the need to expand the scope of the term "refugee" to conform to the contemporary developments and to refer to the violation of human rights as a criteria for the determination of the refugees status along the lines of the Cartagena declaration.

The Committee at its Thirty-second Session decided to "continue with the study of the model legislation in close cooperation with the UNHCR and OAU which includes study of various legislations on refugees in the Asian-African region". He pointed out that the committee at its Thirty-second Session did not debate the proposed structure of the Model Legislation.

Pursuant to that decision the Secretary-General held informal consultations with the representatives of the Organization of African Unity (OAU) as well as the UNHCR, at Addis Ababa during the second week of February 1993. At that meeting it was agreed (i) to reactivate the OAU/UNHCR Working Group on Refugees and to include therein the AALCC and (ii) to reactivate the Study of a Model Legislation. Thereafter another round table meeting of the representatives of the AALCC, OAU and the UNHCR was held in Geneva in June 1993. The focus of discussions at that meeting was the proposed model legislation in refugees. During that tripartite meeting it was observed that the model legislation would be much more meaningful if it were incorporated into national laws.

Accordingly, the Brief prepared by the Secretariat apart from reflecting the current situation of municipal legislation on refugees refers to the significance of ratifying the international instruments relating to status and treatment of refugees. It also includes a draft structure of the model legislation on refugees which the Secretariat was called upon to prepare.

In keeping with the view that the model legislation could be drafted in 'Blocks' the Secretariat study also furnished an overview of the legislative history of the term "Refugees". The Secretariat is of the view that there is a need to consider the distinction to be drawn between the terms to be employed and the scope to be given to the Model Legislation. He stated that the Committee may wish to consider whether or not the Secretariat should seek to incorporate especially, distinctly, enunciated definitions of some key terms to be employed in the proposed model legislation.

He stated further that the Committee might now wish to give consideration to the extent and scope of the key term around which the proposed model legislation is to be drafted. The future work of the Secretariat the preparation of Model Legislation of rights and duties of refugees would now rest on the directives which the Committee may give. The guidelines that the Committee may wish to furnish would enable the Secretariat to fulfill its mandate at an early date.

Turning to the issue of the Establishment of Safety Zones for Refugees and the displaced persons in their country of origin the Deputy Secretary General stated that the item was first placed on the agenda of the session of the Committee at the instance of the delegate of the Government of Thailand. At the twenty-eighth session of the Committee held in Nairobi in 1989 the Secretariat had presented a set of principles which provided for a framework for the establishment of Safety Zones. At that session, several delegates expressed the view that since the question of safety zones raised many political issues the consideration of the item should be deferred to a future date.

The item was reactivated in 1991 when during the Thirtieth Session held in Cairo the delegate of Thailand suggested that in view of the recent events particularly the Gulf War the proposal made by his Government on the question of establishment of Safety Zones for the displaced persons in the country of origin should be placed once again on the agenda of the Committee for further considerations. In fulfillment of the mandate of the Thirtieth Session the Secretariat presented a further Brief, on the topic to the Thirty-first session of the Committee held in Islamabad. The Brief analysed the status of the persons seeking asylum in the proposed Safety Zones, the issue of domestic jurisdiction and the non-interference in the internal affairs of the State and the current practice of establishing Safety or similar zones. At that session the Committee directed the Secretariat to update the study on the topic and to include in it the question of minimizing and removing the causes of influx of Refugees and displaced persons.

Thereafter at the Thirty-second Session held in Kampala in 1993 the Committee considered a revised study on the question of establishment of Safety Zones. At that Session it was decided that the Secretariat of the AALCC should forge closer interaction with the UNHCR and OAU in undertaking joint studies and in exchanging information on the subject. Since then the UNHCR/OAU Working Group has been reinformed by the inclusion of the AALCC and tripartite meeting was held in June 1993 in Geneva and the Secretary-General of the AALCC participated in the discussions. The

Secretariat has now prepared a revised study on the question of establishment of Safety Zones for consideration by the committee at Thirty-third Session. The study prepared by the Secretariat has retained the set of 13 principles which could furnish a framework for the establishment of the Safety Zones for Dispalced Persons in their country of origin.

The Deputy Secretary-General further stated that in the view of the Secretariat the topic needed further study with a careful evaluation of the situation and practice in such areas as in northern Iraq, Sri Lanka, Yugoslavia, Somalia among others. He called upon the Committee to give consideration to the directions which the future work of the Secretariat should take as the Committee was addressing itself to a novel concept and in the absence of a consistent and uniform terminology the fine distinction between the emerging principles of humanitarian law and the customary principles of human rights and refugee law place the concept in a grey area where the two aforementioned branches of law overlap. He said that the usage of a plethora of terms such diverse as "Safety Zones", "Open Relief Centres", "Security Zones", "Safety Haven Zones", "Safe Corridor" and "Safety Corridors" not to mention "humanitarian access" can scarcely be said to be conducive to the progressive development or codification of law where several customary and codified principles of International Law interact, coincide and at times even appear to be mutually exclusive. This he pointed out is particularly true of the principles of State Sovereignty and non-interference in the domestic affairs of the State. He stated that the Committee should give consideration to these and other matters in determining the future work of the Secretariat in this regard.

The *Representative of the United Nations High Commissioner for Refugees* stated that since the establishment of the office of the UNHCR the number of refugees had grown in numbers every year partially on account of internal and external conflicts which involved and *affected almost twenty-five million of the world population*. In the view of the office of the UNHCR every Member State of the international society needed to adopt a national legislation to enable it to manage and regulate humanitarian assistance to be rendered to refugees and displaced persons. He stated that a legal regime to regulate humanitarian assistance while protecting the interests of the asylum seekers could ensure the protection and preservation of the sovereignty of a state and its national interest.

He proposed that the Secretariat of the Asian-African Legal Consultative Committee could second a member of the staff of the Secretariat to the UNHCR for a mutually agreed period to draft a model legislation on refugees. The proposed legislation, he stated, could be modular with alternative provisions

designed to safeguard the national interests of states. The legislation could thus present several models which could be submitted to member States of the Committee for their observations, comments, additions and amendments. The modular legislation could thereafter, be considered at the next session of the Committee and perhaps approved. Thereafter states which desired to do could enact legislation to be drafted with the technical assistance that the UNHCR was offering to the Secretariat of the Committee.

The *Delegate of Uganda* stated that the figures relating to the world refugee population supplied by the representative of the UNHCR represented only those who were registered. In his view the actual figure is about half as much more i.e. there are at least 30 million refugees the world over.

The *Delegate of Iran* stated that the studies of the Secretariat of the Committee and raising the issue in the annual meetings of the AALCC showed importance that the organization attached for refugee problems particularly in Asia and Africa. He added that the importance of raising the issue in the Committee originated from the fact that the majority of them as stated by the distinguished representative of UNHCR, were from developing countries mainly Asian and African ones, and all efforts made at global level to solve this problem had failed to put an end to this painful tragedy of the late years of the present century.

He said that the Islamic Republic of Iran was host to 5 million refugees and as one of the signatories of 1951 convention on the status of Refugees and the protocol of 1967, it had made all efforts to provide facilities for refugees. Although these measures had always been appreciated by the concerned international organizations such as Red Cross and UNHCR during the recent years, the International aid to refugees in Iran had been insignificant when compared with other countries where smaller number of refugees are living.

He further stated that his delegation would like to underline the responsibility of states who made people refugees. In the view of his delegation the measures and policies of these states were the main cause for the displacement of their nationals and these countries should remain accountable and should not shun their responsibilities. The prime responsibility of these countries was to create situation in their country to put an end to more exodus of refugees to other countries. Mass expulsion of the nationals of a country which lead to displacement and had been prohibited by international conventions, should be condemned by the concerned legal organizations such as AALCC.

He recalled that when the question was discussed at the Thirty-first annual session of the Committee his delegation had emphasized that displacing a

number of nationals of a country can not be used as a justification to deny their nationality. He observed that refugee-receiving countries had the right to facilitate the repatriation of the refugees to the country of origin whenever they realized that the situation in that country had become normal. His delegation also wished to emphasize the principle of observance of laws of receiving country by refugees.

He stated that his government had found useful the Brief prepared by the Secretariat. The Workshop on Refugees initiated by the Committee in 1991 in New Delhi in which his delegation participated, was among the positive steps taken by the Secretariat. That meeting dealt with a range of refugees' issues in Asia and Arica, particularly their right of repatriation. He expressed appreciation to the Secretariat of the Committee for preparing the document in which the measures and studies of AALCC from 1960s on had been clearly elaborated, and hopped that these studies would provide a better prospect for Asian and African countries in their efforts to solve this humane problem of the present century.

The *Delegate of Kenya* expressed his appreciation for the Briefs prepared by the Secretariat. He stated that his country had received and has been a host to a large number of refugees during the last twenty years. He favoured the establishment of a legal mechanism to govern the status and treatment of refugees. He was of the view that countries responsible for generating the exodus of refugees should take steps to eliminate causes for the refugee flow.

His Government has had mixed experience with refugees both pleasant and unpleasant. His Government had assisted many refugees to put their lives together and earn a living. When conditions had improved in their country of origin, his government had encouraged the refugees to return and provided assistance to those who wished to return to their countries. During the last four years the presence of a large number of refugees from Somalia had however created major problems. The influx of large numbers had an adverse effect on the economy. Besides many refugees had come armed with guns which they used or put into the hands of criminals to create a climate of insecurity which had inhibited foreign investment in Kenya. On the other hand Kenya had only received limited assistance from the international community.

Speaking on the impact of refugee camps on the environment, he emphasized that environmental disaster is looming large in areas where refugees had settled in large numbers and cut down trees, on a large scale for fuel.

The *Delegate of India* expressed the view that the question of drafting a model legislation on refugees had not been debated exhaustively. He observed

that there were many reasons underlying the flow of refugees and while States had and would honour their obligations to receive asylum seekers at their borders, the significance of the practical problems posed by internal displacement could not be under—estimated. He, however, had reservations about drafting a model legislation as in his view consideration needed to be given to the question of deterence of refugee flow. Besides, the delegate argued, the experiences varied from country to country and from continent to continent. He did not favour an imposition of ideas which had not been voluntarily accepted following a detailed discussion. In his view there were many aspects of the proposed legislation which needed to be deliberated with care. These included the issue related to the definition of terms and the scope of the proposed legislation. His delegation was opposed to the involvement of the UNHCR in the drafting of a Model legislation.

The *Delegate of Egypt* stated that a number of questions raised by his delegation when the item was considered at the Thirty-second session of the Committee had not been satisfactorily answered. He supported the view of the Indian delegate.

The *Representative of the UNHCR* stated that his office had only offered technical assistance in drafting a model legislation. He pointed out that member States of the Committee would remain at liberty to consider the substantive and political questions related to the acceptance or enactment of the proposed legislation.

The *Secretary-General* clarified that the decision to draft a model legislation was taken at the Islamabad Session (1992) following upon a recommendation of the Workshop on Refugee Law held in New Delhi in 1991. He pointed out that the preparation of a model legislation by the Secretariat with the collaboration of the UNHCR would not make it mandatory for any member State of the Committee to enact a law. On the other hand, a model legislation prepapred jointly by the AALCC and the UNHCR could be useful for many member countries in developing their own laws to assist refugees.

The *Delegate of India* emphasized that his reservation was mainly on the ground that the proposed structure of the model legislation had not been extensively debated at any session after the deliberations in the Workshop. His delegation was not opposed to the proposed modular legislation if it was a question of purely technical assistance, and was voluntary and the proposed legislation would not commit or bind any of the member States of the Committee.

The *Delegate of Egypt* clarified that his support of the Indian reservation

was on substantive matters and not on the question of drafting a model legislation.

The *Delegate of Uganda* said that in the opinion of his delegation the draft resolution was very innocuous. He was of the view that the Secretariat should draft a model legislation which could be adopted by those who required it.

The *Representative of the Organisation of African Unity* stated that the proposed model legislation could be a useful instrument and urged the Committee to complete its work on the subject. He pointed out that an OAU and UNHCR Working Group had in 1980 drawn up "National Guidelines on Legislation on Refugees" which had been found useful by several African countries. Both Zimbabwe and Swaziland had relied heavily on those guidelines in the formulation of their national legislations. He pointed out, however, that the OAU/UNHCR Guidelines needed to be revised to meet new challenges.

The *Delegate of Turkey* expressed the view that the delegate of India had advised caution in the interest of good and orderly work. This did not amount to opposition to such a model law.

The *President* pronounced that the proposed model legislation was an ongoing project which could be completed within the existing resources supplemented by technical assistance from the UNHCR and the OAU.

(ii) Decisions of the Thirty-third Session (1994) Agenda item: "Status and Treatment of Refugees and Displaced Persons"

Adopted on January 21, 1994

The Asian-African Legal Consultative Committee at its Thirty-third Session:

Having considered the Secretariat briefs on Model Legislation on Refugees contained in document No. AALCC/XXXIII/Tokyo/94/3 and the Establishment of Safety Zones contained in document No. AALCC/XXXIII/Tokyo/94/4;

And having heard with appreciation the statement of the Deputy Director, the Bureau of Asia and Oceania of the United Nations High Commissioner for Refugees;

And having heard also the statement of the representative of the Organization of African Unity;

1. *Appeals* to Member States to take all measures to eradicate from their countries the causes and conditions resulting in their nationals being forced to leave their countries and becoming refugees;
2. *Urges* the member States who have not already done so to ratify or accede to the Convention on the Status of Refugees, 1951 and the 1967 Protocol thereto;
3. *Takes* note of the general outline of the programme of work proposed by the Secretariat on the Model Legislation which is still to be considered by the Committee;

4. *Decides* to continue with the task of the preparation of a model legislation in close co-operation with UNHCR and OAU in light of the codified principles of international law and the practice of States in the region;

5. *Expresses* appreciation to the UNHCR for the offer to assist the AALCC to draft the model legislation;

6. *Decides* in the context of paragraph 4 above to second a professional staff officer of the Secretariat to the UNHCR, for a specified period to be mutually agreed, to draft the detailed modular draft legislation;

7. *Recommends* that such draft legislation be transmitted by the Secretariat to all Member States, prior to the Thirty-fourth Session, for their consideration, amendments, additions on substractions;

8. *Recommends further* that such duly amended draft legislation be considered at the Thirty fourth Session of the Committee for its possible adoption;

9. *Directs* the Secretariat to include the item "Status and Treatment of Refugees" on the agenda of the Thirty-fourth Session of the Committee; and

10. *Directs* the Secretariat to study further the concept of Safety Zones and to analyse the role played by the United Nations and UNHCR in particular in the recent past in that context.

(iii) Secretariat Briefs

A. Model Legislation on the Status and Treatment of Refugees

It is estimated that there are 19 million refugees in the whole world at present. Africa alone has the unenviable record and the dubious distinction of being host to some six million refugees and a further twelve million displaced persons within or outside the borders of the country of their origin.

Concerning the legislation on refugees, the African region is more enlightened by virtue of the OAU Convention 1969. In practice their treatment of refugees is generous, in spite of their political, economic and social hardships. Zimbabwe Refugee Act, 1983 togehter with the OAU Convention will be of great importance in tackling this problem. The situation in the Asian region is quite different. It is large groups or mass exodus which seek protection in this region as opposed to individuals seeking asylum in other parts of the world.

Of the Eighteen AALCC member states who are parties to the Convention regime only eight States in Asia have so far ratified the Convention relating to the Status of Refugees 1951,[1] and its 1967 protocol.[2] As a result, many states in this region have no binding legislation on refugees. The only guiding principles are Bangkok Principles, 1966 and the 1970 addendum thereto which are recommendatory in nature. Therefore a regional solution to this problem is necessary. The Model legislation proposed to be taken up by AALCC could be particularly useful for the Asian region and could deal with the mass

1. Botswana, *China*, *Cyprus*, Egypt, Ghana, *Iran* (Islamic Republic of) *Japan*, Kenya, Nigeria, *Philippines*, *Republic of Korea*, Senegal, Sierra Leone, Somalia, Sudan, *Turkey*, Tanzania, and *Yemen*.
2. op. cit. Note 2.

determination in one part and individual determination in another. Once the mass admission of refugee is allowed it will not be difficult for individual persons seeking independent refugee status to do so. The Model legislation will be much more meaningful if it is incorporated into national laws. International Law principles lack enforcement procedures, as was typically seen in Bosnian case. It is hoped that refugee law principles will be incorporated as part of the constitution or immigration laws already in existence. The national legislation would therefore guarantee better chances of implementation.

The necessity for the ratification of the Convention relating to the Status of Refugees.

The UN Convention relating to the Status of Refugees (1951) and its 1967 protocol 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 level, 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 and the 1970 addendum thereto. 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 nevertheless remains a vitally important international instrument "providing the foundation" for refugee protection around the world.

As a first step, it is necessary to bring the states in Asian region to the Convention relating to the Status of Refugee, 1951 and its Protocol of 1967. For this purpose, public awareness towards refugee problem is necessary especially in the Asian region, as public opinion will prove a useful mechanism in the acceptance of international standards in the national legislation. The utilization of the mass media like satellite television will be effective for increasing public awareness of the Convention. Also to hold a regional seminar on the Convention and on the international protection of refugees would be useful. In this sense, the Conference to be held in Doha in March 1994 will provide a good forum to highlight the importance of ratifying the Convention.

The proposed draft structure of the AALCC Model Legislation on Refugees.

There is an imminent need for enactment of Domestic legislation on Refugees. This is so because the refuge population has grown to an alarming

figure of 19 million, out of which the majority is unfortunately found in the Asian-African region. Since the adoption of the 1951 Convention the international attitude has radically changed. Therefore 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 be implemented at national level and further be supplemented and enforced through national legislation.

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 legislation on "refugees" and present a comprehensive piece of legislation which could be of immense benefit to states desirous of enacting appropriate "national legislation" on refugees keeping their individual and particular needs in mind. As mentioned earlier this draft structure of the Model Legislation on Refugees was submitted to the Thrity-second Session of the Committee held in Kampala and the same is being reproduced for the consideration of the Committee for its adoption or approval.

The draft structure of the Model Legislation

(1) Preamble

(2) New Definition of "refugees" should at least reflect the enlarged definitions provided for in the 1969 OAU Convention, 1984 Cartagena Declaration and 1966 Bangkok principles as expanded by the 1970 Protocol thereto which would facilitate states to adopt it to their particular requirements;

(3) Basic principles of the Treatment of Refugees

- (i) State Sovereignty;
- (ii) Non-refoulement;
- (iii) Non-discrimination;
- (iv) Fair and Equal treatment;
- (v) Family Unity and other humanitarian practices.

(4) Rights and Duties of Refugees

(5) Penal Clauses in case of the violation of laws

(6) Assistance, measures given to refugees by the recipient country

(16) Miscellaneous clauses.

Historically, the term refugee was used in various instruments prior to 1951 to refer to the ethnic or territorial origins of different uprooted groups, and to their loss of national protection. There was in these instruments no reference to persecution in the sense that this term is currently employed.For example, various pre-war instruments or arrangements provided for the issuance of documents to "Russian refugees" (in 1922) and to "Armenian refugees" (1924)—in both cases referring to their national origin and to their loss of protection by the Governments of the USSR or of the Turkish Republic respectively. These provisions were, in 1928, extended to "Turkish, Assyrian and Assyro-Chaldean refugees" followed by a Convention for "refugees coming from Germany" in 1938, which likewise referred to persons of German origin lacking protection of the German Government.

The first formal reference to persecution as part of the refugee definition came in the 1946 Constitution of the International Refugee Organisation (hereinafter called the IRO), a temporary specialized agency of the United Nations and the predecessor of UNHCR. Paragraph 7 (a) (i) of Section C of the Constitution of the IRO referred to a "persecution or fear, based on reasonable grounds owing to race, religion, nationality or political opinions"[3] as being a valid objection to repatriation. Paragraph 3 of Section A of Part I extended IRO's competence to the "victims of Nazi persecution" still within their couuntry of origin. IRO's Constitution also made reference for the first time to "displaced persons" as well as refugees—a concept which came to be extensively applied to UNHCR's mandate.

Thereafter the United Nations Declaration of Human Rights in 1948 alluded to everyone's right to seek asylum from "persecution", without further defining the term, and the General Assembly employed the term "well-founded fear of persecution" for specified reasons as the central criterion in determining the ambit of UNHCR's Statute.

This definition was essentially repeated in the 1951 Convention relating to the Status of Refugee while its application was limited to victims of persecution as a result of events occurring before January, 1951. The extent and scope of the term "refugee" was, however, expanded in as much as it included "membership of a social group" as one of the possible causes of persecution. States parties could also, if they desired, restrict the causative events to those occurring in Europe. The 1967 Protocol to the Convention removed both the temporal limitation as well as the optional geographic limitation from this definition.

3. Section B. p. 232.

The definitions of the term "refugee" in the Convention and Protocol have, since 1967, remained unchanged, although it may be recalled that Recommendation E of the Final Act of the Conference of Plenipotentiaries which adopted the Convention in 1951, urged all States parties to extend its benefits as far as possible to persons who did not fall within its strict ambit. While this, of course, is not binding on States it is indicative of the general agreement, at that time, of the need for a liberal interpretation of the term refugee, by States in determining who should receive international protection.

This need also became very apparent in regard to UNHCR's activities, and by the 1960s the need for groups outside the original statutory definition to be assisted was clear, particularly in the wake of the General Assembly Resolution on the Granting of Independence to Colonial Peoples and independence movements in Africa.

Consequently there was a series of General Assembly resolutions, extending over the next two decades, which formally endorsed the High Commissioner's involvement with a much broader category of exiles. Thus in 1959 the General Assembly requested the High Commissioner to use his "good office" to transmit contributions to "refugees not within the competence of the United Nations'' (without defining this phrase further). Then from 1961 to 1963 a series of General Assembly resolutions endorsed UNHCR activities for refugees within the High Commissioner's mandate "or those for whom he extends his good offices".

This liberalizing trend was reinforced in 1969 by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, which added to the statutory refugee definition an important expansion of the term so far as it applied in Africa, viz., that:

> "Refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his 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 of origin or nationality"

This expanded definition remains the most formal extension of the refugee concept accepted by Governments, and has, following proposals made at the Arusha Conference on Refugees in Africa in 1979, been endorsed by the General Assembly as applying to UNHCR's activities in the African continent.

At the same time the General Assembly continued to request UNHCR to undertake programmes generally benefitting persons outside the ambit and

scope of the original definition of the term refugee. The High Commissioner was requested, in 1972, to continue to participate, at the invitation of the Secretary-General, in those humanitarian endeavours of the United Nations for which UNHCR had particular expertise and experience. In the following year he was requested, by the General Assembly, to continue his assistance and protection activities for refugees within his mandate as well as for those "for whom he extends his good offices or is called upon to assist".

The next reference to "displaced persons" came in 1975, with a General Assembly resolution requesting the High Commissioner to continue his assistance to Indo-Chinese "displaced persons", a category which was to appear in every resolution endorsing the office's activities for the next five years. Particularly important among these was the General Assembly resolution 31/35 which endorsed ECOSOC resolution 2011 of that year, in which UNHCR's assistance to displaced persons, defined as "the victims of man-made disasters requiring urgent humanitarian assistance", in addition to its aid to refugees was approved. The term has remained undefined except for the ECOSOC resolution mentioned above, although it has been suggested that the "man-made disasters" referred to in this definition might appropriately be described as those outlined in the expanded OAU definition. Nevertheless UNHCR's activities certainly benefit many more "displaced persons" than strictly defined refugees: the millions of uprooted victims of external wars or civil strife normally falling within this category.

The application of the concept of displaced persons led to an acceptance of international responsibility for specified national or ethnic groups, similar to that reflected in the pre-1951 refugee instruments. Concurrently, however, individual eligibility procedures have continued to be applied, particularly by traditional resettlement or receiving countries, often more strictly than in the past. Ironically this resulted partly from continuing pressure on third countries to provide resettlement opportunities for displaced persons granted temporary asylum, particularly in South East Asia.

The liberal use of the displaced persons concept and *prima facie* group determination procedures in countries of first asylum, while essential to enable prompt and proper assistance to be given, has also led to a number of other difficulties in practice. One of these is how to sift out those not entitled to receive help—such as economic migrants—when individual screening is not done, or how to exclude those displaced persons who are not entitled to protection, such as war criminals or armed activists. As regards economic migrants it must be observed that there is no international instruments or authority to deal with such persons, and traditionally, they have been subjected

to the juridical process of emigration-cum-immigration rather than the customary principles of non-refoulement and asylum. Experience has shown that the plight of these peoples could be such as to make their lives unbearable in the country of origin and those conditions could be so serious as to amount to persecution or a "well founded fear of persecution". It is for consideration whether the proposed legislation should seek to include and cover the economic refugees in providing for international protection for economic migrants solutions must be sought from dimensions other than those of the causative end of the outflow and at the recipient end of the outflow.

A new turn was given to the concept of International protection when the ECOSOC referred to persons "who have been forced to flee from their homes suddenly or unexpectedly in large numbers; as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters, and who are within the territory of their own country." It would have been observed that this definition of internally displaced persons does not conform to the traditional understanding of the term of refugee i.e. an asylum seeker who has actually been granted or has received protection outside his own country of origin or habitual residence, to whom asylum has been granted from the authorities of the country of origin and is recognized as a person who is entitled to enjoy certain rights under international law. This is by reason of the fact that in customary international law a refugee is a person who is outside the protection of the State or is unwilling to seek the protection of the State of his nationality or habitual residence. There is thus a need to consider the distinction to be drawn between the terms to be employed and the scope to be given to the Model Legislation. The Committee may wish to consider whether or not the Secretariat should seek to incorporate especially, distinctly, enunciated definitions of some key terms to be employed in the proposed model legislation. The future work of the Secretariat on the work on the task of Model legislation of rights and duties of refugees would now rest on the directives which the Committee's Tokyo Session may give.

The Secretariat of the Committee has managed with assistance of the Office of the UNHCR to obtain all the existing national legislations pertaining to refugees. The Secretariat is grateful to the UNHCR for their assistance in making copies available to AALCC through the officers of the "CDR" division, Geneva. The Secretariat of the AALCC is in the process of a thorough examination of these municipal instruments and has been working towards an expanded definition of the term "Refugees". The Secretariat, however, is of the view that the question of the expansion of the definition of the term requires to be discussed further. The Committee at its forthcoming Session may wish to give consideration to the extent and scope of the key term around which the

proposed model legislation is to be drafted. The guidelines that the Committee may wish to furnish would enable the Secretariat to fulfill its mandate at an early date.

The Secretariat would also like to thank all the member Governments who have replied to the letter requesting them to send their national legislation pertaining to refugees.

Report of Round Table meeting between UNHCR and AALCC on June 3, 1993 at UNHCR Headquarters Geneva

The AALCC's 32nd Session was held in Kampala, (Uganda) from 30th January, 1993 to 6th February, 1993. Among the participants were Mr. Y Makonnen (UNHCR), Mr. Kioko (OAU) and the Secretary-General of AALCC. One of the resolutions of the Session called for closer interaction between the AALCC, UNHCR and OAU in undertaking joint studies and exchanging information on:

(i) A model legislation for refugees, and,

(ii) Creation of Safety Zones for the displaced persons in their country of origin.

The AALCC presented background papers on the two topics at the session. Following the session, the Secretary General of the AALCC had informal discussions on 18th February 1993, at Addis Ababa, with Mr. Y. Makonnen (UNHCR) and Mr. Kioko (OAU), where it was decided to hold if possible a tripartite meeting, between the OAU, UNHCR and AALCC. In particular, it was agreed:

(i) to reactivate the OAU/UNHCR working group on refugees, and also include the AALCC, and

(ii) reactivate the study on model legislation.

In line with this, a tripartite meeting was made possible with the interest and support of UNHCR and was held in Geneva on the 3rd June, 1993.

This meeting commenced with a welcome address and introduction by Mr. Shun Chetty. Discussions in the meeting focussed on Model Legislation. Initiating the discussion Mr. Chetty pointed out that the African region is more enlightened on legislation by virtue of the 1969 OAU Convention. In practice their treatment of refugees had all along been quite satisfactory. The situation in the Asian Region, on the other hand, is otherwise. This region has no binding legislation on the subject and the only guiding principles are in terms of the 1966 Bangkok Principles, which are recommendatory in nature. Further, due

to pressure of numbers the countries involved were unable to do much for the refugee flows.

Accordingly, the need was felt for active co-ordination between UNHCR and AALCC. The UNHCR was well aware of the fact that resort to refugee law in the Asian Region is a difficult proposition, as law, policy and politics were closely interlinked. If an attempt could be made through AALCC annual sessions to achieve this it might be quite useful in view of senior level representation. Though there had always been close co-operation between UNHCR and AALCC, of late, because of technical and professional interest, both the organizations have enhanced their co-operation. The 1994 Tokyo Session would provide an appropriate forum to address various legal issues at a higher level.

Traditionally some major Asian countries have treated refugees well. The majority have however, been reluctant on enacting legislation and signing the 1951 Convention and the 1967 Protocol for varied reasons including political, economic and social pressures from within a particular country. In Asia, it was the large groups or mass exodus which sought protection as opposed to individuals seeking asylum in other parts of the world.

The model legislation proposed to be taken up by the AALCC particularly for the Asian region could deal with mass determination in one part and individual determination in another. Once mass admission of refugees is allowed it would not be difficult for individuals seeking independent refugee status to do so. The rights and duties in the first part would be for the group as a whole, followed by rights and duties for an individual, after one had been accorded refugee status independent of the group. The Zimbabwe Refugees Act of 1983 provides a model piece of legislation for determining individual refugee status. Attention at present had to be focused on:

(i) Application of refugee law to large groups, and

(ii) The nature of mass influx and the manner of dealing with it.

Ms. Karola Paul clarified that individual assessment seemed difficult as in effect it would amount to finger pointing to the country of origin which is likely to be unacceptable to the majority. On the contrary, refugee law principles could be incorporated as part of the Constitution or Immigration laws already in existence. In this connection, she also made reference to the very useful workshop organised jointly by the UNHCR and the AALCC in 1991. It would be a matter of pride and achievement if Asian countries were to be more generous in dealing with the situation as a consequence of the joint efforts of AALCC/UNHCR and OAU.

Mr. Frank X. Njenga also held the view that the African treatment of refugees, particularly political, was more generous despite their political, economic and social hardships. He cited Mozambique and Somalia as examples. He was of the view that the Zimbabwe Refugee Act had sought to do away with the connotation of finger pointing. It would be very useful if the Zimbabwe Act together with the 1969 OAU convention could be used as a basis for framing a legal framework for the Asian region.

The model legislation would be much more meaningful if it were incorporated into national laws. It is because these are far more effective domestically than to international law principles which may lack enforcement procedures.

The lack of willingness to accept international standards has been well illustrated by the unfortunate Bosnian example, which has shown that International Protection and non- refoulement has at best been reduced to good intentions. The national legislation would be more respected:

(i) being law of the land, there were better chances of implementation;

(ii) for fear of international criticism; and

(iii) national as well as international public opinion.

The question of incorporation of existing principles could be left to the individual states. Therefore, a national legislation, keeping all the factors in mind would be much more useful than embarking upon a lengthy task of a new model legislation. Of course, the question of incorporation of the existing principles could be left to individual states.

Ms. Karola Paul considered that studying all existing national legislations and making an inventory would be a big step forward.

Mr. J.F. Durieux quoting an article of his, published in the Refugee Law Journal (Vol. 3 No. 4, 1992) cited the example of Mexican and Belize laws. The latter had benefitted a lot because of a "legal vacuum", the legal vacuum was easy to fill as there was no legislation in that area. Most of the member countries of AALCC did have existing legal principles on refugees, albeit scattered the various legislations. Further, he referred to a study done in the Middle East seeking to incorporate Islamic Law principles for furtherance of refugee law. The need of the hour, in his opinion, was to have a set of flexible principles which could be incorporated in national law.

Mr. Chetty pointed out that in some Asian countries it was even difficult

to find bits and pieces of enabling legislations as some of them provided asylum on purely humanitarian considerations. Examples were cited of India and Thailand, among a few, which had depended on customary practice. Mr. Chetty expresed the view that the goal was to bring the countries in Asian region to accede to the 1951 Convention, as a first step.

It was agreed to:

1. Hold a regional seminar on International protection which would cover if possible, all the area referred to above.
2. Form an inventory of all legislations available with the UNHCR CDR division.
3. Evolve ways and means of elaborating the 1966 Bangkok Principles.
4. Continue work on the model legislation which would help states desirous of doing so to incorporate flexible principles on refugees into their existing legal instruments.

B. Establishment of "Safety Zones" for the Displaced Persons in the Country of Origin

The Secretary-General of the United Nations in his Report on Preventive Diplomacy, Peacemaking and Peacekeeping, entitled "An Agenda for Peace" *inter alia* has observed that "Poverty, disease, famine, oppression and despair abound to produce 17 million refugees, 20 million displaced persons and massive migrations of peoples within and beyond national borders"[1] It is now estimated that the number of refugees is 19 millions and that internally displaced persons are estimated to be more than 20 millions. The most recent are to be found in Afghanistan, Iraq (the Kurds), Cambodia, former Yugoslavia and some members of the Commonwealth of Independence States (CIS) which have been savaged by the ethnic wars. Somalis have also been uprooted due to civil war. The worst droughts of the century in several countries have resulted recently in numerous displaced persons and drawn active UN interventions. More recently the Office of the United Nations High Commissioner for Refugees has drawn attention to the plight of the internally displaced persons in Burundi and appealed for material and financial assistance for them.

1. See U.N. Secretary General Boutros-Boutros Ghali *An Agenda for Peace* Preventive Diplomacy, Peacemaking and Peacekeeping. Report of the Secretary General pursuant to the Statement adopted by the Summit Meeting of the Security Council on 31st January 1992 (United Nations, New York 1992) p 7.

It is extremely difficult for the international community to guarantee the safety and well-being of displaced persons fleeing war, catastrophe, massive violence and the violation of their human rights. 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. Generally speaking internally displaced persons may not be individually persecuted but are fleeing from an unstable and insecure situation. In a large number of cases even where such large number of persons have crossed international borders they have not been recognised as "Convention refugees" since they do not face persecution as individual in their State of origin.

Simultaneous with the growing international concern for the plight of victims of man-made disasters, massive violence and gross violations of basic human rights there has been an increasing desire to avoid the overloading of the existing mechanism for the protection of the individually persecuted persons—the refugees. The customary principle of asylum too is under great strain.[2] But with the growing emphasis on the concern for the respect for human rights, the international community should be more concerned with the fate of massive repression of persons wherever it occurs particularly when such repression is likely to have international repercussions through mass exodus of refugees and the concomitant burden on neighbouring States.

Consequently new legal measures to assist the displaced persons particularly in the wake of the post cold war need to be taken urgently. In this context the programmes designed to resettle displaced people in their own communities could play a vital role in reconciliation and re-establishment of peace in their country of origin. But 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.

Violations of human rights cannot be disregarded by the peoples of the United Nations as both the UN Charter and the Universal Declaration of Human Rights have affirmed the legitimacy of the concern of the international community for the protection of fundamental rights and freedoms. This concern is not limited to refugees alone but extends equally to all persons including internally displaced persons within their own country. Efforts to improve the situation of the displaced persons may therefore require to be undertaken even if that may lead to some adjustment to the concept of national

2. Amnesty International Report, 1992.

sovereignty in the effort to conform to contemporary humanitarian needs and to effectively protect the rights guaranteed to individuals under international humanitarian conventions. One such means might be found in the concept of the establishment of Safety Zones.

FREEDOM OF MOVEMENT AND THE RIGHT TO SEEK ASYLUM:

Once they have been uprooted, displaced people are 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 shifted or to which they have fled. The conditions in the camps are horrendous, medical facilities are lacking and the residents have to strive hard to secure such basics and essentials as food and fuel. Often there is not enough potable water. Sometimes a dusk to dawn curfew is imposed. There are frequent cases of sex crimes against women while men are attacked and abducted.[3]

Displaced people are confronted with problems additional to those 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 stipulated in Article 13 of the Universal Declaration of Human Rights is violated. Against this bleak backdrop Safety Zone concept while not a panacea is 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. But such safety or safe haven zones should not become an impediment or restriction in the exercise of the right to freedom of movement, but should rather function as a regulatory measure to alleviate increasing suffering of innocent civilians.

A Safety Zone to provide humanitarian assistance to victims of man-made disasters should be established with the consent of the State concerned and where applicable, the consent of the parties to the conflict. They should be similar to a "neutralized zone" or a "demilitarized zone" as envisaged in *Article 15* of the Fourth Geneva Convention, 1949 and expanded by *Article 60* of its Protocol I. The brief [4] prepared by the Secretariat for the Twenty-eighth Session of the Committee had identified a set of 13 principles which could furnish a framework for the establishment of Safety Zones in the country of

3. Amnesty International, 1992.
4. Doc. No. AALCC/XXVIII/88/D.

origin. The principles identified therein, which in our view remain valid, are as follows:—

(i) The Safety Zone shall be established with the consent of the state of origin[5] 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 a international organization or agency for administration and supervision of the Safety Zone;

(v) A 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 should 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 seeking asylum therein;

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

5. The United Nations—Republic of Iraq memorandum of Understanding of November, 24, 1991 concluded after the United States, joined by Britain and France are known to have justified the creation of a Safe Haven Zone in Northern Iraq by citing Security Council Resolution 688 (1991) which framed the Security Council's concern in terms of the "massive flow of refugees towards and across international frontiers."

(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 party to the conflict;

(xi) The individuals residing in the Safety Zone shall be provided with facility to seek and enjoy asylum in any 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 (This provides a significant departure from the *non-refoulement* rule where the consent of the individual concerned is required.); and

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

It is imperative in our view that such Safety Zones should be mandated by the Security Council whose decisions are binding on all the member States of the United Nations.

ROLE OF THE UNHCR IN SUCH ZONES

A case can be made for clarifying UNHCR's role in assisting and protecting displaced people. UNHCR has normally assisted displaced people only when requested to do so by the United Nations, and permitted to do so by the authorities concerned. Such requests can be said to have hitherto been made in conformity with primacy of the importance of humanitarian assistance for the victims of natural disasters and other emergencies and the consideration that humanitarian assistance must be provided in accordance with the principle of humanity, neutrality and impartiality. The General Assembly has recognised in this regard that the magnitude and duration of many emergencies are beyond the response capacity of the affected countries.[6] International cooperation to address emergency situations and to strengthen the response capacity of affected countries is thus of great importance. Such cooperation should be provided in accordance with international law and solidarity and in conformity with national law. Intergovernmental and non-governmental organisation working impartially and with strictly humanitarian motives shall continue to

6. Paragraph 4 of General Assembly Resolution 46/182 recognised that each State has the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory. Hence, the affected States has the primacy role in the initiation, organisation, coordination, and implementation of humanitarian assistance within its territory.

make a significant contribution in supplementing national efforts. The starting point for UNHCR's involvement in the country of origin for the displaced persons is said to have been affirmed in General Assembly Resolution 46/182 of 19 December 1991 on Strengthening the Coordination of Humanitarian Emergency Assistance of the United Nations System. Paragraph 3 of the annex to that Resolution States;

> "The Sovereignty, territorial integrity and national unity of *states must be fully respected in accordance with the Charter of the United Nations. 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*". (Emphasis added).

As a UNHCR Working Group on International Protection rightly observed, the above cited provision argues against the UNHCR's involvement without the consent of the affected State in a Safety Zone created through "humanitarian intervention" by one or more States against another State. The Working Group distinguished "humanitarian intervention in its classical sense from the collective action creating a Safety Zone which may have been sanctioned by the United Nations in line with its responsibilities for the maintenance of international peace and security. It clarified that as a part of the UN system the UNHCR cannot refuse to provide humanitarian assistance in such situations, if it is requested to do so either by the General Assembly or the Security Council.[7] The Working Group while supporting UNHCR's involvement in protecting displaced persons in their own country because of the preventive impact and the humanitarian need, emphasized that the UNHCR should, prior to initiating or accepting a request for involvement ascertain *inter alia* that:

(i) The parties concerned acquiesce to UNHCR's involvement;

(ii) The option for seeking asylum abroad remains open at all times, and that the UNHCR's involvement would not lead to or condone *refoulement*;

(iii) The situation calls for UNHCR's particular expertise in protection and/or assistance and is in line with its humanitarian and non-political character;

(iv) UNHCR is granted full access and security and other conditions exist to allow it to operate; and

(v) The political support of the international community and adequate special funds are available.

7. *Report of the UNHCR Working Group on International Protection* (Geneva July, 1992)

The establishment of safety zones for the displaced persons in the country of origin should be regarded as a humanitarian measure the application of which would help curtail the creation of "refugee population".

The conditions in the so called "safe areas" in former Yugoslavia have in recent times demonstrated the difficult conditions under which people live when essential services are cut off and adequate medical care unavailable. People compelled to live in enclosed or delimited areas are totally dependent upon humanitarian assistance provided by external sources. The resultant camp like feeling contributes to an overwhelming lack of normalcy in the lives of the residents of such "protected areas". It has therefore been suggested that donor States and international organizations should be urged to support governmental programmes of assistance to displaced people only when certain conditions are fulfilled and that such Inter-government programmes should conform to the stipulations of the Fourth Geneva Convention of 1949 as this guarantees the presence and security of an international organization, prohibits the use of violence against civilians, and specifies the situations in which relocation programme can be implemented. It is however, doubtful whether any conditionality to render assistance would meet the stringent requirements of the cardinal principles of humanitarian assistance viz., neutrality, impartiality and humanity. The realities of a civil strife situation which is typically marked with the absence or breakdown of any Government programme in the recognised and practical sense of the term should also be taken into account.

It has also been suggested that, donors should ensure that relief programmes for the displaced people in Safety Zones are able to function independently of the military factions. There is, however, a danger that the call for the establishment of "Safety Zones" in such situations might provide justification for interventions by military powers. This should be avoided. 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 acceptable to all the parties to the conflict. In this sense, the word "humanitarian access" might be more appropriate than the word "humanitarian intervention" as the concept of the latter term implies or connotes military intervention.

The extent to which assistance programme for the displaced, like those for refugees, should guarantee choices and participation for the people concerned also requires to be considered at some length. Relief aid imposes its own kind of imprisonment, creating conditions of despondent dependence and hopelessness. Many displaced persons may well become like prisoners within the so called "Safety Zone" in their own country. This psychological dimension

of preventing the up swelling feeling of being in an 'open prison' needs always to be taken into account. This issue is closely related to the question of the length of time or the duration for which the safety zones are established.

In December 1992 the International Committee of the Red Cross (ICRC) issued an unusual statement calling for the creation of safe haven zones in Bosnia. The ICRC is understood to have issued the call because it was convinced there was no alternative to the plan. It observed that:

> "as no third country seems to be ready even on a provisional basis to grant asylum to one hundred thousand Bosnian refugees (the group under immediate threat in the north of Bosnia—Herzegovina) an original concept must be devised to create protected zones.... which are equal to the particular requirements and the sheer scale of the problem".[8]

This statement refers to safe havens in the country of origin not as the preferred way to protect would-be refugees, but rather as a last resort to save the individuals concerned since denial of asylumn by outside countries had closed the option of asylum. The ICRC faced with the stark reality of prevention of refugee outflow by other governments turned to "safe haven" idea as an act of desperation to protect the trapped after international refugee regime had failed. The conditions which the ICRC listed and which would have to be met to establish such safe haven zones included *inter alia* the consent of the parties concerned to the concept and location of such zones and duly mandated international troops to assure security of such protected zones. The ICRC's safe haven proposals were based on the *a priori* assumption that asylum outside Bosnia is not an option. However, it should be recalled that in her Note on International Protection the United Nations High Commissioner for Refugees emphasized that "prevention is not.... a substitute for asylum."[9]

Consequently in our view any proposal for the establishment of a safe haven zone should not preclude the options of seeking asylum outside the country of origin. Thus admission to or residence in the zone should not affect the right to seek asylum, nor should it restrict the right to freedom of movements of the person in and out of the Safety Zone. "Operation provide comfort" launched in northern Iraq following upon the adoption of Security Council Resolution 688 of April 5, 1991 was not an effort to address the root causes of the refugee flow so that potential refugees would feel secure enough

8. Rill Frelick "Preventing Refugee Flows: Protection or Peril?" in *World Refugee Survey 1993*.
9. See *Note on International Protection*, submitted by the High Commissioner, Executive Committee of the High Commissioner's Programme, Forty-third session, August 25, 1992.

to choose not to flee. On the contrary they had no choice since asylum in neighbouring countries was denied. While such zones or areas ought to provide sufficient security to convince displaced persons that they can be adequately protected without crossing an international border, they should not be used as a pretext for barring the movement of those who still feel endangered to seek refuge outside their countries.

A major consideration in the creation of a Safety Zone is its effectiveness in actually providing Safety to those in need. The UNHCR takes the view that guarantees for safety need to be explicitly and effectively underwritten as clearly as possible. "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 parties" their assurances may provide a basis for safety. If it results from multilateral action, international supervision by a UN peacekeeping force may be an option. The presence of international observers or monitoring by organisations, including UNHCR may also be important additional methods. But experience has shown that such operations are cumbersome and very expensive.

While the humanitarian law stipulations envisage the creation of various types of areas under special protection, they do not provide for the physical protection of such areas. It may be stated in this regard that Article 5 of The Draft Agreement Relating to Hospital and Safety Zones and Localities, attached as Annex 1 to the Fourth Geneva Convention, stipulates *inter alia* that hospitals and safety zones "shall in no case be defended by military means". This restriction is also extended to localities under Article 13 of the Draft Agreement. Yet, where parties do not respect an area under special protection, protection cannot be assured to the persons therein without the use of military means. The safety of the security zone in Iraq as opposed to the lack of security in the protected areas and safe areas in the former Yugoslavia highlight this aspect.

Furthermore, a multitude of questions arise in connection with the necessity to ensure the safety of those in the area under special protection. What type of legal framework would be effective in guaranteeing the security of persons in the area—municipal law and structures, regional or universal regimes? While applicable human rights and humanitarian law obligations would, perhaps, continue to apply refugee law as such would be inapplicable since such persons remain in their country of origin. Who would be most effective in enforcing the rules governing the area under special protection including those prohibiting violation of the security of the area? Also, how will the safety of those in the area be ensured—by the police or paramilitary forces of the State or by an international peacekeeping force? How will entry and exit

to the protected areas be controlled and by whom? How and by whom would the demilitarization of the area be effected and ensured? Would the prospect of creating areas under special protection induce parties to try to annex such areas before their protection is established, thus putting at risk the very people the areas under special protection are supposed to protect?

Indirectly related to ensuring the safety of persons in the area, but essential to the smooth functioning of the area, are questions as to who will administrate the area and whether the United Nations agencies will play a monitoring role or an active participatory role in the area by carrying out functions normally performed by the government.

Another factor to be borne in mind is the length of time for which a Safety Zones need to be created. How temporary a measure of protection 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 serious. The cost of maintaining a Safety Zone for a long period and the number of persons it might attract could be astronomical and may make it an unworkable proposition. These concerns underscore the importance of political initiatives for a solution in parallel to the establishment of a Zone. In the absence of a political settlement a protracted camp like situation might result in demands by persons in the zone for transfer abroad. Yet again, the existence of an area under special protection could well soften the political initiative and intention to find a comprehensive solution to the conflict. The *AALCC may undertake* to consider whether the creation of areas under special protection for an indefinite period of time would not also significantly increase the number of persons dependent on international assistance for a protracted period of time. In this regard the cost of maintaining a Safety zone for a long time and the quantum of persons it may draw unto itself over a period of time could make it a workable proposition. In the final count the temporal element of the Safety Zone would be as significant a factor as its *ratione materiae*.

The final consideration relates to the presence and participation of other organizations, governmental and non-governmental, in the Safety Zone. The value of inter-agency co-operation would be enhanced in the politically delicate situation of a Safety Zone. From an assistance point of view, the need for inter-agency cooperation to bridge the gap between relief and rehabilitation is well-recognised. The protection, as much as assistance of the displaced should be seen as a cooperative effort between International Intergovernmental Organisations and States as well as Nongovernmental Organizations, particularly in filling the gaps between UNHCR's protection responsibilities and the overall needs of the displaced population. It may also be relevant in the

context of the mandate entrusted to UNHCR in its operations, since even though UNHCR's protection objectives may have been met, this does not mean that the human rights of the individuals are fully protected. It is important therefore to keep in mind the specific mandate of ICRC for the protection of civilians, as well as the human rights protection and promotion responsibilities of other UN operations. In this respect, the various initiatives which have been launched within and outside the UN to focus greater attention on the plight of the displaced persons—including the internally displaced—should be kept in mind.

This topic needs further serious study with a more careful evaluation of the situation and practice in recent times in such areas as in northern Iraq, Sri Lanka, Yugoslavia, Somalia among others. The *Committee should give consideration to the directions inregard to the future work of the Secretariat.* Not only are we dealing with a novel concept but in the absence of a consistent and uniform terminology the fine distinction between the emerging principles of humanitarian law and the customary principles of human rights and refugee law place the concept in a dark grey area where the two aforementioned branches of law overlap. The usage of a plethora of terms such diverse as "Safety Zones", "Open Relief Centres, " "Security Zones", "Safe Haven Zones", "Safe Corridor", and Safety Corridors" not to mention "humanitarian access" can scarcely be said to be conducive to the progressive development or codification of law where several customary and codified principles of International law interact, coincide and at times even appear to be mutually exclusive. This is particularly true of the principles of State Sovereignty and non interference in the domestic affairs of the State. Consideration should be given to these and other matters referred to above in determining the future work of the Secretariat in this regard.

V. The World Conference on Human Rights and its Follow-up

(i) Introduction

The United Nations General Assembly by its resolution 45/155 of 18 December 1990, decided to convene at a high level a World Conference on Human Rights in 1993 with the following objectives:

(a) To review and assess the progress that has been made in the field of human rights since the adoption of the Universal Declaration of Human Rights and to identify obstacles to further progress in this area, and ways in which they can be overcome;

(b) To examine the relation between development and the enjoyment by everyone of economic, social and cultural rights as well as civil and political rights, recognizing the importance of creating the conditions whereby every one may enjoy those rights as set out in the International Covenants of Human Rights;

(c) To examine ways and means to improve the 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 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;

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

By the same resolution the General Assembly also decided to establish a Preparatory Committee (PREPCOM) for the World Conference, open to all States Members of the United Nations or Members of the specialised agencies, with the participation of observers, in accordance with the established practice of the General Assembly. The PREPCOM was to have the mandate to make proposals for the consideration by the General Assembly regarding the agenda, date, duration, venue of and participation in the preparatory meetings and activities at the international, regional and national levels, and on desirable studies and other documentation.

With the mandate of the General Assembly , the PREPCOM held four sessions at Geneva during the span of September 1991 to April 1993. In addition, as part of the preparatory work for the Conference, three regional preparatory meetings of Asia, Africa, and Latin America were held respectively in Bangkok, Tunis and San Jose. Among the main outcome of the preparatory process was the adoption *ad* referendum of the draft final document of the World Conference which was to be submitted to the World Conference.

Based on the proposals and recommendations of the PREPCOM, the General Assembly successively adopted a number of relevant resolutions or decisions, by which it decided that World Conference would be convened at Vienna for two weeks in June 1993, and approved the draft rules of procedures and provisional agenda for the Conference.

The World Conference on Human Rights was held at the Austrian Centre, Vienna, from 14 to 25 June 1993. It was preceded by informal inter-governmental consultations by senior officers of Member States from 9 to 13 June 1993.

Thirty-third Session: Discussions

Introducing the item "The World Conference on Human Rights" the Assistant Secretary General Professor Huang Huikang, recalled that the General Assembly of the United Nations, at its 45th Session, on 18th December 1990, adopted resolution 45/155, in which the Assembly decided to convene at a high level a World Conference on Human Rights in 1993 with the objectives as stated above.

After two years of intense preparations the World Conference on Human Rights formally took place in Vienna from 14 to 25 June 1993. The Conference was attended by the representatives of 163 States, including all the 44 Member States of the AALCC. Attendance included a large number of observers from United Nations specialized agencies, inter-governmental organizations including the AALCC, as well as numerous non-governmental organizations.

The main outcome of the World Conference was the adoption of a three-part final document, including a Vienna Declaration and a Programme of Action. The final document reflects the consensus of all States participating in the Conference on a wide range of human rights issues and sets out the guidance and programme for the universal promotion and protection of human rights in the years ahead.

In view of the importance of the World Conference, the AALCC had been actively involved in the preparatory process of the Conference and made its modest contribution to the successful conclusion of the Conference. It may be recalled that the Committee at its 31st Session, held at Islamabad in February 1992, decided to take up the matters concerning the preparation for the World Conference and directed the Secretariat to monitor the preparartory process of the Conference and make necessary studies related thereto. At the Thirty-second Session of the Committee held in Kampala in February 1993,the item "Preparation for the World Conference on Human Rights" was placed on the agenda, and an open-ended Working Group was established to prepare a draft declaration on human rights. The draft Kampala Declaration prepared by the Working Group was formally adopted by the Committee on 6 February 1993, which was then submitted to the Preparatory Committee for the Conference and subsequently reproduced and circulated by the Conference Secretariat in UN Document No.A/Conf.157/PC/62/Add.9. During the World Conference the Secretary General of the AALCC Mr. Frank X. Njenga further elaborated the main views of the AALCC on human rights which have been incorporated in the Kampala Declaration. It is pertinent to mention that quite a few ideas of the AALCC on human rights have been reflected in the final document of the World Conference.

After the World Conference, the implementation of the principles and recommendations contained in the final document of the Conference is of vital importance. It is the view of the Secretariat that while considering the follow-up to the conference in addition to the assessment of the final outcome of the Conference the following two issues need to be given urgent attention, namely, the question of the establishment of a High Commissioner for Human Rights; and the promotion of the universal acceptance of multilateral human rights conventions.

The creation of a High Commissioner for Human Rights was one of the most controversial issues in the World Conference. The proposal was made by the United States and supported by the countries from the North, but strongly opposed by many Asian, African and Latin American countries. The issue could not be resolved during the conference. In this context, a compromise

solution was initiated and accepted that the whole question of the establishment of a High Commissioner for Human Rights should be left to the General Assembly for its consideration. For this purpose, the World Conference recommended to the General Assembly that when examining the report of the Conference at its Forty-Eighth Session, it should consider as a matter of priority this question.

The General Assembly at the current session, on 20th December 1993 adopted a resolution, without a vote, to establish the position of UN High Commissioner for Human Rights. The High Commissioner will have a four-year term, with the rank of UN Under Secretary General and will be based in Geneva. The High Commissioner will to be appointed by the UN Secretary General subject to the approval of the General Assembly and the post, will be rotated among geographic regions. The powers and functions of the High Commissioner, however, are not very clear. The Commissioner will be responsible for the promotion and protection of all human rights, while recognizing religious, historical and cultural differences, and will be charged with the task of preventing the continuation of human rights violations throughout the World, and holding dialogue with the Governments concerned with a view to securing respect for all human rights. But as finally agreed upon, the High Commissioner will have no power to send fact/finding missions to countries against whom complaints of rights violations are made. The original proposal had given him discretionary powers to do so. The move to withhold development assistance to countries found to be in violation of human rights has also been abandoned. It is thus clear that the decision to establish the High Commissioner for Human Rights was a compromise among the member States.

With regard to the promotion of the universal acceptance of international treaties on human rights, it could be pointed out that although remarkable progress has been made in the codification of international norms in the field of human rights since the adoption of the Universal Declaration of Human Rights by the General Assembly in 1945, and a large number of multilateral human rights conventions are in force, their status in terms of the number of states parties can scarcely be considered as universal. The process of ratification of or accession to the various conventions has been very slow. Reference to the member states of the AALCC indicates that in many cases the percentage of the ratification or accession is even below the global level. Therefore the vital importance of the promotion for the universal acceptance of international human rights treaties cannot be over emphasized. All states who have not already ratified or acceded to these conventions are encouraged to do so in the implementation of the final document of the World Conference on Human

Rights and in the course of the UN Decade of International Law. For this purpose, fresh efforts should be made to identify the obstacles to the universal acceptance and to seek ways and means of overcoming them.

It was suggested that the deliberation of the subject item at this session could be *inter alia* concentrated on the above mentioned issues.

To factlitate the discussion, the Secretariat had prepared a comprehensive study that included six sections: (i) background introduction; (ii) general proceedings of the Conference; (iii) major issues of contention; (iv) AALCC's views on human rights; (v) final outcome of the Conference; and (vi) follow-up to the Conference. It also included an illustration concerning the status of international legal instruments on human rights in special reference to the Member States of AALCC.

The Delegate of *Japan* stated that his delegation highly valued the fact that the World Conference on Human Rights concluded sucessfuly with the adoption of the Vienna Declaration and Programme of Action in June 1993. The document contained many important principles and concrete programmes for promoting and protecting human rights around the world. The international society therefore needed to follow-up this document by adhering to the principles set forth and effectively implementing the concrete measures contained in the document. In this regard his delegation believed it was timely and useful to discuss the results of the World Conference on Human Rights at the Tokyo Session.

He was of the view that while it may be argued that human rights fell within the domestic jurisdiction of a state, and that the state had primary responsibility for guaranteeing those rights. However it should be recognized that human rights was a universal value common to all mankind and that the promotion and protection of all human rights was legitimate concern of the international community. His government welcomed the fact that this was clearly stated in the Vienna Declaration and Programme of Action.

His Government also appreciated that the World Conference on Human Rights recognized the necessity of strengthening the function of the United Nations for promoting and protecting human rights. For example, the increased coordination in support of human rights and fundamental freedoms within the United Nations system was recommended in the Vienna Declaration and Programme of Action. Taking into account the growing disparity between the activities of the Centre for Human Rights and the resources availble to carry them out, the document also point out the necessity of increasing substantially the resources for the human rights programme from within the existing and future regular bugdets of the United Nations.

One of the most important themes discussed at the World Conference on Human Rights was the proposal concerning the establishment of a High Commissioner for Human Rights. Though participants could not reach final agreement on this matter in the two week conference in Vienna his delegation was glad to note the adoption of the resolution concerning the creation of a High Commissioner for Human Rights at the forty-eighth session of the General Assembly of the United Nations.

The *Delegate of the Peoples Republic of China* said that the declaration adopted by the Vienna Conference, reflected consensus that had been reached concerning the future activities by the international community to promote and protect human rights and fundamental freedoms. The declaration had also reflected some shared understandings and views as well as differences of opinions held by various countries on the question of human rights. Many developing countries including his own, took an active part in the preparation of the Conference and put forward a number of constructive recommendations for the formulation of the conference documents. All this, together with the spirit of flexibility and cooperation, had contributed greatly to the consensus reached at the Conference.

For the implementation of the Vienna Declaration and Programme of Action, his delegation believed that the following points should be taken into consideration

(i) equal importance should be attached to the various recommendations of the Declaration and Programme of Action so as to ensure their comprehensive implementation.

(ii) efforts should be made to promote cooperation of all member states in the field of international human rights on basis of equality and mutual respect and

(iii) the international community should continue to be mobilized to address and end the large-scale violation of human rights resulting from colonialism, racism and foreign aggression and occupation so as to create conditions for the developing countries to raise their people's living standards and fully realize their rights to development at an early date.

On the question of the establishment of the post of High Commissioner for Human Rights which was adopted at the forty-eighth UN General Assembly as one of the follow-up measures of the Vienna Conference, his delegation considered it as an important result of the close cooperation of the non-aligned countries, including the Asian and African countries at the Assembly. He

appreciated the spirit of cooperation prevailing among the non-aligned countries in the discussion and consultation of the issue during that Session of the General Assembly.

His delegation recognised that each country had its own political, economic and historical characters and each is at a different development stage with special national conditions and traditions. As a result each country was faced with its own human rights issues that called for urgent solutions and thus had its own approaches and priorities on human rights questions with regard to the developing countries, the right to subsistance and development were their primary concern. Therefore, respect for different understanding of human rights held by different countries and the different measures they adopt to protect human rights in line with their national conditions constitutes the cornerstone for exchange and cooperation in the field of international human rights. In the opinion of his delegation some practices in the human rights field such as the application of selectivity and double standards needed serious attention, the different social systems should be respected, amelioration of the human rights conditions should be substantial. The Chinese Government held that the developing countries should continue their cooperation in the future work on human rights and the development of the international human rights law should reflect more of the stands and interests of the developing countries including the Asian and African countries.

His Government always attached importance to the development of the human rights and had acceded to eight international human rights conventions and strictly fulfilled its obligations set forth by these conventions. It was ready to work with other members of the international community on the basis of mutual understanding and respect and continue to make unremitting efforts to strengthen international cooperation in the field of human rights with a view to further promoting and protecting human rights.

The Deleate of *Sudan* agreed with the view of the delegate of Japan that human rights were universal and applicable to all and that they should be respected pointing out that there were however, violations of the human rights by many countries. He expressed the view that those allowing human rights to be violated should be condemned. In his view selectivity, bias and double standards were leading to abuse and victimization of small countries especially through the mass media.

He underscored the role played by China in crystallizing the solidarity of developing countries to combat designs against them. While accepting universality, traditional values, culture and religion of people can be used to balance universality. While his delegation did not reject the creation of the post

of the UN High Commissioner for Human Rights wished to qualify it in terms of the extent of his powers and role to prevent him from misuse of powers and to enforce or impose sanction against chapter 7 of the UN Charter.

The delegate criticized the NGOs participating in the Vienna Conference for promoting Western designs to dominate the world. The solidarity of the developing countries and their regional declaration saved the conference. He further criticized imposing of sanctions by the Security Council in the name of democracy while it was not democratic itself.

The *Delegate of India* emphasized that his government attached great importance to the promotion of human rights. In his view economic development and the eradication of poverty are important for the implementation of human rights. He was of the view that human rights should be promoted in the developing countries, through self-practice and not through imposition. Referring to his government's commitment to the promotion and implementation of human rights he said that the Government of India had recently established a National Human Rights Commission. In his view future work on the subject was very important and the subject should be continued to the studied. He called upon the Secretariat to provide assistance to member states by drafting a model legislation on the promotion of human rights.

The *Observer for the Organization of African Unity (OAU)* stated that as a result of gross abuse of human rights in 1970s the OAU adopted a Convention on Peoples and Human Rights in 1981 which came into force in 1986. That Convention, *inter alia* established an African Commission which commenced its work in 1987 to promote and protect human rights and to hear complaints of violation of human rights by governments. The Heads of States in their Cairo Summit in 1993 authorised for the first time the publication of Commission's Report. He also stated that the twenty-ninth session of the OAU called for scrupulous observance of human rights. He pointed out that the African Charter recognises the right to development as a human rights.

(ii) Decisions of the Thirty-third Session (1994) Agenda Item: "World Conference on Human Rights and the Follow-up"

Adopted on January, 21, 1994*

The Asian-African Legal Consultative Committee at its Thirty-third Session

Taking Note with appreciation of the Brief prepared by the Secretariat on the agenda item contained in document No.AALCC/XXXIII/Tokyo/94/12;

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

Mindful of the final document of the World Conference on Human Rights;

1. *Reaffirms* the basic principles incorporated in the Kampala Declaration on Human Rights adopted by the Committee on 6th February 1993;

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* The *Delegate of Japan* expressed the following reservation to the decision:

Since paragraph 1 of the resolution refers to the Kampala Declaration, my delegation reiterates the observations made at the time of its adoption. We recognise that social and economic development often contributes to ensuring respect for human rights. At the same time, however, fundamental freedoms and human rights should not be sacrificed for the sake of development, but they should be respected by all countries regardless of the degrees of their political and economic development.

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

2. *Reaffirms* also the solemn commitment to promote universal respect for and enjoyment by all of human rights and fundamental freedoms;
3. *Welcomes* the successful conclusion of the Second World Conference on Human Rights, and *calls for* the full and effective implementation of the final document of the Conference;
4. *Reiterates* the vital importance of the universal acceptance of international human rights treaties adopted within the framework of the United Nations system, and other treaties adopted within the framework of other regional organizations;
5. *Urges* Member States to devise effective action plans and concrete measures to speed up the process towards the goal. All states are encouraged to ratify or accede to those treaties with the aim of universal acceptance;
6. *Recommends* that the priority be accorded to the following conventions: International Covenant on Economic, Social and Cultural Rights (1966), International Covenant on Civil and Political Rights (1966), International Convention on the Elimination of All Forms of Racial Discrimination (1966), Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (1984), Convention relating to the status of Refugee (1951) and its Protocol (1967), Covention on the Elimination of All Forms of Discrimination against Women (1979), and Convention on the Rights of Child (1989);
7. *Acknowledges* the creation of the post of High Commissioner for Human Rights and requests Member States to Cooperate with the High Commissioner who shall act in accordance with the resolution of the General Assembly;
8. *Stresses* the obligation to respect the sovereignty, territorial integrity and domestic jurisdiction of Member States, while promoting universal respect for and observance of all human rights;
9. *Affirms* that the acknowledgement and promotion of the right to deveopment would greatly enhance respect and observance of human rights in general;
10. *Requests* the Secretary General to approach the Technical Support Facility of the Group of Fifteen (G-15) to explore possible areas of cooperation with the Asian-African Legal Consultative Committees as far as the legal aspects of the right to development are concerned, and to report to the Thirty-fourth session on the outcome of this consultation;
11. *Directs* the Secretariat to make further studies on the development of international law in the field of human rights, and render appropriate legal assistance to the Member States at their request in connection with national legislation concerning the promotion and protection of human rights.

(iii) Secretariat Brief
The World Conference on Human Rights and its Follow-up

General Proceedings of the Conference

The World Conference was held in Vienna, from 14 to 25 June 1993. The Conference was declared open by the Secretary General of the United Nations, Mr. Boutros Boutros-Ghali on 14 June 1994. The inaugural address was delivered by the President of Austria, Mr. Thomas Klescil. The Secretary General of the United Nations, the Secretary General of the Conference, Mr. Ibrahims Fall, and the Federal Chancellor of Austria, Mr. Frank Vranitslay, also delivered addresses at the opening ceremony.

The Conference was attended by the representatives of 163 States, including all the 44 Member States of the AALCC. It was significant that the representation was at the highest level, most of the delegations were headed by Presidents, Prime Ministers or Foreign Ministers. Attendance also included a large number of observers from United Nations human rights bodies, United Nations organs, specialized agencies, inter-governmental organizations as well as numerous non-governmental organizations. The delegation of AALCC was composed of the Secretary General, Mr. Frank X. Njenga, the Assistant Secretary General, Professor Huang Huikang, and the Permanent Observer of AALCC to the Offices of the United Nations in Vienna, Mr. Ki Nemoto.

The provisional agenda of the World Conference, as approved by the General Assembly resolution 47/122 of 18 December 1992, was unanimously adopted by the Conference, which was as follows:

(1) Opening of the Conference.

(2) Election of the President.

(3) Adoption of the rules of procedure.

(4) Election of other officers of the Conference.

(5) Appointment of the Credentials Committee.

(6) Establishment of committees and working groups.

(7) Adoption of the agenda.

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

(9) General debate on the progress made in the field of human rights since the adoption of the Universal Declaration of Human Rights and on the identification of obstacles to further progress in this area and ways in which they can be overcome.

(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 of contemporary trends in and new challenges to the full realization of all human rights of women and men, including those of persons belonging to vulnerable groups.

(12) Recommendation for :

(a) Strengthening international cooperation in the field of human rights in conformity with the Charter of the United Nations and with international human rights instruments;

(b) Ensuring the universality, objectivity and non-selectivity of the consideration of human rights issues;

(c) Enhancing the effectiveness of United Nations activities and mechanisms;

(d) Securing the necessary financial and other resources for United Nations activities in the area of human rights.

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

Mr Alois Mock, Foreign Minister of Austria was elected as President of the Conference. The representatives of the following 44 countries were elected as Vice-Presidents: Australia, *Bangladesh*, Bhutan, Burundi, Cameroon,

Canada, Chile, *China*, Costa Rica, Croatia, Cuba, Denmark, El-Salvador, Ethiopia, France, *Gambia*, *India*, Ireland, Jamaica, *Japan*, *Kenya*, *Kuwait*, Latvia, Mauritania, *Mauritius*, Mexico, Namibia, *Nigeria*, *Pakistan*, Peru, *Philippines*, Romania, Russian Federation, *Senegal*, Spain, *Syrian Arab Republic*, *Thailand*, the former Yugoslav Republic of Macedonia, Tunisia, U.K., USA, Venezuela, Yemen, Zimbabwe, Among them were 15 member States of the AALCC.

According to the rules of procedure, the Conference decided to establish one Main Committee, composed of all Conference participants, to discuss agenda items 9, 10, 11 and 12, and one Drafting Committee, composed of all government delegations. The Conference further elected Mrs. Halima E. Warzazi (Morocco) as the Chairman of the Main Committee, and Mr. Gilberto V. Gaboia (Brazil) as the Chairman of the Drafting Committee.

General debate had been conducted in the Plenanry throughout the Conference from 14 to 25 June 1993. Statements were made by representatives of 155 countries and a number of observers. Mr. Njenga made a statement on behalf of the AALCC on 21 June . The text of the statement was circulated amongst the Member States of the AALCC. During the general debate and within the framework of the Conference, certain specific days were designated as theme days for peace (15 June), development (16 June), women (17 June), indigenous people (18 June), children (21 June), democracy (22 June).

At its 23rd plenary meeting on 25 June 1993, the Conference adopted by consensus the draft final declaration of Vienna as recommended by the Drafting Committee. At the same meeting, the Conference also adopted the draft report of the World Conference.

As some unpredicted developments of the Conference, the Conference on 15 June 1993 after hearing Foreign Minister of Bosnia and Herzegovina, decided, without a vote, to appeal to the Security Council to take necessary measures to end the genocide taking place in Bosnia and Herzegovina, and in particular at Gorazde. The Conference further, on 24th June 1993, after intense debate, adopted with a roll-call vote (88 in favour, 1 against, 54 abstention), a Special Declaration on Bosnia and Herzegovina, introduced by Pakistan on behalf of 51 State Members of the Organization of the Islamic Conference (OIC). At the same meeting, the Conference adopted a Special Declaration on Angola without a vote.

Major Issues of Contention

Reflecting the diversity of opinions on human rights issues among members of the international community, the draft final document, prepared

and adopted *ad referendum* by the PREPCOM for the Conference at its final session in April 1993, had more than 200 brackets, which the Conference itself had to iron out before reaching concensus on a far reaching final document.

While there was disagreement over quite a few issues, the main areas of contention were largely concentrated on the following substantial issues:

(a) The creation of a High Commissioner for Human Rights;

(b) Universality versus particularity of human rights;

(c) The right to development as a human right;

(d) Linkage between human rights and development assistance;

(e) The right of self-determination: its definition and implementation; and

(f) Financing the United Nations Centre for Human Rights.

All those issues were highly sensitive and complicated. Fresh efforts were made to reach compromise solutions that would be acceptable to all parties concerned. A summary analysis on the subject of contention is given below.

The Creation of a High Commissioner for Human Rights

The most burning debate in the final drafting process of the final document of the World Conference at Vienna was on the proposal concerning the creation of a High Commissioner for Human Rights.

The proposal was first launched in the 1940s by Uruguay and Costa Rica and kept resurfacing at the United Nations but was never given much consideration. It was relaunched during the preparation for the World Conference on Human Rights by the United States, which suggested that the Conference call upon the international community to establish the position and office of a High Commissioner for Human Rights, whose responsibilty should include, *inter alia*, the coordination and facilitation of activites related to the promotion and protected of human rights within the United Nations system. The proposed High Commissioner would have the authority to bring to the attention of the Security Council serious violations of human rights threatening international peace and security, and have independent authority to dispatch special envoys on fact-finding missions and to undertake other initiatives to promote human rights. The proposal was included, under the title of Under Secretary General/High Commissioner for Human Rights, in the draft final document within brackets.

At the World Conference, the creation of a High Commissioner for Human Rights was supported by the countries from the North, but strongly opposed

by many African and Asian countries. While the countries in favour advocated that setting up of the High Commissioner's post would "provide a breakthrough in the endeavours to reach and assist the individual victims of human rights violations", those opposed feared that such an institution could be used as a political tool by Western countries in interfering in their internal affairs and constitute a threat to their sovereignty. Many of them also believed the proposed post of High Commissioner, if created, would be just another bureaucratic United Nations institution. A delegate from a Latin American country pointed out that "it makes no sense creating new bureaucracies with the false hope that they would resolve problems which, basically, are more complex".

As expected, it proved that such a sensitive issue could not be easily resolved during the two-week conference. In this context, the Latin American group came out with a compromise resolution proposing the establishment of a group to analyse the creation of the proposed High Commissioner post. On the basis of this proposal consensus was eventually reached among the delegations that the whole question of the establishment of a High Commissioner for Human Rights should be left to the General Assembly for its consideratioin. For this purpose, the World Conference recommended to the Ceneral Assembly that when examining the report of the Conference at its Forty-eighth Session, it should begin as a matter of priority the consideration of the question. Subsequently, the oringinal text in the draft final document concerning the creation of the High Commissioner was totally deleted.

Universality versus particularity

This was another major contentious issue. Because the universal character of human rights was beyond question, the essence of the contention was whether or not, and to what extent, the national and regional particularities/ specifications and various historical, cultural and religious backgrounds should be taken into account in the implementation and observance of human rights. The answers were diverse.

Most Asian countries consistently maintained their earlier attitude reflected in the Bangkok Declaration which emphasized that while human rights are universal in nature, they must be considered in the context of dynamic and evolving process of international norm-setting, bearing in mind the signifinance of national and regional particularities and various historical, cultural and religious backgrounds. This idea was also shared by many African countries. During the general debate, some countries further pointed out that ".... the concept of human rights is a product of historical development. It is closely

associated with specific social, political and economic conditions and the specific history, culture and values of a particular country. Different historical development stages have different human rights requirements. Countries at different development stages or with different historical traditions and cultural background also have different understanding and practice of human rights. Thus, we should not and cannot think the human rights standard and model of certain countries as the only proper ones and demand all other countries to comply with them". It was also said that the universal recognition of the ideal of human rights could be harmful if the concept was used to mask the reality of diversity.

On the other hand, the Western countries, led by the United States, took the opposite approach. They accused the developing countries of coming to Vienna to advocate an alternative concept of human rights, and said that they could not yield on the essential principle of universality of human rights, and they must oppose statements justifying deviations from the internationally accepted norms on the basis of historical cultural, or regional diversity, relativism or particularities. For the accusation of the West, the South dismissed it as "erroneous" and "counter-productive", adding that "any approach to human rights which is not motivated by a sincere desire to protect these rights but by disguised political purposes, or, worse, to serve as a pretext to wage a political campaign against another country, cannot be justified.

Under the issue of universality of human rights, another important aspects was involved, namely, the relationship between different sets of human rights (civil and political, economic, social and cultural rights). While all agreed that all human rights are universal and indivisible, there was some disagreement on whether they were also interdependent and inter-related. One argument advocated by Western Countries was that civil and political rights and economic, social and cultural rights are not interdependent, and promotion and protection of civil and political rights doesn't depend on progress in achieving economic, social and cultural rights. The others could not, however, accept it. They believed that all human rights were interdependent. After intense negotiation, the West relaxed their position.

The final version of the Vienna Declaration in respect of the issue regarding universality of human rights is a compromise and balanced approach which reads as follows :

> All human rights are universal, indivisible and interdependent and inter-related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural system, to promote and protect all human rights and fundamental freedoms.

Right to Development as a Human Rights

Before the World Conference, the issue of development as a human right had been a subject of controversy for a long time. The United States and some others had consistently refused to recognise the right to development as a human right, even after the Declaration on the Right to Development was adopted by the General Assembly in 1986.

During the World Conference, the right to development attracted great attention. There were extremely strong demands for reaffirming and realizing the right to development. Some significant evolution has been emerging mainly due to a change in the United States' position by the Clinton Administration in this regard. The American new position is that they can accept reference to the right to development as it has been identified in the 1986 UN Declaration, but they oppose any implication that the right to development implies a legal right to demand or receive resource transfer, debt relief, termination of structural adjustment programmes required by donors and international financial institutions or other mandatory steps to redress imbalance of wealth. In addition, they have no objection to call in upon the international community to assist states with heavy external debt burden in order to help them attain the full realization of economic, social and cultural rights. They also have no objection to reference to extreme poverty, under-development or social exclusion as inhibiting the full and effective enjoyment of human rights or as violations of human dignity coupled with a generalized call upon states to put an end to them.

Consensus has been reached on this important right and incorporated in the final document. The right to development is reaffirmed as a universal and inalienable right and an integral part of fundamental human rights. The human person is the central subject of development. States should cooperate with each other in ensuring development and eliminating obstacles to development. The right to development should be fulfilled so as to meet equitably the developmental and enviromental needs of present and future generations. However, a sub-paragraph concerning the human right to a safe and social environment originally proposed by the AALCC in the Kampala Declaration and contained in the draft final document within brackets, was deleted because of the objection by the United States delegation on the ground that nothing in customary or conventional international law currently supports the existence of such a right as an individual human right to a clean environment .

Aid Conditionality

The question is whether financial or economic assistance should be linked to respects of human rights. In other words, this is a question of political conditionalities of development aid.

Although developing countries were divided on the need for the creation of a High Commissioner for Human Rights, they were unanimous in their rejection of aid conditionalities. In Vienna Conference, they said that they would not accept any conditions-human rights or otherwise-on development assistance. In their opinion, just as underdevelopment should not be used to justify violation of human rights or the suppression of democracy, neither should development assistance be subject to conditionalities tied to national implementation of civil and political rights. The rejection of aid conditionalities was also shared by the United Nations Development Programme, the largest single multilateral development assistance agency.

The major donor countries, however, insisted on the aid conditionalities. The United States said that they rejected any claims of entitlement to bilateral or international assistance without regard to human rights performance or that the imposition of conditions was unlawful or improper. It was entirely legitimate for donors to promote certain objectives such as improved human rights performance through the provision of bilateral assistance to recipients who agreed with those objectives. In case of Japan, the second largest donor country, the link between human rights and development aid has been spelled out in Japan's Official Development Assistance Charter adopted in June 1992.

The controversial issue was eventually resolved by the inclusion of the two inter-related provisions into the final document. One is that in the framework of the purposes and principles of the United Nations, the promotion and protection of all human rights is a legitimate concern of the international community. The other states that the promotion and protection of human rights and fundamental freedoms at the national and international level should be universal and conducted without conditions attached.

The Right of self-determination

The Right of self-determination was one of the most contentious issue at the Vienna Conference. The issue involved complex political implications. The focus of the controversy was concentrated on the following elements : What is self-determination? Do all peoples have the right of self-determination? What is the distinction between an act of terrorism and the legitimate struggle

for the right to self-determination? Could such a right be construed as authorizing or encouraging any action that could justify the dismemberment of a sovereign state?

The relevant paragraph in the draft final document prepared by the Prepcom for the Conference was all within brackets. The Text was as follows:

"['The right [to]/[of] self-determination [is a right of all peoples and]/ [of peoples under alien or colonial domination and foreign occupation] is an inalienable human right which should be given attention on a [top] priority basis [calling for the greatest attention] within the system of the United Nations. The denial of this right constitutes a [grave]/[serious] violation of human rights. The international community is called upon to ensure its effective realization.]"

In order to iron out the disagreement and work out a new formulation that could meet the apprehension of all the countries concerned, a small task force under the Drafting Committee was set up, composed of Algeria, India, Pakistan, Peru, Sri Lanka, Syria, Turkey, Yemen and some others. The debate in the task force was fierce, and pitched the United States against Syria and Yemen, Pakistan against India, backed by Sri Lanka and Peru.

The American delegation was willing to go along with the concept of self-determination, but it had strong reservations about "struggle for self-determination" primarily because "struggle", could be interpreted as "armed struggle". The U.S. therefore wanted to qualify it by saying that the "struggle" if any, should be "legitimate and peaceful" in accordance with the U.N. Charter. Pakistan delegation implicitly gave its political blessings to "armed struggle" as it expressed reservations over the condemnation of "terrorism" on the ground that one man's terrorist was another man's freedom fighter. On the other hand, India, Sri Lanka and Peru were insisting that World Conference take a strong stand condeming all acts, methods and practices of "terrorism". Syria and Yemen wanted a clear distinction between "terrorism" and " the legitimate struggle of people under colonial domination, foreign occupation and racist regimes". Both Arab nations, who strongly support the Palestinian struggle against Israel in the occupied territories, insisted that "terrorism" and "self-determination" would not mix.

The deadlock was finally broken when a fresh compromise formulation was worked out and considered by all as acceptable. The new formulation consists of three sub-paragraphs. The first one declares that all people have the right to self-determination and by virtue of that right they freely determine their political, status, and freely pursue their economic, social and cultural

development. The second states that the World Conference recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The last sub-paragraph emphasizes that this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial intergrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Goverment representing the whole people belonging to the territory without distinction of any kind.

Financing the Centre for Human Rights

The need for increased financial resources to the United Nations Centre for Human Rights based at Geneva was one of the core issues before the World Conference. The Conference was mandated to make recommendations for securing the necessary financial and other resources for United Nations activites in the area of human rights.

The Centre for Human Rights has been in a difficult financial situation as only one percent of UN's regular budget and about 0.75 percent of UN personnel are earmarked for the Centre. In view of its difficult financial situation and the increasing workload there was unanimous agreement among delegations on the need for the provision of increased funds to the Centre. The question was how this money should be raised. For that there was a division of opinion.

Some countries were of the view that any increase in funding the Centre should come from new and additional resources, not from existing funds, because the UN regular budget had been at zero percent growth, and if the Centre were to get the increased resources for this budget, it would be at the expense of other existing programmes. Since the Western countries had been doing a lot of talking and preaching about human rights, they should put their money where there mouth were. Opposing this idea, the Western countries argued against raising funds from outside the United Nations budget. They claimed that funds from outside might be tied to agenda of donors. They were thus insisting that any increased resources should come from the UN budget, with some coming from voluntary contributions.

As the drafting process moved into the final stage, the problem was resolved by providing that

> "The World Conference, concerned by the growing disparity between the activites of the Centre for Human Rights and the human, financial and other resources available to carry them out, and bearing in mind

> the resources needed for other important United Nations programmes, requests the Secretary General and the General Assembly to take immediate steps to substantially increase the resources for the human rights programme from within the existing and future regular budgets of the United Nations, and to take urgent steps to seek increased extra-budgetary resources".

AALCC's VIEWS ON HUMAN RIGHTS

It should be recalled that at the 32nd Session of the AALCC held in Kampala from 1 to 6 February 1993, the item "Preparation for the World Conference on Human Rights" was placed on the agenda and an open-ended working group was established to prepare a draft declaration on human rights. The draft Kampala Declaration so prepared by the Working Group was formally adopted by the Committee on 6 February 1993. Later, the Kampala Declaration was submitted to the Fourth Session of the Prepcom for the World Conference and subsequently reproduced by the Conference Secretariat in the document No.A/Conf.157/PC/62/Add.9. During the World Conference, the representative of the AALCC, the Secretary General Mr.Frank X.Njenga participated at the general debate. His statement properly reflected the ideas of AALCC on human rights which have explicitly been incorporated in the Kampala Declaration. The essence of the main points are excerpted below.

Human rights, development and international peace are interdependent. Peace and security both at the national and international level remain the condition *sine qua non* for the realization and enjoyment of all indivisible and inalienable human rights in full and substantial measure. Members of the international society must therefore reaffirm their desire to save the present and succeeding generations from the scourage of wars and armed conflicts, both international and domestic, as well as to maintain international peace and security in accordance with the purposes and principles of the Charter of the United Nations.

In the developing countries poverty is one of major obstacles hindering the enjoyment of human rights. The fact that almost three-fourth's of the Planet's population suffer from malnutrition, disease and poverty should be a matter of concern for all of us. The poor socio-economic conditions resulting partly from the transfer of resources to the servicing of external debts and from the disparity in the terms of international trade, hinder both the process of development and the realization of human rights in the developing and least developed countries. We believe that development is not merely a means to economic growth but a process to enlarging people's choices. We also believe that the right to development is an inalienable human right, and the vital

importance of economic and social development to the full enjoyment of human rights should be further recognized and underscored. All states therefore must cooperate in the essential task of eradicating poverty for the universal realization of human rights.

The development and the environment are intrinsically linked and should not be considered in isolation from each other. Development should not be pursued in a manner as would endanger the environment. In this context, the right of an individual or human right to a safe and sound environment as incorporated in the Kampala Declaration needs to be emphasized. This may at the first blush appear to be a novel concept. But it is far from being so since the roots and basis of both concepts viz. international environmental law and sustainable development is inter-generation equity. The right to a safe and healthy environment may therefore require to be progressively developed and codified.

The indivisibility and inter-dependence of human rights have 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. The satisfaction of economic, social and cultural rights are a major factor for the enjoyment of civil and political rights.

The primary responsibility for implementing 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, tradition, norms and values. Whilst the international community should be concerned about the observation of human rights, it should not seek to impose or influence the adoption of the criteria and system that are only suitable to some countries on developing countries. On the other hand, no states should manipulate its sovereignty to deny the inalienable rights of its citizens and expect silence from the international community.

The international cooperation is vital to the promotion of human rights. It is therefore important that states reaffirm their commitment to the principle of universality, objectivity and non-selectivity of all human rights as a just and balanced approach in this regard. Politicization of human rights, application of double standards, interference in the internal affairs of others are a challenge to the international cooperation in the field of human rights, and must be avoided.

The rule of law in the administration of justice is a pre-requisite to full enjoyment of human rights. The international community should reaffirm the significant role that administration of justice should play in the promotion and

protection of human rights as well as in the development process, and training, equipment and incentives should 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 necessary resources.

All states that have not already ratified or acceded to the international human rights convention should endeavour to do so in the course of the United Nations Decade of International Law. In doing so such states would be promoting the objectives of acceptance and respect for the principles of international law and also would ensure universal adherence to the international instruments which have set up norms covering a broad spectrum of human rights. This is of vital significance since despite the fact that most of the international conventions on human rights issues are in force, their status in terms of the number of states parties can scarcely be considered as widespread or universal. Regional human rights instruments should be employed to supplement concepts and norms enumerated in the universal instruments.

In every society, there is a class of persons who may require special consideration. The promotion and protection of human rights of vulnerable groups such as women, children, refugees, disabled, migrant workers, minorities and indigenous people should be given special attention and priority.

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 co-operation 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 both at national and international levels.

FINAL OUTCOME OF THE WORLD CONFERENCE

The World Conference on Human Rights adopted a three-part final document including a Preamble, a Declaration and a Programme of Action, as its final outcome. The document reflects the consensus of all member states participating in the Conference on a wide range of human rights issues and provides a worldwide programme of action for the promotion and protection of human rights in the years ahead. This document has been reproduced in this Chapter.

FOLLOW-UP TO THE WORLD CONFERENCE

The World Conference has recommended that the General Assembly, the Commission on Human Rights and other organs and agencies of the UN system relating to human rights should consider ways and means for the full implementation, without delay, of the recommendations contained in the final document of the Conference, including the possibility of proclaiming a United Nations Decade for Human Rights. The World Conference further recommended that the Commission on Human Rights should annually review the progress towards this end.

The World Conference also recommended to the General Assembly that while examining the report of the Conference at its forty-eight session, it should begin as a matter of priority consideration of the question of the establishment of a High Commissioner for Human Rights for the promotion and protection of all human rights.

The World Conference requested the Secretary General of the United Nations to invite on the occasion of the Fiftieth Anniversary of the Universal Declaration of Human Rights all states, all organs and agencies of the UN system related to human rights, to report to him on the progress made in the implementation of the final document to the Conference and to submit a report to the General Assembly at its fifty-third session, through the Commission on Human Rights and the Economic and Social Council. Likewise, regional and, as appropriate, national human rights institutions, as well as non-governmental organizations may present their views to the Secretary General of the United Nations on the progress made in the implementation of the final document of the Conference. Special attention should be paid to assessing the progress towards the goal of universal ratification of international human rights treaties and protocols adopted within the framework of the UN system.

Promotion of the Universal Acceptance of International Conventions on Human Rights

Since the adoption of the Universal Declaration of Human Rights by the General Assembly in 1948, remarkable progress has been made in the codification and development of international law in the field of human rights. Now there exist a large number of international human rights conventions on various subjects both at the global and regional levels. Among them are universal human rights standard—setting instruments such as International Covenant on Economic, Social and Cultural Rights, and International Covenant on Civil and Political Rights.

However, despite the fact that most of these conventions are in force, their status in terms of the number of states parties can scarcely be considered as universal. In many cases, the process of ratification of or accession to the various conventions has been very slow. The latest information shows that among all the 24 human rights conventions adopted under the framework of the United Nations, as on 1 May 1993, there was only one whose number of States parties was more than 70 per cent of the total states in the world. Thirteen conventions were ratified by less than 50 per cent of the member States. Reference to the member states of the AALCC indicated that in many cases the percentage of the ratification or accession is even below the global percentage. For details see the annex II to this brief.

Therefore the vital importance of the promotion for the universal acceptance of international human rights conventions cannot be overemphasized. All states who have not already ratified or acceded to the human rights conventions are encouraged to do so in the implementation of the final document of the World Conference on Human Rights and in the course of the UN Decade of International Law. For this purpose, fresh efforts should be made to seek ways and means of overcoming them.

It should be recalled that during the World Conference on Human Rights special attention was paid to the universal ratification of international human rights treaties. The text of final document of the conference contains a number of provisions and recommendations in this regard, the reference of which could be found at :

(i)	Para 14 part II
(ii)	Para 4 Section I, Part III
(iii)	Para 4 bis, Section 3, Part III
(iv)	Para 12 Part II
(v)	Para 3, Section II, B ter, Part III
(vi)	Para 4, Section II, C, Part III
(vii)	Para 1and 8 Section II, D Part III
(viii)	Para 2, Section VI, Part III

The member States of the AALCC may wish to address themselves to these urges, appeals, calls and recommendations of the World Conference in the implementation of the final document of the Conference.

It is the view of the Secretariat that the AALCC as a unique intergovernmental organization whose *raison d'etre* is the progressive development and codification of international law should respond to the call for the promotion of the universal acceptance of international human rights

conventions and play an important role in this regard. It is therefore suggested that the issue be taken up either under the item concerning the World Conference on Human Rights and its follow-up or the item of the UN Decade of International Law. It is further suggested that while considering the issue, the priority should be accorded to the following conventions : International Covenant on Economic, Social and Cultural Rights (1966), International Covenant on Civil and Political Rights (1966) and its two Optional Protocols (1966) (1989), International Convention on the Elimination of All Forms of Racial Discrimination (1966), Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (1984), Convention relating to the Status of Refugee (1951) and its Protocol (1967), Convention on the Elimination of All Forms of Discrimination against Women (1979), and Convention on the . Rights of the Child (1989). The special attention needs to be paid to identify obstacles and seek ways and means of overcoming them so as to promote the universal acceptance of international human rights conventions.

WORLD CONFERENCE ON HUMAN RIGHTS
(Vienna, 14-25 June 1993)

VIENNA DECLARATION AND PROGRAMME OF ACTION

Considering that the promotion and protection of human rights is a matter of priority for the international community, and that the Conference affords a unique opportunity to carry out a comprehensive analysis of the international human rights system and of the machinery for the protection of human rights, in order to enhance and thus promote a fuller observance of those rights, in a just and balanced manner,

Recognizing and affirming that all human rights derive from the dignity and worth inherent in the human person, and that the human person is the central subject of human rights and fundamental freedoms, and consequently should be the principal beneficiary and should participate actively in the realization of these rights and freedoms,

Reffirming their commitment to the purposes and principles contained in the Charter of the United Nations and the Universal Declaration of Human Rights,

Reffirming the commitment contained in Article 56 of the Charter of the United Nations to take joint and separate action, placing proper emphasis on developing effective international cooperation for the realization of the purposes set out in Article 55, including universal respect for, and observance of, human rights and fundamental freedoms for all,

Emphasizing the reponsibilities of all states, in conformity with the Charter of the United Nations, to develop and encourage respect for human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,

Recalling the Preamble to the Charter of the United Nations, in particular the determination to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women and of nations large and small,

Recalling also the determination expressed in the Preamble of the Charter

of the United Nations to save succeeding generations from the scourge of war, to establish conditions under which justice and respect for obligations arising from treaties and other sources of international law can be maintained, to promote social progress and better standards of life in larger freedom, to practice tolerance and good neighbourliness, and to employ international machinery for the promotion of the economic and social advancement of all peoples,

Emphasizing that the Universal Declaration of Human Rights, which constitutes a common standard of achievement for all peoples and all nations, is the source of inspiration and has been the basis for the United Nations in making advances in standard setting as contained in the existing international human rights instruments, in particular the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and cultural Rights,

Considering the major changes taking place on the international scene and the aspirations of all the peoples for an international order based on the principles enshrined in the Charter of the United Nations, including promoting and encouraging respect for human rights and fundamental freedoms for all and respect for the principle of equal rights and self-determination of peoples, peace, democracy, justice, equality, rule of law, pluralism, development, better standards of living and solidarity,

Deeply concerned by various forms of discrimination and violence, to which women continue to be exposed all over the world,

Recognizing that the activities of the United Nations in the field of human rights should be rationalized and enhanced in order to strengthen the United Nations machinery in this field and to further the objectives of universal respect for observance of international human rights standards,

Having taken into account the Declarations adopted by the three regional meetings at Tunis, San jose and Bangkok and the contributions made by Governments, and bearing in mind the suggestions made by intergovernmental and non-governmental organizations, as well as the studies prepared by independent experts during the preparatory process leading to the World Conference on Human Rights,

Welcoming the International Year of the World's Indigenous People 1993 as a reaffirmation of the commitment of the International community to ensure their enjoyment of all human rights and fundamental freedoms and to respect the value and diversity of their cultures and identities,

Recognizing also that the international community should devise ways

and means to remove the current obstacles and meet challenges to the full realization of all human rights and to prevent the continuation of human rights violations resulting thereof throughout the world,

Invoking the spirit of our age and the realities of our time which call upon the peoples of the world and all States Members of the United Nations to rededicate themselves to the global task of promoting and protecting all human rights and fundamental freedom so as to secure full and universal enjoyment of these rights,

Determined to take steps forward in the commitment of the international community with a view to achieving substantial progress in human rights endeavours by an increased and sustained effort of international cooperation and solidarity,

Solemnly adopts the Vienna Declaration and Programme of Action.

I

1. The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights and freedoms is beyond question.

In this framework, enhancement of international cooperation in the field of human rights is essential for the full achievement of the purposes of the United Nations.

Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments.

2. All peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development.

Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right.

In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole belonging to the territory without distinction of any kind.

3. Effective international measures to guarantee and monitor the implementation of human rights standards should be taken in respect of people under foreign occupation, and effective legal protection against the violation of their human rights should be provided, in accordance with human rights norms and international law, particularly the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 14 August 1949, and other applicable norms of humanitarian law.

4. The promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purposes and principles, in particular the purpose of international cooperation. In the framework of these purposes and principles, the promotion and protection of all human rights is a legitimate concern of the international community. The organs and specialized agencies related to human rights should therefore further enhance the coordination of their activities based on the consistent and objective application of international human rights instruments.

5. All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

6. The efforts of the United Nations system towards the universal respect for, and observance, of, human rights and fundamental freedoms for all, contribute to the stability and well-being necessary for peaceful and friendly relations among nations, and to improved conditions for peace and security as well as social and economic development, in conformity with the Charter of the United Nations.

7. The processes of promoting and protecting human rights should be conducted in conformity with the purposes and principles of the Charter of the United Nations, and international law.

8. Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. In the context of the above, the promotion and protection of human rights and fundamental freedoms at the national and international levels should be universal and conducted without conditions attached. The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world.

9. The World Conference on Human Rights reaffirms that least developed countries committed to the process of democratization and economic reforms, many of which are in Africa, should be supported by the international community in order to succeed in their transition to democracy and economic development.

10. The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights.

As stated in the Declaration on the Right to Development, the human person is the central subject of development.

While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights.

States should cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development.

Lasting progress towards the implementation of the right to development requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level.

11. The right to development should be fulfilled so as to meet equitably the

developmental and environmental needs of present and future generations. The World Conference on Human Rights recognizes that illicit dumping of toxic and dangerous substances and waste potentially constitutes a serious threat to the human rights to life and health of everyone.

Consequently, the World Conference on Human Rights calls on all States to adopt and vigorously implement existing conventions relating to the dumping of toxic and dangerous products and waste and to cooperate in the prevention of illicit dumping.

Everyone has the right to enjoy the benefits of scientific progress and its applications. The world Conference on Human Rights notes that certain advances, notably in the biomedical and life sciences as well as in information technology, may have potentially adverse consequences for the integrity, dignity and human rights of the individual, and calls for international cooperation to ensure that human rights and dignity are fully respected in this area of universal concern.

12. The World Conference on Human Rights calls upon the international community to make all efforts to help alleviate the external debt burden of developing countries, in order to supplement the efforts of the Governments of such countries to attain the full realization of the economic, social and cultural rights of their people.

13. There is a need for States and international organizations, in cooperation with non-governmental organizations, to create favourable conditions at the national, regional and international levels to ensure the full and effective enjoyment of human rights. States should eliminate all violations of human rights and their causes, as well as obstacles to the enjoyment of these rights.

14. The existence of widespread extreme poverty inhibits the full and effective enjoyment of human rights; its immediate alleviation and eventual elimination must remain a high priority for the international community.

15. Respect for human rights and for fundamental freedoms without distinction of any kind is a fundamental rule of international human rights law. The Speedy and comprehensive elimination of all forms of racism and racial discrimination, xenophobia and related intolerance is a priority task for the international community. Governments should take effective measures to prevent and combat them. Groups, institutions, intergovernmental and non-governmental organizations and individuals are urged to intensify their efforts in cooperating and coordinating their activities against these evils.

16. The World Conference on Human Rights welcomes the progress made in dismantling apartheid and calls upon the international community and the United Nations system to assist in this process.

The World Conference on Human Rights also deplores the continuing acts of violence aimed at undermining the quest for a peaceful dismantling of apartheid.

17. The acts, methods and practices of terrorism in all its forms and manifestations as well as linkage in some countries to drug trafficking are activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of States and destabilizing legitimately constituted Governments. The international community should take the necessary steps to enhance cooperation to prevent and combat terrorism.

18. The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community.

Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated. This can be achieved by legal measures and through national action and international cooperation in such fields as economic and social development, education, safe maternity and health care and social support.

The human rights of women should form an integral part of the United Nations human rights activities, including the promotion of all human rights instruments relating to women.

The World Conference on Human rights urges Governments, institutions, intergovernmental and non-governmental organizations to intensify their efforts for the protection and promotion of human rights of women and the girl-child.

19. Considering the importance of the promotion and protection of the rights of persons belonging to minorities and the contribution of such promotion and protection to the political and social stability of the States in which such persons live,

The World Conference on Human Rights reaffirms the obligation of States to ensure that persons belonging to minorities may exercise fully and effectively all human rights and fundamental freedoms without any discrimination and in full equality before the law in accordance with the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

The persons belonging to minorities have the right to enjoy their own culture, to profess and practise their own religion and to use their own language in private and in public, freely and without interference or any form of discrimination.

20. The World Conference on Human Rights recognizes the inherent dignity and the unique contribution of indigenous people to the development and plurality of society and strongly reaffirms the commitment of the international community to their economic, social and cultural well-being and their enjoyment of the fruits of sustainable development. States should ensure the full and free participation of indigenous people in all aspects of society, in particular in matters of concern to them. Considering the importance of the promotion and protection of the rights of indigenous people, and the contribution of such promotion and protection to the political and social stability of the States in which such people live, States should, in accordance with international law, take concerted positive steps to ensure respect for all human rights and fundamental freedoms of indigenous people, on the basis of equality and non-discrimination, and recognize the value and diversity of their distinct identities, cultures and social organization.

21. The World Conference on Human Rights, welcoming the early ratification of the Convention on the Rights of the Child by a large number of States and noting the recognition of the human rights of children in the World Declaration on the Survival, Protection and Development of Children and Plan of Action adopted by the World Summit for Children, urges universal ratification of the Convention by 1995 and its effective implementation by States parties through the adoption of all the necessary legislative, administrative and other measures and the allocation to the maximum extent of the available resources. In all actions concerning children, non-discrimination and the best interest of the child should be primary considerations and the views of the child given due weight. National and international mechanisms and programmes should be strengthened for the defence and protection of children, in particular, the girl-child, abandoned children, street children, economically and sexually exploited children, including through child pornography, child prostitution or sale of organs, children victims of diseases including acquired immunodeficiency syndrome, refugee and displaced

children, children in detention, children in armed conflict, as well as children victims of famine and drought and other emergencies. International cooperation and solidarity should be promoted to support the implementation of the Convention and the rights of the child should be a priority in the United Nations system-wide action on human rights.

The World Conference on Human Rights also stresses that the child for the full and harmonious development of his or her personality should grow up in a family environment which accordingly merits broader protection.

22. Special attention needs to be paid to ensuring non-discrimination, and the equal enjoyment of all human rights and fundamental freedoms by disabled persons, including their active participation in all aspects of society.

23. The World Conference on Human Rights reaffirms that everyone, without distinction of any kind, is entitled to the right to seek and to enjoy in other countries asylum from persecution, as well as the right to return to one's own country. In this respect it stresses the importance of the Universal Declaration of Human Rights, the 1951 Convention relating to the Status of Refugees, its 1967 Protocol and regional instruments. It expresses its appreciation to States that continue to admit and host large numbers of refugees in their territories, and to the Offfice of the United Nations High Commissioner for Refugees for its dedication to its task. It also expresses its appreciation to the United Nations Relief and Works Agency for Palestine Refugees in the Near East.

The World Conference on Human Rights recognizes that gross violations of human rights, including in armed conflicts, are among the multiple and complex factors leading to displacement of people.

The World Conference on Human Rights recognizes that, in view of the complexities of the global refugee crisis and in accordance with the Charter of the United Nations, relevant international instruments and international solidarity and in the spirit of burden-sharing, a comprehensive approach by the international community is needed in coordination and cooperation with the countries concerned and relevant organizations, bearing in mind the mandate of the United Nations High Commisssioner for Refugees. This should include the development of strategies to address the root causes and effects of movements of refugees and other displaced persons, the strengthening of emergency preparedness and response mechanisms, the provision of effective protection and assistance, bearing in mind the special needs of women and children, as well as the achievement of durable solutions, primarily through the preferred solution of dignified and safe voluntary repatriation, including solutions such as those adopted by the international refugee conferences. The

World Conference on Human Rights underlines the responsibilities of States, particularly as they relate to the countries of origin.

In the light of the comprehensive aproach, the World Conference on Human Rights emphasizes the importance of giving special attention including through intergovernmental and humanitarian organizations and finding lasting solutions to questions related to internally displaced persons including their voluntary and safe return and rehabilitation.

In accordance with the Charter of the United Nations and the principles of humanitarian law, the World Conference on Human Rights further emphasizes the importance of and the need for humanitarian assistance to victims of all natural and man-made disasters.

24. Great importance must be given to the promotion and protection of the human rights of persons belonging to groups which have been rendered vulnerable, including migrant workers, the elimination of all forms of discrimination against them, and the strengthening and more effective implementation of existing human rights instruments. States have an obligation to create and maintain adequate measures at the national level, in particular in the fields of education, health and social support, for the promotion and protection of the rights of persons in vulnerable sectors of their populations and to ensure the participation of those among them who are interested in finding a solution to their own problems.

25. The World Conference on Human Rights affirms that extreme poverty and social exclusion constitute a violation of human dignity and that urgent steps are necessary to achieve better knowledge of extreme poverty and its causes, including those related to the problem of development, in order to promote the human rights of the poorest, and to put an end to extreme poverty and social exclusion and to promote the enjoyment of the fruits of social progress. It is essential for States to foster participation by the poorest people in the decision-making process by the community in which they live, the promotion of human rights and efforts to combat extreme poverty.

26. The World Conference on Human Rights welcomes the progress made in the codification of human rights instruments, which is a dynamic and evolving process, and urges the universal ratification of human rights treaties. All States are encouraged to accede to these international instruments; all States are encouraged to avoid, as far as possible, the resort to reservations.

27. Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable

standards contained in international human rights instruments, are essential
the full and non-discriminatory realization of human rights and indispensable
to the processes of democracy and sustainable development. In this context,
institutions concerned with the administration of justice should be properly
funded, and an increased level of both technical and financial assistance should
be provided by the international community. It is incumbent upon the United
Nations to make use of special programmes of advisory services on a priority
basis for the achievement of a strong and independent administration of
justice.

28. The World Conference on Human Rights expresses its dismay at massive violations of human rights especially in the form of genocide, "ethnic cleansing" and systematic rape of women in war situations, creating mass exodus of refugees and displaced persons. While strongly condemning such abhorrent practices it reiterates the call that perpetrators of such crimes be punished and such practices immediately stopped.

29. The World Conference on Human Rights expresses grave concern about continuing human rights violations in all parts of the world in disregard of standards as contained in international human rights instrumets and international humanitarian law and about the lack of sufficient and effective remedies for the victims.

The World Conference on Human Rights is deeply concerned about violations of human rights during armed conflicts, affecting the civilian population, especially women, children, the elderly and the disabled. The Conference therefore calls upon States and all parties to armed conflicts strictly to observe international humanitarian law, as set forth in the Geneva Conventions of 1949 and other rules and principles of international law, as well as minimum standards for protection of human rights, as laid down in international conventions.

The World Conference on Human Rights reaffirms the right of the victims to be assisted by humanitarian organizations, as set forth in the Geneva Conventions of 1949 and other relevant instruments of international humanitarian law, and calls for the safe and timely access for such assistance.

30. The World Conference on Human Rights also expresses its dismay and condemnation that gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights continue to occur in different parts of the world. Such violations and obstacles include, as well as torture and cruel, inhuman and degrading treatment or punishment, summary and arbitrary executions, disappearances, arbitrary detentions, all forms of racism, racial discrimination and apartheid, foreign occupation and

alien domination, xenophobia, poverty, hunger and other denials of economic, social and cultural rights, religious intolerance, terrorism, discrimination against women and lack of the rule of law.

31. The World Conference on Human Rights calls upon States to refrain from any unilateral measure not in accordance with international law and the Charter of the United Nations that creates obstacles to trade relations among States and impedes the full realization of the human rights set forth in the Universal Declaration of Human Rights and international human rights instruments, in particular the rights of everyone to a standard of living adequate for their health and well-being, including food and medical care, housing and the necessary social services. The World Conference on Human Rights affirms that food should not be used as a tool for political pressure.

32. The World Conference on Human Rights reaffirms the importance of ensuring the universality, objectivity and non-selectivity of the consideration of human rights issues.

33. The World Conference on Human Rights reaffirms that States are duty-bound, as stipulated in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights and in other international human rights instruments, to ensure that education is aimed at strengthening the respect of human rights and fundamental freedoms. The World Conference on Human Rights emphasizes the importance of incorporating the subject of human rights education programmes and calls upon States to do so. Education should promote understanding, tolerance, peace and friendly relations between the nations and all racial or religious groups and encourage the development of United Nations activities in pursuance of these objectives. Therefore, education on human rights and the dissemination of proper information, both theoretical and practical, play an important role in the promotion and respect of human rights with regard to all individuals without distinction of any kind such as race, sex, language or religion, and this should be integrated in the education policies at the national as well as international levels. The World Conference on Human Rights notes that resource constraints and institutional inadequacies may impede the immediate realization of these objectives.

34. Increased efforts should be made to assist countries which so request to create the conditions whereby each individual can enjoy universal human rights and fundamental freedoms. Governments, the United Nations system as well as other multilateral organizations are urged to increase considerably the resources allocated to programmes aiming at the establishment and strengthening of national legislation, national institutions and related infrastructures

which uphold the rule of law and democracy, electoral assistance, human rights awareness through training, teaching and education, popular participation and civil society.

The programmes of advisory services and technical cooperation under the Centre for Human Rights should be strengthened as well as made more efficient and transparent and thus become a major contribution to improving respect for human rights. States are called upon to increase their contributions to these programmes, both through promoting a larger allocation from the United Nations regular budget, and through voluntary contributions.

35. The full and effective implementation of United Nations activities to promote and protect human rights must reflect the high importance accorded to human rights by the Charter of the United Nations and the demands of the United Nations human rights activities, as mandated by Member States. To this end, United Nations human rights activities should be provided with increased resources.

36. The World Conference on Human Rights reaffirms the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information, and education in human rights.

The World Conference on Human Rights encourages the establishment and strengthening of national institutions, having regard to the "Principles relating to the status of national institutions" and recognizing that it is the right of each State to choose the framework which is best suited to its particular needs at the national level.

37. Regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international human rights instruments, and their protection. The World Conference on Human Rights endorses efforts under way to strengthen these arrangements and to increase their effectiveness, while at the same time stressing the importance of cooperation with the United Nations human rights activities.

The World Conference on Human Rights reiterates the need to consider the possibility of establishing regional and subregional arrangements for the promotion and protection of human rights where they do not already exist.

38. The World Conference on Human Rights recognizes the important role of non-governmental organizations in the promotion of all human rights and in humanitarian activities at national, regional and international levels. The

World Conference on Human Rights appreciates their contribution to increasing public awareness of human rights issues, to the conduct of education, training and research in this field, and to the promotion and protection of all human rights and fundamental freedoms. While recognizing that the primary responsibility for standard-setting lies with States, the conference also appreciates the contribution of non-governmental organizations to this process. In this respect, the World Conference on Human Rights emphasizes the importance of continued dialogue and cooperation between Governments and non-governmental organizations. Non-governmental organizations and their members genuinely involved in the field of human rights should enjoy the rights and freedoms recognized in the Universal Declaration of Human Rights, and the protection of the national law. These rights and freedoms may not be exercised contrary to the purposes and principles of the United Nations. Non-governmental organizations should be free to carry out their human rights activities, without interference, within the framework of national law and the Universal Declaration of Human Rights.

39. Underlining the importance of objective, responsible and impartial information about human rights and humanitarian issues, the World Conference on Human Rights encourages the increased involvement of the media, for whom freedom and protection should be guaranteed within the framework of national law.

II

A. Increased coordination on human rights within the United Nations system

1. The World Conference on Human Rights recommends increased coordination in support of human rights and fundamental freedoms within the United Nations system. To this end, the World Conference on Human Rights urges all United Nations organs, bodies and the specialized agencies whose activities deal with human rights to cooperate in order to strengthen, rationalize and streamline their activities, taking into account the need to avoid unnecessary duplication. The World Conference on Human Rights also recommends to the Secretary-General that high-level officials of relevant United Nations bodies and specialized agencies at their annual meeting, besides coordinating their activities, also assess the impact of their strategies and policies on the enjoyment of all human rights.

2. Furthermore, the World Conference on Human Rights calls on regional organizations and prominent international and regional finance and development institutions to assess also the impact of their policies and programmes on the enjoyment of human rights.

3. The World Conference on Human Rights recognizes that relevant specialized agencies and bodies and institutions of the United Nations system as well as other relevant intergovernmental organizations whose activities deal with human rights play a vital role in the formulation, promotion and implementation of human rights standards, within their respective mandates, and should take into account the outcome of the World Conference on Human Rights within their fields of competence.

4. The World Conference on Human Rights strongly recommends that a concerted effort be made to encourage and facilitate the ratification of and accession or succession to international human rights treaties and protocols adopted within the framework of the United Nations system with the aim of universal acceptance. The Secretary-General, in consultation with treaty bodies, should consider opening a dialogue with States not having acceded to these human rights treaties, in order to identify obstacles and to seek ways of overcoming them.

5. The World Conference on Human Rights encourages States to consider limiting the extent of any reservations they lodge to international human rights instruments, formulate any reservations as precisely and narrowly as possible, ensure that none is incompatible with the object and purpose of the relevant treaty and regularly review any reservations with a view to withdrawing them.

6. The World Conference on Human Rights, recognizing the need to maintain consistency with the high quality of existing international standards and to avoid proliferation of human rights instruments, reaffirms the guidelines relating to the elaboration of new international instruments contained in General Assembly resolution 41/120 of 4 December 1986 and calls on the United Nations human rights bodies, when considering the elaboration of new international standards, to keep those guidelines in mind, to consult with human rights treaty bodies on the necessity for drafting new standards and to request the Secretariat to carry out technical reviews of proposed new instruments.

7. The World Conference on Human Rights recommends that human rights officers be assigned if and when necessary to regional offices of the United Nations Organization with the purpose of disseminating information and offering training and other technical assistance in the field of human rights upon the request of concerned Member States. Human rights training for international civil servants who are assigned to work relating to human rights should be organized.

8. The World Conference on Human Rights welcomes the convening of

emergency sessions of the Commission on Human Rights as a positive initiative and that other ways of responding to acute violations of human rights be considered by the relevant organs of the United Nations system.

Resources

9. The World Conference on Human Rights, concerned by the growing disparity between the activities of the Centre for Human Rights and the human, financial and other resources available to carry them out, and bearing in mind the resources needed for other important United Nations programmes, requests the Secretary-General and the General Assembly to take immediate steps to increase substantially the resources for the human rights programme from within the existing and future regular budgets of the United Nations, and to take urgent steps to seek increased extrabudgetary resources.

10. Within this framework, an increased proportion of the budget should be allocated directly to the Centre for Human Rights to cover its costs and all other costs borne by the Centre for Human Rights, including those related to the United Nations human rights bodies. Voluntary funding of the Centre's technical cooperation activities should reinforce this enhanced budget; the World Conference on Human Rights calls for generous contributions to the existing trust funds.

11. The World Conference on Human Rights requests the Secretary-General and the General Assembly to provide sufficient human, financial and other resources to the Centre for Human Rights to enable it effectively, efficiently and expeditiously to carry out its activities.

12. The World Conference on Human rights, noting the need to ensure that human and financial resources are available to carry out the human rights activities, as mandated by intergovernmental bodies, urges the Secretary-General, in accordance with Article 101 of the Charter of the United Nations, and Member States to adopt a coherent approach aimed at securing that resources commensurate to the increased mandates are allocated to the Secretariat. The World Conference on Human Rights invites the Secretary-General to consider whether adjustments to procedures in the programme budget cycle would be necessary or helpful to ensure the timely and effective implementation of human rights activities as mandated by Member States.

Centre for Human Rights

13. The World Conference on Human Rights stresses the importance of strengthening the United Nations Centre for Human Rights.

14. The Centre for Human Rights should play an important role in coordinating system-wide attention for human rights. The focal role of the Centre can best be realized if it is enabled to cooperate fully with other United Nations bodies and organs. The coordinating role of the Centre for Human Rights also implies that the office of the Centre for Human Rights in New York is strengthened.

15. The Centre for Human Rights should be assured adequate means for the system of thematic and country rapporteurs, experts, working groups and treaty bodies. Follow-up on recommendations should become a priority matter for consideration by the Commission on Human Rights.

16. The Centre for Human Rights should assume a larger role in the promotion of human rights. This role could be given shape through cooperation with Member States and by an enhanced programme of advisory services and technical assistance. The existing voluntary funds will have to be expanded substantially for these purposes and should be managed in a more efficient and coordinated way. All activities should follow strict and transparent project management rules and regular programme and project evaluations should be held periodically. To this end, the results of such evaluation exercises and other relevant information should be made available regularly. The Centre should, in particular, organize at least once a year information meetings open to all Members States and organizations directly involved in these projects and programmes.

Adaptation and strengthening of the United Nations machinery for human rights, including the question of the establishment of a United Nations High Commissioner for Human Rights

17. The World Conference on Human Rights recognizes the necessity for a continuing adaptation of the United Nations human rights machinery to the current and future needs in the promotion and protection of human rights, as reflected in the present Declaration and within the framework of a balanced and sustainable development for all people. In particular, the United Nations human rights organs should improve their coordination, efficiency and effectiveness.

18. The World Conference on Human Rights recommends to the General Assembly that when examining the report of the Conference at its forty-eighth session, it begin, as a matter of priority, consideration of the question fo the establishment of a High Commissioner for Human Rights for the promotion and protection of all human rights.

B. Equality, dignity and tolerance

1. Racism, racial discrimination, xenophobia and other forms of intolerance

19. The World Conference on Human Rights considers the elimination of racism and racial discrimination, in particular in their institutionalized forms such as apartheid or resulting from doctrines of racial superiority or exclusivity or contemporary forms and manifestations of racism, as a primary objective for the international community and a worldwide promotion programme in the field of human rights. United Nations organs and agencies should strengthen their efforts to implement such a programme of action related to the third decade to combat racism and racial discrimination as well as subsequent mandates to the same end. The World Conference on Human Rights strongly appeals to the international community to contribute generously to the Trust Fund for the Programme for the Decade for Action to Combat Racism and Racial Discrimination.

20. The World Conference on Human Rights urges all Governments to take immediate measures and to develop strong policies to prevent and combat all forms and manifestations of racism, xenophobia or related intolerance, where necessary by enactment of appropriate legislation, including penal measures, and by the establishment of national institutions to combat such phenomena.

21. The World Conference on Human Rights welcomes the decision of the Commission on Human Rights to appoint a Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance. The World Conference on Human Rights also appeals to all States parties to the International Convention on the Elimination of All Forms of Racial Discrimination to consider making the declaration under article 14 of the Convention.

22. The World Conference of Human Rights calls upon all Governments to take all appropriate measures in compliance with their international obligations and with due regard to their respective legal systems to counter intolerance and related violence based on religion or belief, including practices of discrimination against women and including the desecration of religious sites, recognizing that every individual has the right to freedom of thought, conscience, expression and religion. The Conference also invites all States to put into practice the provisions of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

23. The World Conference on Human Rights stresses that all persons who

perpetrate or authorize criminal acts associated with ethnic cleansing are individually responsible and accountable for such human rights violations, and that the international community should exert every effort to bring those legally responsible for such violations to justice.

24. The World Conference on Human Rights calls on all States to take immediate measures, individually and collectively, to combat the practice of ethnic cleansing to bring it quickly to an end. Victims of the abhorrent practice of ethnic cleansing are entitled to appropriate and effective remedies.

2. Persons belonging to national or ethnic, religious and linguistic minorities

25. The World Conference on Human Rights calls on the Commission on Human Rights to examine ways and means to promote and protect effectively the rights of persons belonging to minorities as set out in the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities. In this context, the World Conference on Human Rights calls upon the Centre for Human Rights to provide, at the request of Governments concerned and as part of its programme of advisory services and technical assistance, qualified expertise on minority issues and human rights, as well as on the prevention and resolution of disputes, to assist in existing or potential situations involving minorities.

26. The World Conference on Human Rights urges States and the international community to promote and protect the rights of persons belonging to national or ethnic, religious and linguistic minorities in accordance with the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities.

27. Measures to be taken, where appropriate, should include facilitation of their full participation in all aspects of the political, economic, social, religious and cultural life of society and in the economic progress and development in their country.

Indigenous people

28. The World Conference on Human Rights calls on the Working Group on Indigenous Populations of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to complete the drafting of a declaration on the rights of indigenous people at its eleventh session.

29. The World Conference on Human Rights recommends that the Commission on Human Rights consider the renewal and updating of the mandate of the

Working Group on Indigenous Populations upon completion of the drafting of a declaration on the rights of indigenous people.

30. The World Conference on Human Rights also recommends that advisory services and technical assistance programmes within the United Nations system respond positively to requests by States for assistance which would be of direct benefit to indegenous people. The World Conference on Human Rights further recommends that adequate human and financial resources be made available to the Centre for Human Rights within the overall framework of strengthening the Centre's activities as envisaged by this document.

31. The World Conference on Human Rights urges States to ensure the full and free participation of indigenous people in all aspects of society, in particular in matters of concern to them.

32. The World Conference on Human Rights recommends that the General Assembly proclaim an international decade of the world's indigenous people, to begin from January 1994, including action-orientated programmes, to be decided upon in partnership with indigenous people. An appropriate voluntary trust fund should be set up for this purpose. In the framework of such a decade, the establishment of a permanent forum for indigenous people in the United Nations system should be considered.

Migrant workers

33. The World Conference on Human Rights urges all States to guarantee the protection of the human rights of all migrant workers and their families.

34. The World Conference on Human Rights considers that the creation of conditions to foster greater harmony and tolerance between migrant workers and the rest of the society of the State in which they reside is of particular importance.

35. The World Conference on Human Rights invites States to consider the possibility of signing and ratifying, at the earliest possible time, the International Convention on the Rights of All Migrant Workers and Members of Their Families.

3. The equal status and human rights of women

36. The World Conference on Human Rights urges the full and equal enjoyment by women of all human rights and that this be a priority for Governments and for the United Nations. The World Conference on Human Rights also underlines the importance of the integration and full participation of women as both agents and beneficiaries in the development process, and

reiterates the objectives established on global action for women towards sustainable and equitable development set forth in the Rio Declaration on Environment and Development and chapter 24 of Agenda 21, adopted by the United Nations Conference on Environment and Development (Rio de Janeiro, Brazil, 3-14 June 1992).

37. The equal status of women and the human rights of women should be integrated into the mainstream of United Nations system-wide activity. These issues should be regularly and systematically addressed throughout relevant United Nations bodies and mechanisms. In particular, steps should be taken to increase cooperation and promote further integration of objectives and goals between the Commission on the Status of Women, the Commission on Human Rights, the Committee for the Elimination of Discrimination against Women, the United Nations Development Fund for Women, the United Nations Development Programme and other United Nations agencies. In this context, cooperation and coordination should be strengthened between the Centre for Human Rights and the Division for the Advancement of Women.

38. In particular, the World Conference on Human Rights stresses the importance of working towards the elimination of violence agaisnt women in public and private life, the elimination of all forms of sexual harassment, exploitation and trafficking in women, the elimination of gender bias in the administration of justice and the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism. The World Conference on Human Rights calls upon the General Assembly to adopt the draft declaration on violence against women and urges States to combat violence against women in accordance with its provisions. Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response.

39. The World Conference on Human Rights urges the eradication of all forms of discrimination against women, both hidden and overt. The United Nations should encourage the goal of universal ratification by all States of the Convention on the Elimination of All Forms of Discrimination against Women by the year 2000. Ways and means of addressing the particularly large number of reservations to the Convention should be encouraged. *Inter alia*, the Committee on the Elimination of Discrimination against Women should continue its review of reservations to the Convention. States are urged to

withdraw reservations that are contrary to the object and purpose of the Convention or which are otherwise incompatible with international treaty law.

40. Treaty monitoring bodies should disseminate necessary information to enable women to make more effective use of existing implementation procedures in their pursuits of full and equal enjoyment of human rights and non-discrimination. New procedures should also be adopted to strengthen implementation of the commitment to women's equality and the human rights of women. The Commission on the Status of Women and the Committee on the Elimination of Discrimination against Women should quickly examine the possibility of introducing the right of petition through the preparation of an optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women. The World Conference on Human Rights welcomes the decision of the Commission on Human Rights to consider the appointment of a special rapporteur on violence against women at its fiftieth session.

41. The World Conference on Human Rights recognizes the importance of the enjoyment by women of the highest standard of physical and mental health throughout their life span. In the context of the World Conference on Women and the Convention on the Elimination of All Forms of Discrimination against Women, as well as the Proclamation of Tehran of 1968, the World Conference on Human Rights reaffirms, on the basis of equality between women and men, a woman's right to accessible and adequate health care and the widest range of family planning services, as well as equal access to education at all levels.

42. Treaty monitoring bodies should include the status of women and the human rights of women in their deliberations and findings, making use of gender-specific data. States should be encouraged to supply information on the situation of women *de jure* and *de facto* in their reports to treaty monitoring bodies. The World Conference on Human Rights notes with satisfaction that the Commission on Human Rights adopted at its forty-ninth session resolution 1993/46 of 8 March 1993 stating that rapporteurs and working groups in the field of human rights should also be encouraged to do so. Steps should also be taken by the Division for the Advancement of Women in cooperation with other United Nations bodies, specifically the Centre for Human Rights, to ensure that the human rights activities of the United Nations regularly address violations of women's human rights, including gender-specific abuses. Training for United Nations human rights and humanitarian relief personnel to assist them to recognize and deal with human rights abuses particular to women and to carry out their work without gender bias should be encouraged.

43. The World Conference on Human Rights urges governments and regional and international organizations to facilitate the access of women to decision-making posts and their greater participation in the decision-making process. It encourages further steps within the United Nations Secretariat to appoint and promote women staff members in accordance with the Charter of the United Nations, and encourages other principal and subsidiary organs of the United Nations to guarantee the participation of women under conditions of equality.

44. The World Conference on Human Rights welcomes the World Conference on Women to be held in Beijing in 1995 and urges that human rights of women should play an important role in its deliberations, in accordance with the priority themes of the World Conference on Women of equality, development and peace.

4. The rights of the child

45. The World Conference on Human Rights reiterates the principle of "First Call for Children" and, in this respect, underlines the importance of major national and international efforts, especially those of the United Nations Children's Fund, for promoting respect for the rights of the child to survival, protection, development and participation.

46. Measures should be taken to achieve universal ratification of the Convention on the Rights of the Child by 1995 and the universal signing of the World Declaration on the Survival, Protection and Development of Children and Plan of Action adopted by the World Summit for Children, as well as their effective implementation. The World Conference on Human Rights urges States to withdraw reservations to the convention on the Rights of the Child contrary to the object and purpose of the Convention or otherwise contrary to international treaty law.

47. The World Conference on Human Rights urges all nations to undertake measures to the maximum extent of their available resources, with the support of international cooperation, to achieve the goals in the World Summit Plan of Action. The Conference calls on States to integrate the Convention on the Rights of the Child into their national action plans. By means of these national action plans and through international efforts, particular priority should be placed on reducing infant and maternal mortality rates, reducing malnutrition and illiteracy rates and providing access to safe drinking water and to basic education. Whenever so called for, national plans of action should be devised to combat devastating emergencies resulting from natural disasters and armed conflicts and the equally grave problem of children in extreme poverty.

48. The World Conference on Human Rights urges all States, with the support of international cooperation, to address the acute problem of children under especially difficult circumstances. Exploitation and abuse of children should be actively combated, including by addressing their root causes. Effective measures are required agaisnt female infanticide, harmful child labour, sale of children and organs, child prostitution, child pornography, as well as other forms of sexual abuse.

49. The World Conference on Human Rights supports all measures by the United Nations and its specialized agencies to ensure the effective protection and promotion of human rights of the girl child. The World Conference on Human Rights urges States to repeal existing laws and regulations and remove customs and practices which discriminate against and cause harm to the girl child.

50. The World Conference on Human Rights strongly supports the proposal that the Secretary-General initiate a study into means of improving the protection of children in armed conflicts. Humanitarian norms should be implemented and measures taken in order to protect and facilitate assistance to children in war zones. Measures should include protection for children against indiscriminate use of all weapons of war, especially anti-personnel mines. The need for aftercare and rehabilitation of children traumatized by war must be addressed urgently. The Conference calls on the Committee on the Rights of the Child to study the question of raising the minimum age of recruitment into armed forces.

51. The World Conference on Human Rights recommends that matters relating to human rights and the situation of children be regularly reviewed and monitored by all relevant organs and mechanisms of the United Nations system and by the supervisory bodies of the specialized agencies in accordance with their mandates.

52. The World Conference on Human Rights recognizes the important role played by non-governmental organizations in the effective implementation of all human rights instruments and, in particular, the Convention on the Rights of the Child.

53. The World Conference on Human Rights recommends that the committee on the Rights of the Child, with the assistance of the Centre for Human Rights, be enabled expeditiously and effectively to meet its mandate, especially in view of the unprecedented extent of ratification and subsequent submission of country reports.

5. Freedom from torture

54. The World Conference on Human Rights welcomes the ratification by many Member States of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and encourages its speedy ratification by all other Member States.

55. The World Conference on Human Rights emphasizes that one of the most atrocious violations against human dignity is the act of torture, the result of which destroys the dignity and impairs the capability of victims to continue their lives and their activities.

56. The World Conference on Human Rights reaffirms that under human rights law and international humanitarian law, freedom from torture is a right which must be protected under all circumstances, including in times of internal or international disturbance or armed conflicts.

57. The World Conference on Human Rights therefore urges all States to put an immediate end to the practice of torture and eradicate this evil forever through full implementation of the Universal Declaration of Human Rights as well as the relevant convention and, where necessary, strengthening of existing mechanisms. The World Conference on Human Rights calls on all States to corporate fully with the Special Rapporteur on the question of torture in the fulfilment of his mandate.

58. Special attention should be given to ensure universal respect for, and effective implementation of, the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations.

59. The World Conference on Human Rights stresses the importance of further concrete action within the framework of the United Nations with the view to providing assistance to victims of torture and ensure more effective remedies for their physical, and social rehabilitation. Providing the necessary resources for this purpose should be given high priority, *inter alia*, by additional contributions to the United Nations Voluntary Fund for the Victims of Torture.

60. States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law.

61. The World Conference on Human Rights reaffirms that efforts to

eradicate torture should, first and foremost, be concentrated on prevention and, therefore, calls for the early adoption of an optional protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, which is intended to establish a preventive system of regular visits to places of detention.

Enforced disappearances

62. The World Conference on Human Rights, welcoming the adoption by the General Assembly of the Declaration on the Protection of All Persons from Enforced Disappearance, calls upon all States to take effective legislative, administrative, judicial or other measures to prevent, terminate and punish acts of enforced disappearances. The World Conference on Human Rights reaffirms that it is the duty of all States, under any circumstances, to make investigations whenever there is reason to believe that an enforced disappearance has taken place on a territory under their jurisdiction and, if allegations are confirmed, to prosecute its perpetrators.

6. The rights of the disabled person

63. The World Conference on Human Rights reaffirms that all human rights and fundamental freedoms are universal and thus unreservedly include persons with disabilities. Every person is born equal and has the same rights to life and welfare, education and work, living independently and active participation in all aspects of society. Any direct discrimination or other negative discriminatory treatment of a disabled person is therefore a violation of his or her rights. The World Conference on Human Rights calls on Governments, where necessary, to adopt or adjust legislation to assure access to these and other rights for disabled persons.

64. The place of disabled persons is everywhere. Persons with disabilities should be guaranteed equal opportunity through the elimination of all socially determined barriers, be they physical, financial, social or psychological, which exclude or restrict full participation in society.

65. Recalling the World Programme of Action concerning Disabled Persons, adopted by the General Assembly at its thirty-seventh session, the World Conference on Human Rights calls upon the General Assembly and the Economic and Social Council to adopt the draft standard rules on the equalization of opportunities for persons with disabilities, at their meetings in 1993.

C. Cooperation, development and strengthening of human rights

66. The World Conference on Human Rights recommends that priority be

given to national and international action to promote democracy, development and human rights.

67. Special emphasis should be given to measures to assist in the strengthening and building of institutions relating to human rights, strengthening of a pluralistic civil society and the protection of groups which have been rendered vulnerable. In this context, assistance provided upon the request of Governments for the conduct of free and fair elections, including assistance in the human rights aspects of elections and public information about elections, is of particular importance. Equally important is the assistance to be given to the strengthening of the rule of law, the promotion of freedom of expression and the administration of justice, and to the real and effective participation of the people in the decision-making processes.

68. The World Conference on Human Rights stresses the need for the implementation of strengthened advisory services and technical assistance activities by the Centre for Human Rights. The Centre should make available to States upon request assistance on specific human rights issues, including the preparation of reports under human rights treaties as well as for the implementation of coherent and comprehensive plans of action for the promotion and protection of human rights. Strengthening the institutions of human rights and democracy, the legal protection of human rights, training of officials and others, broad-based education and public information aimed at promoting respect for human rights should all be available as components of these programmes.

69. The World Conference on Human Rights strongly recommends that a comprehensive programme be established within the United Nations in order to help States in the task of building and strengthening adequate national structures which have a direct impact on the overall observance of human rights and the maintenance of the rule of law. Such a programme, to be coordinated by the Centre for Human Rights, should be able to provide, upon the request of the interested Government, technical and financial assistance to national projects in reforming penal and correctional establishments, education and training of lawyers, judges and security forces in human rights, and any other sphere of activity relevant to the good functioning of the rule of law. That programme should make available to States assistance for the implementation of plans of action for the promotion and protection of human rights.

70. The World Conference on Human Rights requests the Secretary-General of the United Nations to submit proposals to the United Nations General Assembly, containing alternatives for the establishment, structure, operational modalities and funding of the proposed programme.

71. The World Conference on Human Rights recommends that each State consider the desirability of drawing up a national action plan identifying steps whereby that State would improve the promotion and protection of human rights.

72. The World Conference on Human Rights reaffirms that the universal and inalienable right to development, as established in the Declaration on the Right to Development, must be implemented and realized. In this context, the World Conference on Human Rights welcomes the appointment by the Commission on Human Rights of a thematic working group on the right to development and urges that the Working Group, in consultation and cooperation with other organs and agencies of the United Nations system, promptly formulate, for early consideration by the United Nations General Assembly, comprehensive and effective measures to eliminate obstacles to the implementation and realization of the Declaration on the Right to Development and recommending ways and means towards the realization of the right to development by all States.

73. The World Conference on Human Rights recommends that non-governmental and other grass-roots organizations active in development and/or human rights should be enabled to play a major role on the national and international levels in the debate, activities and implementation relating to the right to development and, in cooperation with Governments, in all relevant aspects of development cooperation.

74. The World Conference on Human Rights appeals to Governments, competent agencies and institutions to increase considerably the resources devoted to building well-functioning legal systems able to protect human rights, and to national institutions working in this area. Actors in the field of development cooperation should bear in mind the mutually reinforcing interrelationship between development, democracy and human rights. Cooperation should be based on dialogue and transparency. The World Conference on Human Rights also calls for the establishment of comprehensive programmes, including resource banks of information and personnel with expertise relating to the strengthening of the rule of law of democratic institutions.

75. The World Conference on Human Rights encourages the Commission on Human Rights, in cooperation with the Committee on Economic, Social and Cultural Rights, to continue the examination of optional protocols to the International Covenant on Economic, Social and Cultural Rights.

76. The World Conference on Human Rights recommends that more resources be made available for the strengthening or the establishment of

regional arrangements for the promotion and protection of human rights under the programmes of advisory services and technical assistance for such purposes as regional and subregional workshops, seminars and information exchanges designed to strengthen regional arrangements for the promotion and protection of human rights in accord with universal human rights standards as contained in international human rights instruments.

77. The World Conference on Human Rights supports all measures by the United Nations and its relevant specialized agencies to ensure the effective promotion and protection of trade union rights, as stipulated in the International Covenant on Economic, Social and Cultural Rights and other relevant international instruments. It calls on all States to abide fully by their obligations in this regard contained in international instruments.

D. Human rights education

78. The World Conference on Human Rights considers human rights education, training and public information essential for the promotion and achievement of stable and harmonious relations among communities and for fostering mutual understanding, tolerance and peace.

79. States should strive to eradicate illiteracy and should direct education towards the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. The World Conference on Human Rights calls on all States and institutions to include human rights, humanitarian law, democracy and rule of law as subjects in the curricula of all learning institutions in formal and non-formal settings.

80. Human rights education should include peace, democracy, development and social justice, as set forth in International, and regional human rights instruments, in order to achieve common understanding and awareness with a view to strengthening universal commitment to human rights.

81. Taking into account the World Plan of Action on Education for Human Rights and Democracy, adopted in March 1993 by the International Congress on Education for Human Rights and Democracy of the United Nations Educational, Scientific and Cultural Organization, and other human rights instruments, the World Conference on Human Rights recommends that States develop specific programmes and strategies for ensuring the widest human rights education and the dissemination of public information, taking particular account of the human rights needs of women.

82. Governments, with the assistance of intergovernmental organizations, national institutions and non-governmental organizations, should promote an

increased awareness of human rights and mutual tolerance. The World Conference on Human Rights underlines the importance of strengthening the World Public Information Campaign for Human Rights carried out by the United Nations. They should initiate and support education in human rights and undertake effective dissemination of public information in this field. The advisory services and technical assistance programmes of the United Nations system should be able to respond immediately to requests from States for educational and training activities in the field of human rights as well as for special education concerning standards as contained in international human rights instruments and in humanitarian law and their application to special groups such as military forces, law enforcement personnel, police and the health profession. The proclamation of a United Nations decade for human rights education in order to promote, encourage and focus these educational activities should be considered.

E. Implementation and monitoring methods

83. The World Conference on Human Rights urges governments to incorporate standards as contained in international human rights instruments in domestic legislation and to strengthen national structures, institutions and organs of society which play a role in promoting and safeguarding human rights.

84. The World Conference on Human Rights recommends the strengthening of United Nations activities and programmes to meet requests for assistance by states which want to establish or strengthen their own national institutions for the promotion and protection of human rights.

85. The World Conference on Human Rights also encourages the strengthening of cooperation between national institutions for the promotion and protection of human rights, particularly through exchanges of information and experience, as well as cooperation with regional organizations and the United Nations.

86. The World Conference on Human Rights strongly recommends in this regard that representatives of national institutions for the promotion and protection of human rights convene periodic meetings under the auspices of the Centre for Human Rights to examine ways and means of improving their mechanisms and sharing experiences.

87. The World Conference on Human Rights recommends to the human rights treaty bodies, to the meetings of chairpersons of the treaty bodies and to the meetings of States parties that they continue to take steps aimed at coordinating the multiple reporting requirements and guidelines for preparing

State reports under the respective human rights conventions and study the suggestion that the submission of one overall report on treaty obligations undertaken by each State would make these procedures more effective and increase their impact.

88. The World Conference on Human Rights recommends that the States parties to international human rights instruments, the General Assembly and the Economic and Social Council should consider studying the existing human rights treaty bodies and the various thematic mechanisms and procedures with a view to promoting greater efficiency and effectiveness through better coordination of the various bodies, mechanisms and procedures, taking into account the need to avoid unnecessary duplication and overlapping of their mandates and tasks.

89. The World Conference on Human Rights recommends continued work on the improvement of the functioning, including the monitoring tasks, of the treaty bodies, taking into account multiple proposals made in this respect, in particular those made by the treaty bodies. The comprehensive national approach taken by the Committee on the Rights of the Child should also be encouraged.

90. The World Conference on Human Rights recommends that States parties to human rights treaties consider accepting all the available optional communication procedures.

91. The World Conference on Human Rights views with concern the issue of impunity of perpetrators of human rights violations, and supports the efforts of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities to examine all aspects of the issue.

92. The World Conference on Human Rights recommends that the Commission on Human Rights examine the possibility for better implemetation of existing human rights instruments at the international and regional levels and encourages the International Law Commission to continue its work on an international criminal court.

93. The World Conference on Human Rights appeals to States which have not yet done so to accede to the Geneva Conventions of 12 August 1949 and the Protocols thereto, and to take all appropriate national measures, including legislative ones, for their full implementation.

94. The World Conference on Human Rights recommends the speedy completion and adoption of the draft declaration on the right and responsibility

of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms.

95. The World Conference on Human Rights underlines the importance of preserving and strengthening the system of special procedures, rapporteurs, representatives, experts and working groups of the Commission on Human Rights and the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, in order to enable them to carry out their mandates in all countries throughout the world, providing them with the necessary human and financial resources. The procedures and mechanisms should be enabled to harmonize and rationalize their work through periodic meetings. All States are asked to cooperate fully with these procedures and mechanisms.

96. The World Conference on Human Rights recommends that the United Nations assume a more active role in the promotion and protection of human rights in ensuring full respect for international humanitarian law in all situations of armed conflict, in accordance with the purposes and principles of the Charter of the United Nations.

97. The World Conference on Human Rights, recognizing the important role of human rights components in specific arrangements concerning some peace-keeping operations by the United Nations, recommends that the Secretary-General take into account the reporting, experience and capabilities of the Centre for Human Rights and human rights mechanisms, in conformity with the Charter of the United Nations.

98. To strengthen the enjoyment of economic, social and cultural rights, additional approaches should be examined, such as a system of indicators to measure progress in the realization of the rights set forth in the International Covenant on Economic, Social and Cultural Rights. There must be a concerted effort to ensure recognition of economic, social and cultural rights at the national, regional and international levels.

F. Follow-up to the World Conference on Human Rights

99. The World Conference on Human Rights recommends that the General Assembly, the Commission on Human Rights and other organs and agencies of the United Nations sytem related to human rights consider ways and means for the full implementation, without delay, of the recommendations contained in the present Declaration, including the possibility of proclaiming a United Nations decade for human rights. The World Conference on Human Rights further recommends that the Commission on Human Rights annually review the progress towards this end.

100. The World Conference on Human Rights requests the Secretary-General of the United Nations to invite on the occasion of the fiftieth anniversary of the Universal Declaration of Human Rights all States, all organs and agencies of the United Nations system related to human rights, to report to him on the progress made in the implementation of the present Declaration and to submit a report to the General Assembly at its fifty-third session, through the Commission on Human Rights and the Economic and Social Council. Likewise, regional and, as appropriate, national human rights institutions, as well as non-governmental organizations, may present their views to the Secretary-General on the progress made in the implementation of the present Declaration. Special attention should be paid to assessing the progress towards the goal of universal ratification of international human rights treaties and protocols adopted within the framework of the United Nations system.

ANNEX II

(a) Status of International Legal Instruments on Human Rights Adopted within the framework of the UN in special reference to the Member States of AALCC (As on 1 May 1993)

Table One : General Status

Code No.	List of Instruments	Entry into force	Number of States parties (Total)	(Members of AALCC)
1	International Covenant on Economic, Social and Cultural Rights (1966)	3.1.1976	119	24
2	International Covenant on Civil and Political Rights (1966)	23.3.1976	116	23
3	Optional Protocol to the International Covenant on Civil and Political Rights (1966)	23.3.1976	67	10
4	Second Optional Protocol to the International Covenant on Civil and Political Rights (1989)	11.7.1991	17	0
5	International Convention on the Elimination of All Forms of Racial Discrimination (1966)	4.1.1969	134	32
6	International Convention on the Suppression and Punishment of the Crime of Apartheid (1973)	18.7.1976	95	25
7	International Convention against Apartheid in Sports (1985)	3.4.1988	55	18
8	Convention on the Prevention and Punishment of the Crime of Genocide (1948)	12.1.1951	109	23
9	Convention on the Non-Applicability of Statutory Limitations to War Crimes against Humanity (1968)	11.11.1970	35	10
10	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984)	26.6.1987	71	11
11	Slavery Convention (1926) amended by the Protocol of 1953 (1953)	7.7.1955	88	26
12	Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956)	30.4.1957	109	26
13	Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of others (1950)	25.7.1951	64	15
14	Convention relating to the status of Refugees (1951)	22.4.1954	114	20
15	Protocol relating to the Status of Refugees (1967)	4.10.1967	116	20
16	Convention relating to the Status of Stateless Persons (1954)	6.6.1960	38	5
17	Convention on the Reduction of Statelessness (1961)	13.12.1975	16	1
18	Convention on the International Right of Correction (1952)	24.8.1962	13	3
19	International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (1990)	Not yet entered into force	1	1

Code No.	List of Instruments	Entry into force	Number of States parties (Total)	(Members of AALCC)
20	Convention on the Political Rights of Women (1953)	7.7.1954	102	21
21	Convention on the Nationality of Married Women (1957)	11.8.1958	60	11
22	Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (1962)	7.12.1964	40	4
23	Convention on the Elimination of All Forms of Discrimination against Women (1979)	3.9.1981	121	25
24	Convention on the Rights of the Child (1989)	2.9.1990	131	24

(b) Member States	Code Number of the Instruments as used in Table One																					
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24
Oman					*	*		*			*									*				*
Pakistan	*	*	*		*	*	*	*	*	*	*	*	*	*	*					*		*	*	*
Philippines					*	*	*													*			*	*
Qatar	*	*	*		*			*				*		*	*	*								
R.Korea								*			*	*								*			*	*
Saudi Arabia	*	*	*		*	*	*	*		*		*	*	*	*					*	*		*	*
Senegal					*						*	*		*	*						*			
Sierra Leone												*	*											
Singapore										*				*	*									
Somalia	*	*	*		*	*															*		*	*
Sri Lanka	*	*			*	*	*				*	*	*											*
Sudan	*	*			*	*	*				*	*		*	*									
Syria	*	*			*	*	*	*			*	*	*							*	*		*	
Tanzania	*	*			*	*	*	*			*	*	*								*	*	*	*
Thailand																				*			*	
Turkey								*			*	*	*	*	*							*		
Uganda	*				*	*	*				*	*	*	*	*			*						
UAF					*	*			*											*	*		*	*
Yemen	*	*			*	*			*	*	*	*		*	*	*					*		*	*

Table Two : Specific Status in Reference to AALCC Member States

Member States	Code Number of the Instruments as used in Table One																						
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24
Bahrain					*	*		*			*	*												
Bangladesh					*	*					*	*	*										*	*
Botswana					*									*	*	*								
China					*	*		*		*				*	*								*	*
Cyprus	*	*	*		*			*		*	*	*	*	*	*			*		*	*		*	*
D.P.R. Korea	*	*						*	*															*
Egypt	*	*			*	*	*	*		*	*	*	*	*	*			*	*	*			*	*
Gambia	*	*	*		*	*		*	*					*	*									*
Ghana					*	*	*	*				*		*	*					*	*		*	*
India	*	*			*	*	*	*	*		*	*	*							*				*
Indonesia																				*			*	*
Iran	*	*			*	*	*	*			*			*	*									
Iraq	*	*			*	*	*	*			*	*	*										*	
Japan	*	*											*	*	*					*			*	
Jordan	*	*			*		*	*		*	*	*	*							*	*	*	*	*
Kenya	*	*							*					*	*								*	*
Kuwait					*	*					*	*	*											
Libya	*	*	*		*	*	*	*	*	*	*	*	*			*	*			*	*		*	
Malaysia												*									*			
Mauritius	*	*	*		*		*		*		*	*								*	*		*	*
Mongolia	*	*	*		*	*	*	*	*		*	*								*	*		*	*
Myanmar								*			*													*
Nepal	*	*	*		*	*	*	*		*	*	*								*			*	*
Nigeria					*	*	*		*		*	*		*	*					*			*	*

Table Three : Status as Compared with the Global Percentage in terms of being Parties to the Instruments as at 1 May, 1993

Code No. of Instruments	Status Parties to the Instruments				
	The Global Total		The AALCC Members		
	numbers	Percentage	numbers	Percentage	difference
1	119	63.3%	24	54.5%	-8.8%
2	116	61.7%	23	52.2%	-9.5%
3	67	35.6%	10	22.7%	-12.9%
4	17	9.0%	0	0	-9%
5	134	71.3%	32	72.7%	+1.4%
6	95	50.5%	25	56.8%	+6.3%
7	55	29.2%	18	40.9%	+11.7%
8	109	57.9%	23	52.3%	-5.6%
9	35	18.6%	10	22.7%	+4.1%
10	71	37.8%	11	25%	-12.8%
11	88	46.8%	26	59%	+12.2%
12	109	57.9%	26	59%	+1.1%
13	64	34%	15	3.4%	0.0%
14	114	69.6%	20	45.5%	-15.1%
15	116	61.7%	20	45.5%	-16.2%
16	38	20%	5	11.4%	-8.6%
17	16	8.5%	1	2.3%	-6.2%
18	13	6.9%	3	6.8%	-0.1%
19	1	0.53%	1	2.3%	+1.77%
20	102	54.2%	21	47.7%	-6.5%
21	60	31.9%	11	2%	-6.9%
22	40	21.2%	4	9%	-12.2%
23	121	64.3%	26	56.8%	-7.5%
24	131	69.7%	24	54.5%	-15.2%

188 States in the World
44 Member of AALCC

VI. The Law of International Rivers

(i) Introduction

The subject "Law of International Rivers" was first taken up for consideration by the Asian-African Legal Consultative Committee (AALCC) through a reference made by the Governments of Iraq and Pakistan during the Eighth Session (Bangkok, 1966) of the AALCC. Next year, at the Ninth Session (New Delhi, 1967) Iraq in a statement indicated two areas which necessitated a closer scrutiny, (i) Definition of the term "International Rivers" and (ii) Rules relating to utilization of waters of international rivers by the States concerned for agricultural, industrial and other purposes not connected with navigation. At the Tenth Session (Karachi, 1969) after extensive deliberations the committee decided to set up a sub-committee of all Member Governments to prepare draft articles on the Law of International Rivers, particularly in the light of the experience of the Asian and African countries 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 delegations of Pakistan and Iraq placed before the Sub-Committee a set of draft principles consisting of 21 articles. The Indian delegation had suggested that the Sub-Committee should also consider the Helsinki Rules drawn up by the International Law Association as the basis for discussion. In the subsequent sessions of the Committee, the Sub-Committee could not arrive at any conclusions due to a few unclear provisions existing in the draft formulations. The proposals were referred to the member Governments for their consideration.

Meanwhile, the AALCC was preoccupied with the crucial deliberations relating to the "Law of the Sea" and "Economic Cooperation". It was decided

that since the International Law Commission (ILC) was actively engaged in considering this topic, its examination could be deferred. After a prolonged gap, this item was brought back on the agenda of the Twenty-third Session of the Committee (Tokyo, 1983) at the request of the Government of Bangladesh. The Government of Bangladesh suggested that the Committee could resume the consideration of the item without in any way touching the areas under scrutiny by the ILC. Nepal, on the other hand, had specifically suggested that the Committee might direct the Secretariat to initiate studies relating to regional system agreements of the international rivers. However, many member Governments were of the view that the Committee should await the finalization of ILC's work, in order to avoid duplication of work and they were also keen to follow the progress of work in the ILC. In order to accommodate all these suggestions the Committee decided 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.

During the Kathmandu Session (Nepal, 1985) the Committee considered a "Preliminary Report" prepared by the Secretariat which *inter alia*, indicated five areas which could be examined, 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 watersourse State; (c) study the matter relating to navigational uses and timber floating in international water courses; (d) study to other areas of international rivers such as agricultural uses; and (e) study of State practice in the region of user agreements and examining the modalitics employed in the sharing of waters of such watercourses as the Gambia, Indus, Mekong, Niger and Senegal.

Pending a final decision as to the specific future work programme of the Committee, the Secretariat continued to monitor the ILC deliberations and presented concisely the ILC's progress of work for consideration of the Twenty-fifth Session (Arusha, 1986) of the Committee. At 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. The Thirtieth Session (Cairo, 1991) decided to place this item independently on the agenda

of the Thirty-first Session as the ILC had completed the first reading of the draft articles and to assist the Member Goverments of AALCC to submit their comments. During Thirty-first session (Islamabad, 1992) the Committee discussed a study prepared by the Secretariat analysing the ILC draft articles adopted by it after the first reading.

The Thirty-second Session (Kampala, 1993) considered a study, titled, "The Law of International Rivers: A Preliminary Study Relating to River System Agreements". This study, *inter alia*, examined three major areas, namely (a) International Watercourses; (b) Equitable and Reasonable Utilization and Participation; and (c) Protection and Preservation of Ecosystems. This study broadly examined the institutional and legal aspects of the River System Agreements in the Asian-African region.

Thirty-third Session: Discussions.

The Secretary-General while introducing the agenda item "Law of International Rivers" informed the session briefly the background of this study which was introduced at the initiative of the Governments of Pakistan and Iraq as far back as the Ninth Session of the Committee held at New Delhi in 1967. He also informed the session the reasons for its slow progress due to Committee's increasing work schedule in other areas. He noted that there were some differences concerning the feasibility of the study. Accordingly, he pointed out, the AALCC continued to evaluate the work of the ILC and furnished comments on ILC's draft articles so as to assist member countries to send their comments and observations to ILC. He stated that the Thirty-Second session of the AALCC, while taking note of the study made on Law of International Rivers dircted the AALCC Secretariat to work on the fresh water resources and accordingly the current study was prepared.

He noted that the focus of this study was primarily to continue the examination of legal regulation and protection of available fresh water resources in the Asian and African region. He briefly explained the prevailing divergent views in this regard and difficulties in formulating a viable normative approach. In view of this, he stated, that the balanced utilization of limited freshwater resources had always remained and would remain a critical problem. He referred to the Report of the Rio Conference in its Agenda 21 concerning problems of freshwater management. He also noted that the ILC draft articles constituted an attempt to deal with the preservation of freshwater resources within a "holistic approach". He referred to the necessity for adequate legislative measures within the realm of municipal law.

The Delegate of *Turkey* referred to the title of the report and pointed out that the title "Law of International Rivers" seemed little premature since there

were no rules and regulations on this matter but only deliberations of some international institutions which had not yet assumed legal status. He suggested, therefore, that the title of the study should be "Study on the non-navigational utilization of the international watercourses". He did not agree with the tendency to treat the Draft Articles of ILC as conclusive as they were not endorsed by the international community. He also pointed out the diverse factors existing in different river basins in different parts of the world. The delegate, accordingly suggested that this subject was not amenable for further examination in the AALCC.

The delegate drew the attention of the Session that his delegation, while welcoming the provision appearing in the Article 5 of the ILC concerning "the utilization of an international watercourse in an equitable and reasonable manner", did not accept such concept in utilization of ground water resources. He pointed out that his delegation at the Islamabad Session had stated that to include the subject of confined ground water resources in the international watercourses would complicate the whole matter and might create many other difficulties. He pointed out that his delegation at the Islamabad Session had referred to the distinction between *free* groundwaters and confined groundwaters as a distinction made by the ILC and not as a support for the inclusion of groundwaters into the international watercourses subject. He, accordingly pointed out that the necessary connection should be made in the paragraph 12 on page twelve of the Report.

The Delegate of *India* expressed the view that the work concerning this topic was complicated and involved a level of generality and abstraction. He pointed out that this topic had essentially bilateral dimensions and it would be necessary to sensitize states in this regard. Accordingly, the delegate suggested that there should not be any final conclusion on this topic and the subject should be withdrawn from active agenda.

(ii) Decisions of the Thirty-third Session (1994) Agenda item: "Law of International Rivers"

Adopted on January 21, 1994

The Asian-African Legal Consultative Committee at its Thirty-third Session:

Taking note of the study prepared by the Secretariat on the item "The Law of International Rivers, Normative Approaches to the Sustainability of Fresh Water Resources"contained in Doc. No. AALCC/XXXIII/Tokyo/94/5:

1. *Expresses* its appreciation for the study concerning freshwater resources:

2. *Expresses* its concern at the growing misuse of freshwater sources which constitutes only 2 per cent of the global water resources;

3. *Notes* with satisfaction the progress of work on the item "Non-navigational Uses of International Watercourses" during its second reading in the International Law Commission; and

4. *Decides* to place the item on the agenda of the Thirty-fourth Session to facilitate further substantive discussion.

(iii) Secretariat Brief

The Law of International Rivers

The focus of the following study is primarily on the examination of legal regulation and protection of available freshwater resources in the Asian and African region. The Kampala Session (1993) after due deliberations had endorsed the AALCC Secretariat's study on "River System Agreements" and had further directed the Secretariat to examine crucial areas relating to River System Agreements with special emphasis on the utilization of freshwater resources[1]. There were different views at this session as regards the continued examination of these areas. India felt that as there were immense diverse factors and different systems of management in river basins of the world, this topic was not amenable for continued examination. The other reasons for its non-continuation was that the topic was before the ILC[2] Syria, Uganda and Tanzania, however, supported the inclusion of this topic in the future agenda as it complemented the ILC's work and suggested that the Secretariat should continue to study the topic in order to arrive at more acceptable principles on sharing of freshwater resources [3].

The following study seeks to examine, albeit briefly, the general impediments existing within the structure of the international legal norms to provide for a complete regulatory mechanism to sustain freshwater resources and its flow. At the factual level, the study under consideration identifies the

1. For the Decision of the Kampala Session on this topic see : *Report of the Thirty-second held in* Kampala (Uganda) from 1 to 6 Febeurary 1993.
2. *Verbatim Record of Discussions, Thirty-second Session of the AALCC* (Kampala, 1993) p. 341.
3. *Ibid.*, p. 342.

concrete problems starting from environmental hazards to drinking water defficiencies. In order to get a clear picture of these issues the study draws heavily from the ideas proposed at the United Nations Conference on Environment and Development (UNCED). ILC draft text also forms a strong base for the study. The AALCC Secretariat finds ILC's normative principles relating to freshwater resources (enunciated especially while defining "international watercourse") as acceptable.

Freshwater Resources: Conflicts and Compromises

River and lake basins, especially its freshwater resources form natural frameworks for the planning and management of integrated development programmes. Accordingly, the economic and social development has as its constituent element an effective water resources management, such as, hydropower, water supply, irrigation, navigation, flood control, fisheries development and an environmental protection.[4] For the purposes of effective utilization of available freshwater resources integrated approach to development and growth is essential. In recent years, there is an increasing concern about the environmental impact of large dams, soaring costs of construction and the inefficiency of irrigated agriculture. These models of development of river basins have called into question the wisdom of embarking upon large integrated schemes. This is not all. In the developing world, primarily in the Asian-African continent, the incomplete development of market economies and the low level of economic growth has meant that much greater amount of governmental intervention is necessary in the developmental process[5]. On the other hand, economic assistance from the developed world has not resolved these problems. The developed countries have frequently sought to apply inappropriate criteria in judging development alternatives and are reluctant to support government subsidies by the poorer developing countries which will adversely affect their balance of payment position.

The Report of the United Nations Conference on Environment and Development in its agenda 21 identifies the crucial need for preservation of freshwater resources. The Chapter 18 of this document, titled "Protection of Quality and Supply of Freshwater Resources: Application of Integrated Approaches to the Development, Management and Use of Water Resources", outlines the dichotomy existing in the models of development as regards water

4. Economic Commission for Africa. *Integrated River and Lake Basin Management as a Vehicle for Socio-economic Development in Africa . Natural Resources/Water Series* No. 20(1990) (United Nations, Sales No. E. 90. II.A.10).
5. Ibid., p. 60.

resources. According to the study embodied in this document, "Freshwater resources are an essential component of the Earth's hydrosphere and an indispensable part of all terrestrial ecosystems. The freshwater environment is characterized by the hydrological cycle, including floods and droughts, which in some regions have become more extreme and dramatic. Global climate change and atmospheric pollution could also have an impact on freshwater resources and their availability and, through sea level rise, threaten low-lying coastal areas and small island ecosystems[6]. The consequences of the depletion of freshwater resources on the human populace in particular and living beings in general as defined by this study are cause of great concern. Undoubtedly, innovative techniques including the improvement of indigenous technologies, are needed to fully utilize limited water resources and to safeguard those resources against pollution[7].

The Draft Articles on the Law of the Non-Navigational Uses of International Watercourses under consideration by the ILC since 1971 seek to deal with the preservation of freshwater resources with a "holistic approach".[8] The members of the Commission during the recent session, while expressing their views on the Report submitted by the Special Rapporteur, consistently referred to the concept of sustainable development and the so-called holistic approach to protection of the environment integrating economic and social considerations with environmental issues, as reflected in principle 4 of the Rio Declaration 1992 and in Chapter 18 of Agenda 21 relating to the protection of the quality and supply of freshwater resources, and the application of integrated approaches to development, management and use of water resources[9].

The AALCC members in the successive sessions have noted with concern the necessity for preservation of freshwater resources. It may be noted that in the Asian-African region many major rivers, vital sources of fresh water for their riparian countries, cross international borders; similarly, lakes may fall within the borders of two or more countries[10]. Sierra Leone, at the AALCC's

6. *Report of the United Nations Conference on Environment and Development*, 13 August 1992. U.N. Document No. A/CONF. 151/26 (Vol. II) p. 167.
7. Ibid.
8. *Draft Articles on the Law of the 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* (United Nations), p. 10.
9. *Draft Report on the International Law Commission on the work of its Forty-fifth Session*, 16 July 1993, U.N.G.A. Document No. A/CN.4/L. 483, p.9.
10. Lake Victoria, e.g. has a surface area of some 69,000 sq. Kms including the islands the catchment area of the Upper Nile Basin up to Nimule at the border of Uganda and the Sudan is some 411,000 sq. kms. of which 87 per cent lies in Kenya, Uganda and the United Republic of Tanzania and the remaining 13 per cent in Burundi, Rwanda and Zaire. See: A.B. Abul Hoda, "The Hydrometeorological Survey Project", in *Experiences in the Development and Management of International River and Lake Basins*. Natural Resources/Water Series No. 10., 1983 (United Nations, Sales No. E. 82. II. A. 17) p. 398.

Thirty-first Session (Islamabad, 1992) outlined the importance of freshwater resources, especially for Africa.[11] The delegate of Sierra Leone pointed out that it was only two per cent of freshwater that was available for humanity and only one per cent was fit for human consumption.[12] He also pointed out that more than 40 per cent of the members of the United Nations were *bereft* of pure water for drinking. India has expressed the view that the question of the management and utilisation on international watercourses as a subject, was not amenable to universal, regional or even continent-wise principles. It viewed the preservation and protection of water resources from the perspective of "micro-level management" through mutual agreement between and among the States concerned only with due reference to attendent factors.[13] Uganda underlined the importance of freshwater resources for the African continent as there was probably no country which had freshwater in the form of lakes and rivers in Africa [14]. At the Islamabad Session, Turkey had referred to the identification and equitable utilization of fresh groundwater resources.[15] Jordan had also made reference to groundwater resources in the Middle-East and the necessity for its equitable utilization.[16]

Legislative Measures to Preserve Freshwater Resources

It is stated that Governments apply the general principles of international law applicable to the water resources which include, *inter alia*, the right of each basin State to an equitable utilization and the duty not to cause appreciable harm to a co-basin State (including the environment) and recognize the duty to exchange available relevant information and data. This is also the duty to notify and consult reciprocally with co-basin States that may be adversely affected by a project or programme planned by one or more basin States and the duty to consult, concerning the institutionalization of cooperation or collaboration for basin development, upon the request of any other basin States[17].

For an effective utilization of available freshwater resources legislative measures with adequate regulatory mechanism would be necessary within the realm of municipal systems also. For example, governments planning to

11. Verbatim Record of Discussions, Thirty-first Session (AALCC) Islamabad, 1992, p.124.
12. Ibid. It has been pointed out that main cause of infant mortality in developing countries, particularly in Africa, is lack of pure drinking water.
13. *Verbatim Record of Discussions, Thirty-second Session* (AALCC), Kampala, 1993, p.341.
14. Ibid., p.342.
15. Verbatim Record, Thirty-second Session (AALCC), n.14, p.121.
16. Ibid., p.123. For detailed statements on these issues by Syrian Arab Republic and Bangladesh see *Verbatim Record of Discussions, Thirtieth Session of the AALCC* (Cairo, 1991), p.71.
17. River Basin Development, n. 7, p.18.

implement irrigation schemes in a basin, should enact legislation-making provision for appropriate water laws and, *inter alia*, for administering an equitable programme of land distribution to the intended beneficiaries, under the appropriate tenure systems, and guaranteeing that local populations receive a share of project benefits.[18] Within the existing structure of global economic system, it may be unrealistic to remove legal restrictions, if any, hindering the mobilization and investment of private resources for the achievement of the objectives of river basin programmes. The AALCC Secretariat is of the view that since in majority of the Asian and African developing countries agriculture constitutes a subsistence activity fresh water sustains a huge marginally placed population. The effective utilization of river basin programmes should not radically alter the living pattern of this population. It is vital that the legislative measures, keeping in mind local conditions, should establish a suitable regulatory mechanism for optimum realization of objectives set forth for the river basin programmes funded from the private resources.

A. Approaches to a Legal Definition

The identification of a premise for the "freshwater resources" in the form of a viable legal definition so as to define its effective utilization is crucial. This attempt however poses certain difficulties particularly in connection with groundwater. To begin with, it may be noted that the definition of "international watercourse" as embodied in the Draft Articles on the Law of the Non-Navigational Uses of International Water courses as adopted by ILC on first reading encompasses all predictable situations, including all sources of "freshwater resources". International watercourse is defined as "a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus".[19] The phrase "system of surface and underground waters" refers to the hydrologic system composed of a number of different components through which water flows, both on and under the surface of the land [20]. These components include rivers, lakes, aquifers, glaciers, reservoirs and canals. It is further clarified that so long as these components were interrelated, they formed part of the watercourse.

18. Ibid., p.19.
19. ILC Draft Articles, n.11, p.6.
20. Ibid.

The definition formulated by the ILC satisfies all the requisites of a "watercourse system". However, there is some uncertainty as regards its applicability to "confined" groundwater which it may be noted constitute a major portion of the available freshwater resources. In view of this, some members of the Commission had sought the inclusion of groundwater within the term "watercourse". However, it was decided that in order to constitute a "watercourse" for the purposes of the draft articles, the system of surface and underground waters must flow into a "common terminus".[21] A reference may also be made to the Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System and the annexed Action Plan.[22] A noteworthy feature of this agreement is its emphasis on the "holistic approach to international watercourse management". The objective of this Action Plan concerns primarily to "certain enumerated problems" and thus to promote the development and implementation of environmentally sound water resources management in the whole river system".[23]

During the Thirty-first Session of AALCC, the Turkish delegation had pointed out that incorporating glaciers, canals and particularly underground water, amounted to sharing of those natural resources which were in contradiction with the generally accepted principle of international law concering the permanent sovereignty of States over their natural resources.[24] The Turkish delegation, therefore, supported the distinction between free groundwater and confined groundwaters on the basis that only the "free groundwater" constituted the part of the definition of "watercourse". Further, it was submitted that no concrete examples of international practice could be found in relation to groundwater easily; and there were difficulties in collecting scientific data concerning free and confined watercourses for the Asian-African States[25]. Similar views were expressed by Jordan while pointing out that the importance of groundwaters to the Middle-East. The delegation 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 over the dry surfaces and reservoirs can be built on this".[26] The Syrian delegate endorsing this view had pointed out that as per the ILC report, 77 per cent of joint rivers had underground sources.[27]

21. Ibid., p.7.
22. *International Legal Materials*, Vol XXVII (1988), p.1109.
23. Ibid.
24. *Verbatim Record of Discussions, Thirty-first Session (AALCC)*
25. Ibid.
26. Ibid., p.124.
27. *International Legal Materials*, n.25, p.1109.

B. Utilization and Preservation: A Balanced View

The definitional aspects of "watercourse" in general, and "freshwater" sources in particular, present, as seen from the above discussion, few practical difficulties. It may be stated that these factors were primarily location or region-specific. The utilization and preservation, on the other hand, of available freshwater resources will have to balance two opposing interests. One view, as mentioned already, could be to approach the issue through a holistic management of available water resources in an environmentally sound manner.[28] According to the commentaries provided by the ILC, "the attainment of optimal utilization does not mean achieving the maximum use, the most technologically efficient use, or the most monetarily valuable use. 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".[29]

The concept of efficient basin management is a crucial one. It requires utilizing all the water resources of a basin, both surface and substance, to support a range of economic activity and seeking to optimize such utilization so that the most economically efficient, environmentally sound and socially equitable plan can be evolved.[29] The evolution of the concept of basin development departed from the idea of absolute territorial sovereignty, via the counter-notion of a State using its part of the shared basin so as not to injure co-basin States, towards the concept of using the waters of the basin in an equitable or reasonable manner to meet the needs of each State.[30] In this regard, a more flexible approach as enunciated in the Helsinki Rules (ILA, 1967) and the African Convention on the Conservation of Nature and Natural Resources could be considered as reasonable and practicable.[31]

One of the major source of freshwater resource is rainfall, and it has large seasonal and annual variations in most of the river basins in the Asian-African region. Accordingly, the first necessity of basin management is to store sufficient water in the upper catchments to allow a balancing of flows throughout the dry season and from year to year. further, as it is pointed out

28. Draft Articles, n.11, p.29.
29. Economic Commission for Africa, n.7, p.61. The first attempt to employ the concept of basin management was the Tennessee Valley Authority. It began in 1933 "with a view of encouraging and guiding in the orderly and balanced development of the diverse and rich resources."
30. Ibid.
31. For the texts, see: International Law Association, *Report of the Fifty-second Conference, Helsinki, 1966* (London 1967); *African Convention on the Conservation of Nature and Natural Resources*, National Resource/Water Series No. 13 U.N. Sales No. E/F. 94.II. A.7).

"when one takes into account the sum total of economic and social activity within a large basin which is water-related, e.g. Agriculture, fisheries, livestock, industry, urban development, transportation, forestry soil conservation, wildlife, nature conservation, mining and perhaps, recreation, the complexity of balancing resources against requirement, and of taking into account future development is readily apparent."[32]

The United Nations Conference on Environment and Development in its Agenda 21 called for cooperation among States ".....in conformity with existing agreements and/or other relevant arrangements, taking into account the interests of all riparian States concerned."[33] It also proposed the following programme for the freshwater sector; (a) Integrated water resources development and management ; (b) Water resources assessment; (c) Protection of water resources, water quality and aquatic ecosystems; (d) Drinking water supply and sanitation; (e) Water for sustainable food production and rural development; and (f) Impact of climate change on water resources.[34]

Conclusion

The long-term development of global freshwater requires holistic management of resources and a recognition of the inter-connectedness of the elements related to freshwater and freshwater quality.[35] As mentioned in our study, there are few regions of the world that are free from problems of loss of potential sources of freshwater supply. The Report of the UNCED correctly identifies the causes for the depletion of freshwater resources as: (a) inadequately treated domestic sewage; (b) inadequate control on the discharges of industrial waste waters; (c) loss and destruction of catchment areas; (d) ill-considered siting of industrial plants; (e) deforestation; and (f) uncontrolled shifting cultivation and poor agricultural practices.

The AALCC secretariat is of the view that to protect and preserve freshwater resources in an effective manner, a two-fold regulatory mechanism is *sine quo non*. One, it is essential that municipal law systems should take necessary steps to incorporate legislative measures to restrict the degradation and pollution of limited freshwater sources and flows. Second, at the international level, there should be a unanimous resolve to cooperate at all levels to integrate basin development mechanisms at both legal and institutional levels. The draft text provided by the ILC takes into account clearly the approaches outlined in our study. The emphasis, in our view, should shift to more regional and sub-regional co-operation so as to achieve the long-term objective of sustaining the quantity and quality of freshwater resources.

32. Economic Commission for Africa, n. 7, p.63.
33. *Report of the United Nations Conference on Environment and Development*, n.9, p.168.
34. Ibid.
35. Ibid., p.169.

VII. Report of the International Law Commission on the Work of its Forty-Fifth Session

(i) Introduction

The International Law Commission (hereinafter called the Commission or the ILC) established by the 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-fifth Session in Geneva from May 3 to July 23, 1993. There were as many as four substantive topics on the agenda of the said session of the Commission.

These included:

(i) State Responsibility;

(ii) Draft code of Crimes Against the Peace and Security of Mankind;

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

(iv) International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law.

It may be recalled that the General Assembly had by its resolution 47/33 *inter alia* requested the Commission to continue its work on the elaboration of a draft statute for an international criminal court as a matter of priority. The resolution also called upon the Commission to examine, in this regard, the issues identified in the report of its Working Groups and in the debate in the Sixth Committee, with a view to drafting a Statute, as well as the written comments received from the States and to submit a report at the Assembly's next Session.

The Commission held substantive discussions on the issue of an International Criminal Court, the topics of State Responsibility, and International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law

and the Non-Navigational Uses of International Watercourses. All these items are at different stages of work and some notes and comments on these items which were subjected to detailed discussions during the Commission's forty-fifth session are contained herein.

It may be mentioned 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 Committee attaches great importance in view of the current international situation.

It may be recalled that the General Assembly by its resolution 47/33 had *inter alia* requested the Commission to consider the planning of its activities and programme for the term of office of its members bearing in mind the desirability of achieving as much progress as possible in the preparation of draft articles. The Assembly also requested the Commission to examine its method of work in all their aspects bearing in mind that the staggering of the consideration of some topics might contribute to a more effective consideration of its report in the Sixth Committee.

The Commission acting in pursuance of that request proposes the incorporation into the Commission's agenda, under conditions to be decided, the topics "the Law and Practice Relating to Reservations of Treaties" and "State Succession and its impact on the nationality of natural and legal persons". It is understood that the order of listing of the topics does not suggest any priority.

Apropos the 'Law and Practice Relating to Reservation of Treaties' the Commission is of the view that the topic meets the criteria for selection established by the Commission and endorsed in the Sixth Committee. The reasons advanced by the Commisssion in this respect are threefold viz. that the topic appears to respond to a need of the international community on account of several obscurities and lacunae in such instruments as the Vienna Convention on the Law of Treaties, 1969; the Vienna Convention on Succession of States in Respect of Treaties, 1978 and the Vienna Convention on the Law of Treaties Between States and International Organizations or between International Organizations, 1986. Secondly, the contemporary international climate is propitious with the removal of the obstacles and problems imposed by the cold war and further, the topic falls within the competence of the Commission where both the doctrinal aspects and State practice can be discussed. But lastly, because the topic stands a good chance of producing concrete results within a reasonable period, that is to say the adoption on first reading, by the end of the present quinquennium of a draft intended for the General Assembly. The Commission,

therefore, while aware of the need not to challenge the regime established in articles 19 to 23 of the Vienna Convention on the Law of Treaties, 1969 considers that these provisions could be clarified and developed either in the form of draft protocols to the existing conventions or a guide on practice of states to which states, international organizations and others could refer.

As regards the topic State Succession and its impact on the nationality of natural and legal persons, the Commission has pointed out that it is part of one of the three sub-topics identified by the Commission in 1963 under the topic "Succession of States". It is not among the issues which have so far been dealt with by the Commission which takes the view that it meets the established criteria for selection.

It appears that the formulation, on the basis of a comprehensive examination of State practice, of minimum standard criteria for "*ex lege* acquisition of nationality could provide useful guidelines to legislators of new States that are in the process of drafting laws in this area. It should furthermore be recalled that by virtue of customary rules of international law, a large number of treaty rights and obligations are automatically binding on the successor State and that the application of many such treaties directly concerns individuals, or more precisely nationals of the treaty parties sometimes there is a need for the application of these treaties even before the nationality law is adopted by the successor State. Thus a "preliminary" determination of the nationality of individuals or more persons residing in the territory where the change of sovereignty occured becomes a precondition for the continued application of the mentioned treaties.

The outcome of the work of the Commission on this topic could for instance be a study or a draft declaration to be adopted by the General Assembly. The final form of the work will be decided by the Commission at a later stage.

Thirtythird Session: Discussions:

When the Committee took up consideration of the agenda item *Report of the Work of the International Law Commission : the Vice-Chairman of the International Law Commission* (Prof. V.S. Vereshchetin) stated that the International Law Commission (ILC) attached great importance to the maintaining of close links with the AALCC as well as with other regional legal committees. The ILC, he added, welcomed every opportunity to acquaint itself with the work of the AALCC. In the spirit of longstanding cooperation between the two bodies the Committee was represented at the forty-fifth session of the Commission by the Secretary-General, Mr. Frank X. Njenga and Mr. Bhagwat Singh. He further stated that the International Law Commission was able to make substantial progress on all the items on the agenda of its forty-fifth session. The Commission

had, *inter alia*, worked out a comprehensive and systematic set of draft articles with commentaries thereon, on the draft statute of an international criminal court. The text of this draft statute was the basis for examination by the General Assembly and the member Governments.

On the question of International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law he stated that the Commission had referred to the Drafting Committee the draft articles on prevention of transboundary harm of activities involving a risk of such harm together with the formulation on non-discrimination. The Commission also made substantial progress on the question of State Responsibility and provisionally adopted a number of draft articles. With regard to the Non-navigational Uses of International Watercourses he stated that the Commission had begun the second reading of the draft articles as adopted on first reading in 1991. As regards the future programme of work of the Commission he stated that the ILC had decided to include, subject to the approval of the General Assembly, two topics in its agenda. These are "The law and practice relating to the reservation of treaties" and "State Succession and its impact on the Nationality of Natural and Legal Persons".

The Delegate of Japan expressed his delegation's admiration for the significant progress made by the ILC on each topic and, in particular, on the work of the Working Group on a draft statute for an international criminal court. The progress was the result of the intensive discussions among the Commission's members, and the efforts of its Special Rapporteurs.

As circumstances in the international arena continue to change, the international community feels a need for a new mechanism or new instrument which would ensure the rule of law in the community. Recently the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the territory of the former Yugoslavia was established, as an enforcement measure of the Security Council under Chapter VII of the Charter of the United Nations.

It is important that the International Law Commission should be sensitive to the needs of the international community, and study ways by which the Commission, as a forum of international law experts, may best fulfil those needs within a reasonable period of time. He proposed a more frequent and flexible use of such methods as working groups or a drafting committee in the future work of the Commission for this would increase the productivity of the Commission in a timely manner.

His delegation appreciated the decision of the Commission supported by the

General Assembly to complete the elaboration of draft statute for an international criminal court at its forty-sixth session this year. Referring to the draft statute of the international criminal court he said that the approach of optional acceptance by States of the Court's jurisdiction would facilitate the acceptance of the statute by a larger number of States, which is the main and the most important condition to be satisfied.

Turning to "State Responsibility" he said that it was the most important topic and that the Commission has to find ways to ensure more rapid progress in the drafting of articles on the topic.

As for the topic "International Liability for Injurious Consequence arising out of Acts not Prohibited by International Law", his delegation expected that the next session of the Commission will produce further tangible results in the elaboration of draft articles on prevention and that the commission will be able to decide on the next stage of its work on this important topic, which has particular relevance to the development of international environmental law.

Finally on the topic of, "the Law of the Non-navigational Uses of International Watercourses," he said with regard to the final form of the draft articles, the Commission had better not prejudge its position at this stage.

The Delegate of China expressed the view that since the establishment of an international criminal court involves a number of highly complex and politically sensitive issues, this topic should be dealt with very cautiously. Nevertheless, in a spirit of cooperation and in order to seek possible satisfactory solutions to the issues involved, the Chinese delegation is always ready to participate actively in all the relevant debates on this matter. No matter what the final contents of this statute would be, there still exists a fundamental question as to why a state should surrender its criminal jurisdiction over a certain case if it has the will and sufficient judicial capability to exercise its jurisdiction over such a case. He emphasized that, in view of the important and complex political and legal issues involved in the establishment of an international criminal court, should there be a need to establish such a court, these important issues must be treated with great care and suitable solutions must be found in order to ensure the feasibility of the future court as well as its acceptance by all states. As far as the draft statute of an international criminal court proposed by the ILC is concerned, it is, in his view, relatively realistic and balanced although some of the articles may need further consideration and elaboration in the light of the debate at the Sixth Committee last year.

As regards the topic of "State Responsibility", he pointed out that this topic is rather difficult and the Commission has adopted several important articles

concerning the content, forms and degree of State Responsibility. These articles dealt with some of the most important issues of the whole topic. His delegation shall make an indepth study on the contents of these articles and submit its detailed comments after the first reading of the whole topic is completed, he added.

With respect to the topic of International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law, he agreed with the Commission's decision on the selection of prevention for priority consideration since this approach reflects the current tendency in the international environmental legislation. In this context he stressed that any efforts to formulate preventive measures should take fully into account the special needs of developing countries in view of their backward stage of development.

Regarding the topic "The Law of the Non-Navigational Uses of International Watercourses", it is indeed somewhat difficult to develop a set of legal norms regulating non-navigational uses of international watercourses since it touches upon a series of important issues, such as the national economy and people's livelihood of the watercourse states, ecological balance and environmental protection, while each international watercourse vary greatly in terms of hydrographic, geological, climatic and geographic factors. These involve fundamental interests of, and even contradictions between, the States concerned.

In relation to the future programme of work of the ILC, he was convinced that the Commission's efforts in this area will help to make the Commission's work better reflect the needs of the international community. In this context, he agreed with the Commission's decision on the selection of the new topics for its long-term programme of work, such as "the Law and Practice Relating to the Reservations to Treaties" and "State Succession and its Impact on the Nationality of Natural and Legal Persons".

The Delegate of India was of the view that a lot of issues still required to be considered on the question of the establishment of an international criminal court. He said that both the question of jurisdiction of the proposed court and the type of offences should be considered at the next session of the ILC. He stated that his delegation would not be happy to endorse an *ad hoc* international criminal court and would prefer an institution of a permanent nature. His delegation did not see any urgency in establishing any more *ad hoc* courts since a trial mechanism to deal with the offences in Yugoslavia had already been established.

Referring to the question of State Responsibility he said that his delegation was opposed to the recourse to reprisals as they are iniquitous and only lead to abuse of power. In his view counter measures involve unilateral determination and their subjection to peaceful settlement does not resolve the issues.

The Delegate of Syria stated that his delegation attached great importance to the work of the ILC who is in the process of adoption of draft articles on Non-navigational Uses of International Watercourses. His country had presented its comments on the draft articles on the Law of Non-navigational Uses of International Watercourses to the Committee at its Islamabad Session in 1992. In his view watercourses should under no circumstances, cut off or reduce the water below and the sanitary discharge needed in the river-bed. General obligations to cooperate means that watercourses states should agree and decide on the reasonable and equitable share of the uses of the waters in accordance with the water resources of the International Watercourse concerned. As regards the regular exchange of data and information dealt with in draft article he expressed the view that watercourse states should exchange data and information through joint committees and that the exchanged information should include the reservoir operations in the watercourse states, prior to and after the conclusion of the agreement on the uses of the waters of the international watercourse concerned.

The Delegate of Turkey paid a tribute to the ILC for its contributions to the codification and progressive development of international law and for *the degree to* which the Commission successfully fulfilled its task.

On the desirability and feasibility of establishing an international criminal court he said that the question of the possible establishment of an international criminal jurisdiction had a long history in international relations and that the need to establish such a court had already been felt at the time of the League of Nations. In 1989, the Assembly revived the question of setting up an international criminal jurisdiction in response to a proposal that an international mechanism be developed with jurisdiction over international drug traffickers. The Commission provisionally adopted the draft code in 1991 and sent the text to Governments for comments. The core of the draft statute dealt with jurisdiction and applicable law. The draft statute elaborated by the Working Group established by the International Law Commission is divided into the following seven parts: establishment and composition of the tribunal; jurisdiction; trial; appeal and review; international co-operation and judicial assistance and enforcement of sentences.

In the draft statute the structure of the International criminal jurisdiction, to be created would be made up of three parts: the judicial organ, or "Court"; the administrative organ, or "Registry", and the prosecutorial organ, or "Procuracy". The question remained unsettled as to whether the tribunal would be a judicial organ of the United Nations or if it would be linked to the UN through a relationship laid out in the statute. The draft lists of some of the crimes the court would have jurisdiction over including acts as earlier addressed by various international legal instruments related to genocide, grave breaches of the 1949 Geneva convention and its Protocol, unlawful seizure of aircraft, apartheid and

hostage taking. In addition, the draft would allow States to confer jurisdiction on the court in respect of other international crimes which are not listed.

On International liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law the ILC work has confirmed the importance of the establishment of a global legal regime which would effectively protect man and the environment from the rapidly accelerating negative consequences on the development.

On State responsibility for wrongful acts the international society lacking a universal legislature and judiciary, in which by virtue of its sovereignty a state took its decision in freedom and came into conflict with another state, the regulating mechanism of state responsibility played a major role in the mutual relations of states and appeared as the necessary corollary of their equality. The complexity of the ILC task with regard to this topic arose from the fact that the law of the international responsibility remained basically customary law and was both controversial and confused.

On the Law of the non-navigational uses of international watercourses the ILC is engaged upon delicate task. The diversity in the circumstances and characteristics relating to different rivers, and the vast divergence of interest of states must be taken into account. They emphasise the need to integrate the law and policy concerning international watercourses with similar concerns in the wider context of contemporary global concern for preservation of the environment and sustainable development.

The Delegate of Sri Lanka commended the ILC on the formulation of the draft statute of an International Criminal Court and for the pragmatic and flexible approach the Commission had adopted in formulating the draft articles. He observed in this regard that the provision for recourse to the court by way of two straids jurisdiction providing for acceptance by States of the Court's jurisdiction. In his view there remained several aspects which required to be clarified further. The delegation was of the view that the jurisdiction of the court must be confined initially to the well defined crimes under accepted international convention listed in the draft articles 22-45 at least until the elaboration of a Code of Crimes against the Peace and Security of Mankind was adopted since the concept of "Crimes under general international Law" lacks specificality to confer jurisdiction on the Courts. His delegation was of the view that the UN Convention on International Traffic in Drugs 1983 should be treated on par with other international conventions as constituting international crimes under draft article 22 rather than as undesirable conduct in terms of draft article 26. He further stated that the provisions of the statute relating to surrender of persons and their effect on existing obligations under bilateral/multilateral treaty regimes requires further clarification.

On the question of State Responsibility his delegation shared the concern, expressed by others, concerning the desirability of formulating a legal regime of unilateral counter-measures given the inherent dangers of its abuse. He wondered whether dispute settlement procedures provide an effective remedy in situations of resort to unlawful or disproportionate counter measures.

(ii) Decisions of the Thirty-third Session Agenda Item : Work of the International Law Commission

Adopted on January, 21, 1994

The Asian-African Legal Consultative Committee at its Thirty-third Session

Having taken note with appreciation of the report of the Secretary-General on the work of the ILC at its Forty-fifth Session, (Doc.No. AALCC/XXXIII/ Tokyo/94/1).

Having heard the comprehensive statement of the Vice Chairman of the International Law Commission;

1. *Expresses* its felicitations to the International Law Commission on the achievements of its Forty-fifth Session;

2. *Acknowledges and appreciates* the contributions of the Chairman of the International Law Commission Ambassador Julio Barboza, and the Vice Chairman Prof. Mr. V.S. Vereshchetin and thanks them for the lucid and succinct report that has been presented by the Vice Chairman on behalf of the Commission's Chairman;

3. *Expresses* its appreciation to the Secretary-General for his report on the work of the International Law Commission at its Forty-fifth 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 on different items on its agenda including ideas concerning non-navigational uses of international watercourses during the Thirty-third Session of the AALCC; and

5. *Decides* to inscribe on the agenda of the Thirty-fourth Session of the Committee an item entitled "The Report on the work of the International Law Commission at its Forty-sixth Session".

(iii) Secretariat Brief: Report on the Work of the International Law Commission at its Forty-fifth Session

A. STATE RESPONSIBILITY

At its forty-fifth session the International Law Commission had before it the fifth Report of the Special Rapporteur, Mr. Gaetano Arangio Ruiz.[1] The Report comprised two chapters which were addressed to "Part Three of the Draft Articles on State Responsibility and Dispute Settlement Procedures" and "The Consequences of the so-called International Crimes of States."

Introducing his report the Special Rapporteur recalled that the Commission had in 1985-86 considered, and subsequently referred to the Drafting Committee, dispute settlement provisions proposed by the then Special Rapporteur Mr. Willhem Riphagen. Those provisions had envisaged that the parties to a dispute would seek a solution "through the means" indicated in Articles 33 of the Charter of the United Nations". The recourse to dispute settlement mechanisms and procedures was, of course, to be without prejudice to any rights and obligations, regarding settlement of disputes, that might be in force between the parties. Failing a solution under Article 33 of the Charter of the United Nations, draft article 4 proposed by the former Special Rapporteur, had envisaged three kinds of procedures viz. (a) that any dispute arising with regard to the prohibition of countermeasures which involved the violation of a rule of *jus-cogens* could be submitted unilaterally by either party to the International Court of Justice;

1 See A/CN.4/453 and Add 1 and Add 1. Corr 1; and A/CN.4/453 Add 2 and 3.

(b) unilateral application to the Court in the case of any dispute concerning the "additional rights and obligations" envisaged as the special consequences of crimes as distinct from the consequences of delicts; and (c) resort to a conciliation procedure with regard to the more general category of disputes concerning the application of interpretation of the provisions of part Two (of the draft articles) relating to countermeasures.[2]

While recognising the general support for these proposals, as evidenced by the Commission's debates, Mr. Arangio Ruiz, the present Special Rapporteur believed that in order to remedy the drawbacks identified during the debate more effective dispute settlement provisions needed to be included as an integral part of the proposed convention.

The Special Rapporteur further explained that he was not advancing any suggestions with regard to what had been termed "additional rights and obligations" attaching to the internationally wrongful acts contemplated in article 19 of the Part One of the draft articles and had therefore, for the present, not concerned himself with the dispute settlement provisions covering crimes. He clarified that the proposals set forth in the present (fifth report) were mainly concerned with the dispute settlement in respect of category of disputes concerning the application of interpretation of the provisions relating to the regime of countermeasures.

In the opinion of the Special Rapporteur the general support, both within the Commission and the Sixth Committee for the solution offered by the conciliation procedure in respect of category of disputes concerning the application or interpretation of the provisions relating to countermeasures, had stemmed from the notion that any settlement provision of the draft articles should be of such a nature as not to directly affect the right or *faculte* of the injured State to resort to countermeasures. It was also based on the view that the conciliation procedure introduced in Part Three as proposed by the former Rapporteur Mr. Riphagen, ought to become operative on a unilateral initiative, only when a countermeasure had been adopted and the target State had raised objection thereto. The general agreement that the mandate of the conciliation commission should be confined to any given controversial issue relating to the lawfulness of the countermeasure in question is particularly significant. According to the earlier proposals, as accepted by the Commission the conciliation commission should deal with any question of fact or law that might be relevant under the proposed Convention on State Responsibility.

There had also been general agreement in the Commission, the Rapporteur stated, though some dissension had been heard, on the possibility of unilateral application for judicial settlement by the International Court of Justice of any

2 For detail see *yearbook of the ILC* 1986 Vol. II (Part I).

dispute as to whether or not a particular countermeasure was in conformity with a peremptory norm of international law.

With regard to the most frequent hypothesis, namely, one involving any other question arising under the law of State responsibility between the injured State and the wrong-doing State following the adoption of a countermeasure, the Commission had shown itself to be generally satisfied with the proposed conciliation procedure. It had not contemplated either arbitration or judicial settlement—the only procedures that would lead to a legally binding settlement. In practical terms, the only defence against abusive and unjustified countermeasures was, according to the Commission's decision to refer Part Three as proposed by Mr. Riphagen to the Drafting Committee, a non-binding report by a conciliation Commission.

The very definite drawbacks of having to rely on unilateral countermeasures to secure compliance with international obligations had been stressed in both the third and the fourth reports and also in a number of statements made in the Commission in 1991 and 1992. Indeed, at the Commission's previous session, some members had even questioned the desirability of including provisions that would codify a legal regime of unilateral countermeasures. His immediate response had been that the way to remedy the drawbacks of countermeasures was not for the Commission to close its eyes to a practice of customary law which in fact called for express regulation through the codification and progressive development of international law. The remedy was to adopt in Part Three more advanced, more effective dispute settlement provisions so as to ensure that impartial third-party procedures could always be available in the event of unjustified, disproportionate or otherwise non-lawful countermeasures.

In the Rapporteur's opinion the problem to be resolved in Part Three was different in that it concerned, the settlement obligations to be set forth anew by way of a "general compromissory clause" of the draft articles themselves. Such settlement obligations would be created by Part Three of the draft articles and eventually by Part Three of a future convention on State responsibility. The procedures would complement, supercede or tighten up any obligations otherwise existing between the injured State and the wrongdoing State in any given case of an alleged breach of international law. With regard to such obligations, two kinds of solution were theoretically conceivable. One was described as a maximalist or ideal solution, the other as being a minimalist one.

The theoretically ideal solution would eliminate or reduce the difficulties inherent in relying in on any more or less effective dispute settlement arrangements existing between the parties, or which the parties might conclude in a given case. The way to attain that objective would be to replace provision which merely

referred to dispute settlement obligations deriving from sources other than a convention on State responsibility, as was the case with article 12, paragraph (1) (a), by provisions directly setting forth the obligation to exhaust given third party settlement procedures as a condition of resort to countermeasures.[3]

Recognizing that such a solution might not be acceptable to the majority of members of the Commission the Special Rapporteur did not propose any draft articles embodying it, unless the debate revealed that the maximalist approach would meet with the Commission's approval. He also proposed (i) to leave draft article 12, paragraph (1) (a), unaltered as a provision referring to, and not creating, settlement obligations; and (ii) to strengthen in Part Three the non-binding conciliation procedure proposed in 1985-1986 by adding arbitration and judicial settlement procedure without, however, directly affecting the injured State's prerogative to take countermeasures.[4]

That prerogative, would, as it were, exist only in the mind of the injured State, which would know in advance that resort to a countermeasure exposed it to the risk of third party verification of the lawfulness of its reaction. The theoretically ideal solution in the course of the debate of the Commission, was firmly rejected by the majority of the members of the Commission.

As to the solution recommended in the Fifth report, namely a three-step third party dispute settlement procedure which would come into play only after a countermeasure had been resorted to by an injured State allegedly in conformity with draft articles 11 and 12 of Part Two and after a dispute had arisen with regard to its justification and lawfulness,he referred members to the draft articles set out in section 6 of the report. The three steps of the proposed procedure—conciliation, arbitration, and judicial settlement—were described in paragraphs 62 to 69 *bis* of the report.

According to that solution (as embodied in proposed draft articles 1-6 and the Annex thereto), if a dispute arose between the parties following adoption of a countermeasure by the allegedly injured State and a protest or other form of reaction by the allegedly wrongdoing State, and if such a dispute was not disposed of, either party would be entitled to initiate unilaterally a conciliation procedure within a given period, either party would be entitled to initiate unilaterally an arbitral procedure. A third step before the ICJ was proposed in case of *exces de pouvoir* by the arbitral tribunal and on other hypotheses. The Special Rapporteur pointed out that although in principle three steps were provided for, it would presumably not be frequent that they will be all used in every case. The dispute could well be settled during and following the conciliation procedure, namely as

3. See A/CN.4/450 para 61(c)
4. *Ibid* para 76.

one step. Arbitration would come into play only in case of failure of conciliation; and the procedure before the ICJ, in its turn, would only come into play in case the arbitral proceedings failed or the arbitral award was contested for *excess do pouvoir* or violation of fundamental rules of arbitral procedure.

The proposed system had three essential features which should be emphasized. The main feature was that, failing an agreed settlement between the parties at any stage, the system would—without sigificantly hampering the parties choices as to other possible settlement procedures—lead to a binding settlement. The second essential feature of the proposed solution, was that the settlement procedures to be included in the draft articles would not be of such a nature as to curtail directly, in any significant measure, the injured State's prerogative to resort to countermeasures against a State which it believed had acted in breach of one of its rights. The lawfulness of the resort to countermeasures remained, subject to such basic conditions as the existence of a wrongful act, its attribution to a given State and the other conditions and limitations laid down in draft articles 11 to 14 of Part Two.

The "triggering mechanism" of the settlement obligations developing on the parties under proposed Part Three would neither be an alleged breach of a primary or secondary rule nor a dispute that might arise from the contested allegation of such a breach; it could only be a dispute arising from contested resort to a countermeasure by an allegedly injured State or, possibly, resort to a counter-reprisal by the opposite side. The first-instance evaluation of the existence of such a dispute, and consequently of the triggering conditions, would be made by the proposed conciliation commission. The recommended system afforded the advantage that resort to a third-party procedure by an allegedly wrong-doing State which had been the target of a countermeasure would not follow upon a mere objection to an intended and notified countermeasures: it could take place only after the countermeasure had actually been put into effect.

Although as already stated, the mechanism would not directly preclude resort to countermeasures by an injured State at its own risk, the availability of the system was designed to have a sobering effect on an injured State's decision to resort to countermeasures. At the same time, it would not be the kind of system for suspending unilateral action that was found in other drafts, such as the draft articles on the law of the non-navigational uses of international watercourses. Within the framework of the dispute settlement system proposed for the present topic, the countermeasure would not be suspended at all, except by an order of a third-party body after the initiation of a settlement procedure. The only disincentive would be, in the mind of the injured or allegedly injured State, which, it was to be hoped, would be induced to exercise the highest circumspection in weighing up the necessity for, and lawfulness of, any countermeasure envisaged.

Section 5 of Chapter I of the Fifth Report briefly reviews the policy which had thus far prevailed in the Commission with regard to the dispute settlement provisions of its drafts. The review was followed by an illustration of some of the new trends which were discernible in the more promising attitudes of States in the aftermath of the end of cold war confrontation and in terms of the United Nations Decade of International Law, than the attitudes manifested by the same States in the relatively recent past. Section 5 also emphasized the need for the Commission to view the elaboration of Part Three of the draft as a valuable opportunity seriously to advance the cause of the rule of law in the inter-state system. By adopting a suitably effective settlement system in the draft, the Commission would serve two vital purposes. The first and immediate purpose was to add a correction to the rudimentary system of unilateral reactions represented by countermeasures, however, strictly they were regulated. The commission should feel bound to make an indispensable contribution to cutting down the inequitable consequences of inequalities among the members of the inter-state system, which term more accurately reflected the current reality than did the term "international community".

The second equally important reason for adopting Part Three was to help bridge a striking legal gap: the absence of real procedural obligations for States in the matter of dispute settlement.

The Special Rapporteur urged that the Commission must stop assuming that State would not approve more advance commitments or make use of procedures for the settlement of disputes. He said that the Commission must indicate to the Governments, which it served *uti universi*, as a whole (and probably with their peoples), but not *uti singuli*, what it considered to be the minimalist requirements, and it should let Governments take responsibility for accepting or rejecting them.

In summing up the Special Rapporteur did not propose any draft articles relating to the dispute settlement procedures relating to crimes of States. During the debate in the Commission the majority of members emphasized the desirability of creating effective dispute settlement procedures in particular compulsory procedures, as one of the measures for controlling unilateral reactions to wrongful acts (countermeasures). The arguments advanced in this regard were threefold viz (i) the post cold war international political climate and the increasing willingness of States to submit disputes to third party mechanisms for resolution thereof: (ii) the role of the International Law Commission in the progressive development and codification of International Law and (iii) the need to protect weak States from abuses, on the part of powerful States, of the right to unilateral measures. The Secretariat of the Asian-African Legal Consultative Committee recognises the merits of disputes settlement procedures and endorses the efforts

of the members of the Commission to foster third party dispute settlement procedures during the United Nations Decade of International Law.

Although the three step dispute settlement system which the Special Rapporteur had proposed viz. conciliation, arbitration and judicial settlement, received significant support, some members of the Commission were not convinced of the merits of the proposal. The view was expressed, for instance, that even though the:

> "Special Rapporteur presented his position as being minimalist, he was actually proposing a revolution. States that would ratify such an instrument would be bound to accept conciliation, and the conciliation commission would have a number of decision-making powers; if conciliation failed, arbitration would be compulsory, and if the arbitral tribunal in turn failed to issue an award was not respected, the International Court of Justice would then be competent. All that would cause a great upheaval in the international legal order."

It was stated that the proposed mechanism was intended to apply only to the settlement of all disputes concerning State Responsibility. But since all internationally wrongful acts engaged a State's Responsibility all legal disputes States raised the question of State Responsibility. Therefore, if the Special Rapporteur's proposed mechanism were adopted all disputes would become justiciable.

One member has suggested that there should be separate regimes for the evaluation of the lawfulness of counter-measures and the settlement of disputes relating to the interpretation or application of the future convention. This approach, it was argued had a two-fold advantage in that; it would allow an impartial decision to be taken rapidly on the admissibility of countermeasures, something which would be both in the interest of the wrondoing State, which might be affected by unjustified countermeasures, and in the interest of the injured State, which would thus be assured of not subsequently being penalized for having acted *ultra vires*. Secondly recourse to settlement procedures in the event of dispute relating to the application or interpretation of the future convention would be available even in the absence of countermeasures. The member suggested a distinction between disputes concerning the lawfulness of countermeasures, disputes related to crimes and other disputes.

The view was also expressed that under contemporary International Law the freedom of States to choose the means of dispute settlement was well-established, as well as the obligation to settle disputes peacefully. The proposed three-step system it was argued would be too rigid and would undermine such freedom of choice. The restrictive approach proposed by the Rapporteur it was felt was likely

to give rise to strong opposition from states. In the opinion of that member the proposed system went beyond progressive development of international law, and sovereign States were unlikely to subscribe to it.

Several members while admitting the utility of a compulsory hierarchical settlement regime advocated reducing the system to its two main stages viz. arbitration and/or judicial settlement. Some members favoured a greater use of the International Court of Justice, in particularly the Chamber system request for advisory opinions. One member expressed the view that it would be unfortunate if the Commission were to rule out any possibility of International Court of Justice serving as a third party adjudicator''. The Secretariat of the Asian-African Legal Consultative Committee concurs with this view and strongly recommends a wider use of the World Court in the proposed dispute settlement system. A wider use of the International Court of Justice in matters relating to or arising out of State responsibility needs to be given consideration in light of the observation made in the Commission that the topic of State Responsibility covered the whole spectrum of international law and that any settlement provision in respect of State Responsibility would affect both the primary and secondary obligations of States regardless of the subject matter.

With regard to the first level of the proposed system namely conciliation, the view was expressed that the provisions of the proposed articles could be interpreted to mean that the procedure was applicable only in the case of counter-measures and not of State responsibility in general. It was also observed that the proposed conciliation procedure was compulsory for all disputes when amicable settlement procedures had been exhausted and the conciliation commission could order, the suspension of countermeasures or any provisional measures of protection. Some members however pointed out that the compulsory or binding features of the proposed procedure was not yet established in general international law.

Another member observed with regard to the successive steps of conciliation arbitration and judicial settlement that conciliation was hardly practised in Africa, which had long recourse to the political settlement of disputes at inter-State conferences. He emphasized however, that this did not mean that an organized conciliation system was unthinkable, but that it would have to be established with a degree of caution. In his view, the functions of the conciliation commission might be too hybrid in nature and encompass both conciliation and arbitration. One member pointed out that conciliation had keen successfully used in distributing the joint assets of the East African Community upon its dissolution. The Secretariat of the AALCC supports the role of conciliation in the dispute settlement practice of States which needs to be given serious consideration.

It was also suggested that conciliation involved aspects of negotiation.

encouraging dialogue and inquiry and providing information as to the merits of the positions taken by the parties, resulting in a settlement corresponding to what each party deserved, not what it claimed. Although the proposed conciliation procedures were described as being binding, they nevertheless retained the distinctive feature of conciliation, namely the development of proposals. According to this view the report also seemed to suggest that the proposed regime would be binding only when certain measures had been taken, whereas arbitration and judicial settlement procedures applied to the entire spectrum of State Responsibility.

As mentioned above, Chapter II of the Fifth report dealt with the consequences of the so-called international "crimes" of States. Due to lack of time, however the Commission was unable to consider Chapter II at the present session. It nevertheless deemed it advisable for the Special Rapporteur to introduce this chapter, in order to expedite work on the topic at the next session. In introducing Chapter II the Special Rapporteur drew attention the question of the consequences of international crimes of States. The historical survey of this question provided the starting point for identifying the issues related to the problematic aspects of a possible Special regime of responsibility of "Crimes" and "International Crimainal Liability" of States of individuals or of both respectively.

The Special Rapporteur observed that according to article 19 of Part One of the draft articles, crimes consisted of serious breaches of *erga omnes* obligations designed to safeguard the fundamental interests of the international community as a whole. That did not imply, however, that all breaches of *erga omnes* obligations were to be considered as crimes. The basic problem was to assess to the extent to which the breach seriously prejudiced an interest common to all States and affected the complex responsibility relationship which arose even in the presence of "ordinary" *erga omnes* breaches.

The Special Rapporteur felt that the best approach was to distinguish between the objective and subjective aspects of the issue. From an objective viewpoint, the question was the fashion in which the severity of the breach in question aggravated the content and reduced the limits of the consequences—substantive and instrumental—that characterized an "ordinary" *erga omnes* breach, namely a delict. From a subjective viewpoint, the question was whether or not the fundamental importance of the rule breached gave rise to any changes in the otherwise inorganic and not "institutionally" coordinated multilateral relations that normally arose in the presence of an ordinary breach of an *erga omnes* obligation under general law, either between the wrong doing state and all other States or among the multiplicity of injured States themselves.

Dealing with the substantive consequences, namely cessation and reparation, he said with regard to cessation that crimes did not present any special character

in comparison with "ordinarily" wrongful acts, whether *erga omnes*, or not because the obligation of cessation was not susceptible of a "qualitative" aggravation, attenuation or modification; and second, what was involved, even in the case of delicts, was an obligation incumbent on the responsible State even in the absence of any demand on the part of the injured State or States.

The Special Rapporteur considered the issue of reparation *lato sensu*, which encompassed *restitutio*, compensation, satisfaction and guarantees of non-repetition, to be more complex that the issue of cessation. From an objective standpoint, some of the forms of reparation, especially *restitutio* and satisfaction, were subject, in the case of delicts, to certain limits. Thus it had to be determined whether, in consequence of a crime, such limits were subject to derogation and, to the extent thereof.

As to the subjective aspect, the Special Rapporteur noted that, unlike the case of cessation, the forms of reparation were covered by obligations which the responsible State was required to perform only upon demand by the injured party. Since a crime always involved a plurality of States and possibly, in many cases, States less directly injured than a "principle victim", it must be asked whether, in the current state of international law, each of those States was entitled to claim reparation *uti singulus* or whether the *lex lata* required some mandatory form of coordination among all the injured States.

Apropos the "instrumental" aspects of the possible special consequences of crimes, the Special Rapporteur observed that the Commission needed to provide clear definitions for some of the requirements traditionally considered to be conditions of self-defence, namely, immediacy, necessity and proportionality, the first two of which were often overlooked. It would also have to clarify under what circumstances and preconditions the rights of "collective" self-defence included the use of armed force against an aggressor by States other than the main target of the aggression.

The Special Rapporteur drew attention to another problematic aspect of resort to force in response to a crime, namely whether armed countermeasures were admissible when they were intended not to bring about the cessation of a crime in progress but to obtain reparation *lato sensu* or adequate guarantees of non-repetition.

The Special Rapporteur considered the extent to which the function and competence of the various organs of the United Nations were or should be made legally suitable for the implementation of consequences of international crimes. Three specific questions dealt with in this regard were : (i) *de lege lata*, whether the existing powers of United Nations organs, such as the General Assembly, the Security Council and the International Court of Justice, included the determination

of the existence the attribution and the consequences of the wrongful acts contemplated in article 19; (ii) *de lege ferenda*, whether and in what sense the existing powers of those organs should be legally adapted to those specific tasks; and (iii) of what extent the powers of United Nations organs affected or should affect the *facultes*, the rights or the obligations of States to react to the internationally wrongful acts in question, either in the sense of substituting for individual reaction, or in the sense of legitimizing, coordinating, imposing or otherwise conditioning such individual reactions.

As regards the first question the Rapporteur found that the International Court of Justice was the only existing permanent body which possessed the competence and the technical means to determine the existence, attribution and consequences of an internationally wrongful act, including possibly a crime of State. It was the function of the Court "to decide in accordance with Intenational Law" and its pronouncements possessed "binding force between the parties" to the dispute. Those two features of the Court's function, as well as its composition, made it in principle more suitable than any other United Nations organs to rule on the existence and legal consequences of an internationally wrongful act.

With regard to the third issue, namely the relationship between the reaction of the organized community through international bodies such as United Nations organs and the individual reaction of States, he observed that the possibility of the organized community adopting measures against a criminal State posed the problem of harmonizing the exercise of that competence with the carrying out of those measures which the injured State or States might still be entitled to adopt unilaterally, as indicated by the examples discussed in his report.

The Special Rapporteur believed that the most important questions with regard to the consequences of international crimes were those which affected the role of the organized international community and, in particular, that of United Nations organs. He observed in this regard that were it not for article 19, the Commission's work on international responsibility might seem, to an observer, to be based upon an implied dichotomy between an essentially "civil" responsibility of States, on the one hand, and a penal responsibility of individuals on the other. The Code of Crimes against the Peace and Security of Mankind was based on the assumption that the Code would cover only crimes of individuals, though the individuals in question would have close ties with the State. According to this dichotomy, individuals, would be amenable to criminal justice, but States would not. Although it could be argued that article 19 should be deleted as an illogical and contradictory element, the Special Rapporteur said that he could not subscribe unconditionally either to the notion that criminal responsibility would be incompatible with the nature of the State under existing International Law, or

to the view that the international responsibility of the State was confined *de lege lata* within a strict analogy with civil responsibility under municipal law.

The first and main cause of the alleged incompatibility was the maxim *societas delinquere non potest*. In the view of the Special Rapporteur, that maxim was surely justified for juridical persons of municipal law, but it was doubtful whether it was justified for States as international persons. Although States were collective entities, they were not quite the same thing, *vis-a-vis* international law, as the *personnes morales* of municipal law. On the contrary, they seemed to present the features—from the viewpoint of international law—of merely factual collective entities. That obvious truth, concealed by the rudimentary notion of juridical persons themselves as "factual" collective "entities" found recognition in the commonly held view that international law was the law of the often very seriously punitive.

He pointed out that States seemed bound to remain, under an international law which was inter-State law, essentially factual not juridical collective entities. As such, there remained not only unlawful acts of any kind-notably the so-called "crimes "as so-called "delicits"—but equally susceptible of reactions quite comparable, to those which are met by individuals found guilty of crimes in national societies. The Special Rapporteur drew attention to the crucial problem of distinguishing the consequences of an international State crime for the State itself—and possibly the State's rulers, on the one hand, and the consequences for the State's people, on the other.

Another problem is that of State fault. In this regard, the Special Rapporteur requested the members of the Commission to consider, as "material legislators", whether the kind of breaches contemplated in article 19 could be dealt with without taking account of the importance of such a crucial element as willful intent *(dolus)*....

The last problem which he called attention to concerned article 19 itself. In this regard he asked whether it was appropriate to elaborate a dichotomy between "crimes" and "delicts" if there existed substantial or signficant differences in the manner in which the various specific types of crime were dealt with. He asked whether, it would be preferable to distinguish aggression from other crimes. Pointing out that the list of wrongful acts constituting crimes contained in article 19 dated back to 1976 he asked whether those acts were still the best examples of the wrongful acts which the international community as a whole considered as "crimes of States or whether that list should be "updated". The formulation of the general notion of crimes in article 19, with wording characterized by certain elements rendered it difficult to classify a breach as a crime or a delict and hence

ascertain which unlawful acts now came, or should come, under a regime of "aggravated" responsibility?

The Commission at its forty-fifth session provisionally adopted the text of seven draft articles viz. paragraph 2 of Article 1 and articles 6, 6 *bis*, 7, 8, 10, and 10 *bis* together with commentaries thereto. It may be useful to set out the provisions thereof.

Paragraph 2 of Article 1 as provisionally adopted by the Commission stipulates that the legal consequences (of internationally wrongful acts) are without prejudice to the continued duty of the State which has committed the international wrongful act to perform the obligation it has breached.

The commentary thereto emphasised that paragraph 2 of Article 1 states the rule that where as a result of an internationally wrongful act a new set of relations is established between another State and the injured State the previous relationship does not *ipso facto* disappear and that even if the author State complies with its secondary obligation it is not relieved of its duty to perform the obligation which it has breached. Paragraph 2 is of the nature of a saving clause to allow for the possibility of exceptions, such as the eventuality that the injured State might waive its right to the continued performance of the obligation of the eleven articles which the Commission has till date provisionally adopted Article 1 together with the following four viz, draft articles 2 to 5 are as yet untitled.

Article 6 on cessation of wrongful conduct as provisionally adopted reads :

> A State whose conduct constitutes an internationally wrongful act having a continuing character is under the obligation to cease that conduct without prejudice to the responsibility it has already incurred.

This provision is the first of a series of provisions dealing with the new relations which arise from an international delict between the author State and the injured State. Their new relations involve *inter alia* (i) new obligations of another State and corresponding entitlements of the injured State which are dealt with in articles 6 to 10 *bis* and (ii) new rights of the injured State or States such as the right to take countermeasures which is currently under consideration.

The new obligations of another State consist in the redressal of the situation stemming from the breach of a primary obligation, that is to say, an obligation embodied in a primary rule. The obligation to make reparation is the most frequently invoked of the new obligations and is dealt with in article 6 *bis*. The obligation to make reparations may be discharged in a number of forms as stipulated in articles 7, 8, 10 and 10 *bis*. These articles must therefore be read

together. A primary exigency in eliminating the consequences of a wrongful act is to ensure its cessation i.e. discontinuance of the specific conduct which is in violation of the obligation breached. This provision thus emphasizes and incorporates the importance of cessation.

The Commission has taken the view that cessation falls within the grey area of the "primary" and "secondary" rules in as much as it operates in concretizing the primary obligation, the infringement of which is in progress and affects the quantity and quality of reparation and the modalities and conditions of the measures to which the injured State or States or an international institution may resort to in order to secure reparation.

Among the reasons for devoting an entire article to cessation is to avoid subjecting cessation to the limitations or exceptions applicable to forms of reparation such as *restitutio in integrum*. The difficulties which may normally prevent or hinder restitution in kind are not such as to affect the obligation to cease the wrongful conduct.

Article 6 *bis* entitled Reparation provides:-

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, as provided in articles 7, 8, 10 and 10 *bis*, either singly or in combination.

2. In the determination of reparation, account shall be taken of the negligence or the willful act or omission of :

   (a) the injured state; or

   (b) a national of that state on whose behalf the claim is brought which contributed to the damage.

3. The State which has committed the internationally wrongful act may not invoke the provisions of its internal law as justification for the failure to provide full reparation.

This formulation is based *inter alia* on the widely shared view that a State discharges the reponsibility incumbent on it for breach of an international obligation by giving reparation for the injury or harm caused. The term "reparation", is generic and describe the various methods available to a State for discharging or releasing itself from such responsibility and, is employed in Article 36 paragraph 2 of the Statute of the International Court of Justice.

It would have been observed that while article 6 stipulates an obligation for

the State which commits an internationally wrongful act the present Article 6 *bis* provide for a right of the injured State taking cognizance of the fact that it is a decision of the latter i.e. the injured State that sets a secondary set of legal relations into motion. Thus paragraph 1 expressly provides that a State which commits an internationally wrongful act is under an obligation to provide full reparation for the injury sustained as a result of the internationally wrongful act. The injury may be the result of concomitant factors among which the wrongful act plays a decisive but not an exclusive role. In such cases, to hold the author State liable for reparation of all the injury would be neither equitable nor in conformity with the proper application of the causal link theory which is extensively dealt with in the commentary to article 8. Among the various factors which may combine with the wrongful act to produce the injury, paragraph 2 singles out the negligence or the willful act or omission of the injured State which contributed to the damage (subparagraph (a)) and the negligence or the willful act or omission of a national or the injured State on whose behalf the claim is brought which contributed to the damage (subparagraph (b)). States may bring such claims on behalf of their nationals, namely natural or juridical persons, both of which are covered by the term "national". This factor is widely recognized both in doctrine and in practice as relevant to the determination of reparation.

Article 7 on *Restitution in kind* as provisionally adopted reads :-

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act restitution in kind, that is, the re-establishment of the situation that existed before the wrongful act was committed, provided and to the extent that restitution in kind :

   (a) is not materially impossible;

   (b) would not involve a breach of an obligation arising from a peremptory norm of general international law;

   (c) would not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation; or

   (d) would not seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind.

It may be recalled that in Article 6 *bis* restitution in kind was the first of the methods of reparations listed as being available to a State injured by an internationally wrongful act. There is, however, no accepted definition of

restitution. It has been variously defined as re-establishing the situation that existed prior to the occurrence of the wrongful act in order to bring the relationship between the parties to its original State as well as establishment or re-establishment of the system that would exist, or would have existed if the wrongful act had not been committed. The Commission, has opted for the purely restitutive concept of restitution in kind which, aside from being the most widely accepted has the advantage of being confined to the assessment of a factual situation involving no theoretical reconstruction of what the situation would have been if the wrongful act had not been Committed. The Commission opted for the restructure definition of restitution in kind bearing in mind that it had in paragraph 1 of article 6 *bis* spelt out the entitlement of the injured State, in any event, to "full reparation" for the injury sustained as a result of an internationally wrongful act. It would have been observed that the above mentioned provision clarifies further that restitution in kind compensation are susceptible of combined application. To sum up, the Commission is of the view that restitution should be limited to restoration of the *Status quo ante*—which can be clearly determined—without prejudice to possible compensation for *lucrum cessans.*

Compensation, the main and central remedy resorted to following an internationally wrongful act is the subject matter of draft article 8. Article 8 as provisionally adopted reads as under :

> "The injured State is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.
>
> For the purposes of the present article, compensation covers any economically assessable damage sustained by the injured State, and may include interest and, where appropriate, loss of profits.

To begin with it needs to be recalled that compensation is not the only mode of reparation consisting in the payment of money—nominal damages or damages reflecting the gravity of the infringment are also of a pecuniary nature. The latter, however, perform an afflictive function which is alien to compensation even though a measure of retribution is present in any form of reparation. This distinction between payment of moneys by way of compensation and payment of money for afflictive purposes is generally recongnised.

Paragraph 1 of article 8 as adopted incorporates three elements in relation to compensation. These are (i) the concept of entitlement; (ii) the requirement of a casual link and (iii) the relationship between compensation and restitution in

kind. As to the first, like all other provisions on reparation, article 8 is couched in terms of *entitlement* of the injured State and makes the discharge of the duty of compensation conditional upon a corresponding claim on the parts of the injured State.

Draft Article 10 on satisfaction as adopted at the forty-fifth session reads :

1. "The injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular moral damage, caused by that act, if and to the extent necessary to provide full reparation.

2. Satisfaction may take the form of one or more of the following :

   (a) an apology;

   (b) nominal damages;

   (c) in cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement;

   (d) in cases where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct of officials or private parties, disciplinary action against, or punishment of, those responsible.

3. The right of the injured State to obtain satisfaction does not justify demands which impair the dignity of the State which has committeed the internationally wrongful act.

The term "satisfaction" is employed in article 10 in a technical international sense as distinguished from the broader non-technical sense in which it is merely a synonym for reparation. Although satisfaction has been claimed for various types of injurious behaviour including insults to the symbols of the State such as the national flag, violations of sovereignty or territorial integrity, attacks on ships or aircraft, ill-treatment of , or attacks against heads of State or Government or diplomatic or consular representatives or other diplomatically protected persons and violations of the premises of Embassies or Consulates (as well as the residences of members of foreign diplomatic missions). Claims for Satisfaction have also been put forward by the State in cases where the victims of an internationally wrongful act were private citizens of the foreign State.

Satisfaction is not defined only on the basis of the type of injury with regard to which it operates as a specific remedy. It is also identified by the typical forms it assumes, of which *paragraph* 2 of article 10 provides a non-exhaustive list. "Apology", mentioned in subparagaraph (a) encompasses regrets, excuses, saluting the flag, etc. It is mentioned by many writers and occupies a significant

place in international jurisprudence. Examples are the "I'm Along" Kellet and "Rainbow Warrior"cases. In diplomatic practice, insults to the symbols of the State or Government, attacks against diplomatic or consular representatives or other diplomatically protected agents, or against private citizens of a foreign State have often led to apologies or expressions of regret, as have also attacks on diplomatic and consular premises or on ships. Forms of satisfaction such as the salute to the flag or expiatory missions seem to have disappeared in recent practice. Conversely requests for apologies or offers thereof seem to have increased in importance and frequency.

Another form of satisfaction, dealt with in *subparagraph* (b) of paragraph 2, is that of nominal damages through the payment of symbolic sums. Several examples are to be found in international jurisprudence.

Article 10 *bis* on assurances and guarantees of non-repetition provides :

"The injured State is entitled, where appropriate, to obtain from the State which has committed an internationally wrongful act assuraces or guarantees of non-repetiton of the wrongful act."

The consequences of an internationally wrongful act may include guarantees against its repetition. This particular consequence is however generally dealt with in the framework of satisfaction or other forms of reparation. All remedies—whether afflictive or compensatory—are themselves more or less directly useful in avoiding repetition of a wrongful act and that satisfaction in particular can have such a preventive function, especially in two of its forms, namely damages reflecting the gravity of the infringement, dealt with in paragraph 1 (c) of article 10 and disciplinary action against, or punishment of, officials responsible for the wrongful act, dealt with in paragraph 1 (d) of the same article. Yet assurances and guarantees of non-repetition perform a distinct and autonomous function. Unlike other forms of reparation which seek to re-establish a past state of affairs, they are future-oriented. They thus have a preventive rather than remedial function. They furthermore pre-suppose a risk of repetition of the wrongful act. Those features make them into a rather exceptional remedy, which, in the view of the Commission, should not be automatically avialable to every injured State, particulary in the light of the broad meaning of that term under article 5 of Part Two of the draft.

A request for safeguards against repetition suggests that the injured State is seeking to obtain from the offender something additional to and different from mere reparation, the re-establishment of the pre-existing situation being considered insufficient.

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

PART I

By resolution 47/33, the General Assembly had taken note with appreciation of Chapter II of the report of the International Law Commission (A/47/10), entitled "Draft Code of Crimes against the peace and security of Mankind", which was devoted to the question of the possible establishment of an international criminal jurisdiction; had invited States to submit to the Secretary-General, if possible before the forty-fifth session of the International Law Commission, written comments on the report of the Working Group on the question of an international Criminal jurisdiction. It had also requested the Commission to continue its work on the question of undertaking the project for the elaboration of a draft statute for an international criminal court as a matter of priority as from its next session, beginning with an examination of the issues identified in the report of the Working Group and in the debate in the Sixth Committee with a view to drafting a statute on the basis of the report of the Working Group, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States, and to submit a progress report to the General Assembly at its forty-eighth Session.

Recommendations of the Working Group of 1992

In the report of the Working Group of 1992, the view expressed was that the most appropriate manner to establish an international criminal court would be by means of a treaty agreed to by the States parties, which would contain the Court's statute. The approach recommended by the Working Group was flexible in that it had envisaged a court which would not be a full-time body but an established structure to be called into operation if and when required, according to a procedure determined by its statute. In the first phase of its operation at least, the court should not be a standing full-time body. As regards the composition of the Court and the appointment of its members, the Working Group's suggestion was that each State party to the statute would nominate, for a prescribed term, one qualified person to act as a judge of the Court. On the question of the nature and modalities of acceptance of the jurisdiction of the envisaged Court, the Working Group's suggestion was that the envisaged Court, should not have compulsory jurisdiction, in the sense of a general jurisdiction which a State party to the statute would be obliged to accept *ipso facto* and without further agreement, nor exclusive jurisdiction, in the sense of a jurisdiction excluding the concurrent jurisdiction of States in criminal cases. The Working Group had suggested that the jurisdiction of the envisaged court should be based on specified existing

international treaties in force creating crimes of an international character, including the Code of Crimes after its adoption and entry into force. On the question of personal jurisdiction, the Working Group had stated that "in the first phase of its operations, at least, a court should exercise jurisdiction only over private persons, as distinct from States". As far as the relationship between the statute of the envisaged court and the Code of Crimes, the Working Group's recommendation was that, when drafting the statute of the envisaged court, the possibility should be left open that a State could become a party to the statute without thereby becoming a party to the Code of Crimes. Furthermore, the statute of the Court and the Code of Crimes might constitute separate instruments, with the providing the court's subject-matter, jurisdiction encompassed in crimes covered by the Code in addition to those covered by other instruments. The report of the Working Group on the desirability and feasibility of establishing an international criminal court was considered by the Sixth Committee as very valuable and comprehensive and offered an excellent basis for further work on the topic.

Eleventh Report of the Special Rapporteur

Reference may now be made to the eleventh report of the Special Rapporteur for the topic(A/CN.4/449), which concerned the draft statute of an international criminal Court, and to the written comments received from Member States submitted with reference to General Assembly resolution 47/33 (A/CN.4/452). Relevent material will also be found in the compilation of replies from Governments concerning the first reading of the Code of Crimes against the Peace and Security of Mankind (A/CN.4/448 Add.1). In addition, reference could also be made to the documents distributed further to Security Council resolution 808/1993 and to the report of the Secretary-General (S/25704). At the Forty-fifth Session of the ILC Mr.Thiam (Special Rapporteur), introducing his eleventh report, explained that he had already submitted at least three reports on specific aspects of the question of an international criminal Court, but they had been of an exploratory nature and had been designed to keep interest in the matter alive.

The acting Chairman, speaking on behalf of the Commission, drew the attention of the members of the Commission to the most important development since the previous session, namely, the discussion of the Commission's report by the Sixth Committee of the General Assembly. He stated that the sections of the report on the project for an international criminal court had aroused the greatest interest among delegations, some of which had been of the opinion that the drafting process could be completed within one year, while others had taken a more cautious view that Governments had to be able to give indepth consideration to all the implications of the establishment of such a Court. He classified that a clear-cut majority had been in favour of de-linking the International Criminal

Court and the Code of Crimes against the Peace and Security of Mankind, although it had been generally accepted that, once completed, the Code should be one of the instruments to be applied by the Court. Because of the principle *nullum crimen sine lege-lex* being understood as written law—the Court should not be called upon to base its decisions on rules of customary law. With regard to jurisdiction *ratione personae*, the proposition that the jurisdiction of the Court should apply only to individuals, and not to States, had received unchallenged support.

It will be useful here to recall that, in a carefully drafted resolution, the General Assembly had given the Commission a clear mandate, expressed in paragraph 6 of its resolution.

It provides that the General Assembly :

> "*Requests* the International Law Commission to continue its work on this question by undertaking the project for the elaboration of a draft statute for an Intenational Criminal Court as a matter of priority as from its next session, beginning with an examination of the issues identifies in the report of the Working Group and in the debate in the Sixth Committee with a view to drafting a statute on the basis of the report of the Working Group, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States, and to submit a progress report to the General Assembly at its forty-eighth session."

The draft statute had been distributed well in advance. In view of the urgency of the matter, Mr. Thiam (Special Rapporteur) focused on certain general points.

Main Features of the draft statute

The main characteristics of the draft were, *first*, its realiam, in that it tried mostly to savour the spirit and approach of the Commission which had opted for an organ with structures that were adaptable, not permanent, and of modest cost. Fot this purpose, the draft does not cover all the organs usually to be found in criminal jurisdictions. For instance, there is no investigation organ functioning separately from the individual organ. The draft intoduced a system in which the proceedings are instituted by the Court itself, i.e. by the judicial organ, most often in the course of the hearing. Thus so far as prosecution is concerned, this draft does not propose to establish a department headed by a public prosecutor assisted by a whole army of officers which the functioning of such an organ implies. It advocates a flexible solution, i.e. leaving prosecution in the hands of the complainant State. The draft took account of the existence of other bodies. That would certainly meet with the approval of those who have always maintained that it was not possible to disregard, in particular, State sovereignty.

It will be borne in mind that the jurisdiction of the Court is not exclusive, but concurrent, each State being capable either to judge itself or to relegate a defendant to the Court. This choice seems to have won the support of the majority in the Commission. Moreover, jurisdiction depends on the consent of the two States; the complainant State and the State of the territory of the Crime. The draft is flexible, for it did not make referral of a case to the proposed court mandatory but left it to the discretion of States. It also proposes a body of modest proportions, easy and inexpensive to run—features the Commisson had always wanted to see incorporated in a draft statute.

Main parts of the Draft

The draft is divided into three main parts, a general part and two other parts dealing with organization and functioning, on the one hand and procedure on the other. The general part addresses itself to two questions—the jurisdiction of the Court and applicable law. Under the draft Statute, the Court would not have exclusive jurisdiction. The idea of exclusive jurisdiction has not received broad support. The court's jurisdiction would also be subject to the agreement of the States most directly concerned—the state on whose territory the alleged crime had been committed, and the State of which the perpetrator of all alleged crime was a national. Those two States are the most important, but the possibility that the agreement of other States might be required could also be considered. Jurisdiction would also be limited to individuals. The Court would not have the mandate to try international organizations or States.

The States whose agreement would be required were confined to two broad groups, once under internal law, jurisdiction in criminal proceedings was governed by two principles, neither of which could be excluded since they were essential for the proper fuctioning of the Court. The principles in question were territorial jurisdiction and personal jurisdiction. Personal jurisdiction is designed for instances in which, as sometimes happens, a State, deeming that its fundamental interests or those of its nationals were at stake, in a given case, decides that it should try the case. Personal jurisdiction would allow it to do so. The draft could not exclude one of the two approaches. For this reason, jurisdiction is conferred both to the State in whose territory the crime is committed and the State of which the perpetrator is a national. The draft therefore proposes that, until States adopt an international criminal code, offences within the jurisdiction of the Court should be defined by agreements between State concerned. Any State may also, at the time of its accession to the statute of the Court or at any time, define the crimes over which it recognizes the jurisdiction of the Court. Similar approach which seems more flexible, was proposed in the draft statute of the International Association for Penal Law, adopted in Paris on 16 January 1928 and revised in 1946.

Applicable Law

So far as the applicable law is concerned, the recommendations of the Commission's Working Group, whose view it was that such law could derive only from international conventions and agreements, had been followed by the Special Rapporteur. The proposed Court, therefore, would try only such crimes as were defined in those instruments. The matter had given rise to lengthy debate in the Commission, but the prevailing—and , in the opinion of Special Rapporteur, the realistic—view that the applicable law should be limited to international conventions and agreements. Some members, however expressed the view that both custom and general principles of law could in certain cases also constitute a source of applicable law. Consequently in the draft articles those notions have been placed between brackets to enable the Working Group to review the matter. Nor, incidentally, was case-law to be disregarded, for it was difficult to see how a Court could be prevented from applying its own case-law.

Organization and Functioning of the Court

The organisation and functioning of the Court is governed by two principles: (a) the permanent nature of the jurisdiction of the Court; (b) the non-permanent functioning of all its organs. Two factors have to be reconciled : the Court must have permanent jurisdiction over a number of matters still to be determined, but it should not operate on a full-time basis. The present draft is an attempt to carry out these two aspects, while responding to Commission's concern that a small inexpensive body should be established. So far as the actual composition of the Court is concerned, the judges would not be elected, as is the general rule in international organizations, but would be appointed by their respective States of origin. The Secretary-General of the United Nations would then prepare a list in alphabetical order of the judges so appointed. They would not work full-time, but would be designated to try specific cases on given days. This approach received serious criticism in the Commission.

Composition of a Chamber of the Court

It is necessary for composition of a chamber of a Court, since it is not feasible for all the judges appointed by States parties to sit in the plenary of the court at the same time. Therefore, the Special Rapporteur proposed that a chamber should be composed of nine judges, though the number could be higher or smaller. Such judges would be selected by the President of the Court from the list prepared by the Secretary-General of the United Nations whenever a case was referred to the Court.

In making his selection the President would have to take account of certain criteria in order to guarantee objectivity in the composition of the chamber. A

of a State from which the alleged perpetrator of the crime came could not be selected, not could a judge from a State on whose territory the crime was committed. The President himself would be elected either by all the judges sitting in plenary or by a committee appointed either by the United Nations General Assembly or by the General Assembly of Judges, which shall constitute the Bureau of the Court and shall take all decisions concerning the administrative and financial functioning of the Court. A larger Committee could also be established whose members would be elected by representatives of the State parties. This Committee would then elect the President and Vice-President (s). It would be authorized to oversee the administrative and financial management of the Court and, in particular, to approve the draft budget of the Court before its submission to the General Assembly. Such a larger committee, in the view of the Special Rapporteur, would however be too cumbersome and better suited to an inter-State court.

Court's procedure

The proposed Court's procedure followed various stages, including referral of a case to the Court, investigation, and the trial stage. A case would be brought before the Court only by means of a complaint made by a State. In this connection, reference may be made to the draft articles for and indication of the way in which a complaint should be drafted.

System of investigation

There are two main systems of investigation. One is the inquisitorial system, in which the investigation is entrusted to one person, the examining magistrate, who had excessive powers and his investigation is surrounded with secrecy. The other system is the adversarial system, under which the investigation is carried out openly and publicly by the court itself. In the case of the proposed Court, the simplest course was that the investigation should be carried out publicly by the Court. That did not, however, mean that, where circumstances required or in cases of some complexity, the President of the Court could not appoint some of the members to form a commission of investigation. As a general rule, however, the investigation procedure should be conducted by the trial court.

The trial stage would commence only when the indictment had been drawn up. Under some legal systems, after the investigation, the Procurator General in charge of the prosecution draws up an indictment which is then notified to the accused and any interested parties and, on the basis of the indictment, the trial process takes place. For the International Criminal Court, it has been proposed that a more flexible system—the majority in the Commission favouring a small and flexible body—should be adpopted, whereby the State bringing a complaint before the Court would assume responsibility for conducting the prosecution.

That procedure would preclude the need for a Prosecution Department, with all the attendant legal staff. Such a procedure entails a lengthy process. If responsibility for the prosecution is however placed on the State bringing the complaint, and that State has to assemble the evidence and produce it before the Court, the result, in the final analysis, would be virtually the same. What mattered most in the opinion of the Special Rapporteur, was for the Court to arrive at the truth by whatever means it could be established.

PART - II

Summary of Discussions held in the Commission

The members while initiating the discussion in the Commission were unanimous in thanking Mr. Thiam for his Report. Some members had dealt elaborately with issue of 'Status of the Tribunal'. The general approval of the members was for the Court to be an organ of the UN or at least a body set up and functioning within its framework. In this regard, among other examples, a recent report by the European Parliament on the establishment of an international criminal court for war crimes was cited and it was proposed under the UN system with emphasis being placed on the need to move towards universality. However, some members expressed the view that ".....a desire for concrete results had led to unsystematic treatment of certain issues. A rewording of some of the provisions on the applicable law, the competence of the court and the procedures to be used within the court, for example, might serve to highlight better, including for the benefit of the General Assembly, the position of the Criminal Court within the UN system as a whole."

Majority of the members, however, agreed with the Special Rapporteur's general approach as reflected in the statement in paragraph 4 of the report that the aim should be to establish "an organ with structure that are adaptable, not permanent and of a modest cost." They found this to be somewhat an idealistic solution; but it signified the general direction in which the Commission should move.

As regards the procedure for the appointment of judges (article 12) some members pointed out that it may "result in a veritable armada of judges"and , for that reason, members suggested to "provide from the outset for modest structure". Further it was also suggested that in appointing judges, the traditional principles should be observed, including those relating to representation of the different legal systems and different regions and also the principles that more than one national from the same State could not sit on any organ which tried the accused.

Significantly, as regards the penalities, some members favoured the application

of penalities provided for in the criminal law of the State on whose territory the crime had bneen committed. It was generally agreed by members that concurrence on matters of essentially technical and procedural nature should be relatively simple. It was also noted by them that provisions relating to technical and procedural aspects would account for 70 to 80 per cent of the provisions of the draft statute under consideration, while the remainder 20 to 30 per cent were the difficult residual questions on which much work still has to be done as these consituted the substantive aspects of the draft statute.

Some members referred to the difficulties existing in the process of harmonizing jurisdictional issues. Formulation of article 5 was stated to be little confusing as it dealt with both jurisdiction *ratione personae* and with jurisdiction *ratione materiae*. It would be difficult to accept that States could by special treaties or unilateral instruments, indicate what offences should be included within the jurisdiction of the Court. Accordingly, it was pointed out by the members that the effectiveness of the Court depended on the existence of substantive criminal legal aspects without which it would be vey difficult indeed for the court to function at all.

The Special Rapporteur while summing up the discussion wished to focus on three main points : the relationship between the Court and the United Nations; jurisdiction and the applicable law, and the functioning of the Court. He noted that there was general agreement on the need for a link between the Court and the UN. He also did not favour rigid codification of principles relating to applicable law, especially in an area which is constantly changing. Accordingly, he favoured that the applicable law should not be limited to agreements or conventions, but should also include the general principles of law, custom and even in some cases, national law. Accordingly to him jurisdiction could be dependent on acceptance by the State in whose territory the accused was found, for if the Court were to try to judge the accused without such acceptance, it would constantly be judging by default.

In conclusion, the AALCC Secretariat concurs with general approach of comments provided by the Working Group. Further, for the effective operation of the Court, technical and procedural aspects as applies in different legal systems should be harmoniously adapted. Even at this stage, the AALCC Secretariat is of the view that the issues relating to jurisdiction and appicable law would pose difficulties. One way to overcome this uncertainty is to provide a measure of flexibility to the Court itself while deciding these matters. The AALCC Secretariat notes carefully that this is an area which is constantly experiencing rapid transformation in the light of new political and economic developments. Because of these the responsibility and the manner of effective functioning of the Court assumes greater significance.

PART III

Report of the Working Group on a Draft Statute for an International Criminal Court

The Working Group on a Draft Statute for an International Criminal Court met between 17 May and 16 July 1993 pursuant to a decision taken by the International Law Commission. The mandate given by the Commission to the Working Group was in accordance with General Assembly resolution 47/33 of 25 November 1992 which *inter alia* was devoted to the question of the possible establishment of an international criminal jurisdiction and sought comments on the report of the Working Group concerning this topic. The resolution had requested the Commission to continue its work on the question by undertaking the project for the elaboration of a draft statute for an international criminal court as a matter of priority as from its next session, beginning with an examination of the issues identified in the report of the Working Group and in the debate in the Sixth Committee with a view to drafting a statute on the basis of the report of the Working Group, taking into account the views expressed during the debate in the Sixth Commitee as well as any written comments received from States, and to submit a progress report to the General Assembly at its forty-eighth session.

The Working Group had before it the following documents : (a) the report of the last year's Working Group (A/47/10, Annex) : (b) eleventh report of the Special Rapporteur (A/CN.4/449) : the comments of governments on the report of the Working Group (A/CN.4/452 and Add.1); Chapter B of the topical summary of the discussion held in the Sixth Commitee of the General Assembly during the forty-seventh session; the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (document S/25704) and a compilation prepared by the Secretariat of draft statutes for an intenational criminal court elaborated in the past either in the framework of UN organs or by other public or private entities.

After generally considering series of draft provisions, the Working Group decided to create three subgroups dealing, respectively and primarily with the following subject-matters:[1] (1) Jurisdiction and Applicable Law (2) Investigation and Prosecution (3) Cooperation and Judicial Assistance. The preliminary consolidated text elaborated by the Working Group is divided into seven main parts . Part1 deals with the establishment and composition of the Court; Part 2 is on jurisdiction and applicable law; Part 3 is on investigation and commencement of prosecution; Part 4 deals with the trial; Part 5 is on appeal and review; Part 6

1. Revised Report of the Working Group on the Draft Statute for an International Criminal Court, A/CN.4/ L.490, 19 July 1993.

is on international cooperation and judicial assistance, and; Part 7 is on enforcement of sentences.[2] The draft is termed as "Draft Statute for an International Criminal Tribunal. This is justified by the Working Group on the argument that the three organs contemplated in the draft, namely the "Court"or judicial organ, the "Registry" or administrative organ and the "Procuracy" or prosecutional organ had, for conceptual logistical and other reasons, have to be considered in the draft statute as constituting an international judicial system as a whole. In its report Working Group has more clearly specified various provisions with commentaries for the effective functioning of the Court. It may be recalled here that last year's report had three parts dealing essentially with (a) jurisdiction of the Court and applicable law; (b) organization and functioning, and (c) Procedure.

The Working Group while examining Part 1 of the draft statute (which deals with the establishment and composition of the Tribunal) opts to deal with it in several groupings according to their subject-matter. Accordingly, Articles 1 to 4 refer to aspects closely linked to the nature of the Tribunal and deal with its establishment (article 1), its relationship with the United Nations (article 2), its seat (article 3)and its status. The divergent positions as regards the Tribunal's relationship with UN still remain—should it become an organ of the UN or should it have a link with the UN through treaty of cooperation? Both the options have been provided in the draft within brackets for final resolution.

Article 5 specifies the various organs of the Tribunal, namely, "The Registry"and "The Procuracy". Subsequent provisions relating to qualifications, elections and independence of judges did not present any difficulties. As to the relatively long period of 12 years for the term of office of the judges provided for in paragraph 6 of article 7, it was agreed in the Working Group that this should be considered as a sort of trade-off for the prohibition of their re-election. As regards the 'independence of judges' the Working Group took into account the fact that the Court would not be a full-time body. This is why article 9, without ruling out the possibility that the judge may perform other salaried functions (as also contemplated in article 17) also endeavoured to define the criteria concerning activities which might compromise the independence of the judges and from the exercise of which the latter should abstain. It is pointed out that a judge of the Court could not be, at the same time, a member or official of the Executive Branch of Government. The AALCC Secretariat is of the view that the issues relating to independence of judges in relation to an internal function of State needs to be examined carefully. Because in certain states functions performed by an Executive and a judicial branch are bordered on a very thin line of difference. Although it

2. Ibid., p.4; It is to be noted that some of the provisions are still between square brackets either because the Working Group could not yet find general agreement either on the contents of the proposed provision or on its formulation, or in order to receive guidance from the General Assembly.

is stated by the Working Group that in case of doubt the Court should decide this matter, the ramifications of dealing with an essentially domestic matter *vis-a-vis* Court and its independence needs careful consideration.

Article 12 on election and functions of the Registrar and article 13 on the Composition, functions and powers of the Procuracy deal with the two other organs which compose the international judicial system to be established. The Registrar is the principal administrative officer of the court and is, unlike the judges, eligible for re-election. Similar regulations are applicable to Procuracy also whose main functions will be the investigation of the crime and the prosecution of the accused. The AALCC Secretariat positively concur with the views enunciated by the Working Group to preserve the Prosecution's independence by providing that he should not act in relation to complaint involving a person of his/her nationality.

Articles 14 to 18 deal with aspects related to the beginning and end of the judge's functions, and to the work of the judges and the Court and the performing of their functions. The AALCC Secretariat notes that the provisions relating to "Loss of Office" (Article 15) requires the concurrence of two-thirds of judges of the Court and this provision differed from the corresponding article of the Statute of the International Court of Justice (article 18). According to the latter a judge only accepted dismissal if, in the unanimous opinion of the other members of the Court he had ceased to fulfill the required conditions. The AALCC Secretariat supports a provision relating to Review of the Statute (Article 21). The commentaries provided in the Report of the Working Group however affirm that the place of Article 21 on "Review of the Statute" is still provisional.

The Part 2 deals with the very crucial aspects of "Jurisdiction and Applicable Law." The Working Group terms this part as "the central core of the draft statute". From the point of view of the crimes which may give rise to the court's jurisdiction, articles 22 to 26 lay down, basically, two strands of jurisdiction, which are based on a distinction drawn by the Working Group between treaties which define crimes as international crimes and treaties which merely provide for the suppression of undesirable conduct constituting crimes under national law. An example of the first category of treaties is the International Convention against the taking of Hostages of 17 December 1979. Examples of the second category of treaties are the 1963 Tokyo Convention on Offences and Certain Acts Committed on Board Aircarft (14 September 1963) as well as all treaties dealing with the combating of drug-related crimes, including the 1988 UN Convention against illicit Traffic in Narcotic Drugs and Psychotropic Substances (19 December 1988). The AALCC Secretariat concurs with this categorization and it further suggests that the Court itself may be given an option to rule on the desirability of

including or excluding a treaty or convention for exercising jurisdiction. This should be, however, subject to principles enunciated in the Statute itself.

Article 23 deals with the ways and modalities in which States may accept the Court's jurisdiction. The Working Group presents three alternatives. Alternative A which is termed as "opting in" system, does not confer jurisdiction over certain crimes automatically on the Court by the sole fact of becoming a part to the Statute but, in addition, a special declaration is needed to that effect.Similarly Alternatives B and C were possible formulations discussed in the Working Group. The AALCC Secretariat is of the view that the basic principle underlying these alternatives should reflect the consensual basis of the Court's jurisdiction. Article 24 spells out the conditions for States which have to accept the Court's jurisdiction in a given case under article 22 for the Court to have jurisdiction and Article 25 provides for the "cases referred to the Court by the Security Council. The Working Group felt that provision such as this one was necessary in order to enable the Security Council to make use of the Court, as an alternative to establishing tribunals ad hoc. Article 26 lays down the second strand of jurisdiction, allowing States concerned to confer jurisdiction on the Court in respect of other international crime not covered by article 22. It is further pointed out that article 26 refers to "crimes under general international law"and defines this category probably for the first time in connection with individual responsibility, as "crimes under a norm of international law accepted and recognized by the international community of States as a whole as being of such fundamental character that its violation gives rise to the criminal responsibility of individuals."This paragraph is intended to cover international crimes which have their basis in customary international law and which would otherwise not fall within the Court's jurisdiction, such as aggression, which is not defined by treaty but by the UN Declaration on Aggression, genocide, in the case of States not parties to the Genocide Convention, or other crimes against humanity not covered by the 1949 Geneva Convention. The Working Group noted with regard to its inclusion that it seemed inconceivable that at the present stage of development of international law, the international community would move to create an international criminal court without including these crimes under the Court's jurisdiction. The other category of crimes contemplated by Article 26 related to the distinctions between treaties which define crimes as international crimes and treaties which merely provide for the suppression of undesirable conduct constituting crimes under national law. Article 28 deals with "Applicable Law" sources of which are Stated to be this statute and applicable treaties.

The Parts 3, 4, and 5 of the draft statute deal with the procedural aspects of— investigation and commencement of prosecution, the trial and matters relating to appeal and review respectively. The Working Group noted that "the interests of

the international community in providing a universal mechanism for prosecuting, punishing and determining international crimes wherever they occur weighed in favour of making this particular treaty institution available to all States."

The AALCC is of the view of that while embodying these procedural aspects regard must be had to the different legal mechanisms prevailing in different States. It would be necessary in the interest of community of States to harmonize these criminal law mechanisms relating to procedural aspects. In this regard, Parts 6 and 7 of the draft statute constitute an important component of the whole. These articles deal with matters relating to "International Cooperation and Judicial Assistance" and "Enforcement of Sentences" respectively. The AALCC Secretariat concurs with this procedural mechanism and endorses the commentaries provided by the Working Group in Parts 3, 4, 5, 6 and 7.

C. The Law of the Non-Navigational Uses of International Watercourses

At its Forty-third Session the Commission adopted on First Reading an entire set of draft articles on the topic which was transmitted through the Secretary-General to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 1993. At its Forty-fifth Session the Commission had before it the Special Rapporteur's first report before commencing second reading of the draft articles. The Commission also had before it the comments and observations on the draft articles received from few Governments.

The Special Rapporteur's report analyses written comments and observations received from Governments. The report raises, *inter alia* two issues of a general character, whether the eventual form of the articles should be a Convention or Model Rules, and the question of dispute settlement procedure. The report also examines articles 1 to 10 of Parts I and II of the topic.

While analysing the draft text the Special Rapporteur, made a reference to developments since the Commission's completion of First Reading. The particular references were made to the result of the United Natoins Conference on Environment and Development (UNCED), the Convention on the Protection and Use of Transboundary Watercourses and International lakes signed at Helsinki on 17 March 1992, and the Convention on Enviornmental Impact Assessment in a Transboundary Context signed at Espoo, Finland, on 25 February 1991. He, however, observed that nothing in the abovementioned instruments required fundmental change in the text of the draft as it stands after completion of the First Reading.

The report briefly deals with the question of what form the draft text should take i.e. whether as Framework Convention or Model Rules. According to views expressed by the Special Rapporteur, "the utility of the Framework Convention approach is a function, in large measure, of the width and breadth of its ratification, the utility of the model rules approach largely a function of the strength and depth of the endorsement of the rules that the Commission is prepared to recommend and the General Assembly is likely to endorse".[1] The views expressed by the Special Rapporteur, however, did not express a preference for either of these approaches. Advocating of Framework Convention approach, as the report points out, to a certain extent forecloses "some expectation of widespread acceptance. This is however, subject to "a willingness to support a recommendation for very strong endorsement of the work product by the General Assembly." Model Law, on the other hand, would facilitate inclusion of more specific guidance."[2] The report leaves this qustion at this stage and attempts to highlight objectively the possible preferences between the two approaches.

The views expressed by few countries on this question in their comments and observations could be briefly assessed. Germany supports the idea of framework agreement as this approach does not deny contracting parties the opportunity to deal with the specific characteristics and use of a certain international watercourse by means of bilateral and multilateral agreements, it supplies them with general principles and thus establishes a minimum standard. Turkey also supports this view on account of the variety of geographical locations, hydrological constructions, demographical qualities and characteristics of international watercourses. The 'United States in its comments proposes the structure of the draft as a framework document in order to guide watercourse states in developing management practices tailored to their circumstances. We see that there is some kind of unanimity in accepting draft text as a Framework Convention'. The approach of the Swiss Government, though similar at the outset, defines this question more succinctly. It assumes that "most of the substantive rules contained in the draft are supposed to reflect customary law, while procedural rules, by their very nature, fall in the catrgory of the progressive development of international law."[3]

In the discussions at the Commission the majority of members favoured a Convention rather than Model Rules. According to many of them importance of the matter warranted the conclusion of a multilateral treaty. Ambassador Koroma expressed the view that the ultimate decision would depend on the

1. First Report on the Law of the Non-Navigational Uses of International Watercourses by Mr. Ruben Rosenstock, Special Rapporteur (A/CN.4/451 20 April 1993)
2. Ibid.
3. Comments and observations received from States (A/CN.4/447, 3 March 1993), p.44

quality of the Commission's work. According to him if the draft articles were balanced these would inevitably recommend themselves to the international community. Professor Tomuschat expressed his clear preference for a draft Convention rather than Model Rules. According to him many of the provisions dealt with procedural mechanisms which could become fully effective only within the framework of a treaty; draft articles, he argued, could realize their full potential only if they were embodied in an instrument having binding force. While accepting the reasoning put forward by the Special Rapporteur, Mr. Idris favoured the form a framework agreement or convention which would guide States in the drafting of specific agreements on common watercourses.

The Special Rapporteur makes a reference relating to "dispute settlement" in his report. Specifically, he draws the attention of the Commission to the fact that a number of Governments have urged the Commission to address further the question of including dispute settlement provisions. While sharing in full the views of his predecessor, Professor McCaffrey points out that it would be an important contribution for the Commission to recommend a set of provisions on fact-finding and dispute settlement in the event the Commission decides to recommend a draft treaty. The majority of members in their comments outlined practical problems involved in introducing such a measure relating to fact-finding. It may be recalled here that dispute settlement clauses providing for mandatory conciliation had been included by the precious Special Rapporteur in his sixth report (1991) and had not been pursued further because of want of time. The current report had indicated that as the needs of populations increased and water resources became scarce, disputes on the use of international watercourses were likely to proliferate and might assume serious proportions if they were not resolved at the technical level.

Many members of the Commission observed that water courses were diverse and a specific dispute settlement machinery might be required in each case. In the context it was observed that the means of dispute settlement noted in Article 33 of the Charter would always be available to the parties concerned and disputes relating to the uses of watercourses under consideration. It was also argued that such disputes could more effectively be resolved by political means, rather than by adjudication.

Some of the members who were of the view that dispute settlement clauses should be included in the draft articles considered that the Commission should first complete its work on the draft articles before turning to the question of dispute settlement. References were also made to the establishment of river-basin committees and other similar bodies, such as Niger Basin Authority, the Gambia River Basin Development Organisation and the International Commission for the

Protection of the Rhine against Pollution, and the machinery in the Danube basin. The AALCC Secretariat is of the view that a dispute settlement machinery whatever form it takes, is very desirable.

The report of the Special Rapporteur mainly considered articles 1 to 10 of the draft text. The Special Rapporteur on the basis of comments by Governments, saw no reason for any change in article 1. However, some Governments in their comments, had reopened the question of the appropriateness of the term "Watercourses". In the light of the fact that the term was the result of a compromise, the Special Rapporteur was of the view that it would not be prudent to change the term. A suggestion that the term "transboundary waters" be used because of its use in a recent convention namely, Convention on the Protection and Use of Transboundary Watercourses and International Lakes of 1992 (International Legal Materials, Vol.XXXI, p.1312) was referred to. In the course of the discussion it was suggested in the Commission that article 1 did not reflect a proper balance in the relationship between navigation and other uses of international watercourses. Further, the point was made that the concept of integrated water resources management, as recognised in paragraphs 18.8 and 18.9 of Agenda 21 of the Rio Conference, should be incorporated in article 1, paragraph 1.

As regards article 2 (use of terms) the Special Rapporteur raised two crucial issues. Firstly, he recommended that the phrase, "flowing into a common terminus"in subparagraph (b) be deleted. In his view that notion of "common terminus" did not seem to add anything to what was already covered by the rest of the subparagraph and could be confusing. If retained, the phrase risked the creation of artificial barriers to the scope of the draft articles. Secondly, he proposed in his report that he was inclined to include "unrelated confined groundwaters" if the Commission agreed.

As to the reference to "flowing into a Common terminus" in paragraph (b) of article 2, several members disagreed with the Special Rapporteur's proposal for its deletion. While expressing their views the members felt that this requirement had been included to introduce certain limitation upon the geographic scope of the articles, the fact that two different drainage basins were connected by a canal would not make them part of a single "watercourse" for the purposes of articles. It was further pointed out that in a State where most of its rivers were connected by canals, the absence of the requirement of common terminus would turn all those rivers into a single system and would create an artificial unity between watercourses. A common terminus criterion would, also help to distinguish between two watercourses flowing alongside each other. In view of this few members reserved their positions pending further careful examination of the issue by the Special Rapporteur. The AALCC Secretariat considers that the phrase in question is significant and should be retained.

Many members also did not favour the inclusion of "unrelated confined groundwaters".They did not see how "unrelated groundwaters" could be envisaged as part of a system of waters which constituted "by virture of their physical relationship a unitary whole". And if there was no physical relationship, how could such waters be part of a unitary whole? The Commission's attention was drawn to the fact that the issues of confined groundwater evolved quite recently. Moreover, the law relating to groundwaters was more akin to that governing the exploitation of natural resources, especially oil and natural gas. Another reason mentioned by few members for not including proposals relating to groundwaters in the draft was that such an inclusion would require considerable redrafting of article, delaying in the process Commission's goal of completing the second reading of the articles by next year. Accordingly, several members of the Commision reserved their position until such time as they had been able to consider , next year, the further study to be undertaken by the Special Rapporteur. Whether or not confined groundwaters should be included in the topic is an issue which requires careful consideration. The AALCC would recommend reservation of decision until further study is peesented.

The observations relating to modifications in article 3 concerned two issues —replacement of the adjective "appreciable" with "significant" and the question of how to deal with existing watercourse agreements. Regarding this change two different views were expressed. One view, supported by many members, was that, in all cases adverse effects or harm went beyond the mere possibility of "appreciation" or "measurement, and it was clear that what was really meant was "significant" in the sense of something that was not negligible but which yet did not necessarily rise to the level of "substantial"or "important". "Appreciable" according to the commentary provided for the first reading, contained two elements—the possibility of objective appreciation, detection or measurement, and a certain degree of importance, ranging somewhere between the negligible and the substantial. It has been pointed out that in most cases, "appreciable" could be taken to mean "not negligible" and did not designate the point at which the line should be drawn. That line was crossed when significant harm was caused—harm exceeding the parameters of what was usual in the relationship between the States that relied on the use of the waters for their benefit. In view of this, members agreed with the Special Rapporteur's proposal to replace "appreciable" with "significant". The AALCC Secretariat considered that this would be a positive improvement of the text.

The members who did not concur with this interpretation felt that such a change went further than the necessary distinction between inconsequential harm

that could not be even measured, on the one hand, and consequential harm, on the other. According to these members of the Commission, the subjectivity inherent in the term "significant" would leave the potential victim State defenceless, contrary not only to its interests but to protection of the watercourse itself. The result would be to ignore the cumulative effects of lesser harm, which could be substantial especially in combination with other elements. It was further pointed out that the change took no account of the particular conditions of each watercourse, and the history of its use, which could mean different degrees of tolerance and vulnerability to harm. Keeping apart translation issues of this change, the view was also expressed that the word "appreciable" denoted something that could be established by objective evidence and also conveyed the notion of "significant"and "substantial". However, it was felt necessary that the Commission should consider, once again, the relative merits of the two words before taking a final decision.

The Special Rapporteur considered article 4 (which deals with the question of "who could be parties to the watercourse agreements") as acceptable. On the other hand, views were also expressed in the Commission to the effect that it should be re-examined. According to the argument, the entitlement of a watercourse State to become a party to agreements, whether those agreements applied to the whole or only part of the watercourse, was an exception to the fundamental principle whereby States enjoyed freedom to choose their treaty partners. That exception was sought to be narrowly construed. A further reason advanced for reviewing article 4 was that article 30, which had been adopted after article 4, contemplated a situation in which the obligations of cooperation provided for in the draft articles could be fulfilled only through indirect channels. It was also stated that, article 4, would not presumably, apply to cases in which a watercourse State entered into an agreement with a non-watercourse State, or with an international financial institution, with a view to initiating, new work on the watercourse.

The Special Rapporteur recommended no changes in article 5, which could be termed as constituting an important element in the law relating to international watercourses by defining the principle of "equitable and reasonable utilization and participation". However, some members felt that the relationship between articles 5 and 7 was unclear. Some comments had shown a preference for eliminating article 7 or subordinating that article to article 5 and making "equitable and reasonable" virtually the sole criteria for use. (Article 7 obligates watercouse States not to cause appreciable harm). The ambiguity between articles 5 and 7 was explained in the following way—on the one hand, those who believed that "equitable and reasonable" use, as provided for in article 5, should be the main consideration, implicit in which might be the right to cause some

harm, and, on the other those who gave predominance to harm on the ground that no use could be regarded as "equitable and reasonable" if it resulted in harm to another State.

Pursuant to these comments the Special Rapporteur reformulated article 7, by imposing on States only an obligation to "exercise due diligence", not an obligation to "exercise due diligence", not an obligation not to cause appreciable or significant harm. It was further pointed out that "where the use was equitable and reasonable, some harm would be allowable, with the result that equitable and reasonable would become the overriding consideration".

This was not acceptable to many members on the ground that it would upset the delicate balance built into the draft text. They pointed out that "by way of an exception to the general principle, only harm resulting from pollution would render a use inequitable and unreasonable , although, even then, the harm might be permitted if there was no imminent threat to human health and safety". Although the concept of equitable and reasonable utilization was supported by many authorities and appeared in many international instruments, some members felt that it did not make a good substitute for the basic principle that the overriding consideration was the duty not to cause significant harm to other States. Accordingly, some members expressed the view that article 7 could be deleted. In their view the content of the principles of equitable and reasonable utilization set out in articles 5 and 6, would be determined by States. It would be helpful, therefore, if article 5 were to propose model forms of utilization, for example, a watercourse among States, for that would facilitate the settlement of disputes. Members pointed out that article 7 laid down a standard, already reflected in a number of articles and designed to trigger various procedures such as those relating to notifications, consultations and negotiations. Accordingly, it was stated that the requirement contained in article 7 could be placed in article 5 and article 7 could be deleted.

It was pointed out that list of factors embodied in article 6 though not exhaustive, all six categories were found pertinent. So, it was felt that this article should be retained without any change. The Special Rapporteur in his report had referred to the changes suggested by some Governments but found them unnecessary on the ground that these proposed changes were accommodated within the text itself. The Special Rapporteur noted that, at the present time, he did not propose to initiate changes in articles 8, 9 and 10. He noted views expressed by some Governments in the comments submitted by them about the generality of article 8 which *inter alia* incorporates the "general obligation to cooperate". On the other hand, in regard to the possibility of making the text more precise, view was expressed to the effect that any more precision of the article might be at the cost of sacrificing its general nature.

The subject of "Law of International Rivers has been on the agenda of Asian-African Legal Consultative Committee (AALCC) since its Ninth Session held in New Delhi in 1967. The progress of work concerning this topic was slow initially due to the diversion of Committee's attention to other topical areas, particularly Law of the Sea. In 1983 (Tokyo Session) this topic received full-scale attention and since then it is being considered in such a way as to complement the work of ILC. Accordingly, the Committee at its Islamabad Session (1992) had recommended its Member States to utilize the study on the ILC draft articles contained in Doc.No. AALCC/XXXII/Islamabad/92/5 in the preparation of their comments and observations for the second reading of the draft articles by the ILC. In view of the importance of the topic, after due deliberations at the Islamabad Session (1992) the Committee had directed the Secretariat to initiate preliminary study on the practice in the arena of user agreements and examine the modalities employed in the sharing of waters of watercourse. Pursuant to this, the Secretariat study for the 1993 Kampala Session examined three key areas relating to international rivers in the Asian-African context, namely—(a) Definition of "International Watercourse" (b) Equitable and Reasonable Utilization and Participation, and (c) Protection and Preservation of Ecosystems within the context of institutional and legal aspects of the river system agreements in the Asian-African region.

This study was considered at the Thirty-second Session of the AALCC held in Kampala from 1 to 6 February 1993. While stressing the need for finalizing the work of ILC on this topic, the delegate of Syrian Arab Republic drew the attention of the Committee to the lack of clear legal norms or regulations that would define the duties and rights of countries towards each other and towards international watercourses, which they share. The delegate of Iraq spoke, albeit briefly on the utility of ILC's work. The delegates at this session were given a brief outline of the ILC's work completed on this topic by ILC Chairman H.E. Christian Tomuschat. In view of the significance attached to this topic, members of AALCC directed the Secretariat to continue to study the topic, taking into account regional system agreements. The Committee also urged its member States to furnish the Secretariat with necessary details so as to facilitate more concrete study on this topic.

In conclusion, it is pertinent to record the current ILC's efforts with respect to the second reading of these draft articles. The Drafting Committee, upon a reference by ILC recommended the adoption of following articles namely—article1 (Scope of the present articles)article 2 (Use of terms) article 3(Watercourse agreements) article 4 (Parties to watercourse agreement) article 5 (Equitable and Reasonable Utilization and Participation) article 6 (Factors relevent to equitable and reasonable utilization) article 8 (general obligation to cooperate) article 9

(regular exchange of data and information) article10 (relationship between different kinds of uses). It was also noted that the study the Special Rapporteur has been requested to undertake concerning unrelated groundwaters may require reconsideration of some of the aspects of the articles. The Commission did not adopt articles as these were not accompanied by commentaries. In view, of this, the Commission merely took note of the report of the Drafting Committee.

D. International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law

At its Forty-fifth Session the Commission had before it the Ninth Report of the Special Rapporteur[1] Mr. Julio Barboza. The Report was devoted entirely to the issues relating to the prevention of transboundary harm of activities. Introducing his Ninth Report the Special Rapporteur stated that while several aspects of the question of prevention of transboundary harm had been dealt with in the last four reports[2] that he had submitted to the Commission during its last four sessions, the present report divided into three parts, described the nature and content of the concept of prevention and contained the text of eleven draft articles dealing with the matter.

The Introduction to the Ninth Report addressed itself to two issues viz. the mandate of the Special Rapporteur and the nature of obligation of prevention. Referring to the debate during the Forty fourth Session of the Commission the Rapporteur stated that the Commission had mandated him to confine his study to activities involving risk viz. activities that may cause transboundary harm as a result of accidents due to loss of control, and to commence with the formulation of draft articles on obligations of prevention. The question of activities "having harmful effects" or activities which caused transboundary harm in their normal operations would be considered after the completion of the work on activities involving risk.

The latter part of the Introduction to the Ninth Report dealt with the main features of obligations of prevention. The Special Rapporteur observed in this regard that the obligations of prevention constitute what are called 'due diligence' obligations, which are deemed to be unfulfilled where no reasonable effort is made to fulfil them.[3] In other words, States must make an effort in good faith to prevent any transboundary harm. A State would be said to have fulfilled or complied with its obligation of vigilance if it had applied or taken reasonable

1. See A/CN.4/450
2. See the Fifth Report A/CN.4/423; the Sixth Report A/CN.4/428 and Add.1; the Seventh Report A/CN.4/437 and the Eighth Report A/CN.4/443 and Corr. 1
3. See A/CN.4/450 para 7.

administrative measures to ensure that the precautions imposed by its law on operators were observed.

In the second part of the Report entitled "The Articles" the Special Rapporteur proposed the text of eleven draft articles on prevention. It may be stated that with the exception of draft article 20 *bis* dealing with "Non-transference of risk of harm" most of the provisions had originated in the eighth report, based as these draft articles were on the nine articles that had been proposed (in the eighth report) to be placed in an annex on non-compulsory rules.

In the scheme of the previous report the Chapter on "prevention" had immediately followed the ten draft articles which had been submitted to the Drafting Committee. The Special Rapporteur was of the view that the first ten articles remained unaffected by the decision adopted by the Commission on the recommendation of the Working Group and could thus apply without modification to activities involving risk. He accordingly proposed that, subject to the approval of the Commission, the articles on prevention would begin with article 11 and that the presentation referred in the present (ninth) report could, perhaps, serve as a starting point for drafting new provisions.

The Special Rapporteur accordingly proposed that the texts proposed for the annex to the Eighth Report which were drafted as legal propositions be purged of references to activities having harmful effects and used as a starting point for drafting new articles. Thus former article 1 of the annex, into which a text on pre-existing activities was incorporated has now been split into four draft articles and accordingly renumbered (articles 11 to 14). Article 2 of the annex has been replaced by two draft articles viz. 15 and 16. Article 3 of the Annex, on National Security and Industrial Sectors thus becomes draft article 17. Articles 4 and 5 of the annex are not dealt with in the present (ninth) report as they related to activities with harmful effects. Article 6, of the annex, on consultations with a view to finding a regime for activities involving risk, has become article 18. Article 7, of the annex, on 'Initiative by the Affected States' becomes articles 19 of the new text on 'Right of the State presumed to be affected.'

The Special Rapporteur deliberately omitted article 8 of the annex dealing with the settlement of disputes. He pointed out in this regard that the settlement of disputes could relate to two types of situations viz (i) disputes arising during negotiations in respect of diverging interpretation of facts and consequences of the activity in question, and (ii) disputes arising from the interpretation or application of the articles. In his opinion while the first category of disputes could be rapidly resolved by fact-finding experts or commissions, governments were likely to be reluctant to accept third party settlement in respect of the latter category of disputes i.e. those related to interpretation or application of the

articles. The Special Rapporteur, therefore proposed the postponement of the consideration of the first type of disputes until he had submitted his formulations on a general provision for the settlement of disputes.

Article 9 of the annex on factors involved in a balance of interests pending the decision on where it should be inserted, has been reproduced unaltered as article 20. The new formulation article 20, *bis* on the principle of 'non-transference of risk or harm', the Special Rapporteur said, could either be placed in the chapter on principles or left in the one on prevention to which it primarily related.

In the third and final part of his Ninth Report the Special Rapporteur focussed on the "polluter pays" principles which has thus far not been considered in the treatment of the topic. He believed that the Commission could examine the principle later in the context of the Chapter on principles. He held the view that unlike the "principle of the non-transference of risk or harm" which dealt mainly with the measures of prevention, the "polluter pays" principle had expanded beyond the framework of prevention (i.e. liability on costs of prevention) to focus also on costs incurred in connection with compensation.

The Secretariat of the Asian-African Legal Consultative Committee last year prepared a brief on the Eighth Report of the Special Rapporteur. That brief dealt with the text of draft articles which now form the basis of draft formulations on 'Preventive Measures' set out in the Special Rapporteur's Ninth Report. The present brief is therefore restricted to those proposals which are either new or have been subjected to substantive amendments since they were first proposed last year.

Draft article 11 entitled *'Prior authorization'* sets out the first supervisory function and responsibility of a State in respect of activities with a risk of trans-boundary harm and requires the prior authorization of the State within whose territory or jurisdiction or control they are conducted. Such prior authorization is also required to be obtained in the event that a major modification or change in the activity is proposed.

This formulation is in effect a modified version of the opening sentence of draft article 1 on preventive measures that the Special Rapporteur had proposed in the last report to be included in an annex on preventive measures.

This formulation would best be commented upon after the Commission has taken a decision on and adopted a definition of the concept of risk. Only in the light of that definition could it be determined whether States would reasonably be expected to accept prior authorization as a general obligation. It must, however, be stated that the stipulation relating to prior authorization, as formulated, does not provide or envisage the periodic renewal of the authorization or the possibility or even the obligation to withdraw it in certain cases. Consideration should be

given to the issue of expanding the scope of the provision to cover periodic review and renewal of authorization of activities involving risk.

Draft article 12 on *Transboundary Impact Assessment* would provide that a State requires that an assessment of the possible transboundary impact of an activity be undertaken before an activity is authorized. The Special Rapporteur explained that assessment did not require that there must be *certainty* that a particular activity would cause significant transboundary harm, but only *certainty* that a significant risk of such a harm existed. Opinion was divided concerning this provision with some members believing that it was the State itself which should make the assessment, and others arguing that it was the duty of the operator to undertake such assessment.

The subject matter of this article on assessment and, the requirements of exchange of information and consultation covered by articles 15, 16 and 18 are closely linked and must be read together. All are geared to an objective which is very important for the purposes of an effective prevention regime, namely encouraging the participation of the State presumed to be affected so that it can help to ensure that the activity is carried out more safely in the State of origin and at the same time be in a position to take more precaution in its own territory to prevent or minimize the transboundary impact. Cooperation, in the view of the Special Rapporteur, is an essential part of these obligations.

The requirement of environmental impact assessment plays an important role. Article 12 should therefore be spelt out, in some detail, so that the essential components of a good environmental impact assessment are clearly defined. Precedents for such definitions exist, both in conventions and in decisions of the UNEP Council. Unless the essential requirements are identified, there is a risk that a State might appear to have fulfilled its obligations by carrying out a study of some kind, whereas, in reality, it had totally failed to have the potential risk properly assessed.

The relationship between articles 12 and 15 is unclear, because article 15 gave the impression that, even if the assessment required under article 12 showed a possibility of substantial transboundary harm, the State could nevertheless give its authorization within the meaning of article 11. It is not clear why, in that case, it should be required to notify the other States of the results of the assessment.

Draft Article 13 on *pre-existing activities* provides that it should happen that an activity with a risk of transboundary harm is being conducted without prior authorization the State within whose territory or jurisdiction the activity is being conducted must require that an authorization under article 11 is obtained.

It was pointed out during the discussions in the Commission that article 13,

extended the scope of international liability to pre-existing activities, which may have continued for several years without ever causing harm. This presupposed that they had not involved any significant risk at the outset. To subject pre-existing activities to the requirements envisaged might create differences in the relationship between the State and the operators, since the new demands of the State with respect to prevention could be regarded as a departure from the initial undertakings or as a modification, implied or otherwise, of the investment contract. A suggestion was made that the last sentence be amended by the addition of the words "without prejudice to the liability of the State." The view was also expressed that the article be deleted.

Draft article 14 on *Performance of Activities* referred to, by the Special Rapporteur, as the core of the articles on prevention, would require, in the first instance, that a State ensures, through legislative and other measures, that an operator involved in undertaking the types of activities covered by this topic, has used the best available technology, to minimize the risk of significant transboundary harm; and in the event of an accident, harm is contained and minimized. States, under this article, are also required to encourage operators to take compulsory insurance or provide other financial guarantees enabling them to pay for compensation. This provision deals with two different issues namely the use of the best available technology to minimize the risk and the use of compulsory insurance. It not clear however, whether the reference to the best available technology means the best technology available in the State of origin or available throughout the world. For many developing countries, it was something that would make a great difference. The articles on prevention should therefore include general provisions on ways of facilitating the transfer of tehcnology, including new technology, in particular from the developed to the developing countries. Cosideration should also be given to the question whether it may not be desirable to treat the issues of the use of the best available technology and compulsory insurance in separate articles.

The formulation on *Notification and Information* in article 16 provides that should an assessment of an activity reveal the possibility of significant transbounday harm, the State of origin would be required to inform the State or States likely to be affected should an accident occur, and provide them with the results of the assessment. Where there is more than one potentially affected State, assistance of competent international organizations may be sought.[4] States are also required whenever possible and appropriate, to provide those sections of the public, likely to be affected, with such information as would enable them to participate in decision-making process relating to the activity. The report refers to three recent

4. See Article 16 see A/CN.4/450

legal instruments on the environment which contain similar provisions viz. the Convention on Environmental Impact Assessment in a Transboundary Context; the Convention on the Transboundary Effects of Industrial Accidents; and principle 19 of the Rio Declaration on Environment and Development.

Most members who commented on the articles supported the principle of notification and information, but expressed concerns about the scope of the article and the practical application of the obligation contained in it. The relationship between articles 12 and 15 remains unclear, because article 15 gave the impression that, even if the assessment required under article 12 indicated a possibility of substantial transboundary harm, the State could nevertheless give its authorization within the meaning of article 11. It is not clear why, in that case, it should be required to notify the other States of the results of the assessment.

Article 16, addresses itself to facilitating preventive measures, and provides for periodic *Exchange of Information* between the States concerned on an activity with a risk of transboundary harm.

The Special Rapporteur explained the need for an article on *'National security and industrial sectors'* to ensure the legitimate concerns of a State in protecting its national security as well as industrial secrets which may be of considerable economic value. This interest of the State of origin, in the view of the Special Rapporteur, would have to be brought into balance with the interests of the potentially affected State through the principle of "good faith". *The Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources shared by Two or More States*[5] —attempted to maintain a reasonable balance between the interests of the State involved by requiring the State of origin that refuses to provide information on the basis of national security and industrial sectors, to cooperate with the potentially affected State in good-faith and on the basis of the principle of good-neighbourliness to find a satisfactory solution. The Special Rapporteur attempted to introduce the same balance in article 17 by requiring good-faith cooperation from the State of the origin with the potentially affected State. In the view of the Secretariat of the Asian-African Legal Consultative Committee the protection of national security and industrial secrets, is a very necessary element in regulating the supply of information to other States. However, this formulation reflects a certain inequality in that terms the national security and industrial secrets" are used without according to them a specific definition. The Secretariat of the AALCC is of the view that it may perhaps be useful to define these two terms and great care needs to be exercised in drafting the provision in order to achieve a satisfactory balance of interests.

5. See A/CN.4/406. Also See General Assembly Resolution 34/186 of 18 December, 1979.

It was observed that the exception contained in this article was useful but, apart from the fact that it heightened inequality between States, it might defeat the purpose of the obligation to cooperate in good-faith. In particular, it might suppress any inclination to exercise the right of initiative that draft article 19 recognized for the State likely to be affected by giving the State of origin a discretionary power not only for the information to be transmitted, but even for the decision whether or not to transmit it.

Article 18 provides for *Prior consultations* between the States concerned, on preventive measures. In the view of the Special Rapporteur consultations were necessary to complete the process of participation by the affected State and to take into account its views and concerns about an activity with a potential for significant harm to it. During the debate this article was criticised particularly because the term "mutually acceptable solutions" might give the impression that the envisaged activity might have harmful consequences. The Secretariat of the AALCC concurs with the view. While it is desirable that States should be obliged to consult it is far fetched to require them to reach an agreement.

Article 19 on *Right of the State* presumed to be affected is designed to deal with situations where for some reason the potentially affected State was not notified of the conduct of an activity with a risk of potential transboundary harm, as provided for in the above articles. This may have happened because the State of origin did not perceive the hazardous nature of the activity although the other State was aware of it or because some effects made themselves felt beyond the frontier, or because the affected State had a greater technological capability than the State of origin, allowing it to infer consequences of the activity of which the latter was not aware. In such cases, the potentially affected State may request the State of origin to enter into consultations with it. That request should be accompanied by technical explanation setting forth the reasons for consultations. If the activity is found to be one of those covered by these articles, the State of origin is obligated to pay compensation for the cost of the study.

The Special Rapporteur stated that one of the goals of these articles is to provide for a system or a regime in which the parties could balance their interest. In addition to procedures which allow States to negotiate and arrive at such a balance of interest, there are principles of content to such an exercise. Article 20 intended to deal with the factors involved in a balance of interest lists factors that must be taken into account in any balancing of interests. The Rapporteur was of the view that, an article listing factor relevant to balancing of interests was useful because it more easily operationalized a very general concept.

This article refers both to equitable principles and to scientific data and most of the members found it useful particularly as the articles were to become a frame-

work convention whose provisions were meant not to be binding but to act as guidelines for States. It is however, not clear whether it would be applied in practice, but as long as it was intended to help in applying the provisions of a framework convention, it could be endorsed.

The Special Rapporteur explained that his ninth report dealt with preventive measures that a State should take in respect of activities with a risk of transboundary harm. These measures, which were basically of a procedural nature, should be accompanied by an article setting forth the principle of non-transference of risk or harm. He mentioned that similar provisions were found in some other legal instruments dealing with comparable problems such as the Code of Conduct on Accidental Pollution of Transboundary Inland Waters, the United Nations Convention on the Law of the Sea and the Rio Declaration on Environment and Development. Such an article could be placed in the section on principles and could be drafted more broadly so as to apply to both issues of risk and harm covering the articles on prevention and those on liability which will come later.

Few members commented on article 20 *bis* on the 'Non-transference of risk or harm. Some found it logical and normal to include in the draft articles the principles of non-transference of risk or harm. However, others felt the article only complicated the situation.

By the Special Rapporteur's own admission the approach adopted in the ninth report is a step backwards because although the Commission had decided to consider, for the present only activities involving risk there remained the issue of activities having harmful effects. The Secretariat of the AALCC concurs with the view that this raises three questions viz. (i) when do activities involving a risk become harmful or wrongul; (ii) where would harmful effects fit into the draft provisions if the proposed articles are sufficient for the drafting of a general convention and (iii) whether the Special Rapporteur proposed to provide for a separate regime on the settlement of disputes for activities having harmful effects. Consideration needs to be given to these questions before taking a decision.

The obligation imposed on the States to require an environmental impact assessment to be undertaken before authorizing any activity, likely to cause transboundary harm, be carried out in its territory is indeed the core provision of the draft articles aimed as they are at preventive measures. Careful consideration may be given in this regard to the need and utility of explicitly spelling and defining the essential components of a good enviroment impact assessment. This definition of environmental impact assessment may be necessary because unless the essential requirements were identified there is a risk that a State may appear to have fulfilled its obligations by carrying out a study while in reality it

(the assessment study) may have totally failed to fully envisage and assess the potential risk. Various decisions of the UNEP Council and the United Nations Convention of Enviromental Impact Assessment in a Trasboundary Context, *inter alia*, offer precedents for such a definition on environment impact assessment.

The Special Rapprteur's proposals do not make adequate provision for the special needs of the developing States. The suggestion in the present (ninth) report that some general form of wording should be included in the chapter on principles to take account of the position of the developing countries, does not go far enough. The Secretariat of the AALCC endorses the view that the need of the developing countries, including the need for preferential treatment, should be duly and properly reflected in the proposed articles on prevention. The principles adopted in the Rio Declaration on Environment and Development should be taken into account in this respect. Furthermore with regard to preventive measures it may be pointed out that the standards which applied to the developed countries may be unsuitable or impractical for the developing States in as much as the costs involved, in socio-economic terms, may be so great as to impede their development. This aspect of the need of the developing countries needs to be given due recognition and reflected in the proposed articles.

At the conclusion of the discussion, the Commission decided to refer article 10 on non-discrimination which the Commission had examined at its forty-second session, and articles 11 to 20 *bis* proposed by the Special Rapporteur in his ninth Report to the Drafting committee to enable it to continue its work on the issue of prevention. The Commission indicated that the Drafting Committee could, with the help of the Special Rapporteur, take on a broader task and determine whether the new articles which had been submitted came within a logical framework and were complete or, if they were not, whether they should be supplemented by further provisions. On that basis, the Drafting Committee could then start drafting articles. Once it had arrived at a satisfactory set of articles on the prevention of risk, it might see how the new articles were linked to the general provisions contained in articles 1 to 5 and the principles embodied in articles 6 to 9 and in article 10. The Drafting Committee devoted nine meetings to the articles. Its report which was introduced by the Chairman of the Committee contained the text of the articles adopted by the committee on first reading namely article 1 (scope of the present articles),2 (used terms), (prior authorization), 12 (risk assessment) and 14 (measures to minimize the risk). However, in line with its policy of not adopting articles not accompanied by commentaries, the Commission agreed to defer action on the proposed draft articles to its next session. At that time, it will have before it the material required to enable it to take a decision on the proposed draft articles.

VIII. United Nations Conference on Environment and Development Follow-up

(i) Introduction

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 twentyninth 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 Thirtyfirst 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, who 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 Conferecne 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 obigations 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.

The Secretariat, while monitoring the progress of work in the PREPCOM of UNCED, also took into account the then ongoing parallel negotiations on the Climate Change and Biodiversity Conventions. The outcome of the Rio Summit and the successful conclusion of these two Conventions were the focus of deliberations at the AALCC's Thirty-second Session held in Kampala in 1993. The AALCC's study has been reproduced in the printed report of the Kampala session 1993. At that session, the Committee directed the Secretariat to continue to monitor the developments in respect of these two Conventions and also involve itself in the negotiations concerning elaboration of an International Convention on Combating Desertification. Accordingly, for the Thirty-third Session, two studies were prepared namely, (i) United Nations Conference on Environment and Development: Follow-up and (ii) United Nations Convention on Climate Change and Biodiversity: Follow-up.

Thirty-third Session: Discussions

The Assistant Secretary-General Prof. Huang Huikang while introducing the item *"The United Nations Conference on Environment and Development follow-up."* recalled that the AALCC at its Beijing Session held in March 1990 took note of the United Nations General Assembly's decision to convene the United Nations Conference on Environment and Development in June 1992 at Rio at the Summit level. The Committee directed the AALCC Secretariat to involve itself in the preparatory process and prepare studies to assist the Member Governments in effective participation at the Rio Summit.

Following that directive, the Secretariat prepared studies reviewing the progress made at the UNCED PREPCOM and the parallel negotiations going on in respect of the Conventions on Biodiversity and Climate Change. These studies were placed for consideration at the Cairo and Islamabad Sessions held in early 1991 and 1992 repectively. The then President of the Committee Mr. Aziz Munshi, Attorney-General and Minister of Justice, Government of Pakistan and the AALCC Secretary-General represented the AALCC at the Rio Summit held in June 1992.

The Assistant Secretary-General stated that the Kampala Session (1993) provided the first opportunity to review the outcome of the Rio Summit, and the follow-up of the Rio Summit was of crucial importance to enable the Secretariat to continue to monitor the subsequent developments and submit a report to the AALCC's Thirty-third Session scheduled in Tokyo. The Committee also took note of the resolution 47/188 of the General Assembly of the United Nations at its forty-seventh session by which it established an Intergovernmental Negotiating Committee (INC-D) for the Elaboration of an International Convention to

Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa. It directed the Secretariat to initiate preparation of studies on the proposed International Convention to Combat Desertification.

Following that directive, the Secretariat prepared a Brief which contained a review of the progress made at the first substantive session of the INC-D held in Nairobi from 23 May to 3 June 1993 with a view to assist the Member Governments in preparation for the INC-D Second Session, which was held in Geneva from 13 to 24 September 1993. Subsequent to the Geneva Session, the Secretariat updated its Brief and also prepared a draft text of a Convention on Combating Desertification and Mitigation of Drought. This brief was widely circulated among the AALCC Member States and the concerned international organizations including the Secretariat of the INC-D. It was also placed before the AALCC Legal Adviser's Meeting held in New York on 27th October 1993.

The AALCC Secretariat had been closely co-operating with the OAU in preparation of its proposals to the OAU Member States. The Secretary-General was invited to an Expert Group Meeting Convened by the OAU in Nairobi from 14 to 18 December 1993. The meeting reviewed the consolidated text prepared by the Secretariat of the INC-D taking into consideration the AALCC text. The report of the Expert Group Meeting which also contained draft text of Implementation Annex for Africa was Submitted for discussion to the Ministerial meeting of the OAU in Algeria in January 1994 and thereafter it would be placed before the INC-D third Session Scheduled to be held in New York from 17 to 28 January 1994. He observed that since the negotiations on the Convention were entering into a very crucial phase and had to be completed by June 1994, as mandated by the General Assembly, it would be very useful if the Member States of the AALCC would make their contributions particularly on crucial issues such as the commitments, financial mechanism and the regional annexes.

He noted that the Convention on Biodiversity had just come into force. The Framework Convention on Climate Change was expected to come into force during 1994. The first meeting of the Conference of parties of which convention had already been scheduled to be held in Berlin from 28 March to 7 April 1995 after the Convention achieved the necessary 50 ratifications to enable it to come into force in 1994. The brief prepared by the Secretariat contained an overview of the developments in regard to these two Conventions during the year 1993. The Secretariat was of the view that in the implementation of these two Conventions, the AALCC Member States have vital stakes. Whether they were parties or not, it would affect their future developments and they should not remain silent spectators. In his view, the Tokoyo Session provided a good opportunity to reflect

on the crucial issues and the importance of participation by the Member States in these two Conventions.

Another significant development during 1993 as a follow-up to the Rio Summit was the establishment of the Commission on sustainable Development. The Commission held its first substantive session in New York from 14 to 25 June 1993. At that Session, it adopted a multi-year thematic programme of work, as a concrete step to implement Agenda 21. He invited views of the Member Governments in regard to specific issues which deserved their prior consideration.

The Delegate of the Islamic Republic of Iran while appreciating active participation of the AALCC Secretariat in the UNCED deliberations spoke about the achievements of the Rio Conference. He Commended the Secretariat studies, prepared to assist the delegations participating at the negotiating sessions of the Climate Change and the Biodiversity Conventions. The delegate stated that it was expected that the Secretariat would also participate in the process of the drafting of the Convention on Desertification and keep the Member States informed.

(ii) Decisions of the Thirty-third Session Agenda item: "The United Nations Conference on Environment and Development—Follow-up"

(Adopted on January 21, 1994)

The Asian-African Legal Consultative Committee at its Thirty-third Session

Having considered the Document No. AALCC/XIII/Tokyo/94/7A on matters concerning the follow-up to the United Nations Conference on Environment and Development held in Rio in June 1992.

Noting the contribution of the Secretariat in evaluating the work of the Intergovernmental Negotiating Committee for the Elaboration of an International Convention to combat Desertification in those countries experiencing serious drought and/or desertification particularly in Africa at its first and second substantive session;

Noting with appreciation the close co-operation that has been established between the AALCC and the Organisation of African Unity in connection with the elaboration of an International Convention to combat Desertification;

Recognizing the need to monitor the ongoing work in relation to the Convention on Biodiversity and the Framework Convention on Climate Change;

Recognizing also the importance of the work of the Commission on Sustainable Development towards the implementation of Agenda 21 programmes;

1. *Invites* the United Nations Environment Programme to collaborate with the AALCC in the follow-up to the United Nations Conference on Environment

and Development and to continue to participate actively in the work of the AALCC in the future;

2. *Underscores* the need to participate actively in the relevant meetings on Environment;

3. *Appreciates* the voluntary contributions made by the Governments of Saudi Arabia and Myanmar to the AALCC's Special Fund on Environment as well as the promise by Turkey to make such contribution;

4. *Urges* Member Governments to make similar voluntary contributions to the Fund.

5. *Directs* the Secretariat to continue to monitor the progress in environmental matters, particularly towards the implementation of Agenda 21 and submit a report at the Thirty-fourth Session of the AALCC.

(iii) Secretariat Briefs :

A. Institutional Arrangements to Follow-up the United Nations Conference on Environment and Development

The General Assembly, at its forty-seventh session held in 1992 adopted a lengthy resolution running through eight pages setting out in a comprehensive manner the follow-up to the Rio Conference and the Institutional arrangements to implement Agenda 21 and other recommendations adopted at the United Nations Conference on Environment and Development held in Rio in June 1992. The Resolution 47/191 adopted on 22 December 1992 was based on the set of recommendations contained in Agenda 21, Chapter 38 entitled "International Institutional Arrangements."

The Commission on Sustainable Development is the principal institution which has been established by the Economic and Social Council in accordance with Article 68 of the Charter of the United Nations. The Commission has been entrusted with the task of ensuring effective follow-up of the UNCED, to enhance international co-operation and to co-ordinate activities relating to the implementation of Agenda 21 at the national, regional and international levels taking into consideration the Principles of the Rio Declaration on Environment and Development and the objective of achieving sustainable development in all countries.

Paragraphs 3,4 and 5 of the General Assembly Resolution 47/191 set out in details the functions of the Commission. This is in line with paragraphs 38.13, 33.13, and 33.21 of Agenda 21. One of the important functions of the Commission as envisaged is to "monitor progress in the implementation of Agenda 21 and

activities related to the integration of environmental and developmental goals throughout the United Nations System through analysis and evaluation of reports from all relevant organs, organisations, programmes and institutions of the United Nations System dealing with various issues of environment and development, including those related to finance" (Paragraph 3(a) of the Res. 47/191). Further, in the fulfilment of its functions, the Commission would also:

a) Monitor progress in promoting, facilitating and financing, as appropriate, the access to and the transfer of environmentally sound technologies 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;

b) Consider issues related to the provision of financial resources from all available funding sources and mechanisms, as contained in paragraphs 33.13 to 33.16 of Agenda 21.

The General Assembly decided that the membership of the Commission would consist of representatives of 53 states elected by the Economic and Social Council from among the Member States of the United Nations and its Specialised agencies for three-year terms, keeping in view equitable geographical distribution. The Commission would meet once a year for a period of two to three weeks. The details in regard to the holding of an organisational session and the first substantive session were spelt out in paragraphs 11 and 12 of the resolution.

In addition to the establishment of the Commission on Sustainable Development, the General Assembly Resolution 47/191 mandated the Secretary-General to constitute a High Level Advisory Board consisting of eminent persons broadly representing all regions of the world and having expertise in various disciplines relating to environment and development. The main task of the Board would be to consider issues related to implementation of Agenda 21, taking into account the thematic multi-year programme of work of the Commission and to provide expert advice on those matters to the Secretary-General and through him to the Commission , the Economic and Social Council and the General Assembly.

The resolution also dealt with another important issue concerning co-ordination within the United Nations System. It urged all United Nations specialised agencies and related organisations of the United Nations system to strengthen and adjust their activities, programmes and plans taking into account the recommendations stipulated in Agenda 21. It requested the Secretary-General to consider restructuring and revitalizing the United Nations in the economic,

social and related fields with a view to optimising the work of the Commission and other related intergovernmental bodies dealing with matters concerning environment and development.

With regard to the work programme of the Commission, the General Assembly recommended that at its first substantive session, the Commission should adopt a multi-year thematic programme of work which would provide "a framework to assess progress achieved in the implementation of Agenda 21 and ensure an integrated approach to all of its environment and development components as well as linkages between sectoral and cross sectroal issues." (Paragraph 12). It also recommended that a high level meeting, with ministerial level participation could be held in conjunction with the sessions of the Commission. Such a meeting would provide necessary political impetus to the implementation of the decisions of the Rio Conference. It was recognised that the Commission, in discharging its functions, would submit its consolidated recommendations for consideration to the Economic and Social Council and, through it, to the General Assembly. It called upon the Secretary-General to establish a clearly identifiable, highly qualified and competent secretariat to provide support for the Commission, the Inter-Agency Committee on Sustainable Development and the High Level Advisory Board. It also noted that the establishment of Inter-Agency Committee on Sustainable Development was significant initiative to enhance inter-agencies co-ordination among the United Nations Agencies.

Following the recommendations of the General Assembly the Secretary General established a new Department for policy co-ordination and sustainable development, headed by an Under Secretary-General.

The Commission held a short organisational session in New York from 24th to 26th February 1993. At that Session, the Commission elected the Bureau of the Commission representing each of the regional groups, comprising a Chairperson, three Vice-chairpersons and Rapporteur. The bureau is composed of :

Chairman :

Mr. Razali Ismail (Malaysia)

Vice-Chairmen :

Mr. Rodney Williams (Antigua and Barbuda)

Mr. Hamadi Khouini (Tunisia)

Mr. Bedrich Moldan (Czech Republic)

Mr. Arthur Campaeu (Canada)

The Commission held its first substantive session in New York from 14th June to 25th June 1992. The high level meeting with Ministerial participation was held on 23rd and 24th June. The Session was attended by all 53 states members of the Commission. Observer delegations included member states of the United Nations, the United Nations Agencies and Inter-governmental Organisations and non-governmental organisations. The AALCC was represented by its Permanent Observer in New York. Apart from the organisational items on the agenda, other items for consideration included, exchange of information regarding the implementation of Agenda 21 at the national level, progress in incorporating of recommendations of UNCED in the activities of international organisations and the measures taken by the United Nations System, progress achieved in facilitating and promoting transfer of environmentally sound technology, co-operation and capacity building, initial financial commitments, financial flows from available funding sources and mechanisms and the adoption of a multi-year thematic work programme.

The Session while adopting a multi-year thematic programme of work, noted that it "would provide a framework to assess progress achieved in the implementation of Agenda 21 and ensure an integrated approach to all of its environment and development components as well as linkages between sectoral issues." The programme is based on certain chapters of Agenda 21 which are cross-sectoral in nature and includes the following clusters:

(a) Critical elements of sustainability;

(b) Financial resources and mechanisms;

(c) Education, science, transfer of environmentally sound technologies, co-operation and capacity building;

(d) Decision-making structures;

(e) Roles of major groups.

The Commission decided to review the progress on these clusters at its annual sessions each year. In addition, it also agreed that certain programmes which are broadly sectoral in nature would be taken up for consideration within time-frames of three years. These include:

(a) Health, human settlements and fresh water (1994)

(b) Toxic chemicals and hazardous wastes (1994)

(c) Land, desertification, forests and bio-diversity (1995)

(d) Atmosphere, oceans and all kinds of sea (1996).

It is envisaged to complete a review of follow-up work of all the major programme activities set out in the Agenda 21 prior to 1997 Session of the Commission, so that a consolidated progress report could be considered at the Special Session of the General Assembly as envisaged in the General Assembly Resolution 47/191.

An important issue which the Commission addressed at its first substantive session was the transfer of enviromentally sound technology, co-operation and capacity building. It had before it a report highlighting the progress made in this regard during the last one year. The report also contained a review of the emerging trends at the national and international levels and the initiatives taken by the non-governmental organisations and the private sectors. Some delegations, in their interventions, identified the specific measures undertaken by various United Nations Agencies such as the UNDP, UNCTAD, UNIDO and the Commission on Science and Technology for Development. The need for concrete initiatives in line with the recommentdations laid down in Chapter 34 of the Agenda 21 was stressed particularly in the establishment of information networks and strengthening of national capacities. It was suggested that the Commission should consider establishing a focal point for technology assessment within the United Nations system, which would serve as a clearing house for information.

Issues concerning financial commitments, financial flows and arrangements to give effect to the decisions of the Rio Conference from all available funding sources and mechanisms were discussed at length. The Secretariat had submitted a detailed paper on the progress on this matter since the Rio Conference. Another paper contained update information provided by some Governments regarding their financial commitments. Not only the delegates from the developing countries but also from many developed countries expressed concern over the constraints posed by the lack of financial resources to implement the Agenda 21 programmes. It was stressed that the Commission should interact with the multilateral funding agencies to seek greater financial support for sustainable development programmes.

The two-day High Level Meeting at the Ministerial level was held on 23rd and 24th June. It was attended by more than 40 ministers. Participants at that meeting recognised the political importance of an effective follow-up to the Rio Conference. There was general agreement on the work schedule as outlined in the thematic programme. It was recognised that the Commission could play a dynamic role as a central political forum for the monitoring and review in an integrated manner the implementation of Agenda 21.

General Comments

The first substantive session of the Commission was held exactly after one year of the conclusion of the Rio Summit. The period of one year is too short to

make thorough assessment on the follow-up work. While the process of establishment of institutional arrangements as envisaged at the Rio Conference has been completed satisfactorily, there appears to be little progress on the two key issues, namely the financial commitments involving new and additional resources and the transfer of environmentally sound technology to the developing countries. It will be recalled that the successful adoption of Agenda 21 at the Rio Summit added a new dimension to the concept of partnership among the developed and the developing countries. The need of the hour is to sustain and strengthen this concept. Mr. Nitin Desai, Under Secretary-General for policy Co-ordination and Sustainable development rightly observed; "Agenda 21 was an expression of a North-South compact on development and environment, and that new spirit of co-operation must be maintained by commitment to action".[1] In a similar note, the Vice-president of the USA recognised, "if sustainable development were to become a reality, the principle of partnership must be followed".[2] It is a matter of concern to note the discouraging trends in the aftermath of the Rio Conference. The cut-back in the aid programmes, the reluctance to accept the 0.7% target towards official development assistance (ODA) and imposition of certain conditionality in the assistance programmes weakens the convictions and commitments.

Much emphasis is being placed on the need to mobilize domestic resources by the developing countries. It would be worth recalling that the principle of "Common but differentiated responsibility", recognised that in the implementation of Agenda 12, financing would be the major responsibility of the industrialized countries. No attempt should be made to undermine this basic understanding reached in Rio.

Issues concerning restructuring of Global Environment facility (GEF) have been under active consideration. It is hoped that there will be agreement on these issues prior to the beginning of the next phase of GEF in 1994. The GEF II, as it will be called envisages universal participation and a transparent and democratic system of decision-making process. The establishment of a Participating Assembly (PA) with no pre-set membership fee will ensure wider participation. However, on the crucial issue of decision-making and the voting system there appears to be divergence of views. Also, the modalities of linkage between the GEF II and the Commission on Sustainable Development are still in the evolutionary stage. Much would depend on whether the Commission on Sustainable Development will be entrusted with a marginal role to recommend certain proposals for financial grants or a central role to determine and implement the policy. It is not

1. UN Press Release ENV/DEV/192, 14 June 1993, p.3.
2. Ibid p.5

the intention to suggest a predominant role for the Commission. However, being the apex institution of the United Nations System to implement the Agenda 21, the Commission must enjoy certain financial authority.

Agenda 21 contains more than 115 programmes. The first effective step towards implementation of these programmes should begin at the national level. Each Government should identify its environmental problems and establish its own priorities. The United Nations system and the regional organisations should supplement, co-ordinate and wherever necessary initiate measures to assist the governments in implementing those programmes. It is encouraging to note that in the aftermath of Rio Conference, more than 70 countries have already established national commissions to implement Agenda 21. It would be desirable that the Commission's priority should be to assist those governments who seek assistance to strengthen their national mechanism and institutions to implement Agenda 21.

One of the principal tasks undertaken by the Commissions is the preparation of guidelines and format for national reporting on the measures to implement achievements related to Agenda 21 on a yearly basis. It has been suggested that a standard format prepared by the Commission will be used to prepare national reports approximately of 50 pages. These reports will contain statistics, tables and other details. They will be reviewed and an analytical study will be prepared by the Commission for submission to member governments in an appropriate form. This is a gigantic task both for the Governments and the Commission. Moreover, Governments are expected to submit their national statistics on programmes like poverty alleviation, population control, consumption pattern etc. It would be difficult to quantify the measures and the achievements on an yearly basis. By the time, such statistics are collected, transmitted and evaluated, the data might be outdated. Lastly, it is envisaged that the submission of national reports will be on a voluntary basis. Consequently, omission to submit such reports ought not deprive any state of the opportunity to seek financial and technical assistance from the funding agencies.

It is noticed that while serious attempt is being made to co-ordinate the activities of the United Nations system, the intergovernmental organisations and the non-governmental organisations in the field of environment, this on the contrary is resulting in proliferation of organisations, Ad hoc group meetings and programmes . Most of the developing countries lack material and human resources to actively participate and assimilate the outcome of these meetings on their national programmes and activities. This issue deserves serious consideration by the Commission.

INTERNATIONAL CONVENTION TO COMBAT DESERTIFICATION IN COUNTRIES EXPERIENCING SERIOUS DROUGHT AND/OR DESERTIFICATION, PARTICULARLY IN AFRICA*

Background

The General Assembly, at its forty-seventh session in 1992, by its Resolution 47/188 established an Intergovernmental Negotiating Committee (hereinafter called INC-D) for the elaboration of an International Covention to combat desertification in those countries, experiencing serious drought and/or desertification, particularly in Africa. It decided that the INC-D, in addition to an organisational session in New York, should hold five substantive sessions. It laid down the guidelines for the work at the organisational and first substantive session. It requested the Secretary-General to establish an *ad hoc* Secretariat to assist the INC-D in its work. It also decided to constitute a multidisciplinary panel of experts to assist the *ad hoc* Secretariat and to provide necessary expertise in the scientific, technical, legal and other related fields, making full use of the resources and expertise within and available to Governments and/or organisations of the United Nations system dealing with drought and desertification. Finally, it provided for the establishment of a special voluntary fund to promote participation of developing countries in the INC-D meetings and a Trust Fund to meet the cost of the negotiating process.

The INC-D held its organisational session in New York from 26 to 29 January 1993. During that session, it adopted the rules of procedure and tentative schedule of five substantive sessions. It constituted two working groups and elected the members of the Bureau. Ambassador Bo Kjellen of Sweden was elected as Chairman.

The first substantive session of the INC-D was held in Nairobi from 24th May

* The Asian-African Legal Consultative Committee at its Thirty-second Session held in Kampala from 1 to 6 February 1993, at the conclusion of the discussion on the item entitled "United Nations Conference on Environment and Development —outcome and follow-up" directed the Secretariat to initiate preparation of studies on the proposed international Convention to combat desertification. The Secretariat prepared a Note containing a review of the progress made at the First Substantive Session of the Intergovernmental Negotiating Committee on Combating Desertification, held in Nairobi from 24th May to 3rd June 1993 with a view to assist the AALCC Member States in preparation for the INC-D's Second Session held in Geneva from 13th September to 24th September 1993. Following the Geneva Session, the Secretariat has prepared the present Note, which also sets out a tentative draft text on the Convention on Desertification and Mitigation of Drought.
The views expressed in this Note and the AALCC draft text do not necessarily reflect the position of any of the Member States of the AALCC.

to 3rd June 1993. The first half of the session was devoted to technical evaluation of the available information on causes, extent of desertification and drought and the experience with international, regional, sub-regional and national programmes to combat and mitigate these problems. During the Session, apart from the views expressed by the Experts statements were made by the representatives of the Governments, the United Nations Agencies, Intergovernmental Organizations and the Non-governmental Organizations.

During the second week of the Session, the discussion was focussed on the possible structure and essential elements of the proposed international Convention to combat desertification. The INC-D Secretariat, in consultation with the Panel of Experts established by the General Assembly Resolution and the international organisations engaged in this field prepared a document entitled "Format and Possible Elements of the Convention" (Doc. A/AC. 241/7). Discussion on these matters was general in nature. It was agreed that concrete proposals should be submitted to the INC-D Secretariat by 1st July 1993. The Secretariat was mandated to prepare a compilation of these proposals.

As many as 30 Governments and Organisations submitted written proposals. The Organisation of African Unity (OAU) submitted a complete draft text of the proposed Convention. The INC-D Secretariat in consultation with the International Panel of Experts considered all these proposals and also taking into account the views of delegations expressed at the Nairobi Session, prepared a comprehensive compilation running into 85 pages and submitted it for consideration at the Second Session of INC-D. (Doc. A/AC. 241/12). This document was the basis of discussion at the Geneva Session.

The AALCC Secretariat has prepared an overview of the Geneva Session. The first part contains a brief summary of the discussions together with some general comments of the AALCC Secretariat. It is followed by a tentative text of the draft Convention. While preparing this text, it is not the intention to prejudge the work of the INC-D which has been requested to prepare a consolidated text in the light of the views expressed at the Geneva Session. It is also not the intention to undermine any proposals submitted so far. It is only an attempt to prepare a tentative text which might facilitate the discussions at the AALCC's Legal Adviser's Meeting in New York on 27th October 1993 and at the Thirty-third Session in Tokyo. The AALCC text is based on Agenda 21, Chapter 12, INC-D Compilation (A/AC. 241/12) the text of the Organisation of African Unity (Doc/CM/1781 LVIII, Rev. 4 Annex I) and the Document of Economic Commission for Africa (ECA/NRD/ENV. INC-D/1/Rev. 1, 28 July 1993).

INC-D Second Session, Geneva, 13th to 24th September 1993

The Second Substantive Session of INC-D was held in Geneva from 13th to 24th September 1993. It was attended by a large number of States particularly from the African region, United Nations Agencies, Organisations and Non-governmental Organisations. The following thirty AALCC Member States attended the Session: Bangladesh, Botswana, China, Egypt, Gambia, Ghana, India, Indonesia, Islamic Republic of Iran, Iraq, Japan, Jordan, Kenya, Libya, Malaysia, Mongolia, Nepal, Nigeria, Pakistan, Philippines, Republic of Korea, Saudi Arabia, Senegal, Sierra Leone, Sudan, Syria, Tanzania, Thailand, Uganda and Yemen. The AALCC was represented by the Director Mr. P.K. Jha.

The Chairman, in his opening address, informed the Meeting of the progress made since the INC-D Nairobi Session. He drew attention to the work of the Commission on Sustainable Development at its first session held in New York in June, the Eighth Session of the INC Climate Change, particularly on "Prompt Start" arrangement and the Non-governmental Organisations Co-ordination Session held in Bamako in August 1993. He commended the compilation prepared by the Secretariat and suggested that the two Working Groups should complete first reading of that document during the Geneva Session. He expressed the hope that in the light of progress thus made, it would be possible for the Secretariat to elaborate a consolidated single negotiating document for consideration at the INC-D's third session in New York scheduled in January 1994. He expressed satisfaction over the consensus arrived on the mandates of the two Working Groups and proposed its formal adoption by the Plenary.

The Plenary approved the Chairman's proposal (A/48/226, decision 1/3). Accordingly, Working Group I was allocated sections on Preamble, Principles, Objectives, Commitments, National and Sub-regional Action Programmes, Capacity Building, Education and Public Awareness, Financial Resources and Mechanisms and Co-ordination and Co-operation. Working Group II was concerned with Definitions, Research and Development, Information Collection, Analysis and Exchange, Technology Transfer and Co-operation, Institutional and Procedural Arrangements and the Final Clauses.

The Chairman also introduced a non-paper which dealt with the preparation of regional instruments and "prompt start" arrangements. He suggested that as a first step work on the Convention together with the regional instrument for Africa could be concluded. It would be followed by the commencement of negotiations for the regional instruments for Asia and Latin America. He stressed that the Convention should not be a mere framework instrument but rather a text with substantive commitments, and the regional instruments should spell out concrete actions to implement the objectives of the Convention.

The Delegate of Brazil recognized that the issue of desertification gained importance because of the initiative taken by the African States. He, however, stressed that alongwith the Convention, instruments for all regions should be negotiated and the Convention should be brought into force when all the regional instruments were concluded.

The Executive Secretary of the INC-D explained the background of the preparation of the compilation and informed the meeting about the case studies which were under preparation or being planned.

Statements were made by a number of Ministers who were participating at the Geneva Session. The delegate of Japan and the representative of OAU also addressed the plenary on the opening day. On the following day, after a brief Plenary Meeting, the two working groups began consideration of the items allocated to them.

Discussions in Working Group I

On *Preamble*, the general view was that the text should be precise and relevant keeping in view the purpose of the Convention. It should recall the mandate given by the General Assembly resolution 47/188 and other relevant resolutions including the resolution 32/172 of 1977 concerning Action Plan to Combat Desertification. It should express the determination of the international community to deal with both desertification and drought in a concerted manner at the national, regional and international levels. The developing countries expressed the view that issues concerning eradication of poverty, mitigation of debt, removal of distortion in international trade should be mentioned in the Preamble as highlighting their concerns. Most of the developed countries however considered these issues as not relevant in the context of the Convention on combating desertification. There were also divergent views on whether desertification was a global issue or not. It was also stressed that there should be no duplication with Principles and Commitment Provisions.

With regard to *Principles* most of the delegations agreed that like Climate Change and Biodiversity Conventions there should be a separate article dealing with Principles. Some delegations from the developed countries considered the legal ambiguity of the Principles and preferred to include them, if necessary, either in the Preamble or in the section on Commitments. While there was no agreement on the list of Principles, it was generally agreed that the Rio Declaration could be the point of departure and the Principles which might be included should have links with the subject matter of the Convention.

As for the *Objectives*, the general view was that they should be focussed and

concise addressing the main causes of desertification and the preventive measures required. A few delegations were of the view that the Convention's objective should be to combat desertification and not drought. Some others, however, stressed the need for an integrated approach, which might lay down specific commitments and a system to monitor and review such commitments.

Structure and nature of commitments were considered as central elements of the Convention. It was suggested that Climate Change and Biodiversity Conventions provided models for the drafting of specific provisions relating to commitments. There was wide support among the developing countries for the proposals submitted by the African Group which set out in details the commitments to be taken at the local, national, regional and international levels. Some delegates stressed that there should be no duplication and overlapping and the commitments should be framed in such a way so that they could be implemented in an effective manner. In that context, the need for financial, technical and scientific assistance by the international community was also emphasised. Most delegations recognised the importance of participation by local population, capacity building and the partnership in the implementation of the commitments.

Issues concerning *National Action Plans and Programmes* were discussed in detail. It was stressed that National Action Plans to combat desertification should be an integral part of the national development programmes. The OAU draft, identified key elements of the National Action Plans which included: popular participation; water resource management; land use planning; soil conservation; land tenure reform and institutional strengthening. It was suggested that National Action Plans should focus on concrete initiatives and practical measures and macro-economic issues should not be linked with it. A few delegations, advocating a cautious approach, considered that it was the responsibility of the Government and not the local people or the international community to draw detailed plans for national action.

With regard to Sub-regional Action Programmes, it was stressed that they should complement national programmes. It was, however, observed that while such programmes may be scientifically based and technologically feasible, many a times they were not implemented because of the political or financial reasons. While recognising the need for increased co-ordination, suggestions were made for the establishment of sub-regional centres to facilitate exchange of experiences. This suggestion was not favoured by most of the developed States who stated that they were opposed to proliferation of institutions. Instead, they supported strengthening of the existing institutions.

Capacity Building was considered to be a corner-stone of the Convention. Some delegations stressed the need for capacity building at the national and

regional levels. Some others recognised the crucial role of local population, especially women and youth and the non-governmental organizations. It was stressed that capacity building should be carried out in conjunction with public awareness and education. African delegations urged for the establishment of an international training centre with its headquarters in Africa which could train scientific, technical and managerial personnel. The need for adopting a public awareness strategy was also recognised by many delegations.

Issues concerning *Financial Resources and Mechanisms* were discussed at length. It was generally agreed that the bulk of financial resources should come from mobilization at national level. Several delegations from the developing countries stressed that the existing mechanisms should be improved qualitatively and quantitatively. While recognising the need for new and additional financial resources it was suggested that the establishment of a special fund, opening a new window at the GEF and debt relief could be some of the measures which need to be considered in this context. The delegations of the developed countries however, neither supported the establishment of a special fund nor recourse to GEF. In their view, it was not the lack of fund but rather proper utilization and co-ordination which was required. Some countries supported a 'package approach' as outlined in paragraph 102 (b)(A/Ac 241/12) envisaging panoply of financial resources involving bilateral assistance, global and regional multilateral assistance and private flow, particularly from non-governmental organisations. A suggestion was made that all affected and donor countries should make an estimate of the resources which can be devoted to combating desertification.

Co-operation and Co-ordination was the last item on the agenda of Working Group I. Some delegations felt that a deliberate attempt was being made to omit the reference to international co-operation and North-South Co-operation and to transfer all the responsibility for combating desertification to developing countries. It was recognised that the INC-D could achieve its goals only when a new type of North-South co-operation based on a spirit of partnership and international solidarity is launched.

Discussions in Working Group II

When Working Group II commenced its work, some delegations proposed that consideration of the article on definitions should be deferred until the INC-D next session. In the meantime, INC-D in consultation with WMO and other competent UN agencies should compile definitions based on the available scientific knowledge.

With regard to the section on *Research and Development* it was suggested that instead of preparing detailed action plans, the endeavour should be to identify

issues for consideration. A view was expressed that distinction should be made between the desertification and drought. Others, however, reiterated the close link between the two problems. There was however consensus that research and development was necessary in areas such as socio-economic issues relating to drought and desertification, land management system and integration of indigenous knowledge with modern research.

On the section concerning *Information Collection Analysis* and Exchange, the issues addressed included collection of basic information and its utilization for early warning system, and studying socio-economic effects. Some delegations expressed concern over the cost of establishing a system for data collection, monitoring and assessment.

On *Technology Transfer and Co-operation* it was stressed that the convention should enhance the transfer of technology by facilitating access to and transfer of technology and improving capacity, identification and application of joint and collaborative technologies. In that context, it was recognised that Chapters 12 and 34 of Agenda 21 provided valuable guidelines. It was argued that there was no need to elaborate a detailed list of technology transfer and co-operation activities in the Convention. Instead, the Convention should contain a mechanism for technical co-operation and identify a combination of modern and traditional technologies which might be available to the developing countries. While the developing countries recognised the need for the establishment of institutions to facilitate the transfer and strengthening of sub-regional centres for this purpose it was not supported by the delegations of the developed countries.

Other issues concerning *Institutional and Procedural Arrangements and Final Clauses* were also discussed. It was evident from the preliminary discussions that there was general agreement on these issues. The provisions on these issues as set out in the compilation were very similar to the provisions in Climate Change and Biodiversity Conventions. Some delegations however pointed out that it was rather premature to express any final positions on these issues until agreement was reached on the other key provisions in the Convention.

The Working Group could hardly discuss the key issues on the conclusion of regional instruments which remained the focus of discussion in various regional groups and the Informal Plenary. After hectic consultations, the plenary on the last day was able to adopt a draft resolution which would be placed before the Forty-eighth Session of the General Assembly. That resolution sets out the time-frame and the future work plan of the INC-D including the conclusion of regional instruments.

The Non-governmental Organizations participated at the Geneva Session

with full vigour and strength. A significant contribution was the Daily Earth Negotiating Bulletin published by the International Institute for Sustainable Development, a Non-governmental organization based in Canada. The Bulletin provided a very useful source for update information everyday.

On the closing day, i.e. 24th September 1993, the Plenary adopted the report of its Second Session, which also contained the reports of the two Working Groups. This Report would be placed before the General Assembly at its forty-eighth session. In the meantime, the INC-D Secretariat has been entrusted with the task of the preparation of a consolidated text which will be considered at the third session of the INC-D scheduled to be held in New York from 17 to 28th January 1994.

General Comments

The Geneva Session of the INC-D was a step forward towards the goal of completion of the elaboration of a convention by June 1994. The compilation prepared by the INC-D Secretariat with the assistance of the International Panel of Experts helped to focus the discussions on a set of proposals on the relevant issues.

It appears that there will be no disagreement on the format of the convention which will essentially follow the pattern established by the Convention on Climate Change and the Biodiversity. The unanimity reached at the opening of the INC-D Meeting in Geneva on the allocation of work to the two Working Groups was a good omen at the commencement of the negotiating work in Geneva. The two Working Groups during the first week of the Session made remarkable progress in the first round of discussions on the basis of the compilation made by the Secretariat (Doc.A/Ac.241/12). Regrettably during the later part of the second week, the deliberations got derailed over the semantics.

It is however encouraging to note that there is wide consensus on several provisions of the Convention. The divergent views in respect of Preamble, Definitions, Principles, Objectives, Research and Development, Capacity Building, Technology Transfer and Co-operation, Institutional and Procedural Arrangements and Final Clauses will narrow down as the negotiations reach the concluding phase.

There are only three key issues which could keep the INC-D negotiations at tenterhooks. These issues include: the nature and type of commitments, the financial resources and mechanisms and the nature and the time-table of conclusion of regional instruments. At the conclusion of the Nairobi Session it was hoped that especially the issues concerning regional instruments will not pose problems at the Geneva Session. Regrettably, this was not to be.

It is interesting to note that many of the developed countries purport to advocate that this should be a *'strong'* convention. However, if the views expressed at the Geneva Session on crucial issues such as commitments and the financial mechanisms are any indication, the Convention when it emerges in the final form would perhaps be among the *weakest* on this field of environment and development. The differences of opinion on a single word "globalisation" substantiates this observation. For the climate change issues, the developed countries had vital stakes and therefore they were prepared to cajole and to go to some length to seek support and participation of the developing countries in that process. It may be too harsh to express the opinion that in some quarters, it is felt that 'desertification convention' is a "charitable convention". Such a view would be a travesty of the whole international co-operation system currently in vogue. The semantic differences over the character of the issue and whether it is 'global' or not should not be the yard-stick to judge the importance of the international convention to combat desertification.

It has been further suggested that the convention should be *'realistic'* and should not deal with issues which are not relevant in the context of the desertification convention. Nobody would dispute that point. However, the word *"realistic"* has to be interpreted in the context of overall approach, both by the developed and developing countries. It has been recognised that 'desertification' and 'drought' are two distinct issues and accordingly different types of commitments should be elaborated to deal with them. Drought has been defined as "a sustained period of water deficit in particular areas, perhaps lasting a few months or many years". Does it mean that one has to wait for many years to identify any particular situation whether it is 'drought' or 'desertification' and provide any assistance accordingly? In the context of desertification, it has been further suggested that the proposed Convention should deal with 'preventing' further desertification and not with the problems of 'reclamation' of degraded land. If the objective is to adopt an 'integrated approach' such different categories of situations, involving different types of commitments does not seem to hold logic. There cannot be a dividing line separating these issues. As and when the Convention comes into focre, the Conference of Parties (COP), the highest body designated to oversee the implementation of the Convention, should consider the specific situation in the light of scientific information available and take a decision as to what type of technical and financial assistance would be necessary to deal with that type of situation. If the Convention is to be realistic, it must be *flexible* in its approach on this issue. Instead of arguing for drawing a fine distinction, it should be left to the Conference of Parties to determine the specificity of each situation and act accordingly.

It has been suggested that the Convention should strictly deal with the issues

which are relevant in the context of desertification issues. The very mention of 'biodiversity' or climatic issues has not been recognised as relevant, as they are being dealt with other international Conventions. Similarly since the sensitive issues such as mitigation of debt or removing distortions in international trade belong to other international forums, it has been argued that they should not cast their shadows in the negotiations on desertification convention. These issues are not directly related to this exercise, but there is no doubt that they are relevant and could be mentioned albeit in a very general manner perhaps either in the preamble or in the article relating to 'Principles'. Nobody is seeking solution of the debt problem in the context of desertification but debt burden of developing countries is a reality which is hampering their development process and unless it is seen in a broader perspective no meaningful achievement could be made on any front including combating desertification and drought.

In the context of relevance of issues, a couple of observations may further be made. At some quarters it is felt that the Convention should not fail to refer to 'good governance' and the virtue of democratic form of government. Some veiled charges were also made in identifying the reasons why the past efforts and financial assistance provided to developing countries could not yield the desired result. It is unfortunate but true that democracy while crucial is not the panacea for all the ills of today's world. There are examples where supposedly democratic governments have systematically exploited their own people and involved in all types of corruption and also where in some instances the authoritative regimes have done best for the welfare of their people and lead to phenomenal developments. In the context of desertification, it is not the type of government which matters. Each situation should be judged by the performance and the way that commitments at the national level have been implemented by the Governments. The Convention should not attempt to impose a "Charter for good governance" and dictate the national budgetary process and other matters lying in the national domain. Respect for sovereignty and freedom for independent action should be one of the element in granting international assistance to deal with such problems as desertification which are essentially within national jurisdiction of States. Such an approach only would make the Convention *realistic*.

Another set of provisions which would be the yardstick to measure the success of the Convention are the financial commitments and the related mechanism to implement the Convention. Perhaps Geneva during the INC-D second session did not provide the right atmosphere to discuss seriously the financial commitments to ameliorate the conditions of millions who are struggling for survival from the menace of desertification far away. The views expressed during the consideration of this item in Working Group I do not appear to be encouraging. There is so far little indication from many of the developed

countries of their desire to reach the target of 0.7 per cent of their G.N.P. in response to the fervent appeal made just a year ago during the Rio Summit. There is little inclination to support the establishment of a separate and special fund within the context of the desertification Convention. On the contrary, there is strong opposition to open a fifth window at the Global Environment Facility (GEF) specifically for desertification issues. It has been suggested that 'desertification' may attract GEF Fund in specific situation which may fall under the four programme areas covered under the existing scheme. Although, the discussions on restructuring of GEF is still going on and any clear view on this issue would emerge only after GEF's December 1993 session, there is not much hope of breaking any new ground.

Against this background, it would not be surprising if the fate of discussion on crucial issue of 'new and additional financial resources' will hang on the balance until the last moments of the negotiating process. The negotiating history of the Climate Convention provides a precedent in this regard. The Convention on desertification, however, must address this issue in a pragmatic or innovative manner which will pave the way for any realistic Convention.

Another difficult issue, which remained unresolved at the INC-D first session in Nairobi and continued to haunt the deliberations in Geneva is the conclusion of regional instruments. The General Assembly Resolution 47/183 of 22 December 1992 mandated the INC-D to elaborate an international convention to combat desertification in those countries experiencing serious drought and/or desertification, particularly in Africa, with a view to finalising such a Convention by June 1994. The absence of any clear guidelines and the determined time-frame have resulted in a difficult situation and a variety of interpretations.

One view is that the resolution only refers to the conclusion of an international Convention by June 1994. It does not specify elaboration of any regional instrument within this time. The other view, stressed by many delegations, particularly the African States, is that the text of a regional instrument for Africa must be completed within the stipulated time along with the Convention. The third view, advocated by the States from the Asian, Latin American and the Northern Mediterranean regions, seeks simultaneous elaboration of similar regional instruments for their respective regions.

It is our considered view that, it may not be feasible to complete the entire work of the elaboration of the Convention together with all the regional instruments by June 1994. The Chairman of the INC-D initially put forward a proposal which proposed to seek from the Forty-eighth Session of the General Assembly an extension of the mandate of the INC-D until August 1995. The obvious implications would have been additional financial commitments by the United Nations and the

countries which are supporting the INC-D negotiating process by making voluntary contributions for the Special Fund and the Trust Fund established by the General Assembly (Res. 47/188, Paragraph 13, 14 and 15).

Subsequently, the Chairman submitted another draft on 21st September 1993. In this revised paper, the extension time sought is until January 1995. The marked reluctance of some countries who are contributing for these funds and the continuing financial squeeze of the United Nations may pose some difficulties. However, it is presumed that the Chairman through his skill and pursuasive manner will succeed in his mission when the General Assembly takes up the item on report of the INC-D for consideration. At this juncture, one can only speculate whether even with this extension it would be feasible to complete the entire process.

Apart from the time-frame, the nature of regional instruments raise several difficult legal issues. Two kinds of legal instruments could be elaborated, protocols or annexes. It appears that the general view at the Geneva Session is in favour of annexes. Adoption and integration of protocols with the main Convention is a complex process. However, a similar complexity may arise in the context of annexes. The protocol and annex are integral parts of the Convention. Generally, protocols deal with more substantive legal matters and annexes are concerned with the technical, administrative and procedural matters. In the event, the INC-D contemplates to elaborate annexes as the regional instruments, presumably, there will be at least four annexes representing four different regions, i.e. Africa, Latin America including Carribean, Asia including the Central Asian region and Northern Mediterranean respectively.

It is hoped that the INC-D will complete the elaboration of the Convention by June 1994 and possibly the text of the annex for Africa. The Convention, together with the African annex should be adopted by the General Assembly at its Forty-ninth Session and thereafter be open for signature by member States of the United Nations. If other annexes are concluded thereafter, how will they be integrated with the Convention? Would a State which signs the Convention at the first instance be expected to sign the subsequent annexes? If for any reason, it chooses not to do so, what will be the legal effect of subsequent annexes *vis-a-vis* that State? To stretch this question further, would any State have the option to pick and choose one of the annexes and declare not to be bound by other subsequent annexes if it chose not to ratify/accede to them. These are just a few legal issues which would need to be considered in this context.

The AALCC Secretariat is of the view that a Convention accommodating the situations in different regions and specifying particular measures to deal with situations in Africa would have been the ideal approach. However, this may not

be acceptable to African countries as it would not fully meet their aspirations. The alternative is to elaborate a general convention together with separate regional instruments for different regions. In our view these regional instruments should not seek to establish additional commitments beyond those envisaged in the Convention for the parties which do not face any desertification and drought problem. Other Contracting Parties, facing such a situation, may commit themselves to initiate and implement such measures which would be necessary in the context of their respective regions. Since the idea of 'annex' as the regional instrument is gaining ground, it would be desirable to identify the common elements and elaborate administrative and technical details corresponding to specificity of each region. As for the time-frame, since all the annexes would be identical in terms of their legal effects, it would not matter which is elaborated first. The IMO has evolved a very practical system of 'tacit acceptance' of annexes. Such a provision could also be considered in the context of this Convention. This would do away with the problem of integration of annexes with the main Convention.

Another interesting example which may be relevant in this context is the 'Implementation Agreement" relating to the implementation of Part XI and related provisions of the United Nations Convention on the Law of the Sea of 1982 currently under discussion in the Informal Negotiations initiated by the UN Secretary-General. The initiative of the UN Secretary-General to hold consultation on the outstanding issues on the Law of the Sea Convention is intended to lead to Implementation Agreement which would facilitate universal participation in the Convention. Article 2(2) of the Implementation Agreement now under discussion envisages that the provisions of Part XI and the Implementation Agreement would be read and interpreted together as one single account. Under Article 3, this Agreement would be "....open for accession by those States and other entities referred to in Article 305 of the Convention which have ratified or acceded to the Convention or which are simultaneously ratifying or acceding to the Convention and this Agreement". Further, Article 4 provides for a simplified procedure. A State or entity which is a Party to the Law of the Sea Convention prior to the adoption of the Implementation Agreement, "....would be considered to be a party to this Agreement unless it notifies the Depository within 12 months of the adoption of the Implementation Agreement that it would not have recourse to the simplified procedure as set out in Article 4."

The AALCC Secretariat is of the view that a combination of 'tacit acceptance' and 'simplified procedure' could provide a solution to the difficulties which might arise in the context of the conclusion and implementation of regional annexes to be adopted after the conclusion of the Convention. While the 'tacit acceptance' could promote expeditious entry into force of the regional annexes, the simplified procedure might help in sorting out the legal problems raised in relation to the implementation of annexes.

Lastly, the fourth ACP-EEC Convention, popularly known as Lome IV Convention, signed in Lome on 15 December 1989 will be a very useful precedent. It deals with Environmental Matters (Articles 33 to 41) and specifically with Drought and Desertification Control (Articles 54-57). The procedure for the Implementation Agreements and promotion of regional co-operation are the two key features which may guide the INC-D in its work.

DRAFT TEXT OF THE UNITED NATIONS CONVENTION ON COMBATING DESERTIFICATION AND MITIGATION OF DROUGHT

(As prepared by the Secretariat of the Asian-African Legal Consultative Committee)

Title of the Convention

So far, no discussion has been held in the INC-D about the title of the Convention. The AALCC Secretariat is of the view that this is an important matter which deserves due consideration at an early stage. Since this Convention is elaborated in accordance with the mandate given by the General Assembly Resolution 47/188 of 22 December 1992, it would be appropriate if the title reflects that status. The title suggested by the AALCC Secretariat "The United Nations Convention on Combating Desertification and Mitigation of Drought" is based on that consideration.

Preamble

Recalling the United Nations General Assembly Resolutions 32/172 of 19 December 1977, 44/172 of 19 December 1989, 44/228 of 22 December 1989 and other relevent resolutions, as well as decisions adopted by the United Nations Conference on Environment and Development held in Rio de Janiero in June 1992, in particular the recommendation by which the Conference invited the General Assembly to establish, under its auspices an Inter-governmental Negotiating Committee for the Elaboration of an International Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa;

Recalling also the General Assembly Resolution 47/188 of 22 December 1992 by which it established the Inter-governmental Negotiating Committee for the Elaboration of a Convention to Combat Desertification with a view to finalizing such a Convention by June 1994;

Reaffirming the validity and relevance of the decisions adopted at the United Nations Conference on Environment and Development regarding measures to combat desertificaion and mitigate drought, and especially Chapter 12 of Agenda 21 "Managing fragile ecosystems: Combating desertification and drought";

Taking into account past experience particularly the efforts to implement the 1977 United Nations Plan of Action to Combat Deserification;

Appreciating the measures already taken or underway by States and organisations such as the United Nations Environment Programme, the United Nations Development Programme, the Food and Agriculture Organisation, the United Nations Educational, Scientific and Cultural Organisation, the World Meteorological Organisation, the United Nations Sudano-Sahelian Office, the International Fund for Agriculture Development at various levels to understand and address the problems of desertification and drought;

Considering that measures to combat desertification should be planned in the framework of sustainable development, with dynamic interaction between all development activities, and that measures to combat desertification must therefore form an integral part of the overall economic and social development strategies of the countries concerned;

Conscious of the adverse effects, including socio-economic, of land degradation in dryland areas, which affects a significant portion of the earth's surface and population and the need for proper management, utilization and conservation of resources and prevention of mass exodus and migration of populations;

Noting that economic and social developments and eradication of poverty are priority concerns of countries experiencing drought and desertification, particularly in Africa;

Determined to make concerted efforts to combat desertification and mitigate drought, for the benefit of present and future generation;

Recognising the responsibility of countries affected by desertification to make necessary policy changes in their land tenure systems with a view to promoting sustainable land use practices and encouraging participation of rural communities and indigenous people in the development process;

Recognising also that in view of the widespread nature and complexity of the problems relating to desertification and/or drought and of the particular conditions affecting each region;

Stressing the need for promotion of sub-regional, regional and international co-operation to combat desertification;

Stressing also the need for effective international co-operation in the field of research and development and for applying ecologically sound technologies to combat desertification and mitigate drought;

Recognising the need to make available further and additional financial resources to countries affected by drought and desertification, particularly in Africa;

Recognising also the vital role played by the local people, particularly the women in combating desertification and affirming the need to ensure that they participate fully and effectively in planning and implementation of measures to combat desertification and mitigate drought;

Decides to conclude an international convention on combating desertification and mitigation of drought as well as appropriate instruments adapted to the specific needs of different regions;

Explanatory Note

Since the discussion concerning section on Preamble will continue until the late stage of negotiations, the AALCC draft text on Preamble sets out only a tentative list, which may be further shortened or elaborated as need be. There are issues such as poverty eradication, mitigation of debt etc., which could find place in the Preamble.

Article 1

Definitions

(a) 'Desertification' is a process of land degradation in arid, semi-arid and dry sub-humid areas resulting from various factors, including climatic variation and human activities.

(b) 'Drought' refers to a sustained period of water deficit in particular areas, perhaps lasting a few months or even many years and can be classified according to a number of criteria involving several variables used either alone or in combination such as meteorological drought, agricultural drought and hydrological drought.

(c) 'Combating desertification' means all activities aimed at halting and reversing the process of desertification as defined in this Convention.

(d) 'Drought mitigation'

(e) 'Regional economic integration organisation' means an organisation constituted by sovereign states of a given region which has competence in respect of matters governed by this Convention, its Protocols or

annexes and has been duly authorised, in accordance with its internal procedures to sign, ratify, accept, approve or accede to the instruments concerned.

Explanatory Note

No attempt has been made to give a complete list of definitions. The AALCC Secretariat is of the view that the definition of desertification as set out in Agenda 21 is appropriate. For the definitions of other terms which may be necessary to be defined in the context of the Convention advice could be sought from World Meteorological Organization and such other organisations engaged in similar work. Some elements of the OAU and the ECA texts have also been included in the AALCC text. The definition of the term "Regional Economic Integration Organisation" is the standard one as set out in Climate Change and Biodiversity Conventions.

Article 2

Principles

(a) States have, in accordance with the Charter of the United Nations and 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 areas beyond the limits of national jurisdiction.

(b) The Principle of Sovereignty of States shall prevail in all international programmes and measures for combating desertification and mitigate drought.

(c) The Principle of shared, but differentiated responsibility in promoting and implementing the provisions of the Convention.

(d) The right to development must be realized in such a way as to satisfy the development and environmental needs of present and future generations.

(e) States should co-operate in promoting an open international economic system that will facilitate economic growth and sustainable development in all countries, thus enabling particularly those countries which are affected by drought and desertification to take effective action.

Explanatory Note

It appears that the divergent views on the inclusion of an article on Principles could be narrowed down if the list is precise and the principles to be included are

generally acceptable. The AALCC Secretariat draft text is a tentative one. There are certain principles in the OAU draft (A/Ac.241/12, paragraph 29) which may be considered in this context.

Article 3

Objective

The overall objective of the convention is to promote and strengthen international co-operation to combat desertification and mitigate drought more effectively in the regions affected by such problems.The immediate objectives are : to prevent land degradation and the destruction of ecosystems; to establish a corroborative framework of co-operation and partnership based on mutual interest; to strengthen capacity-building at the local, national, sub-regional and regional levels; and to establish a system to monitor and review the commitments of the parties to the Convention and its other instruments.

Explanatory Note

Perhaps the AALCC draft may be considered as short and precise. In view of the pending decision on the nature and time-table for the conclusion of regional instruments, it is felt that elaboration of the article on objective could be deferred until a clear view appears on that issue.

Article 4

Commitments

1. The contracting Parties, taking into account their specific national and regional developments priorities, objectives and circumstances, shall:

(a) formulate, implement publish and periodically update their national and, where appropriate, regional programmes containing measures to mitigate drought and combat desertification;

(b) Develop and strengthen the knowledge base and information for regions prone to desertification and drought, including the economic and social aspects of these ecosystems;

(c) Strengthen regional and global systematic observation networks linked to the development of national system for the observation of land degradation and desertification caused both by climatic fluctuations and by human impact and identify priority areas for action;

(d) Support the integrated data collection and research work of programmes related to desertification and drought;

(e) Support national, regional, sub-regional activities in technology development and dissemination, training and programme implementation to arrest dryland degradation;

(f) facilitate the mobilization of adequate financial resources for providing technical and financial assistance to developing countries affected by drought and desertification.

2. The Contracting Parties experiencing drought and desertification problems shall :

(a) Develop comprehensive anti-desertification programmes and integrate them into national development plans and national environmental planning;

(b) Develop comprehensive drought preparedness and drought-relief schemes for drought-prone areas and, where necessary, design programmes to cope with environmental refugees;

(c) Develop land-use models based on local practices for the improvement of such practices with a view to preventing land degradation;

(d) Promote integrated research programmes on the protection, restoration and conservation of water and land resources and land-use management based on traditional approaches, where feasible;

(e) Develop and adopt, through appropriate national legislation, and introduce institutionally, new and environmentally sound development-oriented land-use policies;

(f) Strengthen national institutional capabilities to develop and implement appropriate programmes to combat desertification and mitigate drought;

(g) Co-ordinate and harmonise the implementation of programmes and projects funded by the United Nations Agencies, Inter-governmental and Non-governmental organizations that are directed towards combating desertification and mitigation of drought;

(h) Encourage and promote popular participation and environmental education, focussing on desertification control and the management of the effects of drought;

(i) Establish mechanisms to ensure that Land-users, particularly women are the main actors in implementing improved land-use, including agroforestry systems, in combating land degradation;

3. The Contracting Parties, especially those facing serious drought and desertification shall, in addition to the measures mentioned in Paragraph 2, give priority and mobilize financial, technical, material and human resources to deal with the situation.

Explanatory Note

Since the deliberations on this crucial issue just began at the Geneva Session, it is considered rather premature to draft concrete provisions. Besides the problem concerning its format, it is also not clear as to what type and categories of commitments would emerge from future deliberation. It is the key issue in the Convention and to arrive at any consensus there has to be give and take approach. The AALCC Secretariat draft merely identifies few provisions which need to be considered and elaborated in the light of subsequent developments.

Article 5

Regional and sub-regional co-operation

The contracting Parties shall endeavour to promote:

(a) Regional and sub-regional co-operation in the areas concerning combating desertification and mitigation of drought;

(b) Strengthening, and where necessary, establishment of regional and sub-regional centres as well as networks of research monitoring and systematic observation including early warning systems for drought and desertification;

(c) Exchange of information, experiences and know-how relating to policy and programme alternatives in fields such as land-tenure, resource management and use of indigenous technologies;

(d) The establishment of modalities for joint effective management and use of shared resources such as grazing lands, rivers and lake basins;

(e) Mobilization of technical and financial support and resources necessary for the formulation, implementation, follow-up and evaluation of regional and sub-regional plans of actions.

Article 6

Research and Training

The Contracting Parties, taking into account the special needs of developing countries affected by drought and desertification, shall:

(a) Establish, promote and support research and programmes concerning scientific and technical education and training for monitoring, prevention and control of desertification and mitigation of drought;

(b) The Conference of the Parties at its first meeting shall determine how to establish a clearing house mechanism to promote and facilitate a standardized system for observing and reporting data, as well as other forms of technical and scientific co-operation.

Article 7

Technology transfer and co-operation

The Contracting Parties shall facilitate access to and transfer of ecologically-friendly anti-desertification technologies on a fair, equitable and preferential basis by encouraging programmes of co-operation and assistance to the developing countries affected by drought and desertification. Such programmes shall take into account the applicability of technology transfer to local communities and encourage active involvement of the private sector, aiming at the development and transfer of appropriate technologies to combat desertification and mitigate drought.

Article 8

Capacity building

The Contracting Parties shall :

(a) establish and maintain programmes for the development and strengthening of national capabilities by supporting scientific education and training for the specific needs of the developing countries particularly in Africa; and

(b) take all measures to ensure the participation of local populations, particularly women, youth and children.

Article 9

Education and Public Awareness

The Contracting Parties shall :

(a) promote and encourage awareness campaigns for combating desertification and mitigate drought through the electronic and print media.

(b) co-operate in and promote, at the international level the development and exchange of educational and public awareness material on the causes, effects and measures to deal with drought and desertification.

Explanatory Note

The texts of these four articles dealing respectively with Regional and Sub-regional co-operation, Research and Training, Technology Transfer and Co-operation and Capacity Building reflect the emerging consensus. The AALCC Secretariat draft is by no means an exhaustive one. Depending upon the text of articles on commitments the substances of these four articles would need to be considered again.

Article 10

Financial Mechanism

(a) There shall be a mechanism for the provision of financial resources to developing country parties for the purposes of this Convention on a grant or concessional basis. The mechanism shall function under the authority and guidance of , and be accountable to, the Conference of Parties which shall at its first meeting, decide upon the institutional structrure for such a mechanism and determine the policy, strategy, programme priorities and eligibility criteria relating to access to and utilization of such resources. The mechanism so established shall take into account the importance of burden sharing among the parties to the Convention;

(b) The Contracting Parties may seek financial assistance from the Global Environment Facility (GEF) for the implementation of any programme concerning combating desertification and mitigate drought provided such programmes are related to or lie within the areas identified by the GEF for its financial assistance;

(c) The Contracting Parties shall be free to seek or provide any financial resources related to the implementation of the provisions of the Convention through bilateral, regional and other multilateral channels.

Explanatory Note

INC-D Negotiators will find this issue as the toughest one. The divergence of views between the developed and developing countries in regard to financial resources is too wide. If it becomes possible to involve GEF with this Convention, it will be a real breakthrough. There is no indication whether the developed countries would be prepared to extend generous financial assistance to implement the lofty provisions in the Conventions. The AALCC Secretariat, keeping this reality in view, has followed the guidelines established in the Biodiversity Convention (Article 20) in preparing the text of this article.

Article 11

Co-ordination and co-operation

The Contracting Parties shall take measures to promote efficient co-ordination and co-operation at all levels.

Explanatory Note

The AALCC Secretariat is not sure whether such a provision is necessary. However, this theme is the basic purpose of the Convention. Since the compilation (A/Ac 241/12) contained such a provision (paragraph 108) and there was some dicussions on this issue during the Geneva Session, the inclusion of such a provision in general terms may be considered useful.

Article 12

Relationship with other Conventions

(a) The Contracting Parties recognise the close link that exists between the realization of the objectives of this Convention and those pursued by other legal instruments particularly the Framework Convention on Climate Change and the Convention on Biodiversity.

(b) In this regard, the provisions of this Convention shall be complementary to and in no manner affect the rights and the obligations of the Parties inherent in any international legal instrument related to objectives of this Convention.

Explanatory Note

The objective of the proposed Convention on combating desertification is in many ways, close to other environmental Conventions particularly, the Climate Change and the Biodiversity Conventions. In order to recognise and strengthen such relationship, it would be useful to stipulate a provision to this effect.

Article 13

Conference of the Parties

(i) A Conference of the Parties is hereby established.

(ii) The Conference of the Parties as the supreme decision-making body within this Convention shall keep under regular review the implematation of the Convention and of any related instruments that the Conference of the Parties may adopt. It shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention. To this end, it shall :

(a) Periodically examine the commitments of the Parties and the institutional arrangements under the Convention, in the light of the objective of the Convention, the experience gained in its implementation and the evolution of scientific and technological knowledge;

(b) Promote and facilitate the exchange of information on measures adopted by the parties to implement the Convention, taking into account the differing circumstances, responsibilities and capabilities of the Parties and their respective commitments under the Convention; and adopt such measures as necessary for the successful implementation of the objectives of the Convention;

(c) Agree upon and adopt, by consensus, rules of procedure and financial rules for itself and for any subsidiary bodies; and

(d) Exercise such other functions as required for the achievement of the objectives of the Convention as well as other functions assigned to it under this Convention.

(iii) The first Session of the Conference of the Parties shall be convened by the *Ad Hoc* Secretariat referred to in Article 23 and shall take place not later than one year after the entry into force of the Convention. Thereafter, ordinary sessions of the Conference of the Parties shall be held every year unless otherwise decided by the Conference of the Parties.

(iv) Extraordinary sessions of the Conference of the Parties shall be held at such other times as may be deemed necessary by the Conference, or at written request of any party, supported by one-third of the membership of the Conference, within two months of the request being communicated to the Parties by the Secretariat.

(v) The United Nations, its specialized agencies as well as any State member thereof or observers thereto not Party to the Convention, may be admitted by the Conference of the Parties as observers. Anybody or agency, whether national or international, governmental or non-governmental, which is qualified in matters covered by the Convention, and which has informed the Secretariat of its wish to be represented at a session of the Conference of the Parties as an observer, may request to be so admitted unless at least one-third of the Parties present object. The admission and participation of observers shall be subject to the rules of Procedure adopted by the Conference of the Parties.

Explanatory Note

The AALCC Secretariat draft is based on OAU draft paragraph 116 (A/Ac 241/12).

Article 14

Secretariat

(i) A Secretariat is hereby established.

(ii) The functions of the Secretariat shall be :

(a) To make arrangements for sessions of the Conference of the Parties and its subsidiary bodies established under the Convention and to provide them with services as required;

(b) To compile and transmit reports submitted to it;

(c) To facilitate assistance to the Parties, particularly the affected Parties, on request, in the compilation and communication of information required in accordance with the provisions of the Convention;

(d) To prepare reports on its activities and present them to the Conference of the Parties;

(e) To ensure the necessary co-ordination with the Secretariats of other relevent international bodies;

(f) To enter, under the overall guidance of the Conference of the Parties, into such administrative and contractual arrangements as may be required for the effective discharge of its function; and

(g) To perform other Secretariat functions specified in the Convention and in any of its protocols and annexes and such other functions as may be determined by the Conference of the Parties.

(iii) The Conference of the Parties, at its first session, shall designate a permanent secretariat and make arrangements for its functions.

Explanatory Note

The source of the AALCC draft text is the OAU draft (Paragraph 120, A/Ac 241/12) which is identical to Article 8 of the Climate Change Convention.

Article 15

Scientific and Technological Council

(a) A Scientific and Technological Council is hereby established as a subsidiary organ of the Conference of the Parties. It shall be made up of 10 Members appointed by the Conference of the Parties for a renewable period of three years.

(b) At the request and under the supervision of the Conference of the Parties, provide scientific and technical opinion on all issues that might assist the Confernce of the Parties in promoting and pursuing the objectives of the Convention;

(c) Co-operate with relevant and competent international organisations and Agencies as may be determined by the Conference of Parties;

(d) Submit its activity reports to the Conference of the Parties.

Explanatory Note

The AALCC Secretariat text is based on the OAU text in paragraph 124 (a) (A/AC 241/12). During the discussions in Geneva Session it was suggested that the Convention instead of proliferating institutions, should strengthen the existing institutions. However it has been suggested that the regime established by Convention should operate independently. At some stage it would be inevitable that new institutions will have to be established particularly for promoting research and monitoring implementation of the Convention. The Convention should provide for such eventuality. To begin with, as and when the Convention comes into force, a Scientific and Technological Council comprising 10 members nominated by the COP from different regions might be the only additional institution.The UNEP has played a significant catalytic role in this field. It could be entrusted with major responsibilies for promoting research, data collection and public awareness programmes. In this context, Inter Agency Co-operation and co-ordination among the United Nations Agencies and various international and non-governmental organisations is of equal importance, Besides avoiding duplication, such combined effort could render useful assistance to the Scientific and Technological Council in taking a concerted approach.

Article 16

Adoption of Protocols

(a) The Conference of the Parties, may, at any of its regular sessions, adopt protocols to the Convention.

(b) The text of any protocol that is proposed shall be communicated to the parties by the Secretariat at least six months before the session.

(c) The rules governing the entry into force of a protocol shall be laid down in the protocol itself.

(d) Only the parties to the Convention may be parties to a protocol.

(e) Only the parties to a protocol shall take decisions under that protocol.

(f) No state nor any regional economic integration organization may become

a party to a protocol without being or simultaneously becoming a party to the Convention.

Explanatory Note

The AALCC Secretariat text is based on the text set out in paragraph 133 (A/AC 241/12)

Article 17

Amendments

(a) Amendments to this Convention may be proposed by any Contracting Party. Amendments to any protocol may be proposed by any Party to that Protocol.

(b) Amendments to this Convention shall be adopted at a meeting of the Conference of the Parties. Amendments to any protocol shall be adopted at a meeting of the parties to the Protocol in question. The text of any proposed amendment to this Convention or to any protocol, except as may otherwise be provided in such protocol, shall be communicated to the Parties to the instrument in question by the Secretariat at least six months before the meeting at which it is proposed for adoption. The Secretariat shall also communicate proposed amendments to the signatories to this Convention for information.

(c) The Parties shall make every effort to reach agreement on any proposed amendment to the Convention or to any protocol by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a two-third majority vote of the Parties to the instrument in question present and voting at the meeting, and shall be submitted by the Depositary to all Parties for ratification, acceptance or approval.

(d) Ratification, acceptance or approval of amendments shall be notified to the Depositary in writing. Amendments adopted in accordance with paragraph (3) above shall enter into force among Parties having accepted them on the ninetieth day after the deposit of instruments of ratification, acceptance or approval by at least two-thirds of the Contracting Parties to this Convention or of the Parties to the protocol concerned, except as may otherwise be provided in such a protocol. Thereafter the amendments shall enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification, acceptance or approval of the amendments.

(e) For the purposes of this Article, Parties present and voting means parties present and casting an affirmative or negative vote.

Article 18

Adoption and Amendment of Annexes

(i) The annexes to this Convention or to any protocol shall form an integral part of the Convention or such protocol, as the case may be, and, unless expressly provided otherwise, a reference to this Convention or its protocols constitutes at the same time a reference to any annexes thereto.

(ii) Except as may be otherwise provided in any protocol with respect to its annexes, the following procedure shall apply to the proposal, adoption and entry into force of annexes to this Convention or of annexes to any protocol:

(a) Annexes to this Convention or to any protocol shall be proposed and adopted according to the procedure laid down in Article 17, paragraphs (b), (c) and (d).

(b) Any Party that is unable to approve an additional annex to this Convention or an annex to any protocol to which it is a Party shall so notify the Depositary, in writing, within one year from the date of the communication of the adoption by the Depositary. The Depositary shall without delay notify all Parties of any such notification received. A Party may at any time withdraw a previous declaration of objection and the annexes shall thereupon enter into force for that party.

(c) On the expiry of one year from the date of the commuication of the adoption by the Depositary, the annex shall enter into force for all Parties, to this Convention or to any protocol concerned which have not submitted a notification in accordance with the provisions of sub-paragraph (b) above.

(d) The proposal, adoption and entry into force of amendments to annexes to this Convention or to any protocol shall be subject to the same procedure as for the proposal, adoption and entry into force of annexes to the Convention or annexes to any protocol.

(e) If an additional annex or an amendment to an annex is related to an amendment to this Convention or to any protocol, the additional annex or amendment shall not enter into force until such time as the amendment to the Convention or to the protocol concerned enters into force.

Explanatory Note

The AALCC Secretariat text is identical to Article 30 of the Bio-diversity Convention and Article 16 of the Climate Change Convention. In the event the INC-D decides to conclude annexes as the regional instruments, the procedure for adoption of such regional annexes may be different and this will necessitate redrafting of this article accordingly.

Article 19

Settlement of Disputes

In the event of a dispute between any two or more Parties concerning the interpretation or application of the Convention, the Parties concerned shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice.

Explanatory Note

The AALCC Secretariat text is identical to OAU drafting proposal set out in paragraph 142 (A/AC 241/12).

Article 20

Right to Vote

1. Each Party to the Convention shall have one vote, except as provided for in paragraph 2 below.

2. Regional economic integration organisations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member States that are Parties to the Convention. Such an organisation shall not exercise its right to vote if any of its member States exercises its right, and vice versa.

Explanatory Note

This is identical to Article 18 of the Climate Change Convention and Article 31 of the Bio-diversity Convention.

Article 21

Depositary

The Secretary-General of the United Nations shall be the depositary of the Convention, Protocols and annexes adopted in accordance with Articles 16 and 18. respectively.

Article 22

Signature

This Convention shall be open for signature by States that are Members of the United Nations or of any of its specialized agencies or that are parties to the Statute of the International Court of Justice and by regional economic integration organisation, at New York, during the forty-ninth Session of the General Assembly on_____1994 and shall remain open for signature until_____.

Article 23

Interim Arrangements

The Secretariat functions referred to in Article 14 will be carried out on an interim basis by the Secretariat established by the General Assembly of the United Nations in its Resolution 47/188 of 22 December 1992, until the completion of the first session of the Conference of Parties.

Article 24

Ratification, Acceptance, Approval or Accession

The Convention shall be subject to ratification, acceptance, approval or accession by States and by regional economic integration organisations. It shall be open for accession from the day after the date on which the Convention is closed for signature. Instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.

Any regional economic integration organisation which becomes a Party to the Convention without any of its member States being a Party shall be bound by all the obligations under Convention. In the case of such organisations, one or more of whose member States is a Party to the Convention, the organisation and its member States shall decide on their respective responsibilities for the performance of their obligations under the Convention. In such cases, the organisation and the member States shall not be entitled to exercise rights under the Convention concurrently.

In their instruments of ratification, acceptance, approval or accession, regional economic integration organisations shall declare the extent of their competence with respect to the matters governed by the Convention. These organisations shall also inform the Depositary, who shall in turn inform the Parties, of any substantial modification in the extent of their competence.

Article 25

Entry into Force

The Convention shall enter into force on the ninetieth day after the date of deposit of the (thirtieth) (fiftieth) instruments of ratification, acceptance, approval or accession.

For each State or regional economic integration organisation that ratifies, accepts or approves the Convention or accedes therein after the deposit of the (thirtieth) (fiftieth) instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the ninetieth day after the date of deposit by such State or regional economic integration organisation of its instrument of ratification, acceptance, approval or accession.

For the purposes of paragarphs 1 and 2 above, any instrument deposited by a regional economic integration organisation shall not be counted as additonal to those deposited by member States of the organisation.

Article 26

Reservation

No reservations may be made to the Convention.

Article 27

Withdrawal

At any time after three years from the date on which the Convention has entered into force for a Party, that Party may withdraw from the convention by giving written notification to the Depositary.

Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal, or on such later date as may be specified in the notification of the withdrawal.

Any Party that withdraws from the Convention shall be considered as also having withdrawn from any protocol or annex to which it is a Party.

Article 28

Authentic Texts

The original of the Convention, of which the Arabic, Chinese, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

In witness whereof the undersigned, being duly authorised to that effect, have signed this Convention.

Done at New York this_____1994.

B. United Nations Convention on Climate Change and Biological Diversity : Follow-Up

I. The United Nations Framework Convention on Climate Change : Follow-Up

It will be recalled that at its forty-fifth Session, the General Assembly by its resolution 45/212 of 21st December 1990 established an Intergovernmental Negotiating Committee (INC) to prepare an effective Framework Convention on Climate Change, and any related legal instruments as might be agreed upon, for signature during the United Nations Conference on Environment and Development (UNCED) 1992. The Intergovernmental Negotiating Committee at its fifth session held in New York on the closing day on 9th May 1992, adopted the United Nations Framework Convention on Climate Change. The Convention was opened for signature during the United Nations Conference on Environment and Development held in Rio, from 4th to 14th June 1992 and thereafter at the United Nations Headquarters, New York, from 20 June 1992 to 19 June 1993. As many as 166 States had signed the Convention by that date.

The General Assembly, during its forty-seventh Session considered the Report of the United Nations Conference on Environment and Development (UNCED)as well as the Reports of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on its work during 1992.

It will be recalled that resolution INC/1992/1 adopted by the Inter-governmental Negotiating Committee on 9th May 1992 mandated the INC to hold its sixth session in Geneva from 7th to 10th December 1992. Further, as envisaged in the Article 21 of the United Nations Framework Convention on Climate Change the interim Secretariat established by the General Assembly in resolution 45/212 would carry out the interim arrangements until the first session of the Conference of the Parties to the Convention.

The General Assembly by its resolution 47/195 adopted on 22nd December 1992 while endorsing the decision of the INC decided that the Intergovernmental Negotiating Committee should continue to function and prepare for the first session of the Conference of the parties to the Convention. It invited the Intergovernmental Negotiating Committee to implement expeditiously the Plan of preparatory work drawn up at its Sixth Session and to promote a coherent and co-ordinated Programme of activities by competent bodies aimed at supporting the entry into force and effective implementation of the Convention, including

strengthening the capacities of developing and all other countries to prepare for their participation in the Convention. It called upon the organs, organizations and bodies of the United Nations System to involve actively and to initiate and strengthen activities related to climate change.

Following the directives given by the General Assembly, the Intergovernmental Negotiating Committee during the year 1993 held its Seventh and Eighth Sessions in April and August respectively. It discussed organisational and financial matters and substantive issues such as commitments, joint implementation, article 11 concerning financial mechanisms including proposals on policies, programme priorities and eligibility criteria for the financial mechanism.

The Seventh Session of the Intergovernmental Negotiating Committee was held at New York from 15 to 20 March 1993. At its 3rd Plenary Meeting held on 16 March, the INC elected a new Chairman and the officers of the Working Groups I and II to fill the vacancies that had arisen. The Bureau now comprises as follows:

Chairman :	Mr. Raul Estrada-Oyuela (Argentina)
Vice-Chairmen :	Mr. Ahmed Djoghlaf (Algeria) Mr. Maciej Sadowski (Poland) Mr. T.P. Sreenivasan (India) Ms. Penelope Wensley (Australia)
Rapporteur :	Mr. Maciej Sadowski (Poland)

Working Group I

Co-Chairmen :	Mr. Mohamed M. Ould El Ghaouth (Mauritania) Ms. Cornelia Quennet (Germany)
Vice-Chairman :	Mr. Edmundo de Alba Alcaraz (Mexico) (in charge of consultations)

Working Group II

Co-Chairmen :	Mr. Nobutoshi Akao (Japan) Mr. Robert F. Van Lierop (Vanuatu)
Vice-Chairman :	Mr. Tibor Farago (Hungary)

With regard to substantive item entitled "Matters relating to arrangements for the financial mechanism and for technical and financial support to developing country parties", the discussion was focussed on matters relating to the implementation of article 11 as well as to the interim arrangements as envisaged in article 21, paragraph 3 of the Convention. Issues concerning functional linkages between the conference of Parties and the operating entity or entities of

the financial mechanism, as provided in article 11, were examined. In that context the committee took note of the ongoing work related to the restructuring and the replenishment of the Global Environment Facility by the end of 1993. A Preliminary discussion was held on the provisions of guidance to the financial mechanism on policies, programme priorities and eligible criteria, in accordance with article 11, paragraph 1 of the Convention. It was reaffirmed that the financial mechanism would function under the guidance of and be accountable to the conference of parties, which would decide on its policies, programme priorities and eligibility criteria related to the Convention. Further, articles 4, 5 and 6 of the Convention would be a basis from which priorities would be determined. Finally, as to the governance and accountability of the financial mechanism, it was emphasized that it should be equitable and balanced in its representation of all parties within a transparent system of governance as laid down in article 11, paragraph 2 of the Convention.

At its 8th Plenary meeting, the INC took note of the information provided by the Secretariat on the status of signature and ratification of the convention. It expressed its appreciation to those States that had ratified the Convention, and urged other signatories to inform the Secretariat of the expected time of their ratification.

The Eighth Session of the Intergovernmental Negotiating Committee, was held at Geneva from 16th to 27th August 1993. This was the first full session of the INC after the signing of the Convention in Rio in June 1992. Both Working Groups I and II resumed consideration of the item allocated to them. In addition to the statements by the Chairman of the INC and the Executive Secretary, the Executive Director of UNEP, the Secretary-General of the WHO, the Chairman of the participant's Meeting of the Global Environment Facility and the Vice-Chairman of the Commission for sustainable Development addressed the meeting.

The Executive Director of the UNEP, Ms. Elizabeth Dowdeswell, in her statement, pledged full support of the UNEP to the Convention process and gave information about the UNEP's specific activities and assistance in that respect. These, among others, included the development of the methodologies for the measurement and analysis of greenhouse gases the development of guidelines for climate change impacts and adaptation assessment and information exchange.

The Chairman of the IPCC informed the meeting that his organization would complete a special report by November 1994 which would address the issues for consideration at the first session of the Conference of the Parties to the Convention. He also informed the meeting that the Second full assessment report by the IPCC would be completed in late 1995.

The Chairman of the GEF briefed the meeting on the progress in the GEF regarding its restructuring and replenishment. While assuring GEF's support to the Convention he pointed out that the GEF would not be the sole source of funding for the implementation of the Convention.

The Vice-Chairman of the Commission for sustainable Development recognised the interest of the Commission in promoting the harmonization of the activities of other relevant agencies and forums, including the INC for climate change.

At the first and second plenary meetings, the Committee took note of the national communications submitted to the Secretariat by the representatives of Germany, Japan, Ireland, New Zealand, Norway, Italy and Czech Republic. This was in conformity with the request made by the General Assembly in its resolution 47/195, paragraph 4, by which it invited signatories of the Convention to communicate to the head of the interim Secretariat, as soon as feasible, information regarding measures consistent with the provisions of the Convention, pending its entry into force.

Working Group I took up the matters relating to commitments. The discussion was focussed on four issues which included: (a) methodologies for calculations inventories of emissions and removal of greenhouse gases, (b) criteria for joint implementation, (c) first review of information communicated by each party included in Annex I of the Convention and (d) the roles of the subsidiary bodies established by the Convention.

Working Group I held preliminary discussions on issues concerning methodologies for calculations/inventories of emissions and removal of greenhouse gases. The Intergovernmental Panel on Climate Change (IPCC) has been closely co-operating with the INC in developing guidelines on this matter. During the discussions while there was great appreciation of the work of the IPCC, some delegations stressed the need for effective participation of the developing countries in this process. Several delegations recognised the need for refining and further developing methodologies for sources and sinks of all greenhouse gases in all economic sectors as envisaged in Article 3.3 of the Convention. It was observed that the guidelines for national inventories should take into account the uncertainty in climatic change and ensure transparency, comparability and consistency. It was hoped that prior to INC's ninth Session, the IPCC would be able to provide more detailed information about the progress on this matter as it would help the INC to make its recommendations to the Conference of Parties for consideration at the first session.

With regard to criteria for Joint Implementation as provided in article 4.3 of the Convention, all States Parties to the Convention are committed to prepare

national inventories of emission by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol. Such commitments could be met either individually or jointly. Since the industrialized countries are mainly responsible for climate change, the idea of joint implementation would be more relevant in their context and they must take the lead in this regard. A Preliminary discussion on this concept was held in Working Group I.

In veiw of the complex nature of the issues, the Working Group I decided to hold further discussion during the INC's ninth Session. In the meantime, the Secretariat was requested to provide further documentation on this issue, including a list of possible criteria, taking into account the views expressed and submissions by the Member States.

Working Group I held a preliminary discussion on the item concerning 'first review of information communicated by each party included in Annex I of the Convention.' The Working Group took note of the information provided by the group of countries and an organization included in Annex I of the Convention. It was recognised that preparation of guidelines for communication of national information will be a useful step. As envisaged in the Convention, such national communications would be reviewed by the Conference of Parties, it was agreed that the future task should include: (i) a thorough analysis of national communications; and (ii) a compilation and synthesis of the information provided by the parties in their national communications, including the overall effects of policies and measures. With regard to the first task, the Report of the INC's eighth Session in its para 62 outlines that, it should include "verifying methodologies used; comparing national data with authoritative international sources; noting the inclusion or absence of information and data, as well as thier quality reviewing projections of emission by sources and removals by sinks and the assumptions on which those projections were based; and assessing the comprehensiveness and effectiveness of claimed mitigation and adaption measures, as well as evaluating national impacts of climate change". (A/AC.237/41, para 62).

Articles 9 and 10 envisage establishment of two subsidiary bodies namely (i) subsidiary body for scientific and technological advice and (ii) subsidiary body for implementation. Working Group I during the discussion on the item "The roles of the Subsidiary Bodies established by the Convention", recognised the important role of these two Subsidiary Bodies in the implementation of the convention. After a preliminary discussion, it was agreed that the Secretariat would prepare documentations clarifying the respective roles of the subsidiary bodies, the relationship between them and their relationship with other bodies, including the IPCC. Other issues which need to be examined related to the timing of the convening of the meetings of the subsidiary bodies and technical Secretariat

support, including human and financial resource implications. All these issues will be discussed at the INC's ninth Session.

Working Group II during INC's eighth Session resumed consideration of "matters relating to arrangements for the financial mechanism and for technical and financial support to developing country parties". The discussion was centred on four issues related to the implementation of article 11. These issues were : (a) policies, eligibility criteria and programme priorities; (b) modalities for the functioning of operational linkages between the conference of the parties and the operating entity of the financial mechanism; (c) approaches to the determination of "agreed full incremental costs" and (d) elements relevant to the funding needs.

With regard to "policies, eligibility criteria and programme priorities", it was recognised that the conference of parties, the supreme body of the Convention will decide on these matters. It was agreed that only developing countries that are parties to the Convention would be eligible to receive funding upon entry into force of the Convention. Further, priority would be given to the funding of agreed full costs (or agreed full incremental costs) incurred by the developing country parties as laid down in article 12.1 and other relevant commitments under the convention.

With regard to modalities for the functioning of operational linkages between the conference of the parties and the operating entity of the financial mechanism, the following preliminary conclusions were reached:

(i) The Conference of the Parties, (COP) the supreme body of the Convention, and the entity or entities entrusted with the operation of the financial mechanism, shall agree upon arrangements to give effect to the provisions of paragraphs 1 and 2 of Article 11 through the operational linkages which are discussed below:

(ii) In line with Article 11.1 of the Convention, the COP will, after each of its sessions, communicates to the governing body of the operating entity relevant policy guidance for implementation and action by that governing body, which shall accordingly ensure the conformity of the entity's work with the guidance of the COP. Guidance from the COP will address issues relating to policies, programme priorities and eligibility criteria, as well as possible relevant aspects of the activities of the operating entity that are related to the Convention;

(iii) The governing body of the operating entity has the responsibility of ensuring that funded projects related to the Convention are in conformity with the policies, eligibility criteria and programme priorities established by the

COP. It will report regularly to the COP on its activities related to the Convention and the conformity of these activities with the guidance received from the COP;

(iv) Regular reports by the Chairman or secretariat of the operating entity to its governing body will be made available to the COP through its secretariat. Other official documentation of the operating entity should also be made available to the COP through its Secretariat;

(v) In addition, the COP should receive and review at each of its sessions a report from the governing body of the operating entity which should include specific information on how it has applied the guidance and decisions of the COP in its work related to the Convention. This report should be of a substantive nature and incorporate the programme of future activities of this entity in the areas covered by the Convention and an analysis on how the entity, in its operations, implemented the policies, eligibility criteria and programme priorities related to the Convention established by the COP. In particular, a synthesis of the different projects under implementation and a listing of the projects approved in the areas covered by the Convention, as well as a financial report including accounting and evaluation of its activities in the implementation of the Convention, indicating the availability of resources, should be included;

(vi) In order to meet the requirements of its accountability to the COP, reports submitted by the governing body of the operating entity should cover all its activities carried out in implementing the Convention, whether decisions on such activities are made by the governing body of the operating entity or by bodies operating under its auspices for the implementation of its programme. To this end, it shall make such arrangements with such bodies as might be necessary regarding the disclosure of information;

(vii) The funding decisions for specific projects should be agreed between the developing country Party concerned and the operating entity in conformity with policy guidance from the COP. However, if any Party considers that a decision regarding one of the specific projects does not comply with the policies, eligibility criteria and programme priorities established by the COP in the context of the Convention, the COP should analyse the observations presented and take decisions on the basis of compliance with such policies, eligibility criteria and programme priorities. In the event that the COP considers that this specific project decision does not comply with the policies, eligibility criteria and programme priorities established by the COP, it may ask the governing body of the operating entity for further clarification on the specific project decision and in due time ask for a reconsideration of that decision;

(viii) The COP will periodically review and evaluate the effectiveness of all modalities established in accordance with Article 11.3. Such evaluations will be taken into account by the COP in its decisions, pursuant to Article 11.4 on the arrangements for the financial mechanism."
(A/AC. 237/41, paragraph 86).

Substantive discussion on issues related to (c) and (d) were deferred for consideration at the ninth session. Consideration of the draft decision on financial mechanism submitted by the G-77 and China at the Seventh Session was also deferred to the ninth Session.

With regard to the sub-item entitled "provision to developing country parties of technical and financial support" the discussion was focussed on the UNEP and the INC joint pilot projects (known as CLIMEX) on an information exchange system for country activities. It was stressed that participation in this project should be voluntary in nature and not subject to any conditions. Further, it should not pre-empt and prejudice the decisions of the conference of the parties.

Apart from the above mentioned substantive issues, the INC during its eighth Session reviewed the activities of the interim Secretariat and other administrative and budgetary matters. At its 3rd Plenary meeting on 24th August, 1993, the Committee expressed satisfaction that the instruments of ratification, acceptance, approval or accession had been deposited by 31 States.[1] It took note of the information provided by the delegations of Botswana, Burkina Faso, Kiribati, Mauritania, and Uganda that their countries had completed ratification procedures at national level and soon they will be depositing their instruments of ratification.

The Committee decided to schedule its future session as follows:

Ninth Session—7 to 18 February 1994, Geneva

Tenth Session—22 to 31 August 1994, Geneva

Eleventh Session—6 to 17 February 1995, New York.

The Committee also considered the offer of the Governments of Germany to host the first session of the Conference of parties. It recommended to the General Assembly at its forty-eighth session to consider as a follow-up of UNCED giving approval to the invitation of Germany to hold the first session of the Conference of Parties from 28 March to 7 April 1995, in Berlin.

1. As of 24 August 1993, the Convention has been ratified by: Algeria, Antigua and Barbuda, Armenia, Australia, Canada, *China*, Crote Islands, Dominica, Ecuador, Fiji, Guinea, Iceland, *Japan*, Maldives, Marshall Islands, *Mauritius*, Mexico, Monaco, Norway, Papua New Guinea, Peru, San Kitts and Nevis, Saint Lucia, Seychelles, Sweden, Tunisia, U.S.A. Uzbekistan, V Zambia and Zimbabwe.

II. The Convention on Biological Diversity: A Note on Post Rio Summit Developments

The Convention on Biological Diversity was opened for signature at the Earth Summit held in Rio de Janeiro, Brazil, on 5 June 1992. As of 1 December 1993, 167 countries had signed the Convention and 37 nations had ratified it. Consequently, the Convention entered into force on 29 December 1993.*

At the last session of the Intergovernmental Negotiating Committee held in Nairobi which adopted the final text of the Convention on 22 May 1992, the negotiating Governments also adopted Resolution 2 on international cooperation for the conservation of biological diversity and the sustainable use of its components pending the entry into force of the Convention. This resolution invited the UNEP, at its Governing Council Session, to consider convening meetings of an Intergovernmental Committee on Biological Diversity to consider, *inter alia*,:

- assistance to Governments in preparation of an agenda for scientific and technological research;
- the need and modalities for a protocol for the safe transfer, handling and use of modified organisms resulting from biotechnology;
- modalities for the transfer of technology;
- policy guidance for the institutional structure designated to undertake the operation of the financial mechanisms for the period until the entry into force of the Convention;
- and other preparations for the first Conference of the Parties which is to be convened by the Executive Director of the UNEP not later than one year after the entry into force of the Convention.

In November 1992, the Executive Director of the UNEP established four expert panels to prepare recommendations on specific issues for the first meeting of the Intergovernmental Committee on the Convention on Biological Diversity (ICCBD) (which was subsequently constituted by the Governing Council of the UNEP in May 1993).

Panel 1—Priorities for Action and Research Agenda—This panel developed a methodology for setting priorities for action arising out of the Convention. It recommended an agenda for scientific and technical research and called for an interim scientific and technological advisory committee to be established as soon as possible.**

* The *Indian Express*, New Delhi dated 30 September 1993

** The reports of these panels are available on request from the Interim Secretariat.

Panel 2—Economic Implications and Valuation of Biological Resources: This panel identified the socio-economic factors that lead to biodiversity loss. The Panel recommended:

— identifying policies and incentive systems that work against biological diversity conservation;

— conducting additional research regarding the potential of economic instruments to combat biodiversity loss; and

— assessing the values of biodiversity.**

Panel 3—Technology Transfer and Financial Resources: This panel concluded that access to information and capacity building are key to the implementation of the Convention's technology transfer provisions. The panel suggested that the ICCBD develop guidelines for international cooperation in this regard. Regarding funding arrangements, the panel suggested that the ICCBD propose substantive modifications to the GEF. The Panel concluded that the ICCBD should develop a procedure for estimating the level of funding needed to implement the Convention.**

Panel 4—Safe Transfer, Handling and Use of Living Modified Organisms resulting from Biotechnology: This panel concluded that only Conference of the Parties (COP) can take a decision regarding the creation of a bio-technology protocol. The panel recommended that such an instrument should only cover genetically-modified organisms and should aim at preventing and/or mitigating the consequences of unintended releases.**

Subsequently, an Expert Conference on Biodiversity was hosted by the Norwegian Ministry of Environment in cooperation with UNEP in Trondheim (Norway) from 24 to 28 May 1993. One of the primary purposes of this meeting was to bring together scientists, managers, bureaucrats and policy-makers from 80 countries to provide input to UNEP's preparatory work for the first session of the ICCBD. The themes discussed in this meeting included: ecosystem functions of biodiversity; loss and conservation of biodiversity; marine biodiversity; biodiversity inventory and monitoring; forestry and biodiversity conservation; socio-cultural aspects of biodiversity; the economic aspects of biodiversity conservation and use; and the transition from scientific knowledge to political action.

The Expert Conference on Biodiversity was followed by the first session of the ICCBD held in Geneva from 11 to 15 October 1993. It was convened by the Executive Director of the UNEP with the objective of preparing for the first

** The reports of these panels are available on request from the Interim Secretariat.

meeting of the Conference of the Parties (COP) and ensuring an early and effective operation of the Convention once it enters into force.

The Bureau elected for the ICCBD consisted of the following:

Chairman—Ambassador Vincente Sanchez (Chile);
Vice-Chairmen—Veit Koester (Denmark)
S.K. Ongeri (Kenya)
Geogry Zavarzin (Russian Federation);
Rapporteur—Sarfraz Ahmed (Pakistan)
Vice-Chairman of Working Group I—Frantisek Urban (Czech Republic)
Vice-Chairman of Working Group II—Balmiki Prasad Singh
Rapporteur of Working Group I—Nordahl Roaldsoy (Norway)
Rapporteur of Working Group II—Sulayman Samba (Gambia).

The plenary adopted, first of all, the rules of procedure for the ICCBD contained in document No. UNEP/CBD/IC/1/2 subject to certain amendments. The agenda adopted contained the following items:

— election of officers;
— adoption of the agenda;
— procedural matters and organization of work;
— preparation for the first meeting of the Conference of the Parties to the Convention, in accordance with the resolutions of the Nairobi Final Act of the Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity;
— other matters; and
— adoption of the Report of the ICCBD.

It was agreed that Working Group I would deal with the conservation and sustainable use, including the full range of important activities for reducing the loss of biodiversity, the scientific and technical work between meetings and the issue of biosafety. Working Group II would deal with the institution operating the financial mechanism, a process of estimating funding needs, the meaning of 'full incremental costs', the rules of procedures for the Conference of the Parties (COP) and technical cooperation and capacity building.

The plenary sessions were devoted to reviewing the progress made with regard to ratification of the Convention, its implementation, and the conservation of biological diversity..

Working Group I agreed to submit the following list of proposed activities to the ICCBD for its consideration and possible transmission to the COP : (Dec. No. UNEP/CBD/1C/WG. 1/L. 1):

— All parties should conduct country studies and prepare national biodiversity stratagies with the provision of technical, scientific and financial support as needed. The Interim Secretariat should report to the Conference of the Parties on progress. (Country studies should not be mandatory or a precondition for provision of financial support for implementation of the Convention).
— To facilitate access to and exchange of information, it should be made available in computerized form, using existing software. The Interim Secretariat should develop format for data entries and institute regional training programmes on the use of such formats;
— Finance support should be provided for the purchase of relevant classical literature and other publications;
— Conservation and sustainable use measures should emphasize the participation of local communities, women and youth, and should improve local standards of living;
— Regional approaches should be devised, i.e. through workshops, seminars, to address shared concerns;
— *Ex situ* and *in-situ* programmes should be integrated and should include micro organisms;
— All existing identified conservation aspects falling under different conventions should be integrated;
— Restoration of ecosystem, which may include the elimination of alien species, should be considered;
— Capacity-building, including institutional strengthening and human resource development, particularly of taxonomists, should receive greater attention;
— Conservation of biodiversity outside the protected areas should receive greater attention;
— National legislation should be reviwed to reflect the needs of the Convention;
— Traditional knowledge should be integrated in modern management practices to conserve biodiversity;
— Educational programmes to raise the public awareness of biodiversity issues should be developed; and
— All parties should designate the appropriate protected areas, paying due attention to the management of the surrounding areas;

Factors to Determine the Priority of Activities—Working Group I identified the following broad indicative categories of factors to be possibly taken into account for the setting of national action priorities:
— ecological (including the extent of threatened species and ecosystems, rehabilitation of threatened habitats and ecosystems, air and water pollution, atmospheric changes, deforestation and disaster);
— socio-economic and cultural (including population, change in land use, soil degradation, and ensuring integration of traditional knowledge) and institutional (including involvement of governmental and non-governmental organizations and other groups, adjustments in management approaches, capacity for implementation, compliance and monitoring, and level of financial resources).

Scientific and Technical Work between Sessions—Working Group-I recommended that, before the next session of ICCBD, the UNEP should convene a scientific meeting to report on several issues including:

— international cooperation and research to implement the Convention;
— Scientific and technical assessment of status of biodiversity; and
— state-of-the-art technology. Governments should nominate competent experts. There should be one meeting with tightly defined terms of reference.

Working Group II in its report (Doc. No. UNEP/CBD/IC/IWG.II/L.1 and Add.1) proposed the following recommendations:

Institution or institutions operating the Financial Mechanism:

— The financial mechanisms should meet the requirements of Article 21 of the Convention, which established the financial mechanisms in the first place. No further interpretation of this article should be necessary.
— Channels of communication to the mechanisms should be established.
— There should be clear procedures for processing requests for funding.
— The need for a regular flow of information.
— The need for a capacity to respond quickly to funding requirements.
— The need for cost-effectiveness and efficiency in its operations.
— Funds should be replenished quickly.
— Regular advice should be given to the financial mechanisms on the resources needed, and
— There should be possibilities for multiple sources of funding, in which information on practices and eligibility criteria applied for by other institutions funding biodiversity-related projects would be relevant, as well as working relationships with these institutions.

Rules of Procedure for the COP—It was agreed that all the observations made on this topic would be taken into account by the Secretariat when it proposes a further draft for consideration by the Working Group at its next session.

Full Incremental Costs—The Working Group II agreed that the Secretariat be requested to examine the methodologies in order to define and understand the

meaning of the term 'full incremental costs' and in the light of this examination, provide an indicative list. This list should build on current projects and, to the extent possible, be made in collaboration with organisations such as UNESCO, FAO, the Multilateral Fund for the Implementation of the Montreal Protocol, the Secretariat for the Climate Change Convention and the GEF.

Technical cooperation and capacity building—Working Group II agreed to recommend that the Secretariat

— identify existing clearing-house mechanisms and existing mechanisms for information exchange and report on their expertise;
— catalogue existing databases of relevance to the Convention and identify their gaps and linkages; and
— examine and report on existing examples and possible models for national legislation for regulating access to genetic resources.

Assessment

Despite the hectic work done by the two Working Groups, they were not able to produce reports that could be approved by the Plenary. When their reports were presented to the Plenary, a number of delegates expressed concern that they had not seen the documents in their final form, and, due to the large number of amendments and changes, could not adopt them. As a last minute solution, the Plenary adopted only two decisions, the establishment of a scientific and technical committee that will meet before the next session of the ICCBD and a request to the Secretariat to use the unadopted Working Group reports as guidance during the intersessional period.

The suggested dates for the first meeting of the Conference of the Parties (COP), which is required to be held before the end of 1994, are 28 November to 9 December 1994. As for the meeting of the Interim Scientific and Technical Advisory Committee (ISTAC), it is required to be convened one month before the next session of the ICCBD. Mexico has offered to host this meeting between January and March 1994. As to the next session of the ICCBD, the suggested dates are either 10 to 19 March 1994 or 20 to 30 June 1994 with the venue being either Nairobi or Geneva.

IX. International Trade Law

A. Legal Aspects of Privatization

(i) Introduction

At the Thirtieth Session of the Asian-African Legal Consultative Committee (AALCC) held in Cairo in April 1991, it was noted by the Standing Sub-Committee on International Trade Law Matters 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 economies 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 to go in for privatization of these undertakings, almost making it a precondition for the grant of financial assistance and the extent thereof. The Sub-Committee, taking note of these developments, requested the Secretariat to commence a study on the legal issues involved in the matter of privatization with the final objective of preparation of a guide or guidelines on legal aspects of privatization in Asia and Africa. The principal aim of such a guide or guidelines would be to assist the Member Governments in carrying their privatization programmes in an orderly manner which would be consistant with their national interests.

Since the preconditions, basic methods and procedures for privatization and the legal issues involved would vary from country to country, the view was expressed that it would be necessary for the Secretariat first to collect the relevant information from the Member Governments so that it was able to identify the macro-and micro-legal issues involved before commencing a study on the topic. Consequently, the Secretariat prepared and circulated a questionnaire to assist the Member Governments in furnishing the required information. It requested the relevant authorities of the Member Governments to respond as early as possible.

Before the Islamabad Session (1992) only the Governments of Singapore and Thailand had responded to the questionnaire. Only a preliminary study was presented at the Islamabad Session and 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 and which had an impact on national economies, adopted a recommendation that the AALCC urge the Member Governments which had not responded to the questionnaire to do so and/or furnish relevant documentation to the Secretariat at the earliest.

The Governments of Indonesia, Turkey and Kuwait sent in useful information. The Government of Cyprus wrote to say that the issue of privatization had not arisen in Cyprus". In addition, the Secretariat had also collected some useful information from other sources such as the World Bank, the Economic Commission for Europe, UNIDROIT and the International Development Law Institute (IDLI).

In view of the lack of adequate information from the bulk of Member Governments about their privatization programmes, underway or contemplated, it was not possible for the Secretariat to prepare a meaningful study on the topic. However, given the importance of this matter for the developing countries in general and Member States of the AALCC in particular, a preliminary study revised in the light of the information received by the Secretariat was submitted to the Thirty-second of the AALCC held in Kampala (Uganda) in February 1993. At that session, the delegations of Japan and Uganda presented their country responses to the Secretariat's questionnaire. After the Kampala Session, the Secretariat renewed its request to the Member States in a communication addressed to them on 25th of May 1993. In response thereto, useful information was received from the Governments of Mongolia, Pakistan, the Philippines and Sri Lanka. Thus, the overall response received were those from Indonesia, Japan, Kuwait, Mongolia, the Philippines, Pakistan, Singapore, Sri Lanka, Thailand, Turkey and Uganda.

As it was felt that adequate information had not yet been received from all the Member Governments, it was decided that the Secretariat should participate as an observer in the second session of the UNCTAD *Ad Hoc* Working Group on Comparative Experiences with Privatization which was scheduled to be convened in Geneva from 7 to 11 June 1993. This Working Group had been established by the Trade and Development Board of UNCTAD to deal with the issues related to privatization and to enable the participating countries to share each other's experience with privatization. The Working Group had attracted broad participation from the developing countries. Amongst the AALCC Member States which had made national presentations on privatization before the Working Group (up to its second session) included China, Egypt, Indonesia, Japan, Jordan, Malaysia, Nigeria, Pakistan, the Philippines, the Republic of Korea, Sri Lanka, Tanzania,

Thailand and Turkey. The overall information available to the Secretariat enabled it to prepare a comprehensive study entitled "Legal and Institutional Framework governing Privatization in Asia and Africa".

Subsequently, it was proposed by some Member States that since developing countries in general and Afro-Asian States in particular were attaching growing importance to the privatization of public sector undertakings, demonopolization and administrative de-regulation of economic activities in the context of ongoing economic restructuring programmes, the AALCC as a wider forum of Afro-Asian co-operation and consultation in the fields of law and economics should take the intiative of convening a special meeting to provide a forum for interaction between invited experts and legal advisers and/or senior officers of the AALCC Member States engaged in the implementation of privatization programmes in their respective countries. Through such joint endeavours, legal and institutional guidelines for privatization and post-privatization regulatory framework could be developed to provide an added impetus to the process of orderly privatization in Africa and Asia.

In response to this proposal, a Special Meeting on Developing Institutional and Legal Guidelines on Privatization and Post-Privatization Regulatory Framework was convened in Tokyo from 18 to 20 January 1994 during the Thirty-third Session of the AALCC held there from 17 to 21 January 1994. Twenty-four Member States of the AALCC and six observer delegations participated in the Special Meetings. The basic working papers prepared for the Special Meeting inlcluded :

(i) a study prepared by the AALCC Secretariat entitled "Legal and Institutional Framework governing Privatization in Asia and Africa".

(ii) "Draft General Procedures and Guidelines for Privatization" prepared by the World Bank at the request of the AALCC; and

(iii) "Legal Guidelines for Privatization Programmes" a Working Paper prepared by the World Bank at the request of the AALCC which was introduced at the start of the Special Meeting.

Other papers submitted to the Special Meeting included:

(i) "A Structural Framework for Privatization" by Ms. Rumu Sarkar, General Counsel, USAID;

(ii) "Korea's Policy on Public Enterprises for Strengthening National Competitiveness" by Mr. Nam Shun-Woo, Director, Economic Planning Board, Government of the Republic of Korea;

(iii) "Sri Lanka's Current Divestiture Strategies" by Mr. Tissa Jayasinghe,

Director, Commercial Division, Ministry of Finance, Government of Sri Lanka, and

(iv) Presentation on Privatization of the Japan National Railway System by Mr. Katsuhiko Hara, a senior officer of the Japanese Ministry of Transport.

At the request of the AALCC the World Bank had placed at the disposal of the Special Meeting the expertise of two of its Senior Legal Counsels who served as resource persons throughout the deliberations of the Special Meeting. Their assistance was invaluable to the success of the Special Meeting. These resource persons introduced the discussions on the following themes before the Special Meeting :

(i) Micro-economic and legal issues involved in privatization;
(ii) Privatization strategies and techniques;
(iii) Legal reform procedures for restructuring and privatization of public sector undertakings; and
(iv) Post-Privatization regulatory framework.

At the end of its deliberations, the Special Meeting recommended the text of the Legal Guidelines for Privatization Programmes, for consideration of the Member Governments of the AALCC. This report was subsequently endorsed by the Committee.

It is hoped that these Guidelines will assist the Governments in the Afro-Asian region in particular and other countries in general, which have already undertaken or are contemplating to undertake privatization programmes in their respective countries, in carrying out such programmes in a manner which would be consistent with their national interests.

Thirty-third Session : Discussions

The Report on the Special Meeting on Privatization was introduced in the seventh plenary meeting of the AALCC held on 21st of January 1994 by Mr. Raul I. Goco, Chairman of the Special Meeting on Privatization.

The President thereafter invited the comments of the Member Delegations on the Draft Decision related to this Report which was as follows:

Draft Decision on the Report of the Special Meeting on Privatization

The Asian-African Legal Consultative Committee

Taking Note of the Report of the Special Meeting on Developing Legal and Institutional Guidelines on Privatization and post-Privatization Regulatory

Framework which was held in Tokyo from 18 to 20 January 1994 within the organizational framework of the AALCC:

1. *Commends* the Secretary-General for his timely initiative in organizing such a meeting on a topic which is of utmost importance to the developing countries in general and in particular for the developing nations in Asia and Africa;

2. *Compliments* the Chairman of the Special Meeting on Privatization and all the participants for having accomplished the difficult mandate entrusted to that meeting within the limited time that was at its disposal;

3. *Commends* the World Bank for its financial assistance and for putting at the disposal of the Special Meeting the expertise of two resource persons whose contribution has contributed immensely to a greater undrestanding and enlightenment on the subject of Privatization;

4. *Notes* the contents of Report which faithfully describes the discussion during the meetings on vital legal issues on privatization; the concerns expressed thereto are the consensus arrived at by the participants including the essential points covered in the presentation of the two resource persons from the World Bank;

5. *Considers* as constituting part of the Report the text of the Legal and Institutional Guidelines on Privatization and post-Privatization Regulatory Framework already appended to the Report for consideration of member states;

6. *Requests* the Secretary-General to arrange to publish and give broad publicity as expeditiously as possible, the proceedings and Report of the Special Meeting including the guidelines annexed thereto to ensure its widest dissemination in the Afro-Asian region;

7. *Directs* the Secretary-General to report to the 34th Session on reactions, comments or suggestions, if any, of member states to the Report and the guidelines annexed thereto.

The Delegate of *Indonesia* proposed the substitution of the word '*Endorses*' by "*Approves*" in paragraph 4 so that it would read "Approves the contents of the Report which faithfully describes the discussion during the meetings on vital legal issues on privatization" and deletion of the rest of the wordings. She also proposed deletion of paragraphs 5, 6 and 7 as in her view the Guidelines were already in the hands of the Member Delegations and the exchange of views thereon did not require the mediation of the Secretary-General.

The Delegate of *Thailand* endorsed the suggestion of the Delegate of Indonesia to modify paragraph 4.

The *Secretary-General*, however, emphasized the retention of paragraphs 5,

6 and 7 as he was of the view that the publication and dissemination of the background papers and the Guidelines on Privatization would be extremely useful as the topic of privatization had acquired worldwide interest. He also clarified that the publication of these materials would have no financial implications for the AALCC as the World Bank had already agreed to provide funds for that purpose.

The Delegate of *India* stated that since the Guidelines annexed to the Report had not been properly considered by the Committee, they should be treated as Draft Guidelines. Consequently, paragraph 5 of the Draft Decision should reflect that they were draft guidelines only. As regards paragraph 6, which provided for the publication and broad publicity to be given to the Guidelines, he was opposed to its circulation outside the Member States since the Guidelines had not been formally adopted by the AALCC. He sought a clarification on the reference in paragraph 2 as regards "complimenting the Chairman and participants for having accomplished the difficult mandate". He suggested deletion of paragraph 4 which in his view was a repetition of the preambular paragraph of the Draft Decision.

The Chairman of the Special Meetings on Privatization was then invited to give his views on the suggestions mooted by the Delegations. He explained that the Special Meeting had been convened with the specific mandate of developing legal and institutional guidelines on privatization and consequently submission of the guidelines by the Special Meeting as appended to its Report was execution of that mandate in terms of paragragh 2. As regards the Status of the Guidelines, he clarified that the document containing these Guidelines had been provided to the participants before the Special Meeting and the discussions during the meetings of the Social Meeting had revolved around or based upon these guidelines. As to the concern expressed by the Delegate of Indonesia over the binding nature of the guidelines, it had been sufficiently clarified in the Special Meeting that they were not binding on the Member States. He, therefore, concurred with the view of the Secretary-General that paragraphs 5, 6 and 7 be retained. He asked the Director of the AALCC Secretariat, who was in-charge of the Special Meeting, to further clarify the matter.

The Director (Mr. Mohil) stated that a background study and a set of guidelines prepared by the World Bank at the request of the AALCC Secretariat, had been circulated to the Member States about two months before the Special Meeting. Just before the Special Meeting, a revised and shorter version of these Guidelines had been presented so as to facilitate the deliberations in view of the limited time at the disposal of the Special Meeting. The discussions in the Special Meeting were primarily based on these two documents. It was, however, true that the Guidelines appended to the Report had not been formally adopted and that was

the reason the Report of the Special Meeting had recommended the text of the Guidelines for the consideration of the Member Governments.

The President enquired from the Delegate of India whether he was prepared to accept the term 'accomplished' in paragraph 2 of the Draft Decision.

The Delegate of *India* stated that if this implied that the Guidelines was an AALCC's document and had acquired the authoritative stand of the AALCC and hence of his Government which, according to him, was not the case, he could not accept this suggestion.

The Delegate of *Malaysia* expressed his opposition to paragraph 4 as amended in the light of the suggestion made by the Delegate of Indonesia. According to her, it created difficulties for her Delegation as the reference made in the Report of the Special Meeting to the effect that golden shares had a negative impact on potential investors, was not acceptable to her Delegation. She, therefore, favoured the suggestion made by the Delegate of India that paragraph 4 be deleted in its entirety.

However, at the suggestion of the Chairman of the Special Meeting, it was agreed to retain paragraph 4 with the following wording:

"Endorses the contents of the Report which faithfully describes the discussion during the meetings on vital legal issues on privatization;"

The Delegate of *Indonesia*, who had earlier proposed deletion of paragraph 5, expressed her agreement for retaining this paragraph provided the Guidelines appended to the Report of the Special Meeting were referred to as Draft Guidelines as suggested by the Delegate of India. However, as proposed by the Delegate of India, it was agreed to rephrase paragraph 5 as under :

"Commends the Report which contains the text of the draft Legal and Institutional Guidelines on Privatization and Post-Privatization Regulatory Framework for consideration of Member States;

It was agreed to retain, paragraph 6 of the Draft Decision with the following wording:

"*Requests* the Secretary-General to endeavour to obtain funds from the World Bank to publish and give broad publicity as expeditiously as possible, the proceedings and Report of the Special Meeting including the guidelines annexed thereto to ensure its widest dissemination in the Afro-Asian region;"

It was decided to delete paragraph 7 of the Draft Decision.

The text of the Decision as finally adopted by the Committee is set out next in this Chapter.

(ii) Decisions of the Thirty-third Session Agenda item: Report of the Special Meeting on Privatization

(Adopted on January 21, 1994)

The Asian-African Legal Consultative Committee at its Thirty-third Session

Taking Note of the Report of the Special Meeting on Developing Legal and Institutional Guidelines on Privatization and post-Privatization Regulatory Framework which was held in Tokyo from 18 to 20 January 1994 within the organizational framework of the AALCC;

1. *Commends* the Secretary-General for his timely initiative in organizing such a meeting on a topic which is of utmost importance to the developing countries in general and in particular for the developing nations in Asia and Africa;

2. *Compliments* the Chairman of the Special Meeting on Privatization and all the participants for having accomplished the difficult mandate entrusted to that meeting within the limited time that was at its disposal;

3. *Commends* the World Bank for its financial assistance and for putting at the disposal of the Special Meeting the expertise of two resource persons whose contribution has contributed immensely to a greater understanding and enlightenment on the subject of privatization;

4. *Notes* the contents of the Report which faithfully describes the discussion during the meetings on vital legal issues on privatization;

5. Commends the Report which contains the text of the draft legal and

institutional guidelines on privatization and post-Privatization regulatory framework already appended to the Report for consideration of member states;

6. *Requests* the Secretary-General to endeavour to obtain funds from the World Bank to publish and give broad publicity as expeditiously as possible, the proceedings and Report of the Special Meeting including the guidelines annexed thereto ensure its widest dissemination throughout the Afro-Asian region.

(iii) Report of the Special Meeting on "Developing Institutional and Legal Guidelines for Privatization and Post-Privatization Regulatory Framework" Held in Tokyo, Japan, 18-20 January 1994

During its Thirty-third Session, held in Tokyo, Japan, from 17th to 21st January 1994, the Asian-African Legal Consultative Committee convened a three-day Special Meeting on the theme, "Developing Institutional and Legal Guidelines for Privatization and Post-Privatization Regulatory Framework".

At the first session, Mr. Raul I. Goco, Solicitor-General, Government of the Philippines, was elected as the Chairman of the Special Meeting on Privatization and Mr. Ralph W. Ochan from Uganda as the Rapporteur, by acclamation. Twenty member countries and four observer delegations participated in the Special meeting.

At the request of the AALCC, the World Bank placed at the disposal of the Special Meeting the expertise of two of its Senior Legal Counsels, Mr. Peter Kyle and Mr. Eric Haythorne, who acted as resource persons throughout the deliberations of the Special Meeting.

The AALCC Secretary-Gerneral, Mr. F.X. Njenga, delivered the keynote address at the special meeting in which he underscored the importance of privatization as vital instrument in the quest for efficiency in the management of economic and wealth generating activities and institutions in all countries, developed and developing alike. He outlined the scope of privatization worldwide and noted that privatization is now a global trend. He, however, noted with regret that inspite of the visible evidence of the success of privatization, there is still some hesitation in this region with regard to the adoption of the policy of

privatization. The Secretary-General called upon member states of the AALCC to open their minds to this global trend. While he did not advocate a blind adoption of the policy, he urged member states to study all aspects of the concepts with the view to evolving policies appropriate to their different national circumstances. The Secretary-General concluded that it was in that context that the AALCC found it necessary to organize the Special Meeting to deal with the legal and institutional aspects of privatization.

At the first substantive session, Mr. Essam Mohamed, Deputy Secretary-General, introduced a working document prepared by the AALCC Secretariat entiltled Draft Gerneral Procedures and Guidelines for Privatization, together with an amended and more concise revision entitled "Legal Guidelines for Privatization Programmes". These two documents served as background material for the subsequent two substantive sessions which were held on the 18th and 19th of January of 1994.

After Mr. Essam Mohamed's introduction of the discussion paper, Mr. Peter Kyle led the first substantive discussion session. He addressed the theme, "Macro-economic and Legal Issues involved in Privatization". He defined privatization as the process by which ownership of an enterprise is transferred from public to private. He outlined the optimum legal, environmental and institutional arrangements that should be put in place once the policy decision to privatize had been made by a country. He further outlined the various techniques available for implementation of the process of privatization.

Views expressed in the open debate included the following:

(a) that before consideration of the legal and institutional regime of privatization could be discussed, the question of whether to privatize or not as a matter of policy should first be resolved by the member state;

(b) that there was no set formula for privatization applicable to all situations in all countries. There was, therefore, need to develop privatization strategies to suit situations existing in particular countries:

(c) that foreign investment, while often an integral part of the privatization process, should be carefully rationalized with the need of maintaining national sovereignty;

(d) that a clear policy decision and a firm commitment by the government and the agencies involved in the privatization process was fundamental to the success of the policy of privatization;

(e) that social considerations must be taken into account in adopting and implementing privatization strategies especially with reference to any planned privatization of public utilities;

(f) that effective privatization strategy must be conducted in an open, accountable and transparent manner.

During the Second session, Mr. Peter Kyle led the discussion on the procedure for restructuring state-owned enterprises in preparation for privatization. He stressed the importance of ensuring that public enterprises are transformed into legal entities, percieved as separate and independent from the government, and are capable of being transformed legally to new owners. In the discussion that ensued, the Chairman found it necessary to allay the fear of some delegates on the nature and objectives of the special meeting. He clarified that the primary purposes of the meeting was to share experience, exchange of views and to expose members to the various options open to them and to alert them to fundamental steps that needed to be taken in terms of legal and institutional arrangements if a country chose to privatize. The guidelines or document prepared by the Secretariat of the AALCC was not a draft treaty document that aimed to bind any country to a particular course of action.

In the ensuing discussions the following important points were made:

(a) that in preparing enterprises for privatization, it was preferable to treat each enterprise on its own merits and peculiar circumstances or on a case-to-case basis;

(b) that during tha privatization process it was necessary to address quickly the problems or concerns of labour including retraining;

(c) that it was usually better to sell smaller enterprises as they were (as it was) rather than to restructure them first;

(d) that the use of "golden shares" in the privatization process might have a negative impact on potential buyers of public enterprises as such shares were perceived to allow a continued government control of the enterprise.

In the course of the last meeting, a special presentation on the privatization of the Japan National Railway (JNR) System was made by a senior official of the Japanese Ministry of Transport, Mr. Katsuhiko Hara. Mr. Hara outlined the success achieved in the privatization of the Japan National Railway. Mr. Hara's presentation was followed by a brief discussion in the course of which he clarified that as a result of the reform of Japan National Railways, a large number of workers were pensioned off and paid generous parting packages. It was also pointed out that the reform of JNR constituted a good example of how a public enterprise could be efficiently privatized gradually. The presentation also highlighted the real need to address the social factors such as employee displacement, retirement and possible dislocation resulting from the process of privatization.

Mr. Eric Haythorne, the World Bank Expert, addressed the key question of post privatization regulatory framework. He stressed that the design of the appropriate framework, if any, should be considered at the outset of any specific privatization transaction. In the event that country conditions were market-friendly with a legal framework supportive of private sector activity and the enterprise to be privatized operates in a competitive market, there would be no requirement for enterprise specific regulation and privatization of the enterprise might thus proceed swiftly. When, however, country conditions were not as supportive of private sector activity, creating the basic legal framework, including economy-wise competition laws, and staffing the relevant institution should come first. Regardless of country conditions, whenever a monoply or public utility was to be privatized, significant advance planning was required so as to ensure that the appropriate post-privatization regulatory mechanism, was in place when the privatization took place. Typically a license, franchise or concession would be needed in order to ensure an appropriate on-going balancing of the interests of the public and the newly privatized enterprise.

Several points were raised during the discussions that could be summarized, thus:

(a) That in situations where the legal and economic environment was not market-friendly, the process of privatization might have to be preceded by a fairly prolonged period of preparation of the enterprise to be privatized;

(b) That an effective privatization programme should avoid situations where privatized public sector enterprises continued to enjoy favoured treatment by governments;

(c) That the post-Privatization era required the existence of a strong judicial system working in an environment of strong commercial laws that were supportive of private sector activities;

(d) That Member States should consider adopting UNCITRAL Model Law on arbitration as an additional measure to enhance the legal environment for privatization.

The Chinese delegate briefed the meeting on his country's efforts in the field of market economy. He stated that China had lifted price controls, liberalized trade, encouraged foreign investment, established effective competition mechanisms, all with the primary purpose of creating an enabling legal and economic environment to facilitate market economy. In this connection, he expressed the view that the legal framework for privatization should include all the laws that govern market-oriented economic activities.

The document, 'Legal Guidelines for Privatization' is appended to this report.

Legal Guidelines For Privatization Programmes

Background

The objective of this paper is to provide guidance to policy-makers in addressing legal issues likely to arise once a governmental decision has been made to proceed with a programme for the privatization of state assets or enterprises. Such a programme may entail the privatization of substantially all state enterprises in the tradeable sectors of a country, sectoral privatization or the privatization of selected medium or large enterprises. The paper does not, however, discuss small-scale privatization of the retail or service sectors or mass privatization programmes involving the distribution to the general public of vouchers or similar instruments.

A "privatization transaction" for the purposes of these guidelines is one in which ownership or control of a public body (state, government, ministry, department, enterprise or corporation) or its major assets or shares held by a public body in a company representing a controlling interest are to be transferred from the government or a government-controlled entity to the private sector.

"Private sector" would exclude an entity which is owned or controlled, directly or indirectly, by a public body. So the sale of an enterprise to a public body, whether of the host state or another state, is not a privatization for the purposes of these guidelines.

A privatization law serves a valuable purpose in defining the legal authority for a country's privatization programme, the key principles on which it will be based, and the institutional arrangements for policy-making and implementation. Other supporting laws provide for the legal steps in preparation for privatization and to consummate the transaction, as well as forming part of the business environment in which the newly-privatized enterprises will operate.

Privatization Law

The choice of whether or not to enact a privatization law depends upon the legal and individual circumstances of the country concerned. In some cases, a privatization law to authorize the sale of state assets may be a constitutional requirement. Even if a separate privatization law is not mandatory, such a law can serve a variety of purposes, such as to :

— define the government's objectives and establish commitment to the privatization process;

— make amendments to existing laws which otherwise would be an obstacle to privatization, e.g. laws preventing private sector participation in what were previously thought of as "strategic" activities;

— create institutions with the authority to implement privatization;

— avoid the "vacuum of authority" which can lead to spontaneous or unauthorized privatization;

— allow for the financial restructuring of enterprises prior to sale and permit liabilities to be cancelled, deferred or swapped for equity;

— define the methods of privatization and any limitations on potential bidders; and

— provide for the allocation of sale proceeds.

A principal function of a privatization law is to define the scope of the programme and any exclusions of specific sectors or enterprises. Though the law may list the enterprises to be privatized, the disadvantage of doing so is that the listing becomes inflexible, with the resulting difficulty of either removing or adding enterprises as the programme evolves. Other alternatives are to:

(a) adopt a "negative list" approach, so that all state enterprises are eligible for privatization other than named exceptions; or

(b) require a high-level political decision on a case-by-case or sectoral basis to transfer an enterprise to the privatization agency for disposal.

The privatization law can provide for employee preferences to be available on the sale of an enterprise. Preferences should be in the form of a right to acquire a small proportion (normally not more than 10 per cent) of the shares of the enterprise. Payment may be deferred for a limited period, with transfer of ownership of the shares delayed until payment has been made. Employee consortia should also be eligible to participate in the full bidding process on a basis of parity with other bidders.

Other Supporting Laws

The legal framework of the country should support privatization in two respects: first, laws may be required to govern the process of preparing enterprises for privatization and undertaking the transactions; and second, the overall legal environment must be one in which the newly-privatized businesses can obtain access to land and finance, enter into enforceable contracts for their inputs and outputs, and compete on a basis of equality with one another and with the residual state sector.

The conversion of enterprises into corporations under a modern corporations law is an effective prelude to privatization. Corporatization enables the assets and liabilities of the business to be identified; allows for the appointment of a transitional board of directors to oversee the management; and provides for the issue of shares to the government, allowing flexibility in the sale of partial interests if required. The corporations law should also include procedures for the liquidation or dissolution of enterprises, thereby releasing the assets of a corporatized state entity for sale to the private sector.

Prior to the sale of certain heavy polluting enterprises, it would be advisable to perform an environmental audit of those industries to determine the requirements for any environmental and occupational health cleanup. This audit can be performed in accordance with any existing domestic or international environmental and occupational health standards. Based on that audit, the seller can decide whether to absorb the costs of existing environmental degradation, while requiring the buyer to meet future environmental liabilities.

Labour restructuring is commonly required before privatization to reflect the change from a government agency to a profit-oriented enterprise. Labour laws should define the entitlement of redundant employees to severance or other benefits, while recognizing the right of the employer to reorganize the labour force to meet changing needs.

Privatized enterprises are most likely to operate efficiently when they are exposed to competitive forces. A competition law is desirable to:

— allow for the review of the potential cartel effects of purchase of former state enterprises by domestic or foreign entities with market power in the same or related sectors;

— prohibit restrictive or unfair trade practices.

If the enterprise is a public utility, a regulatory regime should be created by law so that the regulator can protect the public interest in output pricing and the quality of services and support future entry by competitors.

If foreign investors are expected to participate in the privatization programmes, the laws of the country should guarantee fair and equitable treatment to those investments according to generally acceptable international standards.

Institutional Arrangements

Privatization requires institutional arrangements to manage the programme that ensure transparency and consistency in implementation.

Yet the conduct of privatization transactions differs from traditional bureaucratic activities, in that:

(a) the process must be as open as possible.

(b) privatization cuts across existing areas of influence and political and bureaucratic control.

(c) the agency controlling privatization must itself operate in a professional manner, as it will be dealing with private domestic and foreign buyers and with investment banks and other professional advisers.

These factors suggest the need for a central unit or agency responsible for overall guidance of the privatization programme. The agency should have a single mandate: to sell the assets and enterprises in accordance with the policy principles on which the programme is based. A clear mandate to privatize, sufficient autonomy, minimal bureaucracy, ready access to top decision-makers, and a small nucleus of quality staff are conditions for success. Responsibility for managing the enterprises prior to sale should rest, if possible, with the governing board of the enterprise.

The agency should desirably be given sole authority to:

— recommend to the appropriate political decision-maker the enterprises or classes of enterprise to be included in the privatization programme;

— decide upon any necessary financial restructuring of the enterprise prior to sale;

— determine the timing and method of sale;

— control the preparation and issue of bid invitations and the pre-qualification of bidders, if required;

— require government-appointed members of the governing board of each enterprise to resign at or prior to settlement of the sale; and

— recommend the acceptance of the winning bid.

Though design, policy-making and supervision of the process is best centralized, transaction management and implementation should be decentralized to accelerate the process and reduce the workload of the central unit. Responsibility for implementation can be delegated to holding companies or institution-specific groups of experts and stakeholder representatives, assisted by investment banks, lawyers or other professional advisers as required.

Transparency

Transparency must be maintained in every privatization transaction. This can be ensured by having a precise, detailed and publicly announced process for carrying out privatization transactions consisting of clearly defined competitive bidding procedures; clear and simple selection criteria for evaluating bids; disclosure of the final purchase price and buyer; well-defined institutional responsibilities, and adequate monitoring and supervision of the programme.

Lack of transparency can lead to a perception of unfair dealing—even where it does not exist—and to criticism that can threaten not only privatization, but reform in general.

Competitive bidding ensures both transparency and fairness and can help maximize sales proceeds if qualified bidders participate and if the process is properly structured and carefully implemented. The dual objective of competitive bidding is to draw all potential buyers into the bidding process, and to avoid the risk of collusive dealing (or the appearance of it) inherent in closed bidding procedures. Competitive bidding also eliminates the need for the seller to devote time and resources to obtaining a market valuation of the assets to be sold.

Methods of Privatization

The choice of the method of privatization would be determined, in the case of each transaction, according to the following main criteria:

(a) the objectives pursued by the government;

(b) the enterprise's performance record and economic prospects;

(c) the size of the company to be sold and the ability to mobilize private funds, whether from a core domestic or foreign investor or from the general public.

Even within the same transaction, a variety of privatization methods may be used; for example, sale of a tranche of shares to employees, followed by the sale of a core shareholding to a long-term investor, and finally a public offering of the balance of the shares.

For the sake of transparency, to minimize the influence of special interests and to protect the integrity of the privatization programme, the choice of privatization methods should normally be limited to:

(a) sale of assets or shares through public auction or tender;

(b) public offering of shares on the stock-exchange;

(c) employee/management buy out;

(d) concession, lease or management contracts; or

(e) a mix of these four methods.

Subject only to existing legal obligations, such as preemptive rights of existing shareholders, no direct sale or negotiation with a single party should occur, except after the failure of a public bid process, and then only with the approval of a high-level government body such as the Cabinet or Council of Ministers.

The following paragraphs provide general guidelines for the sale of assets through public auction or tender and through public offering of shares.

Public Auction and Public Tender

The public auction technique should be reserved for selling individual assets, such as land, cars, and pieces of equipment and similar assets as well as small or less important businesses. It consists of convening a public forum at a pre-specified date and location at which one or more companies or simple assets are bid upon by interested, and sometimes, pre-qualified buyers and sold to the highest price bidder. The process of sale mandates that the assets or companies to be sold are described in public announcements and the opportunity to inspect the assets prior to the auction is allowed.

In contrast to public auction, public tender is usually in the form of a sealed bid submitted to the managers of the tender process. Preparation of the request for bids requires careful thought and attention to be certain that the concerns which the government may wish bidders to address are specified. The general principles for a public tendering process are:

(a) the tender notice should be widely publicized and should provide summary information on the assets, should fix the date of bidding and should invite prospective bidders to obtain the tender document;

(b) interested parties should submit letters of interest to receive the tender document and should be invited to visit the enterprise being sold to inspect its operations and finances;

(c) bids should be sought on a cash basis, accompanied by a deposit;

(d) bids should remain valid for a period after the closing date to allow careful evaluation and possible negotiation with the top bidder; and

(e) the privatization agency should have the right to reject any bids which do not conform to the general bidding guidelines, or to reject all bids if none are adequate.

The criteria for evaluating the tenders received could differ from one case to another. Desirably, tenders would be evaluated solely on the basis of price, i.e. the cash and other financial aspects of the bid (such as the assumption of liabilities by the bidder) would be assessed on a net present value basis, using a standard and consistent discount rate. The highest value bid would be selected.

The inclusion of non-price criteria can be justified in certain cases, though the bid evaluation process is made more complex. Examples of possible criteria are;

(a) Consistency with privatization principles and objectives

— New Capital investment proposed in the bidder's offer;

— The bidder's commitment to continue operating the business;

— Extent to which the proposal offers job protection or retrenchment to employees;

— Budgetary impact;

— Bidder's intention to offer expanded or related services; and

— Bidder bringing in foreign exchange for the investment.

(b) Operational considerations and constraints

— Feasibility of the bidder's proposed business plan;

— The financial standing of the bidder;

— Aspects related to contract implications, asset transfers, personnel transfers and the transitional implications to the government;

— Costs related to environmental cleanup.

Non-price criteria should so far as possible be dealt with in the pre-qualification process to avoid the need to attribute financial "weights" to these factors. When factors such as investment or employment maintenance promises are included as tender criteria, rather than simply pre-qualification assurances, it will be necessary to include legally-binding terms to give effect to these promises in the contract with the successful bidder. The privatization agency would also need to maintain an effective monitoring and enforcement capacity during the post-privatization period.

Public Offering of Shares

Approval of an offering prospectus by the relevant capital markets authority according to its normal requirements and criteria contained in the securities market law is necessary before any public offering of shares can be made. Steps for public offering of shares typically include:

(a) preparation of the prospectus, which should include relevant information concerning; the price; a detailed description of the securities offered; the use of the proceeds from the issue; the plan of distribution of the securities; the risk factors that the investor should take into account; the business of the company; its legal and financial structure; a description of its main assets and important pending legal proceedings. The prospectus would also contain audited historical financial statements of the most recent three years and state the name of the auditor. The prospectus should be full, true and clear so the investor has all relevant information necessary before making a decision whether or not to buy the securities being offered;

(b) determination of offering price and timing of sale;

(c) organization of a selling campaign and distribution of the prospectus as widely as possible; and

(d) distribution and collection of applications for buying shares.

Allocation of Proceeds

When state assets are sold, the general budget law may determine how the sales proceeds are to be dealt with. If the existing laws do not do so, the privatization law itself should specify that proceeds should be applied;

— first, to meet the costs of sale, which may include a fixed percentage of the proceeds as a contribution to the operating costs of the privatization agency;

— second, towards liabilities of the enterprise retained by the state;

— third, towards outlays which benefit the economy at large or large segments of the population.

Since the restructuring of enterprises for privatization can frequently lead to one-time labour costs for the severance and retraining of redundant labour, a fixed proportion of the amounts remaining after payment of sale costs and enterprise liabilities may be applied to a special fund set up for this purpose.

The Privatization Transaction

In addition to the broad legal issues having application across the entire privalization programme, individual privatization transactions will give rise to a variety of legal issues needing to be dealt with on a case-by-case basis in reliance upon legal advice.

Specific transactional legal issues are most readily resolved in the context of

a clear and consistent set of publicly announced guidelines for each step of the process, from evaluation through implementation. These guidelines should include the following principles;

(a) Public enterprises should be divested into markets open to competition. For public enterprise operating in commercially-oriented sectors, purchasers should not obtain an intact or unregulated monopoly and should not be accorded special protection or privileges such as market protection, concessional or differential input prices, public sector financing, loans or loan guarantees.

(b) All appropriate regulatory issues should be dealt with prior to or simultaneously with privatization. In the tradeable, commercially-oriented sectors, regulatory provisions entailing the deregulation/ liberalization of imports, prices and market and the removal of other barriers to competition should be introduced. In the non-tradeable, utilities sectors which generally require large investment (such as electric power and water supply), the establishment of regulatory mechanisms dealing with entry and pricing policies is essential to ensure the confidence of private investors, and to protect the interests of users.

(c) In cases where the government retains a minority shareholding; it should not be entitled to any special or extraordinary voting rights, except in certain cases in the "strategic" non-tradeable sector, where a golden share could be retained. Such a golden share could permit the government to veto the resale of a controlling interest if that would not be in the interests of the country.

(d) The consideration received by the government in privatization transaction should be cash or the assumption of public debt (in the case of debt conversion). Where shares are to be transferred to the workforce of the enterprise and are to be paid for over-time, the government should receive payment for those shares in full at the time ownership is transferred. The ultimate beneficiaries may finance their share purchase from the financial markets in such manner as they may arrange, or alternatively the shares may be held by a trustee until payment has been made.

(e) There should be no restrictions on participation (local or foreign) either as owner, manager, shareholder or otherwise in the privatization process. The government may however decide, as an exception, to reserve a tranche of shares for domestic investors only.

B. Debt Burden of Developing Countries

(i) Introduction

The item "Debt Burden of Developing Countries" has been on the agenda of the Asian-African Legal Consultative Committee (AALCC) since Kathmandu Session (1985). Subsequently, in view of its increasing importance, this matter was under active consideration by the Expert Group Meeting at New Delhi in 1986 as well as by the successive sessions of the Committee. The Secretariat, considering its relevance in the Asian-African context, initiated several studies on this item encompassing various aspects of the issue of debt burden. The study entitled "Legal Aspects of the International Loan Agreements" submitted to the Singapore Session (1988) was, at the behest of the Committee, distributed to the entire membership of the Group of 77. This study has already been reproduced in the recent combined report of the AALCC (1987-91).

As mandated by the Nairobi Session (1989), the Secretariat prepared a study dealing with the legal aspects of rescheduling of loans and debt relief with a view to formulating workable legal guidelines for rescheduling and debt relief. The Committee, while considering this study at the Beijing Session (1990), directed the Secretariat to continue to update the study. During the Cairo (1991) and Islamabad (1992) Sessions, this study could not be taken up for comprehensive discussion due to lack of time.

During the Kampala Session, (1993), the Committee briefly considered the item "Debt Burden of Developing Countries; Guidelines for Rescheduling". The study, *inter alia*, considered primarily the whole problem of debt, its solution, effect on the economic development and other ramifications in the context of Asian-African countries. While examining this problem, the study briefly dealt with the factors which had been playing a crucial role in shaping the global economic relations. During the Kampala Session there were several references to the issue of debt burden in the general statements made by various delegations. The specific references to the debt problem were made by Indonesia and Uganda in the context, urging greater exchange of views and experiences in debt management. Accordingly, it was decided at the session to initiate necessary dialogue with other members of the international community, including various international agencies to find a durable and workable solution to the debt problem.

Thirty-third Session: Discussions.

The Assistant Secretary-General Mr. Asghar Dastmalchi introduced the

agenda item entitled "Debt Burden of Developing Countries" and stated that the item had been on the agenda of the Committee since Kathmandu Session held in 1985. He briefly outlined the developments and mentioned about the studies prepared since then. He informed the Committee that due to lack of time the study prepared on the Debt Burden could not be taken up for discussion at the Committee's Cairo and Islamabad Sessions in 1991 and 1992. He also noted the serious view taken of the increasing burden of debt of the developing countries at the AALCC's Kampala Session in 1993. he made a particular reference to the emphasis laid down by the President of Uganda in this regard.

While outlining the focus of the study, he pointed out that the study attempted to evaluate and update the efforts initiated in the recent times to mitigate the effects of debt burden, and referred to the major factors which were responsible in shaping the global economy. He made a particular reference to Uruguay, Round of Multilateral Trade Negotiations under the auspices of General Agreement on Tariffs and Trade (GATT) which brought into focus a completely new global economic order. He noted that the increasing liberalization of trade and market access might not immediately help developing countries.

He also stated that the debt burden of developing countries had recently shown some signs of amelioration. In this regard, he referred to a study prepared by the Economic Commission for Africa. Further, he outlined the measures for an effective debt relief and debt management; which *inter alia*, included various terms of debt relief. He also referred to the various components of the effective debt management strategy. He observed that the Secretariat study considered briefly some recent developments which had a positive impact on the debt reduction strategies. While welcoming these strategies, he concluded, that in the majority of the developing countries, particularly in Africa, the debt problem was viewed as a multi-dimensional problem necessitating an integrated approach.

(ii) Decisions of the Thirty-third Session Agenda item: "Debt Burden of Developing Countries"

(Adopted on January 21, 1994)

The Asian-African Legal Consultative Committee at its Thirty-third Session:

Taking note of the study prepared by the Secretariat on the item "Debt Burden of Developing Countries: An Overview of Recent Developments" (Doc. No. AALCC/XXXIII/Tokyo/94/14)

1. *Notes* with concern the continuing debt burden of developing countries and further necessity of concrete measures towards the solution of the external debt problems of a large number of developing countries;

2. *Reiterates* the need to address and solve the problem of debt burden through effective debt-relief measures, bearing in mind in this context, the special and critical situation of the most indebted developing countries of Africa;

3. *Calls* for the creation of a supportive international economic environment, particularly in regard to terms of trade, commodity prices, improved market access, trade practices, exchange rates and international interest rates;

4. *Expresses* concern at the growing burden of debt and debt service constituting a major obstacle to the revitalization of growth and development, despite the often strenuous economic reforms undertaken by many developing countries;

5. *Calls* upon the member states to explore ways to implement additional

measures, including further cancellation or reduction of debt and debt service related to official debt, and to take more urgent measures as regards the remaining commercial debt owed by the developing countries;

6. *Welcomes* the write-off by certain donors of a significant part of the bilateral official debt and calls upon the multilateral financial institutions to consider additional appropriate new measures for substantial relief of the debt of low-income countries;

7. *Urges* the commercial banks to extend initiatives to overcome the commercial debt problems of the least developed countries and of low and middle-income developing countries;

8. *Directs* the Secretariat to continue to update the study in the light of new initiatives and measures with special reference to international economic environment.

(iii) Secretariat Brief
Debt Burden of Developing Countries: An Overview of Recent Developments.

Background

In the last two decades external debt burden of many developing countries has increased significantly. This has resulted in negative economic growth affecting vitally the overall development process. Remedial measures to limit the economic impact of this problem have so far not been very successful. Instead, some of these remedial measures have had an impact which could be termed as negative. In view of these shortcomings, debtors and creditors have been attempting to outline new measures to overcome this problem. Importantly, to minimize the growing adverse impact of increasing burden of debt, efforts at different levels have been made to find suitable and durable solutions. In view of these efforts, it is said that the fears of the international financial system collapsing because of the debt crises of developing countries have subsided.[1]

The major portion of the debt of African countries is represented by their long-term borrowings from International Monetary Fund. The remaining 10 percent is short-term debt. Further, an important feature of the African debt is that over 96 percent of the long-term debt was either publicly contracted or publicly guaranteed and is thus sovereign debt. The major share of the Asian developing countries burden of debt, however, constitutes short-term and unofficial debt.

HISTORICAL PERSPECTIVES:

Although the roots of the debt crisis could be traced to rising expectation for rapid economic growth mainly in the countries of Asia, Africa and Latin America, the tentacles of the problem lie further in the past of colonial times, especially in Africa.[2] A study prepared by the ECA notes—"typical of most colonial empires, practically all aspects of Africa's economic activity were exclusively oriented towards serving the needs of colonial powers. Therefore, all the physical infrastructure, communications, banking and other related facilities in Africa were geared to facilitate the exploitation of its natural and human resources for the benefit of the colonial masters. Africa was purposely made dependent on the production of primary products to feed the hunger for raw materials from the factories and industries of the colonial powers. The development of African

1. *The African Debt Problem: Financial Shackles to Africa's Development Process* (Economic Commission for Africa: 1993, E/ECA/TRADE/93/5).
2. Ibid., p.3.

industry was actively discouraged as competition with the centres was to be avoided."[3] During 1960s and 1970s when majority of the Afro-Asian countries became independent, devastated by colonial exploitation, they had no capital to fuel the rapid economic growth that they hoped for.[4] Foreign investors who came to these newly independent nations did business on terms favourable to them, such as full ownership of equity, generous tax concessions and non-restricted repatriation of profits. All these incentives, however, failed to attract requisite amount of foreign investment in substantial quantity. Therefore, the majority of the developing countries had little option left but to borrow to finance development and growth.[5]

The newly-independent Asian and African countries had to face in the decade of 1970s two major setbacks. Firstly there were marked rises in the prices of oil which resulted in resorting to heavy external borrowing in many poor countries. Secondly, there was a decline in the prices of primary commodities which affected the debt repayment capacity of the debtor countries. And there were other factors which affected the stable administrative and economic set up in many of these countries. These factors concerned civil wars, government delerictions, natural calamities such as drought, desertification and population explosion.

After the crisis of repayment faced by Mexico in 1982, a spate of rescheduling began at the behest of the creditors.[6]

Few recent developments have altogether, though partially, given a different, but practical dimensions to the burden of debt. These dimensions which have enhanced the debt burden of developing countries concern excessive arms purchases and military spending. Significantly, the defense expenditure of the developing countries increased more than six fold from 1960 to 1985 as a result of the political and military insecurity.[7] The impact of certain events in the Persian Gulf and the consequent military deployments had affected oil prices, interest rates, labour migration, workers' remittances and financial systems all over the

3. Ibid.
4. *Foreign Direct Investment and Industrial Restructuring in Mexico: Government Policy, Corporate Strategies and Regional Integration*, United Nations, 1992 ST/CTC/SER.A/13. Also see: Yacob-Haile Mariam, "Legal and other Justifications for Writing off the Debts of the Poor Third World Countries: The Case of Africa, South of the Sahara", *Journal of World Trade, 1990, p.56.*
5. Daniel H. Cole, "Debt Equity Conversions, Debt-for-Nature Swaps, and the Continuing World Debt Crisis", *Columbia Journal of Transnational Law*, Vol. 30, 1992, p.57. Also see: Yacob-Haile Mariam and Berhanis Mengistu, "Public Enterprises and the Privatisation Thesis in the Third World", *Third World Quarterly*, October 1988, pp. 1565-1587.
6. For details see: Enrique Castro Tapia, "Mexico's Debt Restructuring" Columbia Journal of Transnational Law, Vol. 23 no.1, 1984: Also see—Foreign Direct Investment and Industrial Restructuring in Mexico. n.7
7. *External Debt Crises and Development: Note by the Secretary-General*, A/45/380, p.7.

world.[8] It should be noted that the abnormal increase in the external debt of the developing countries resulted from the lack of a set of internationally agreed rules for monetary and fiscal policies and bank supervision. In such a vacuum, borrowing took forms that were especially risky for a developing country.

DEBT RELIEF: THE GREAT CHALLENGE

Realising the growing adverse impact of increasing burden of debt, efforts at different levels have been made to find suitable solutions. Declarations have been made by both debtor and creditor countries at international fora, focussing the attention mainly on the alleviation of debt burden. The General Assembly in its resolution (46/148) entitled "International Debt Crisis and Development: enhanced international cooperation towards a durable solution to the external debt problems of developing countries", noted with appreciation institutional efforts to reduce the debt burden, such as Toronto terms, Trinidad and Tobago terms, the Netherlands Initiatives, the French Initiatives, the Houston terms and the Enterprises for the American Initiative.[9] The Special Session of the UN General Assembly on "International Economic Co-operation and Development" held from 16 to 28 April 1990 reiterated its commitment to find ".....a durable and broad solution of the external debt problems of the debtor developing countries".[10]

At the Tokyo summit Meeting of the Seven lending industrialized countries held in 1993 a reference was made in the final declaration to the problem of debt burden. The tenth Non-Aligned Summit held in Jakarta (Indonesia) in September 1992 had referred in its final declaration to the difficulties created by the mounting debt burden for developing countries.[11] The United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro (Brazil) noted in the Agenda 21 "that it is important to achieve durable solutions to the debt problems of low and middle income developing countries in order to provide them with the needed means for sustainable development." Further, it also outlined the possible remedies, such as, mobilization of higher levels of foreign direct investment and technology transfers; new ways of generating new public and private financial resources to be explored which *inter alia* would include: (a) various forms of debt relief, apart from official or Paris Club debt, including greater use of debt swaps'; (b) the use of economic and fiscal incentives and

8. Ibid. The external debt of developing countries according to the estimates of the Bretton Woods Institutions reached the figure of $1200 billion. The flow of payments for interests and amortizations has increased from $90 billion in 1980 to an estimated $175 billion in 1990.
9. For a brief discussion on each of these intitiatives see: *Debt Burden of Developing Countries: Guidelines for Rescheduling*, Doc. No. AALCC/XXXII/KAMPALA/93/15.p.13.
10. Declaration adopted by the UN General Assembly at its Special Session on International Economic Cooperation and Development on 1 May 1990.
11. *Times of India*, 16 September 1992.

mechanisms; (c) the feasibility of tradeable permits; (d) new schemes for fund raising and voluntary contributions through private channels; (e) the reallocation of resources presently committed to military purposes.[12]

The root of the problem, according to the available information, lies in the functioning of the global economy itself. There were, however, some important positive developments also. According to an UNCTAD Report, a notable factor is the successful completion of adjustment measures by a number of Asian and African countries and their ability to raise domestic savings and investment.[13] The present recession and stagnation in global trade is also significant. Successful completion of Uruguay Round of Multilateral Trade Negotiations would be of immense importance to majority of the developing countries.[14] These negotiations were supposed to be completed in December 1990. Due to a continued deadlock between the United States and European Community over the issue of farm subsidies, these negotiations have yet to reach any conclusion. Due to this stalemate, the position of developing countries in international trade and finance has substantially weakened further, widening the gap between developing and the developed countries.

A. Debt Reduction Strategies:

Three distinct phases of debt reduction strategies have been identified:[15] (a) Until late 1985 emphasis was placed on market solutions and financial engineering to ease debt restructuring: (b) from late 1985 to March 1989, the strategy consisted in the provision of financial resources to highly indebted countries with a view to facilitating their growth and structural adjustment and thus reducing the burden of debt (this is popularly known as the "Baker Plan" named after the former United States Secretary of the State) (c) since 1989, the focus is on debt reduction.[16] The debt reduction and interest relief became part of international policy towards commercial bank debt with the launching of the new international debt strategy, informally known as the "Brady Plan", after the Secretary of the Treasury of the United States who proposed it in 1989. This initiative is centered on voluntary, market-based debt and debt-service reduction with the support of the multilateral financial institutions and other official creditors. The extension

12. *Report of the United Nations Conference on Environment and Development: Note by the Secretary - General*, C-69 INF-2, 17 August 1992. Also see: GA Resolution 47/198, 22 December 1992; *Notes and Comments on some Selected Items on the Agenda of the Forty-eighth Session of the General Assembly of the United Nations* Doc. No. AALCC/UNGA/XLVIII/93/1.
13. *The Least Developed Countries Report 1992*, UNCTAD Sales No. E. 93. II.D.3.
14. Ibid., p.99.
15. *External Debt Crisis and Development: Note by the U.N. Secretary-General*, 8 October 1990, A/45/380. p.18.
16. For details regarding "Baker and Brady Plans" See: *UNIDO, External Debt and Industrial Development*, UNIDO/IDB/7/19.

of loans and rescheduling of repayments were also elements of the strategy. Debt relief was negotiated on a case-by-case basis with governments whose economic policies were approved by the World Bank and the IMF. The "Brady Plan" strategies dominated commercial bank debt negotiations in 1990; agreements were reached with Costa Rica, Mexico, Morocco, the Philippines, Uruguay and Venezuela.

At national level, countries have been employing various techniques for reducing the debt burden, such as (a) debt-to-equity swaps; and (b) Debt-to-Debt conversion. Debt swaps could be considered as a market-based "voluntary debt reduction" by the commercial banks, through a variety of techniques and instruments.

Some governments, for example, have devised schemes whereby foreign corporations interested in investing in the country, can buy outstanding loans at a discount on the secondary market and cash them in with the Central Bank for local currency. The equity to be swapped for the debt are the equities of state-owned enterprises, known in Africa generally as *parasatals* and which are almost invariably bankrupt. Further, it is suggested that the debt service operations could be linked to the prices of raw materials exported by debtor countries. Under such a mechanism, it is argued, the debtor countries' ability to pay would not be affected by unfavourable fluctuations in the terms of trade in world markets.[17]

Debt rescheduling remains an important element in all the initiatives. Factors ranging from balance-of-payments difficulties to managing their own internal resources may result in mounting arrears of debt and its non-repayment in accordance with the scheduled terms and conditions. It also invokes "the payments of principal and/or interest falling due in a specified interval being deferred for payment on a new schedule".[18]

B. Debt Management

Debt Management constitutes an important element in the scheme of debt reduction strategies. It requires a capacity to monitor and manage a country's debt comprehensively and efficiently. For an effective debt management strategy, following components have been identified.[19] (a) a well-defined legal and institutional framework to monitor the contracting of loans, their utilization and repayment; (b) the administrative arrangements for the management; (c) facilities

17. "External Debt Crisis and Development", n.18, p.25.
18. Alexis Rieffel: "The Paris Club, 1978-1983", *Columbia Jounrnal of Transnational Law*, Vol. 23, no.1, 1984 pp.83-104; For detailed discussion on "Rescheduling See: *Debt Burden of Developing Countries: Guidelines for Rescheduling*, Doc. No. AALCC/XXXII/Kampala/93/5. p.17.
19. UNITAR: Nihal Kappagoda, "Requirements for Effective Debt Management, 1993, p.16.

for the storage, retrieval and analysis of debt data, either by a manual system or by computer software; (d) the organisational arrangements for debt management which involves the creation and staffing of a Debt Management Office in an appropriate location; and (e) training in aspects of debt management that are relevant to the needs of the borrowing country.

Legal aspects of external debt management should be considered seriously. It has been pointed out that in developing countries lawyers play only a marginal role in development financing and debt management.[20] Further, the appraisal and implementation of projects and programmes have generally been placed in the hands of financial experts and political actors. In the recent times, the debt management process has evolved into a highly specialised and complex practice. In view of this, the sovereign debtors should consider the necessity for employing expert legal counsels to assist in the debt renegotiation and management plan.

As indicated earlier, the AALCC study submitted to the Kampala Session (1993) examined recent proposals such as Toronto Terms, the Netherlands Initiative, Trinidad Terms and the US Initiative.[21] Subsequently, the UNCTAD Secretariat had made a preliminary assessment of the impact of enhanced concessional treatment on the debt service burden of Less Developed Countries analysing the effect of the new initiatives and terms on different countries according to their specific debt profiles.[22] This study had noted in its conclusions: "It appears that implementation of enhanced concessional treatment would not by itself remove the debt overhang of all debt-distressed LDCs, even if applied to all of them. Additional measures are needed, in particular for those countries whose debt is mainly to non-OECD countries (and which do not as a rule participate in the Paris Club) or to multilateral institutions. Moreover, although most LDCs with IMF-sponsored adjustment programmes appear to be eligible for special concessional terms within the Paris Club, not all of them have in the past sought such debt relief. In spite of their large debt burdens and high costs involved, some have made special efforts to meet their debt servicing obligations and avoid rescheduling. The debt problems of those countries also deserve attention.[23]

In view of these initiatives some recent developments are noteworthy :[24] (a) The agreement of December 1992 between Argentina and its Commercial

20. UNITAR: Rolf Knieper, "Legal Aspects of External Debt Management", 1993, p.25.
21. *Debt Burden of Developing Countries: Guidelines for Rescheduling*, AALCC/XXXII/Kampala/93/5, p.10.
22. UNCTAD: *The Least Developed Countries Report, 1992* Sales No. E.93.II.D.3. P.93.
23. Ibid., p.96.
24. U.N. ESC E/CN.17/1993/11. 7 June 1993.

Bank creditor, supported by World Bank loans commitments of $750 million, that will help achieve a commercial debt reduction in the amount of about $11 billion; (b) The agreement between Philippines and its commercial bank creditors arrived at in December 1992 on the second phase of the commercial bank part of its overall external debt reduction strategy. About $4.4 billion was eliminated or converted; (c) The International Development Association in four agreements totalling about $35 million has concluded with Guyana, Mozambique, the Niger and Uganda at an average cost of US $ 0.12 per dollar of debt. These agreements have extinguished 89 per cent of the commercial debt of these countries. Similar agreements have been negotiated with Brazil and Peru also.

Conclusions

The AALCC welcomes the new initiatives taken by both debtor and creditor countries in order to reduce the burden of debt. As indicated in the study, the initiatives have shown only marginal success. Despite this, the fears of the international financial system facing a crisis have almost disappeared. It is to be noted that after a decade of crisis, stagnation and difficult economic and political sacrifices, some of the most heavily indebted developing countries seem to have resumed some measure of economic and social development. Nevertheless, for many Asian and African developing countries the debt issue remains a major bottleneck, threatening their development process. A large proportion of scarce foreign exchange earnings has to be earmarked by many developing countries to service debt at an enormous economic, social and political cost.

The view of majority of the developing, countries, particularly in Africa, is that the debt problem is a multi-dimensional problem which requires an integrated and comprehensive rather than a piece-meal approach.[25] A comprehensive solution would invariably have to include: a significant reduction in the external debt stock, a reduction in the original contracted interest rates, lengthening of the maturity spread, net real resource flows and measures to improve general terms of trade. In addition, some concrete measures have been suggested specifically to Africa.[26] First, more efforts should be devoted to strengthen Africa's human resources. Second, there is a need for transfer of technology and managerial know-how through concerted policy efforts. Third, international trade barriers to Africa's trade should be reduced or eliminated. In our view, the Asian-African countries, must undertake realistic economic restructuring as well as creating the necessary and stable political climate so as to achieve success in debt relief negotiations.

25. The African Debt Problem; n.4, p.12.
26. Ibid., p.14.

C. Legislative Activities of the U.N. and other International Organizations in the field of International Trade Law

(i) Introduction

The AALCC Secretariat presents a report on the recent legislative developments in the field of International Trade Law at every session. The purpose of such reports is to keep member states abreast with the recent developments in this field. The Organizations covered include the UNCTAD, UNCITRAL, UNIDO, UNIDROIT and the Hague Conference on Private International Law.

Thirty-third Session : Discussions

The Deputy Secretary-General, Mr Essam introduced the agenda item "Progress Report concerning the Legislative Activities of the UN and other International Organisations in the field of International Trade Law", and stated that this study outlined the legislative activities of the five international organizations, namely, the United Nations Commission on International Trade Law (UNCITRAL), International Institute for the Unification of Private Law (UNIDROIT), United Nations Conference on Trade and Development (UNCTAD) and the Hague Conference on Private International Law. He referred to the Twenty-sixth Session of the UNCITRAL and the substantive topics before that session namely, (a) New International Economic Order: Procurement; (b) Electronic Data Inter-change (EDI); and (c) International Contract Practices; Draft Convention on International Guaranty Letters. He pointed out that the substantive discussions were mainly confined to the adoption of the UNCITRAL Model Law on Procurement of goods and construction and a Guide to Enactment of the Model Law. Further, he also referred to the work of UNIDROIT as considered by its Governing Council at the 71st Session. While referring to the UNIDO's work programme he pointed out that its major areas of work related to its preparation of guidelines so as to assist countries in their industrial development. He referred briefly to the topics presently considered by the Hague Conference, such as (a) Negotiable instruments; (b) Convention on Civil Procedure and on International Judicial and Administrative cooperation and (c) Law applicable to Civil Liability for Environmental Dangers. He noted that the legislative activities undertaken by these organisations in the field of International Trade Law contributed meaningfully towards the realization of objectives set forth in the UN

Decade of International Law, especially in the context of proposed Congress on Public International Law in 1995. Finally, he extended his gratitude to all these organizations for their cooperation in sharing information.

(ii) Decisions of the Thirty-third Session (1994) Agenda item: "Progress Report covering the Legislative Activities of the United Nations and other International Organizations concerned with International Trade Law"

(Adopted on January, 21. 1994)

The Asian-African Legal Consultative Committee at its Thirty-third Session

Taking note of the Progress Report covering the Legislative Activities of the United Nations and other International Organisations concerned with International Trade Law, Doc. No. AALCC/XXXIII/Tokyo/94/15.

Expresses its appreciation for the report prepared by the Secretariat on the recent developments in the field of International Trade Law.

Expresses appreciation for the continued cooperation with the various international organisations active in the field of international trade law and hope that this cooperation will be intensified in the future;

Requests the Secretary-General to continue to monitor the developments in the area of international trade law and present the same to the thirty-fourth session.

(iii) Secretariat Brief Progress Report Concerning the Legislative Activities of the UN and other International Organisations in the field of International Trade Law

(i) Report on the Work Done by the United Nations Commission on International Trade Law at its Twenty-Sixth Session (1993)

The Twenty-sixth Session of the United Nations Commission on International Trade Law (UNCITRAL) was held in Vienna from 5 to 23 July 1993. The substantive topics before this session were: (i) New International Economic Order: procurement; (ii) Electronic Data Interchange (EDI); and International Contract Practices: Draft Convention on International Guaranty Letters. Substantive discussions were, however, principally confined to the first item which has culminated in the adoption of the UNCITRAL Model Law on Procurement of Goods and Construction and a Guide to Enactment of the Model Law, the primary purpose of which is to assist legislatures in preparing legislation based on the Model Law. It has also been agreed to commence the preparation of a Model Law on Procurement of Services as an essential complement to the Model Law on Procurement of Goods and Construction. On the other items, the Commission took note of the progress reports submitted by the Working Groups. The Working Group on Electronic Data Interchange is engaged in preparing the content of a uniform law on EDI while the Working Group on International Contract Practices is preparing a draft Convention on International Guaranty Letters. While the work in respect of a uniform law on EDI is in a formative stage, some substantive progress has been made in the preparation of a draft Convention on International Guaranty Letters.

Since the major accomplishment of the twenty-sixth session was the adoption of the Model Law on Procurement of Goods and Construction, this note focusses only on this legislative work.

UNCITRAL Model Law on Procurement of Goods and Construction

Background

The work on this project was first undertaken by UNCITRAL in 1986 and had been entrusted to its Working Group on NIEO. Between 1986 and 1993, the Working Group on NIEO devoted six sessions to the elaboration of the draft text of the Model Law on Procurement. The Working Group completed its mandate at the close of its fifteenth session by adopting the draft text. Concurrently, the Secretariat had been entrusted with the task of preparing the draft of a Guide which would provide assistance to legislatures enacting the Model Law on Procurement.

The Draft of the Model Law as finalized by the Working Group was then circulated to Governments and interested international organisations for comment. At the twenty-sixth session, the draft of the Model Law was examined in the light of the comments received. At the end of its deliberations, the Commission formally adopted the draft text as "UNCITRAL Model Law on Procurement of Goods and Construction". The Commission also formally approved the draft of the Guide to Enactment of Model Law subject to the incorporation of modifications which had become necessary on account of the changes effected in the text of the Model Law. The Commission, in a resolution adopted by it, has requested the UN Secretary General to transmit the text of the Model Law together with the Guide to Enactment of the Model Law to Governments and interested bodies and to recommend to States to give consideration to the Model Law when they enact or revise their laws on procurement in view of the desirability of improvement and uniformity of the laws of procurement and the specific needs of procurement practice.

An Overview of the Model Law on Procurement

The Model Law on Procurement consists of a Preamble and 47 articles arranged under five chapters. Chapter I sets forth the general provisions. Chapter II lists out the various methods of procurement and conditions for their use. Chapter III deals with Tendering Proceedings. Chapter IV sets out the provisions relative to procurement methods other than tendering. Finally, Chapter V sets

forth provisions establishing a right of review of acts and decisions of the procuring entity and setting forth provisions governing its exercise.

The Preamble sets out a statement of objectives aimed at providing guidance in the interpretation and application of the Model Law. In States where preambles are not included in Statutes, this statement of objectives will have to be incorporated into the body of the law itself.

Chapter I, made up of Articles 1 to 15, sets out general provisions. Article 1 delineates the scope of application of the Model Law. The Model Law applies to all types of procurement, but recognises that States may wish to exclude certain types of procurement from its ambit. However, such exclusions are limited to the cases provided by the Model Law itself, such as procurements involving national defence or national security, or by regulation. Even for these excluded sectors, Article 1(3) provides for partial or complete application of the Model Law.

Article 2 sets forth the definitions of 'procurement', 'procuring entity', 'goods', 'construction', supplier or 'contractor', 'procurement contract', 'tender security' and 'currency'. The definition of 'procuring entity' has three options. This is because the Model Law covers primarily procurement by government departments and public sector enterprises, and which are those entities would differ from one State to another. Option I brings within the scope of the Model Law all government departments, agencies, organs and other units within the enacting State. Option II is intended for those States that enact the Model Law only with respect to organs of the national Government. Under Option III, the enacting State may extend application of the Model Law to certain entities or enterprises that are not considered part of the Government of the enacting State if it has an interest in requiring those entities to conduct procurement in accordance with the Model Law.

Article 3 on International obligations of the State relating to procurement clarifies that the obligations of the State relating to procurement clarities that the obligations of the enacting State under an international agreement or at an intergovernmental level with respect to procurement take precedence over the Model Law. It also permits a federal State enacting the Model Law to give precedence over the Model Law to intergovernmental agreements concerning matters covered by the Model Law concluded between the federal Government and one or more subdivisions of that State, or between any two or more of such subdivisions.

Article 4 on Procurement regulations empowers the organ or authority designated by the enacting State to promulgate procurement regulations to fulfil the objectives and to carry out the provisions of the Model Law. The Model Law

is a framework law setting forth basic rules governing procurement and would, therefore, need to be supplemented by detailed regulations. There are a number of provisions in the Model Law which expressly envisage supplementation by procurement regulations.

Article 5 on *Public accesssibility of legal texts* requires the enacting State to ensure public accessibility of the Model Law, procurement regulations and other legal texts. This provision is intended to promote transparency of the national legal infrastructure relating to procurement.

Article 6 on *qualifications of suppliers or contractors* is purported to create a procedural climate conducive to participation by qualified suppliers or contractors in procurement proceedings. It does so by strictly specifying the criteria and procedures that the procuring entity must use to assess the qualifications of suppliers and contractors. The aim of the procedure laid out in Article 6 is to help ensure that all suppliers and contractors are treated on an equal footing and to avoid arbitrariness in the evaluation of qualifications of contractors and suppliers.

Article 7 on *Prequalification proceedings* is intended to eliminate at the initial stage of the procurement proceedings suppliers and contractors who are not suitably qualified to perform the contract and thus to narrow down the number of tenders, proposals or offers that the procuring entity must evaluate and compare. The prequalification procedures set forth in this article are made subject to a number of important safeguards. These include the subjugation of prequalifications procedures to the limitations contained in Article 6, in particular as to the assessment of qualifications and the procedures stipulated in paragraphs (2) and (7) of this article. The inclusion of these safeguards is intended to ensure that prequalification procedures are conducted on a non-discriminatory basis and on conditions that are fair and transparent. Paragraph (8) of Article 7 entitles the procuring entity to obtain, at a later stage of prequalification proceedings a reconfirmation of the qualifications from the suppliers and contractors who had prequalified. The purpose of this provision is to enable the procuring entity to ascertain whether the qualification information submitted by a supplier or contractor at the time of prequalification was authentic.

Article 8 on *Participation by suppliers or contractors* stipulates that contractors and suppliers should, subject to limited exceptions, be permitted to participate in the procurement proceedings without regard to their nationality. Such exceptions are not to be taken informally or secretly, but must be based on the grounds specified in the procurement regulations or according to other provisions of law. This approach appears to be the best possible compromise, in particular from the standpoint of striking a proper balance between the progressive fostering of non-discrimination and the need to recognise that enacting states would, at least, for

the foreseeable future, continue, to one degree or another, to apply measures designed to favour national suppliers and contractors.

Article 9 on *Form of communications* is intended to provide certainty as to the required form of communication between the procuring entity and suppliers and contractors. The essential requirement as to the form of such communications, subject to other provisions of the Model Law, is that they must be in a form that preserves a record of the content of the communication. This is not only confined to paper-based communications, but also enables the use of electronic data interchanges (EDI) in procurement proceedings. This provision also permits certain specified types of communications to be made on a preliminary basis through means that do not leave a record of the content of the communications provided that the preliminary communication is immediately followed by a confirming communication in a form that leaves a record of the communication. Article 9 forbids the procuring entity to discriminate between suppliers and contractors on the basis of the form of communications received from them.

Article 10 on *Rules concerning documentary evidence provided by suppliers or contractors* forbids the imposition of any requirements by the procuring entity as to the legalization of documentary evidence provided by suppliers and contractors as to their qualifications other than those provided in the laws of the enacting State relating to the legalization on such documents so as not to discriminate against the foreign suppliers and contractors. It should, however, be noted that this provision does not take care of the situation of unequal treatment of foreign suppliers and contractors which might arise in instances where the enacting State is a party to a treaty regulating the legalization of documents with the countries of origin of some and not of all foreign suppliers and contractors and the enacting State is, therefore, obliged to apply less strenuous procedures only to some suppliers and contractors.

Article 11 on *Record of procurement proceedings* requires the procuring entity to maintain a record of the procurement proceedings so as to promote transparency and accountability in relation to procurement proceedings. Such a record may be prepared by another Government agency, but the procuring entity is obliged to maintain this record so as to make it available to suppliers and contractors. A key question addressed by this Article is the extent of disclosures by the procuring entity and who would be entitled to that disclosure. Two kinds of disclosure are provided. Disclosure of basic information geared to the accountability of the procuring entity is mandated to the general public. Disclosure of more detail information concerning the conduct of the procurement on request. Such information is necessary to enable them to monitor their relative performance in the procurement proceedings and the conduct of the procuring entity.

Article 12 on *Public notice of procurement contract awards* obligates the procuring entity to publicise the notice of procurement contract awards. This requirement is, however, not applicable to cases where the contract price is less than a prescribed amount.

Article 13 on *Inducement from suppliers or contractors* provides an important safeguard against corruption: requirement of rejection of a tender proposal, offer or quotation if the supplier or contract in question attempts to improperly influence the procuring entity. However, to ensure a check against the abusive application of this provision, the rejection is made subject to approval of higher authorities, a record requirement and a duty of prompt disclosure to the alleged wrong-doer.

Article 14 on *Rules concerning description of goods or construction* is intended to make it clear that the prequalification and solicitation documents should be formulated in a clear, complete and objective manner, particularly with respect to the description of goods or construction to be procured, it also frames an important rule that these specifications should be written in such a way so as not to favour particular contractors or suppliers. The principle of objectivity in the description of goods or construction enshrined in this provision is applicable to all methods of procurement so as to foster competition, to limit abusive resort to single-resource procurement and to facilitate the choice of the most competitive method of procurement.

Article 15 on *Language* stipulates that the prequalification documents, solicitation documents or other documents for solicitation of proposals, offers or quotations should be formulated in the official language of the enacting State and in a language customarily used in international trade. This rule is intended to help make the solicitation documents understandable to foreign suppliers and contractors. However, this requirement is not to be invoked where the procurement proceedings are confined solely to domestic suppliers or contractors and where the procurement contract would be of low value. Further, the bilingual requirement may not be necessary where the official language of the enacting State is one customarily used in international trade.

Chapter II entitled *Methods of procurement and Their Conditions* contains Articles 16 to 20. *Article 16* on *Methods of Procurement* enumerates the important principle underlying the Model Law that tendering should be the normally used methods of procurement. However, the Model Law also provides a number of other methods of procurement for exceptional circumstances in which tender proceedings would not be feasible, or even if feasible, would not be the procurement method most likely to provide the best value. It also lays down a further requirement that a decision by the procuring entity to use a procurement

method other than tendering should be supported by a statement of grounds and circumstances justifying the use of the selected method.

Article 17 on *Conditions for use of two-stage tendering, request for proposals or competitive negotiation* permits the enacting State to employ three different methods of procurement other than tendering, viz. two-stage tendering, request for proposals, and competitive negotiations, in the circumstances referred to in this article. These circumstances include the case which it would not be feasible for the procuring entity to formulate detailed specifications for the goods or construction and to obtain the most satisfactory solution to its procurement needs. The foregoing methods of procurement employ different procedures for selecting a supplier or contractor. In the first stage of a two-stage tendering proceedings, the procuring entity solicits proposals from suppliers and contractors as to various possible ways of meeting its procurement needs and consults with them concerning the details and possible modifications of those proposals, upon the completion of the first-stage, the procuring entity decides what exactly it wants to procure and formulates a set of final specifications that form the basis of an ordinary tender proceeding. In the second method of procurement, request for proposals, the selection of a winning proposal from among the proposals, offering varied solutions is based on the effectiveness of that proposal in meeting the needs of the procuring entity and the cost. In the third method, competitive negotiation, the procuring entity is permitted to conduct negotiations except for compliance with the requirements of 'best and final offer' procedure mandated in Article 39. Paragraph (2) of this article also permits the use of competitive negotiation in two types of cases of urgency: (i) the case of urgent circumstances that neither foreseeable nor were a result of dilatory conduct on its part; and (ii) the case of urgency caused by a catastrophic event.

Article 18 on *Conditions for use of restricted tendering* lays down the conditions for the use of restricted tendering by a procuring entity. These conditions are (i) when the goods or construction by reason of their highly complex or specialized nature are available from only a limited number of suppliers or contractors; and (ii) when the time and cost required to examine and evaluate a large number of tenders would not be commensurate with the value of goods or construction to be procured. The modalities for engaging in restricted tendering are laid down in Article 36.

Article 19 on *Conditions for use of request for quotations* prescribes the conditions for use of request for quotations. This procurement method is appropriate for low value purchases of standardized goods. In such cases, engaging in tender proceedings, which can be costly and time-consuming, may not be justified. However, the use of this method is made subject to the principle

that procuring entities should abstain from artificially deriving procurement packages in order to avoid tendering.

Article 20 on *Conditions for use of single-source procurement* lays down the conditions for the use of single-source procurement. In view of the non-competitive character of this procurement method, this article strictly limits its use to the exceptional circumstances set forth in paragraph (1) of this article. Paragraph (2) permits the use of this method in cases of serious economic exigency in which such procurement would avert serious harm to the national economy.

Chapter III on *Tendering Proceedings has* three sections. Section I entitled "*Solicitation of Tenders and of Applications to Prequalify*" consists of Articles 21 to 26. Section II entitled "*Subsmission of Tenders*" consists of Articles 27 to 30. Section III entitled "*Evaluation and Comparison*" is made up of articles 31 to 35.

Article 21 on *Domestic Tendering*. Domestic tenderings are those procurement proceedings in which participation is limited solely to domestic suppliers or contractors either because the procuring entity has so decided or because in view of the low value of the goods or construction, foreign suppliers or contractors would not be interested in participating in the tender proceedings. Article 21 specifies the exceptional cases in which measures designed to solicit foreign participation in the tender proceedings will not have to be employed in the case of domestic tendering.

Article 22 of *Procedures for soliciting tenders of applications to prequalify* sets forth the procedures for publication of solicitation of tenders and applications to prequalify as widely as possible. It obliges the procuring entity to publicise the invitation to tender or invitation to prequalify in a publication having international circulation.

Articles 23 on *Contents of invitation to tender and invitation to prequalify* requires that invitations to tender as well as invitations to prequalify contain the information required by suppliers and contractors to enable them to ascertain whether the goods or construction being procured are of a type they can provide, and if so, how they can participate in tender proceedings. The specified information requirements are only the required minimum so as not to preclude the procuring entity from including additional information that it considers appropriate.

Article 24 on *Provision of Solicitation documents* requires the procuring entity to ensure that all suppliers and contractors who have indicated an interest in participating in the procurement proceedings and comply with the procedures set forth by the procuring entity are provided with solicitation documents on

payment. The price to be charged for these documentation should reflect only the cost of their printing and providing them to suppliers or contractors.

Article 25 on *Contents of solicitation documents* contains a listing of information required to be included in the solicitation documentation. This would enable the suppliers or contractors to submit tenders that meet the needs of the procuring entity and to enable the procuring entity to evaluate them in an objective and fair manner. Many of the items listed in this article are regulated or deal with in other provisions of the Model Law.

Article 26 on *Clarifications and modifications of solicitation documents* establishes procedures for clarification and modification of the solicitation documents for the successful conduct of tender proceedings. The right of the procuring entity to modify the solicitation document is fundamental in order to enable it to obtain goods or construction that meet its needs. The article provides that clarifications together with questions that gave rise to the clarifications and modifications must be communicated by the procuring entity to all suppliers and contractors to whom the procuring entity provided solicitation documents. Further, the procuring entity is required to respond promptly to a clarification sought by a contractor or supplier in order to enable him to take the clarification into account in the preparation and submission of his tender or to modify withdraw his tender. Similarly, minutes of meetings held by the procuring entity with the contractors and suppliers and required to be communicated promptly so that those too could be taken into account in the preparation of tenders.

Article 27 on *Language of Tenders* provides that tenders may be formulated and submitted in a language in which the solicitation documents have been issued or in any other language specified in the solicitation documents. This rule has been included in order to facilitate participation by foreign suppliers and contractors.

Article 28 is entitled *Submission of Tenders*. Paragraph (1) of this article leaves it to the procuring entity to fix the place for and the deadline for the submission of tenders. Paragraph (2) requires the procuring entity to extend the deadline for submission of tenders in to exceptional case of late issuance of clarifications and modifications of the solicitation documents, or of minutes of a meeting of suppliers and contractors. Paragraph (3) gives a discretionary power to the procuring entity to extend the deadline for submission of tenders in case where one or more suppliers or contractors are unable to submit their tenders on time due to any circumstances beyond their control. Under paragraph (4), notice of extension of the deadline for the submission of tenders is required to be given promptly to each contractor or supplier to which the procuring entity had sent the solicitation documents. Paragraph 5(a) lays down the requirement that tenders are

to be submitted in writing, signed and in a sealed envelope. However, paragraph 5(b) permits the submission of tender in an EDI form provided it is so specified in the solicitation document and a degree of security, confidentiality and authenticity comparable to the degree of security, confidentiality and authenticity offered by a written tender in a sealed envelope is assured. Paragraph (6) prohibits the consideration of late tenders and they are required to be returned unopened to the suppliers or contractors that had submitted them.

Article 29 on *Period of effectiveness of tenders: modification and withdrawal* frames the rule that the procuring entity should stipulate in the solicitation document the period of time for which tenders should remain in effect. Where a request is made by the procuring entity to extend the period of effectiveness of tenders prior to the period of expiry of effectiveness and such request is refused by the supplier or contractor, the effectiveness of the tender will terminate upon the expiry of the unextended period without entailing forfeiture of the tender security. However, if the contractor or supplier agrees to such an extention, he will be required to have the effectiveness of his tender security extended correspondingly or to provide a new tender security. A default in this regard will tantamount to refusal on the part of the contractor/supplier to extend the period of effectiveness of his tender. Paragraph (3) of this article permits modifications and withdrawal of tenders prior to the deadline for submission of tenders. This is desirable because restricting modifications or withdrawals would discourage participation by suppliers and contractors in tender proceedings and would run counter to widely accepted practice under most national procurement laws. At the same time, it permits the procuring entity to depart from this general rule and to impose a penalty of forfeiture of tender security for modifications and withdrawals prior to the deadline for the submission of tenders, but only if so stipulated in the solicitation documents.

Article 30 on *Tender securities* authorizes the procuring entity to require all suppliers and contractors participating in the tender proceedings to provide a tender security. Tender securities are insisted upon by the procuring entities to recoup the costs to tender proceedings and to discourage the suppliers and contractors from defaulting (withdrawal of tender, refusal to conclude the procurement contract). Tender securities are usually important when procurement is of high value goods. The article contains safeguards to ensure that the tender securities are imposed fairly and for the intended purposes which are to secure the obligations of suppliers or contractors to enter into procurement contracts on the basis of tenders submitted by them and to provide a security for the performance of the procurement contract if required to do so.

Paragraph 1(c) has been included to remove unnecessary obstacles to the participation of foreign suppliers and contractors that could arise if they were

restricted to providing securities issued by institutions in the enacting State. However, flexibility is provided to procuring entities in States in which acceptances of tender securities not issued in the enacting State would be a violation of law.

The reference in paragraphs (c) through (f) of paragraph (1) to confirmation of tender security is intended to take account of the practice in some States of requiring local confirmation of a tender security issued abroad. This inclusion, however, is not intended to encourage such a practice in particular since the requirement of local confirmation could constitute an obstacle to participation by foreign suppliers and contractors in tender proceedings.

Paragraph (2) is purported to provide clarity and certainty as to the point of time after which the procuring entity may not make a claim under the tender security.

Article 31 deals with the *Opening of Tenders.* The rule framed in paragraph (1) of this article is intended to prevent time gaps between the deadline for submission of tenders and the opening of tenders by stipulating that tenders shall be opened at the time specified in the solicitation documents as the deadline for the submission of tenders or at the extended deadline. This requirement appears to be too onerous and there should be some lapse of time between these two events.

Paragraph (2) frames the rule that the procuring entity must permit all suppliers and contractors or their representatives to be present at the opening of tenders. This is intended to ensure transparency in the tender proceedings.

Paragraph (3) requires that at the opening of tenders, the names of all suppliers and contractors that have submitted tenders as well as prices of their tenders should be announced to those present. It also requires communication of this information to participating suppliers and contractors who were not present or represented at the opening of tenders.

Article 32 is addressed to the *examination, evaluation and comparison of tenders*. Paragraph 1(a) entitles the procuring entity to seek from suppliers or contractors clarifications of their tenders in order to assist in the examination, evaluation and comparison of tenders, while making it clear that this should not involve changes in the substance of tenders. Paragraph 1(b), however, entitles the procuring entity to correct purely arithmetical errors that are discovered during the examination of tenders which it is required to promptly notify to the concerned supplier or contractor.

Paragraph (2) frames a rule for determining whether tenders are responsive

and permits a tender to be regarded as responsive even if it contains minor deviations.

Under paragrah (3), the procuring entity is authorised to reject a tender if: (i) the supplier or contractor that submitted the tender is not qualified; (ii) the supplier or contractor does not accept the correction of an arithmetical error; (iii) the tender is not responsive; and (iv) the supplier or contractor attempts to improperly influence the procuring entity.

Paragraph (4) outlines the modalities for ascertaining the successful tender. Although ascertaining the successful tender on the basis of tender price alone is the widely accepted norm, in some tender proceedings the procuring entity may wish to select a tender not purely on the price factor. Accordingly, paragraph (4)(b)(ii) enables the procuring entity to select the "lowest evaluated tender", i.e. one that is selected on the basis of criteria in addition to price. Sub-paragraphs (4)(c)(i) through (iv) list out these criteria. The criteria in (4)(c)(iii) related to economic development objectives have been included because in most developing countries it is important for procuring entitites to be able to take into account criteria that permit the evaluation and comparison of tenders in the context of economic development objectives, paragraph (4)(d) permits a procuring entity to grant a margin of preference to domestic tenders, but makes its availability contingent upon rule for calculation and application of the margin of preference to be set forth in the procurement regulations.

Article 33 on *Rejection of Tenders* authorises the procuring entity to reject all tenders at any time prior to the acceptance of a tender. Paragraph (1) does not require the procuring entity to justify the grounds it cites for rejection of all tenders. However, under paragraph (3), it is obligated to notify the rejection to all suppliers or contractors that had submitted the tenders. Paragraph (2) exempts the procuring entity from any liability on this score towards contractors or suppliers. However, this blanket power given to the procuring entity can take effect only if such power had been vested in it in the solicitation documents.

Article 34 entitled *'Prohibition of negotiation with supplier or contractor* contains an explicit prohibition against negotiations between the procuring entity and a supplier or contractor concerning a tender submitted by him. This is because once suppliers or contractors know that negotiations would take place after submission of tenders, they would have little incentive to offer their best prices instead, they would increase their tender prices measurably in anticipation of being persuaded to reduce them and procuring entities would in the end pay more than necessary.

Article 35 relates to *Acceptance of tender and entry into force of procurement contract*. Paragraph (1) of this article enunciates the rule that the tender determined

to be successful pursuant to Article 32 (4) (b) is to be accepted and that notice of acceptance is to be given promptly to the supplier or contractor that submitted the tender. The article then sets forth three different methods of entry into force of procurement contract. Under one method, (paragraph (4)), unless provided otherwise in the solicitation documents, the procurement contract enters into force upon dispatch of the notice of acceptance to the supplier or contractor that submitted the successful tender of a written procurement contract conforming to the tender. The second method (paragraph (2)) links the entry into force of the procurement contract to the signature by the supplier or contractor submitting the successful tender of a written procurement contract conforming to the tender. A third method of entry into force (paragraph (3)) provides for the entry into force of the procurement contract upon its approval by a higher authority. The requirement in paragraph (3) that the solicitation document disclose the estimated period of time required to obtain the approval and the provision that a failure to obtain the approval within the specified period would not extend the period of effectiveness of the successful tender or of any tender security furnished are designed to strike a balance between the rights and obligations of suppliers and contractors. In the event the supplier or contractor whose tender the procuring entity has selected fails to sign a procurement contract, paragraph (5) clarifies, the procuring entity shall be within its right to select another tender from among the remaining tenders in accordance with the provisions normally applicable to the selection of tenders subject to the right of the procuring entity to reject all tenders. Paragraph (6) requires the procuring entity to notify other suppliers and contractors that participated in the tender proceedings about the award of the procurement contract, the name and address of the successful supplier or contractor and the contract price. This requirement is intended to promote transparency of the tender proceedings.

Chapter VI entitled Procedure for *Procurement Methods other than Tendering* is made up of Articles 36 to 41. These articles outline the procedures to be used for the methods of procurement other than tendering. It should be noted that Chapter IV does not provide as full a procedural framework as Chapter III does with respect to tendering proceedings. This is presumably because the procurement methods other than tendering need more flexibility. It should further be noted that Chapters I and V are also generally applicable to procurement methods other than tendering.

Article 36 on *Restricted tendering* prescribes the procedure to be followed while engaging in restricted tendering. Under the Model Law, a procuring entity can use restricted tendering in two circumstances: (1) when the goods or construction by reason of their highly complex or specialized nature are available from only a limited number of suppliers or contractors; and (ii) when the time and

cost required to examine and evaluate a large number of tenders would not be justifiable in view of the low value of the goods or construction. Consequently, paragraph (1) of this article requires the procuring entity, in the first case, to solicit tenders from all suppliers or contractors from whom the required goods or construction to be procured are available; and in the second case, to select a sufficient number of suppliers or contractors in a non-discriminatory manner so as to ensure effective competition. Paragraph (2) obligates the procuring entity to publicise the restricted tendering either in the official gazette or other official publication. Paragraph (3) makes the entire Chapter III of the Model Law (except for Article 22) applicable to restricted-tendering proceedings except to the extent those provisions derogate from Article 36. This is because restricted tendering is, after all, a specie of the procurement method of tendering.

Article 37 on *Two-stage Tendering* lays down the procedural modalities for recourse to this procurement method which is a combination of negotiations with the suppliers or contractors and tender proceedings. The first stage involves solicitation of proposals from suppliers or contractors so as to reach a final set of specifications for the goods or construction to be procured and at the second stage ordinary tender proceedings are involved.

Article 38 on *Request for Proposals* lays down the procedural modalities for this method of procurement. In this procurement method, the procuring entity typically solicits proposals from a select relatively small group of suppliers or contractors. Paragraph (1) requires the procuring entity to solicit proposals from as many suppliers or contractors as practicable, with the minimum being three. Paragraph (2) requires the procuring entity to publicise its request for proposals in a publication having international circulation unless it considers that undesirable for reasons of economy or efficiency. The remainder of Article 38 sets forth the essential elements for request for proposals proceedings related to the evaluation and comparison of proposals and the selection of the winning proposal. These requirements are designed to promote transparency and fairness in competition and objectivity in the comparison and evaluation of proposals.

Article 39 on *Competitive Negotiation* is a skeletal provision. In this procurement method, the procuring entity is permitted to organise and conduct the negotiations with the suppliers or contractors as it sees fit, except for the compliance with the 'best and final offer' procedure laid down in paragraph (4) of this article.

Article 40 on *Request for Quotations* specifies the procedural modalities for this procurement method. Paragraph (1) requires the procuring entity to invite quotations from as many suppliers or contractors as practicable, with the minimum number being three. Under paragraph (2), each supplier or contractor

is permitted to give one price quotation which cannot subsequently be changed. Any negotiations between the procuring entity and the suppliers or contractors are forbidden. Under paragraph (3), the procurement contract would be awarded to the supplier or contractor whose quotation is found to be lowest and meets the needs of the procuring entity.

Article 41 relates to *Single-source procurement*. The conditions for the use of this procurement method are set forth in Article 20 of the Model Law. No procedures are laid down for this procurement method as it involves a sole supplier or contractor and is subject to very exceptional conditions of use.

The final chapter, i.e. *Chapter V on Review* consists of Articles 42 to 47. This chapter sets forth provisions establishing a right of reivew of the actions and decisions of the procuring entity and provisions governing its exercise. As indicated in a footnote of Chapter V, these provisions appear to be optional in that some States might incorporate them without change or with minimal changes while other States may not do so. In the latter case, these provisions could be used to measure the adequacy of existing revivew procedures. This is because, in the context of procurement, some States provide for review by a body that exercises overall supervision and control over procurement in the State (e.g. a central procurement board) while in other States the review function is performed by the body that exercises financial control and supervision over the operations of the Government and of the public administration. In some States, the review function is performed by quasi-judicial administrative tribunal while many legal systems provide for judical review. In view of this divergence of State practice, the Model Law provides for a first recourse to the head of the procuring entity or the head of the approving authority, followed by an administrative review and/or judicial review. Within this framework, Article 42 establishes the basic right to obtain review and frames rules as to which parties can initiate review proceedings and what kinds of actions and decisions of the procuring entity would be subject to review. Article 43 provides for the first instance review by the head of the procuring entity or of the approving authority. Article 44 provides for recourse to an administrative tribunal and Article 47 to judicial review. Under Article 46, submission of a complaint before the head of the procuring entity or before an administrative tribunal suspends the procurement process, and also the performance of the procurement contract if it has already entered into force, for a period of seven days which could later on be extended up to 30 days in order to preserve the rights of the complaining supplier or contractor.

Comments and Observations

Procurement expenditure represents a significant portion of the overall development expenditure in the developing and other countries which are now

transiting to market-oriented economies. However, few of these countries have adequate legal frameworks for procurement while in most of the other countries the matter is regulated by rules and regulations which differ from one government agency to another. It has also been the general impression in some quarters that these rules and regulations are often titled in favour of national suppliers and contractors and biased against their foreign counterparts. Since procurement of goods and services should be quality-oriented and cost-effective,sound laws and practices for public procurement are *sine qua non* for all countries. The UNCITRAL Model Law on Procurement of Goods and Construction is, therefore, bound to serve as a handy tool for updating and modernising existing laws and as readily available text for the enactment of new legislation where none exists.

It should be noted that the Model Law is a framework law that does not set forth all the rules and regulations that may be necessary to implement the procurement procedures in an enacting State. Accordingly, the Model Law envisages issuance of procurement regulations by the enacting State to fill in the procedural details for procedures authorised by the Model Law and also to take account of the local conditions obtaining therein. In this regard, assistance should be taken from the UNCITRAL Guide to Enactment of the Model Law in identifying the areas in which the national law would need to be supplemented by procurement regulations.

The Model Law offers the following procurement methods for incorporation into the national law: tendering, restricted two-stage tendering, request for proposals, competitive negotiation, request for quotations and single-source procurement. Primacy has, however, been given by the Model Law to tendering to which bulk of its provisions are devoted. The others methods of procurement including restricted tendering and two-stage tendering, which are variants of tendering, have been dealt within a few and skeletal provisions. Moreover, while the Model Law mandates the use of tendering in normal circumstances, the use of the other methods of procurement is permitted only in specified exceptional circumstances and conditions. It is true that procurement by tenders is widely recognised as generally most effective in promoting competition, transparency, efficiency and objectivity in procurement. The other methods of procurement could also be useful alternatives in some circumstances as procuring entities have greater flexibility in the use of these methods as compared to their recourse to tendering. Since the Model Law has now been finalized, it would be in the fitness of things if detailed procedural modalities in respect of procurement methods other than tendering are set forth at least in the national procurement regulations.

The Model Law represents a fair balance between the interests of the procuring entities and those of suppliers and contractors. To ensure that this balance is preserved, it is utmost essential that there are in place adequate institutional and bureaucratic structures and an impartial review machinery in the enacting States.

(ii) INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT)

The programme of the work of the International Institute for the Unification of Private Law (UNIDROIT) was considered by its Governing Council at the 71st Session and was adopted. The adopted work programme was for the 1993-1995 triennium. Three items namely the Hotelkeeper's Contract, Relations between Principals and Agents in the International Sale of Goods and the Forwarding Agency Contract were not retained. The Governing Council decided that the Programme should consist of the following:

1. Principles for International Commercial Contracts.
2. International Protection of Cultural Property.
3. International Aspects of Security Interests in Mobile Equipment.
4. International Franchising.
5. Inspection Agency Contracts.
6. Civil Liability connected with the carrying out of Dangerous Activities.
7. Legal Issues connected with Software.
8. Programme of Legal Assistance.
9. Organization of an Information System on Data Bank of Uniform Law.
10. Organisation of a Congress or Meeting on Uniform Law during the triennial period 1993-1995.

This Work Programme was subsequently approved by the 46th Session of the UNIDROIT General Assembly held in Rome during December 1992.

The 72nd Session of the Governing Council which was scheduled from 15 to 18 June 1993 had incorporated in its agenda an item entitled, "Implementation of the Work Programme for the triennial period 1993-1995". This Work Programme consisted of all the items indicated above, as approved by the 71st Session of the Governing Council. The other item particularly was related to "Status of Implementation of UNIDROIT Convention". The UNIDROIT document under consideration for its 72nd Session of the Governing Council briefly surveys the status of each item adopted for the Work Programme for the triennial period 1993-1995 (UNIDROIT, C.D. (72) 5).

The item *"Principles for International Commercial Contracts"* is, as the report puts it, finalised. These proposed principles are intended to provide a kind of model regulation of international commercial contracts and once its final version is approved by the Governing Council, the UNIDROIT Secretariat proposes to publish it and circulate it to the interested business circles. Subsequent to its finalization, a small steering committee constituted by the President of UNIDROIT examined various aspects of this topic in the sixteen meetings. Later a restricted Working Group representing various legal systems took up the task of preparing draft rules relating to the formation, interpretation, validity, content, performance and non-performance of contracts. (The draft consists of seven chapters forming a total of more than 110 articles).

The item, *"International Protection of Cultural Property"* is to be finalised by convening of a Diplomatic Conference for the adoption of its final version, most probably in the latter half of 1994. This topic, however, had many key provisions in its draft which were not agreed to by members; for example, its scope of application, the payment of compensation to good faith purchasers of stolen or illegally exported cultural objects and the principle of non-retroactivity. Earlier, after due deliberations the text of the preliminary draft convention was duly submitted to the Governing Council at its 69th Session in April 1990. There were some differences and members had expressed their hesitations regarding certain provisions. Accordingly, the topic was submitted to a Study Group to consider these view points. The draft was to be finalized by the Study Group during 1993.

The item *"International Aspects of Security Interests in Mobile Equipment"* is under active consideration of a Study Group constituted after due deliberations held in a restricted exploratory Working Group, as envisaged by the Governing Council in 1991. It was generally agreed that the proposed International Convention should be restricted to situations partaking of an international character and should be continued to security interests in mobile equipment held by the debtor for business use. it has been proposed that in advance of the next session of the Study Group, which is to be held in 1994, the UNIDROIT is proposing to convene a small sub-committee of the Study Group, towards November 1993 for the purposes of preparing one or more tentative drafts.

The item *"International Franchising"* concerns the "consideration of the desirability and feasibility of drawing up uniform rules application to certain aspects of franchising agreements concluded at international level". This topic is under the active consideration of UNIDROIT. The item, "Inspection agency contracts" concerns "preparation of uniform rules on inspection agency contracts". The final version of this study is to be submitted to the Governing Council at its 72nd Session.

The item, *"Civil liability connected with the carrying out of dangerous activities"* proposes "the preparation of model rules governing the liability of operators of establishments engaged in dangerous activities for damage sustained by third parties". At its 71st Session in June 1992 the Governing Council took note of the most recent developments in other organisations reported by the UNIDROIT Secretariat and decided to include the subject in the Work Programme for the triennial period 1993-1995.

The item, *"Legal issues connected with software"* proposes to make an inquiry into the extent to which problems may arise in the international relations between producers and users of software and in particular the identification of new types of contract which may be evolving as the use of computers becomes even more widespread. Initially, there was no unanimity among the members of Governing Council at the 71st Session as regards its inclusion for the Work Programme of 1993-95 triennial period. Notwithstanding, the scepticism of some Council members, a decision was taken to include it so as to examine certain areas such as whether transactions relating to the marketing of software were encompassed by the UN Sales Convention and whether they fell within the scope of the EEC Directive on products liability or of that on the provision of services. Accordingly, the UNIDROIT Secretariat was requested to prepare a paper focussing on the problems raised by the subject for the 73rd session of the Governing Council in 1994.

The item *"Programmes of legal assistance"* relates to "the provision of technical assistance in legal matters (especially international trade law) to developing countries and to countries engaged in the transition to a market economy, directed in particular to the practical implementation of the Statutory Objectives of UNIDROIT". The other item concerns the *"setting up by UNIDROIT of a data bank permitting ready access by Governments, judges, arbitrators and practicing lawyers* to information regarding uniform law conventions and in particulars acceptance thereof, reservations thereto, and the relevant case law and bibliography. With regards the *"Convening of a congress or meeting on uniform law during the triennial period 1993-95"*, the item is under consideration by the UNIDROIT's Governing Council and it has called for further study on this topic

In conclusion, the UNIDROIT Work Programme covers important aspects of trade law which have bearing on the international commercial transactions. Some of these studies prepared by the UNIDROIT Secretariat have been of crucial importance to Asian and African countries in their development of trade and commerce in accordance with established legal practices.

(iii) UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD)

The legislative work programme of UNCTAD is mainly concerned with the commodities, transfer of technology, restrictive business practices, maritime and multimodal transport. This study attempts to survey, albeit briefly, the current legislative work of UNCTAD concerning trade law.

I. COMMODITIES

International Commodity Agreements (ICAs) Negotiated/Renegotiated under the Auspices of UNCTAD

The aims of international commodity agreements and arrangements vary from one agreement/arrangement to another. It should be noted that the principal objectives of agreements with economic provisions were price and export earnings stabilization, although they often also aim at long-term development.[1] Agreements whose main functions were mainly developmental comprised activities related to improved market access and supply reliability, increased diversification and industrialisation, augmented competitiveness of natural products *vis-a-vis* synthetics and substitutes, improved marketing and distribution and transport systems. Further, it is also pointed out that international commodity agreements may also have additional objectives, such as the promotion of consumption, the prevention of unemployment, and the alleviation of serious economic difficulties. Several commodity agreements or arrangements have been adopted pursuant to the objectives adopted by UNCTAD in resolutions 93(IV) and 124(V) on the Integrated Programme for Commodities as well as the Final Act of UNCTAD VII and the Cartagena Commitment of UNCTAD VIII.[2]

The International Commodity Agreements (ICA) as enunciated in the above indicated resolutions, propose to achieve:

a) improving the functioning of commodity markets by reducing the distortions affecting supply and demand;

b) optimizing the contribution of the commodities sector to development by, *inter alia*, working towards greater cost-effectiveness and productivity, thereby enhancing competitiveness;

c) reviewing and comparing national policies with the aim of enhancing the competitiveness of the commodity sector, taking into account market trends;

d) achieving a gradual reduction in excessive dependence on the export of primary commodities through horizontal and vertical diversification of production and exports as well as crop substitution, within a macro-economic framework that takes into consideration a country's economic structure, resource endowments and market opportunities;

e) progressive removal of trade barriers i.e. trade liberation for commodity products;

f) improving market transparency;

g) exploring the links between commodity policies, sound management of natural resources and achievement of sustainable development;

h) employing greater use and efficiency of various mechanisms for risk management, having in mind the objective of minimizing the risks arising from commodity market fluctuations, including market-linked price-hedging mechanisms such as commodity futures and options and related long-term mechanisms such as commodity swaps, bonds and loans, obstacles to their potential use and modalities for overcoming them;

i) analysing problems stemming from commodity-related shortfalls of developing countries and reviewing developments in the field of compensatory financing of export earnings shortfalls.

COCOA: The International Cocoa Agreement 1986 was due to expire on 30 September 1987 but was extended by a decision of the International Cocoa Council for a further period of three years. The UN Cocoa Conference 1992 met from 21 April to 1 May and from 6 to 24 July 1992 and a third session was held from 2 to 13 November 1992 to conclude negotiations on a successor agreement with economic provisions. The fourth session was held from 22 February to 5 March 1993 which affirmed its intention to negotiate an agreement with economic mechanisms and the determination of producing and consuming countries to conclude, as soon as possible, the negotiation of a new International Cocoa Agreement. The fifth part of the UN Cocoa Conference 1993 was held in Geneva during July 1993 to establish the text of the International Cocoa Agreement, 1993. Although the principal aim of this Agreement like that of the previous Cocoa Agreement is to maintain the price of Cocoa beans between an agreed set of prices, it has several distinctive features as compared with the previous Agreements. Notable among these features are:

a) the incorporation of discretionary intervention prices;

1 A/CN.9/380
2 *Ibid.*

b) the abandonment of the maximum and minimum prices;

c) withholding scheme to supplement the buffer stock which remains, however, the main supply regulatory mechanism to achieve the principal aim of the Agreement;

d) rules and procedures for the revision of price levels both at an annual review; and

e) the deletion of all references to borrowing and the denomination of the price levels in special drawing rights.

COPPER: The terms of reference of the International Study Group on Copper came into force in January 1992. The Secretary-General of the UNCTAD convened the inaugural meeting of the Group in Geneva from 22 to 26 June 1992, which *inter alia*, amended paragraphs 13 and 14 of the terms of reference. Paragraph 13, now, authorises the Group to be designated as an International Commodity Body (ICB) under Article 7(9) of the Agreement establishing the Common Fund for Commodities, for the purpose of sponsoring in accordance with the provisions of these terms of reference, projects on Copper to be financed by the Fund through its Second Account. Paragraph 14 bestows on the Group an international legal personality.

IRON ORE: Following a series of preparatory meetings of UNCTAD involving iron ore producing and consuming countries, Governments had decided to set up an Intergovernmental Group of Experts on Iron Ore which *inter alia* has been examining the following aspects:

a) providing regular dialogue between producers and consumers;

b) improving statistics and market transparency;

c) reviewing and monitoring the market situation and outlook for iron ore; and

d) exchanging views about issues of concern to the iron ore industry worldwide.

The first session of the Intergovernmental Group of Experts on Iron Ore was held in Geneva from 26 to 28 October 1992 which reviewed broadly the above-mentioned aspects.

Jute: The 1982 Agreement was renegotiated at the UN Conference on Jute and Jute products held under the auspices of UNCTAD from 30 October to 3 November 1989. The Agreement, without much change, was to have entered into force definitively or provisionally on 1 January 1991 or any date thereafter if by that date three Governments of exporting countries accounting for at least 85%

net exports and 20 Governments of importing countries accounting for at least 65% of net imports had signed the Agreement. As that condition had not been met by 1 January 1991, the Secretary-General of UNCTAD in consultation with the parties concerned, convened a meeting on 12 April 1991. At that meeting, it was agreed to put the Agreement into force provisionally among the concerned parties as a whole as of 12 April 1991.

NATURAL RUBBER: The International Natural Rubber Agreement 1987 entered into force provisionally on 29 December 1988 and definitively on 3 April 1989. It is to expire on 28 December 1993 unless extended by decision of the International Natural Rubber Council. The most important objective of the agreement relates to the stabilization of prices and the achievement of balanced growth between demand and supply.

NICKEL: The International Nickel Study Group has met regularly since June 1990 with the objectives of assessing the market situation and prospects as well as to improve statistics and to examine issues impinging on the market for the metal.

OLIVE OIL: The United Nations Conference to negotiate a successor agreement to the International Agreement on Olive Oil and Table Oils, 1986 took place from 8 to 12 March 1993 and approved, "Protocol of 1993 extending the International Agreement on Olive Oil and Table Oils, 1986 with amendments."[3] The 1986 Agreement contains general objectives with respect of international cooperation and concerted action for the integrated development of the world economy for olive products and is aimed at the trade expansion and standardization of olive products, the modernization of olive cultivation and oil extraction, tranfer of technology, improvemnt of the olive-products and by-products industry with regard to the environment, and the defence and promotion of trade in olive products.[4]

TIN : Available information points out that the terms of reference of the Internationals Tin Study Group negotiated under UNCTAD auspices in April 1989 have yet to enter into force. It is stated that the Secretary-General of the UNCTAD, on behalf of the Secretary-General of the United Nations who is the depository of these terms of reference, held consultation during the last quarter of 1992 with the concerned countries on future international cooperation on tin.[5]

TROPICAL TIMBER: At its sixth session in May 1989 the International Tropical Timber Council decided to extend the International Tropical Timber

3. TD/OLIVE OIL.9/6
4. TD/OILIVE OIL .9/3
5. TD/D/CN.1/2

Agreement, 1983 for a further period of two years ending on 31 March 1992. The UN Conference on Tropical Timber met from 13 to 16 April and was to meet in June 1993 to negotiate a successor agreement.[6]

TUNGSTEN: The Committee on Tungsten reports to the Standing Committee on Commodities and its term of references were very general, namely:

(a) to provide opportunity for international consultations concerning trade in Tungsten;

(b) to promote the improvement of statistics on Tungsten and follow developments in the Tungsten market. There had been 23 Sessions of the Committee. The Intergovernmental Group of Experts on Tungsten met in its First Session during December 1992 and reviewed the market situation and outlook.[7]

SUGAR : The International Sugar Agreement, 1992 negotiated in March 1992 entered into force provisionally as of 20 January 1993.[8] The main thrust of this Agreement is based on export quotas and national stocks in order to stabilize prices.

BAUXITE: In accordance with the decision adopted by the *Ad Hoc* Review Meeeting on Bauxite at its 4th Meeting on 17 May 1991, and taking into account the results of consultations held with producers and consumers of Bauxite, the Secretary-General of UNCTAD convened the Second *Ad Hoc* Review Meeting on Bauxite in April 1993.[9]

It should be noted that in respect of certain agricultural products, there are Intergovernmental Groups in the Food and Agriculture Organisation (FAO), on bananas, citrus fruits, fisheries, forestry, grains, hard fibres, jute, kenat and allied fibres, meat, oilseeds, oils and fats, rice, tea and wine, and in GATT (dairy products and meat). The Intergovernmental Working Groups meet at regular intervals to review the market situation and prospects of commodities in question.[10]

COFFEE: The International Coffee Agreement, 1983, with its economic provisions suspended since July 1989 had been extended to 30 September 1993. In April 1992, the International Coffee Council had established a Negotiating Group for the negotiation of a new, market-oriented International Coffee Agreement on the basis of a universal quota supported by an effective system of

6. TD/TIMBER.2/7 and TD/TIMBER.2/3
7. TD/B/CN.1/7 and TD/B/CN.1/TUNGSTEN/5
8. TD/SUGAR.12/8
9. TD/B/CN.1/RM/BAUXITE/4 and TD/B/CN.1/RM/BAUXITE/2
10. TD/B/CN.1/2

controls. The Negotiating Group, however, could not bridge the gap between the different views on the question of the continuous operation of the selective adjustment of quotas under a universal quota system. At its meeting of 29 April 1993, the Executive Board of the International Coffee Organization recommended tha the issue of a possible one-year extension of the current Agreement till 30 September 1994 be put to a postal vote in order to maintain international cooperation on coffee and allow more time for renegotiation of a new Agreement. Following the postal vote, the International Coffee Council agreed on 4 June 1993, to the further extension of the International Coffee Agreement, 1983, for one more year i.e. until 30 September 1994.

II. TRANSFER OF TECHNOLOGY

The UNCTAD Secretariat prepared a study in 1990 entitled "The relevance of recent developments in the area of technology to the negotiations on the draft International Code of Conduct on the transfer of technology."[11] The consultations were held during 1990, 1991 and 1992 by the Secretary-General of UNCTAD and interested Governments aimed at facilitating agreement on the Code. The General Assembly in its resolution 47/182, invited the Secretary-General of UNCTAD to continue his consultations with Governments on the future course of action on the Code and to report to the General Assembly at its forty-eighth session on the outcome of those consultations.

The focus of UNCTAD's initiative in this area has been reflected in the comparative analysis of the role of the national policies, laws and regulations in promoting investment, technological innovation and transfer of technology. In this regard, reference is made to two studies concerning Brazil[12] and the Republic of Korea.[13] Regarding the role of intellectual property systems in promoting technological innovation, three studies have been prepared:

(a) Historical trends in protection of technology in developed countries and their relevance for developing countries[14]

(b) A case study of selected Swedish firms[15]

(c) A case study of the United Republic of Tanzania[16]

11. TD/CODE/TOT/55
12. UNCTAD/ITP/TEC/15
13. UNCTAD/ITP/TEC/16
14. UNCTAD/ITP/TEC/18
15. UNCTAD/ITP/TEC/13
16. UNCTAD/ITP/TEC/17

III. RESTRICTIVE BUSINESS PRACTICES

The Intergovernmental Group of Experts on Restrictive Business Practices held its ninth and tenth sessions from 23 to 27 April 1990 and 21 to 25 October 1991. The ninth session was devoted to preparations for the second United Nations Conference to review all aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. During that session, it was recommended that a third Review Conference be convened in 1995. Pursuant to General Assembly Resolution 41/167, the Second UN Conference to Review all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices was convened from 26 November to 7 December 1990. The Conference adopted a resolution entitled "Strengthening the implementation of the Set" [17] which *inter alia* calls upon States to implement fully all provisions of the Set in order to ensure its effective application by adopting and effectively enforcing national restrictive business practices legislation and calling upon them to adopt, improve and effectively enforce appropriate legislation and to implement judicial and administrative procedures. During its tenth Session, the Intergovernmental Group of Experts reviewed the operation and implementation of the Set of Principles and Rules on Restrictive Business Practices.[18]

IV. MARITIME AND MULTIMODAL TRANSPORT

The United Nations Convention on Conditions for Registration of Ships was signed by 16 countries. As of 31 December 1992 eight countries had become contracting parties to the Convention. This Convention contains a set of minimum conditions which should be applied and observed by States when accepting ships on their shipping registers.

Guidelines on the UN Convention on a Code of Conduct for Linear Conferences

The resumed session of the Review Conference on the UN Convention on a Code of Conduct for Linear Conferences was convened from 21 May to 7 June 1991 and adopted a resolution[19] that sets forth a number of Guidelines relating to the working and implementation of the Convention. The Guidelines deal with issues such as membership of container slot/space-charter operators in conferences, sea leg of multimodal transport services, transhipment operations, participation of national shippers or shipper's organizations in the consultation machinery, and measures necessary to ensure implementation of the Convention, Resolution II calls upon all parties, including the governmental authorities at the two ends of trade to which the Code applies, to hold consultations in order to find mutually acceptable solutions to problems relating to the working and implementation of the Convention.

17. TD/RPB/CONF.3/9
18. A/CN.9/380
19. TD/CODE.2/13-Res.II

UNCTAD/UNCITRAL JOINT STUDY

A joint study was conducted by UNCITRAL/UNCTAD, entitled "Study on the economic and commercial implication of the entry into force and the Hamburg Rules and the Multimodal Transport Convention"[20]. This study discusses the background of the Hamburg Rules, the economic and commercial implications of the entry into force of the Hamburg Rules and contains an article-by-article commentary on the Hamburg Rules.

UNCTAD/ICC: Rules for Multimodal Transport Documents:

Pending the entry into force of the 1980 United Nations Convention on International Multimodal Transport of Goods and pursuant to Resolution 60 (XII) of the former UNCTAD Committee on Shipping, the UNCTAD Secretariat and ICC jointly prepared a set of Rules for Multimodal Transport Documents which came into effect on 1 January 1992. The Rules follow the network liability principle. The multimodal transport operator (MTO) and the consignor may invoke the mandatory liability rules of international conventions and national law, which would have applied if a separate and direct contract had been made for the particular stage of the transport where the loss, damage or delay occurred. The general basis of liability is expressed in Rule 5.1 as a liability for "presumed fault or neglect". The MTO is also liable for acts or omissions on the part of its servants or agents or any other person whose service he makes use of for the performance of the contract (Rule 4.2).

Charter-Parties:

The twelfth Session of the UNCTAD Working Group on International Shipping Legislation (WGISL) was held in October 1990 and considered the subject of charter-parties. The Working Group had before it the report prepared by the Secretariat entitled "Charter-Parties—A Comparative Analysis"[21]. The report highlighted some of the problems and disputes arising from the use of out-dated charter-party forms; the interpretation of their wording; the application of different liability regimes to the charter-party and to bills of lading, as well as

20. UN Publication, Sales No. E.91.II.D.8
21. TD/B/C.4/ISL/55

problems caused by contractual incorporation of the Hague-Visby Rules into the charter-party through a paramount clause.

General Average

The Thirteenth Session of the UNCTAD Working Group on International Shipping Legislation was held in November 1991 to examine the subject of general average. The report prepared by the UNCTAD Secretariat reviewed, *inter alia*, the arguments for and against the general average system.[22] It concluded that in view of a long history of calls for abolition of the system going back to 1877, it would seem premature to consider questions of reform until the technical problems had been thoroughly discussed by the insurance interests concerned. The Working Group decided to request the Secretariat, in close collaboration with CMI, to approach the insurance industry and other interested organizations in order to study the extent to which insurance arrangements could simplify the operation of the general average system. Investigations are presently under way for the preparation of the requested report.

Presently, the UNCTAD Secretariat is involved in updating and harmonizing the maritime legislation of various countries at the regional level (Western and Central African States and Central American Countries) and at national level (Ethiopia) with the aim of providing a legal framework for more effective maritime transport. Training of nationals of these States forms an integral part of the project.

(iv) UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION (UNIDO)

The major work programme of UNIDO relates to its preparation of guidelines so as to assist countries in their industrial development. Accordingly since 1990 UNIDO has published two investor's guides, one for Tanzania and another for Hungary. It has also completed a study on the trends in international product standards and the implications for developing countries ("*International Product Standards: Trends and Issues*" UNIDO/PPD.182, 7 January 1991). As regards its work on "*Guides on industrial subcontracting*". It has surveyed legal, tax and custom aspects related to industrial subcontracting operations in the Arab region and a Guide is presently being prepared.

The Manual on Technology Transfer Negotiations under preparation by

22. TD/B/C.4/ISL/58, General Average—A Preliminary Review

UNIDO is intended to serve the purpose as a teaching tool for technology transfer negotiation courses, for developing the skills of trainers of negotiators and as a working tool for negotiators. It is pointed out that this study covered, in a comprehensive manner, the range of subjects that entrepreneurs, decision-makers and government officials dealing with technology acquisition were likely to be confronted within the various phases of the technology transfer process. It is further pointed out that these subjects included not only those directly related to the evaluation and negotiation of contracts but also the aspects that influence technology options, the behaviour of parties and the results of negotiations.

The other guidelines under preparation by UNIDO were intended to impart to users as potential users of the BOT (build-operate-transfer) scheme for project implementation with guiding principles on issues such as the legislative framework, tendering, basic and essential contractual features, the risk structure of parties involved, financing, insurance, period of operation and transfer of ownership. In addition, it is pointed out, the Guidelines would outline the methods of meeting the new risks and differentiating between the risks which should be decreased or minimized and the risks which were unavoidable.

(v) HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

The Hague Conference on Private International Law has been working for a number of years on several topics in the area of contract practices. The Special Commission which met in June 1992 recommended that the Seventeenth Session should strike from the agenda the topic of the Law Applicable to Licensing Agreements and Transfer of Technology because of continuing doubts about the viability of this topic. The Special Commission had recommnded to the Seventeenth session that the topic of the "Law Applicable to Unfair Competition" be retained because of its inherent and continuing interest, but without priority, as there was doubt as to whether there was a pressing need for a convention, especially in view of the growing trend in case law and legislation towards uniformity of conflicts treatment. The Special Commission considered a report prepared by the Permanent Bureau and recommnded that the topic relating to "Law Applicable to Contractual Obligations" be deleted from the agenda for future work.

The topic, "Law Applicable to Negotiable Instruments" was considered by the Permanent Bureau identifying the problems arising with regard to the revision of the Geneva Conventions of 1930 and 1931 and the specific conflict of law issues that the UN Convention on International Bills of Exchange and International Promissory Notes might raise. The Special Commission decided to maintain the

topic on the agenda for the Conference's work, but without any priority. The topic concerning the "Law Applicable to Multimodal Transport" was deleted on the recommendation of the Special Commission. The Commission had noted that the work that UNCTAD and ICC had undertaken on this topic had minimized its interest from a conflict of laws view.

The Permanent Bureau of the Hague Conference had prepared and submitted to the Special Commission a report analysing the conflict of laws problems arising in connection with credit transfer. A questionnaire was circulated to banks and international payment systems and it is expected that the Conference will consider it at its Seventeenth Session the question whether a Convention on the Law Application to Credit Transfers should be prepared.

The Hague Conference is considering under the heading "Conventions on Civil Procedure and on International Judicial and Administrative Cooperation", a number of Conventions, such as the Conventions on Service of Documents Abroad and on Taking of Evidence Abroad. In particular, attention was drawn to the Convention of 15 November 1965 on the "Service Abroad of Judicial and Extra Judicial Documents in Civil and Commercial Matters" and "Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters."

In view of the UNCITRAL work on bank guarantees and stand-by letters of credit the Permanent Bureau of the Hague Conference had prepared a report dealing with the conflict of laws problems arising with regard to bank guarantees. The Permanent Bureau submitted also a report on the "Law Applicable to Civil Liability for Environmental Damages." The Special Commission had decided to recommend to the Seventeenth Session that both topics be included in the agenda for future work, the latter with high priority. The attention of the Special Commission was also drawn to the possible drafting of a convention on recognition and enforcement of decisions in civil and commercial matters. The Special Commission had decided that a Working Group would be set up, which would meet before the Seventeenth Session and submit its conclusions about the possibility and feasibility of drafting a convention on this topic and report to the Seventeenth Session. The Working Group unanimously concluded that negotiating through the Hague Conference a general convention on jurisdiction and enforcement of judgements was both desirable and feasible.