ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

REPORT
AND
SELECTED DOCUMENTS
OF THE
THIRTY-FOURTH SESSION
DOHA, QATAR
17-22 APRIL 1993

THE AALCC SECRETARIAT

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

REPORT
AND
SELECTED DOCUMENTS
OF THE
THIRTY-FOURTH SESSION
DOHA, QATAR
(17-22 APRIL, 1995)

Prepared & Published by
The AALCC Secretariat
27, Ring Road, Lajpat Nagar-IV, New Delhi-110024

Printed by :
TARA ART PRESS
B-4, Hans Bhawan, B.S. Zafar Marg,
New Delhi-110002

Preface

The Thirty-fourth Session of the Asian-African Legal Consultative Committee was held in Doha, Qatar, from 17th to the 22nd April 1995. The six-day session was attended by delegations from more than 35 Member States, observers from non-member States, international and regional organizations and the United Nations including its subsidiary bodies and specialized agencies.

A number of Justice Ministers attended the session which was held under the chairmanship of H.E. Dr. Najeeb Bin Mohamad Al-Nauimi, the then Minister Legal Adviser at the office of the H.H. the Heir Apparent and Defence Minister now Minister of Justice of the State of Qatar.

At this session the delegations discussed various legal issues and stressed for support to formulate the views of the Asian and African States on these issues to enable them to participate in the deliberations of international and regional organizations.

Most of the subject items on the Agenda were taken up for discussion at the Doha Session. The present Report provides detailed background information, deliberations of the Thirty-fourth Session and the decisions adopted at that Session.

The papers prepared for the session, highlighted the undisputed common denominator of indispensable international and regional approaches to relevant international law. The AALCC's work in the above mentioned field is designed to project the subjects more adequately and fully appraise its Member States. There was prolific discussion during the high-level meetings. The ensuing decisions have been structured to express an overall vision and wider applicability of the basic principles of international law.

On the 'Status and Treatment of Refugees' the Committee appealed to Member States to take all possible measures to eradicate the causes and conditions which force people to leave their countires and cause them to suffer unbounded misery, and urged those states who have not already done so to ratify or accede to the Convention relating to the

Status of Refugees, 1951 and the 1967 Protocol thereto. It also requested the member governments to send their comments and observations on the proposed legal framework for the establishment of safety zones for displaced persons in their country of origin and model legislation on the status and treatment of refugees prepared by the Secretariat, and directed the Secretariat to study further the two concepts of safety zones and the model legislation in light of the comments received.

On the 'Report on the work of the International Law Commission (ILC)' the Committee expressed its appreciation for the study and monitoring of progress at the International Law Commission at its 46th Session. The Committee commended the adoption of the draft articles on the non-navigational uses of interntional watercourses as adopted by the International Law Commission on second reading. The committee urged Member States to consider utilising the Secretariat studies and commentaries while furnishing comments on the draft articles before July 1996 to the United Nations.

On the 'Establishment of International Criminal Court', it was pointed out that equal emphasis should be placed on the completion of the work on the Draft Code of Crimes against the Peace and Security of Mankind as it might eventually be applied by the Court. The Code forms an integral part of the proposed international criminal jurisdiction. Consideration should also be given to the issues arising out of complementary jurisdictions which might become optional once the ICC is established. A widely accepted view was that pre-trial procedures concerning the international crimes within the national boundaries should be governed by the relevant domestic laws. Also, provisions concerning the relationship of the ICC with the United Nations needed consideration. Special emphasis would need to be laid on the possible implications which might flow from the role of the Security Council. It is the view of the AALCC that the role given to the Security Council in this context should in no way affect the independent functioning of the ICC.

On the 'Law of the Sea', the Committee urged the Member States who have not yet ratified the Convention on the Law of the Sea to consider doing so. It urged the full and effective participation of the Member States in the International Seabed Authority so as to ensure and safeguard the legitimate interests of the developing countries; and for the development of the principle of common heritage of mankind. The Committee reminded 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, and, for this purpose urges Member States to take an evolutionary

approach especially to the "initial function" of the authority so as to make the International Seabed Authority useful to the international community and developing countries during this initial period.

On 'Deportation of Palestinians in violation of International Law particularly the fourth Geneva Convention of 1949 and the massive immigration and settlement of Jews in the occupied territories', the Committee directed the Secretariat to continue to monitor the developments in the occupied territories and to take cognizance of the hardships suffered by Palestinian refugees.

On the "United Nations Conference on Environment and Development: Follow-up", the Committee, while recognising the importance of the work of the Commission on Sustainable Development towards the implementation of Agenda 21 programmes, invited the United Nations Environment Programme to collaborate with the AALCC in the follow-up on the United Nations Conference on Environment and Development and to continue to participate actively in the work of the AALCC in the future. The Committee also underscored the need to participate actively in the relevant meetings on environment and urged member governments to make voluntary contributions to the special fund on environment.

On the 'United Nations Decade on International Law', the Committee reaffirmed the importance of strict adherence to the principles of international law as enshrined in the charter of the United Nations and reiterated 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.

On the subject 'International Trade Law', the Secretariat presented a report on the recent legislative developments in this field, to enable Member States to keep informed with the latest developments. The organizations covered include UNCITRAL, UNCTAD, UNIDO and UNIDROIT. A Report of the seminar entitled:

"International Seminar on Globalization and Harmonization of Commercial Arbitration Law" has also been included.

As regards the follow-up of the decision taken at the Kampala Session in 1993 about shifting the headquarters of the AALCC from New Delhi to Doha, Qatar, a 'Headquarters Agreement' has been signed between the AALCC and the Government of the State of Qatar. Details relating to shifting are to be worked out between the AALCC and the Government of the State of Qatar in due course.

I believe this volume would contribute to the development of new legal frameworks and mechanisms at national, regional and international levels for the purpose of achieving dissemination, study and wider appreciation of international law especially during the United Nations Decade of International Law.

New Delhi
10 August 1995

Tang Chengyuan
Secretary-General

CONTENTS

I. Asian-African Legal Consultative Committee

(i) Introduction

The Asian-African Legal Consultative Committee, an inter-governmental organization was constituted on 15 November 1956. The founding members included: Burma (Myanmar), Ceylon (Sri Lanka), India, Indonesia, Iraq, Japan and the United Arab Republic (Now Arab Republic of Egypt and Syrian Arab Republic). The Committee has at present a membership of forty-four governments*, comprising almost all the major States from Asia and Africa. The Committee's annual sessions are generally attended by about fifty observer delegations representing governments and international organizations from all regions consistent with the global impact of its work in various fields.

A. Basic Purpose

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

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

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

B. The Secretariat

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

C. Procedure for Membership

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

D. Functions of the Committee

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

E. AALCC's Co-operation with the United Nations, its Agencies and other International Organizations

Almost simultaneously with the establishment of the Committee on a regular footing, the United Nations had evinced considerable interest in the Committee's activities and close collaboration has been developed not only through inter-Secretariat consultations but also through the Committee's participation in a number of plenipotentiary conferences convoked by the United Nations. In the year 1960 the Committee entered into official relations with the International Law Commission (ILC) in pursuance of which the Commission is traditionally represented by its Chairman at the Committee's regular sessions. The Committee is also represented by its Secretary-General at the Annual Sessions of the ILC. In 1969 the Committee was accorded the status of a participating inter-governmental organisation with the UNCTAD and in 1970 official relations between the Committee and the UNCITRAL were established. In addition, the Committee has been working in close co-operation with the United Nations High Commissioner for Refugees (UNHCR), the United Nations Environment Programme (UNEP), the International Maritime Organization (IMO), the United Nations Industrial Development Organisation (UNIDO) and the International Atomic Energy Agency (IAEA). The Committee also maintains relations with the Commonwealth Secretariat, the Hague Conference on Private International Law, the UNIDROIT, the Organisation of African Unity (QAU), the League of Arab States and other regional inter-governmental organisations.

F. Work Programme of the Committee

During the first ten years of the Committee's establishment its work programme centered on consideration of international law topics referred to the Committee by its Member Governments. Some of the topics so referred were of considerable importance to the region where uniformity of approach was desirable.

The subjects considered by the Committee during this period included Diplomatic Immunities and Privileges; Immunity of States in respect of Commercial Transactions; Extradition of Fugitive Offenders; Status and Treatment of Aliens; Dual or Multiple Nationality; Legality of Nuclear Tests and the Rights of Refugees.

Since the year 1968 the main 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 which become the subject matter 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 actively involved itself in the World Conference on Human Rights held in Vienna in 1993 and its follow-up and the follow-up work related to the United Nations Conference on Environment and Development held in Brazil in June 1992.

The Committee's activities have also been devoted to the field of international economic relations and trade law and in this area the Committee has been working closely with various United Nations other inter-governmental organisations including the UNCITRAL. In addition, special items 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 and Legal Guidelines for Privatization Programmes, 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.

G. Current Work Programme

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;

— Follow-up of the work of ILC, UNCITRAL, UNIDO and UNCTAD, Hague Conference and UNIDROIT on legal issues and preparation of notes and comments as may be necessary;

— Periodic meetings of Legal Advisers of member governments;

— Training Programme;

— Rendering of assistance by the Committee's Secretariat to a Member Government on any Subject of particular interest to that government upon request;

— Preparation of Studies on Agenda items;

— Decade of International Law;

— Status and Treatment of Refugees;

— International Rivers;

— Law of the Sea;

— Mutual Co-operation on Judicial Assistance;

— Legal Framework of the Zone of Peace;

— Indian Ocean as a Zone of Peace;

— Environmental Protection;

— Criteria for the distinction between Terrorism and People's Struggle for Liberation;

— Deportation of Palestinians as a violation of international law, particularly the 1949 Geneva Convention;

— Responsibility and Accountability of former colonial powers;

— Debt Burden of Developing Countries.

H. Publications

The emphasis in the work programme of the UN Decade of International Law has encouraged the AALCC to publish its studies on the basis of which 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 sessions for the last few years. Also a very useful publication, 'Quarterly Bulletin' is being brought out on regular basis. The Bulletin contains information on the preceding quarter about the Committee's activities, activities of the United Nations, regional and international organizations and multilateral and bilateral agreements and conventions.

I. The Statutes

The original statutes of the Asian-African Legal Consultative Committee were drawn up in 1956. Efforts have been made from time to time, especially since 1972, to revise the Statutes to bring them into conformity with the changed structure of the Organization. At the Twenty-Second Session of the Committee, held in Colombo in May 1981, action was initiated to revise the Statutes on an urgent basis which culminated in the preparation of a revised text of the Statutes by an inter-sessional meeting held in New Delhi in September 1985. The matter was discussed at the Arusha Session in February 1986 and thereafter a communication was sent to all member governments for their acceptance of the text drawn up at the inter-sessional meeting.

The text of the Statutes as drawn up at the inter-sessional meeting held in New Delhi in September 1985 was thereafter approved at the Twenty-sixth Session of the Committee held in Bangkok in January 1987. The Statutes were adopted on 12th January 1987 and have since abrogated the Statutes drawn up in 1956.

J. The Statutory Rules

The Statutory Rules of the Committee which were drawn up in April 1957 remained unaltered over the years in spite of major changes in the functioning of the Committee. A decision was taken at the Colombo Session, held in 1981, that the Rules should be revised to conform to the pattern suited to an international organization. At the Kathmandu Session, held in February 1985, it was decided to entrust the task of revision of Statutory Rules to an inter-sessional Meeting. The meeting was held in New Delhi in September 1985 which was able to adopt the revised version of the Rules 1 to 3. That meeting had also requested the Liaison Officers to prepare a revised text of the remaining provisions of the Rules for consideration of the Committee at its Arusha Session. At that Session it was pointed out that the Committee itself would have to undertake the task of revision of the Rules.

A Working Group of the Whole established at the Twenty-sixth Session of the Committee held in Bangkok in January 1987, substantially improved upon the text of the draft statutory rules drawn up by the Liasion Officers. The report of the Working Group of the Whole was considered at the Twenty-seventh Session of the Committee held in Singapore in 1988. During that Session Rule 20 relating to the Secretary-General was adopted. Thereafter at the Twenty-eighth Session held in Nairobi in February 1989, the text of the Rules was adopted and the Rules were brought into force w.e.f. 1st May, 1989.

K. Arbitration Centres

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.

These Regional Centres for Arbitration were intended to function as international institutions under supervision until they became autonomous institutions with their own governing bodies. The tasks entrusted to the Centres in the light of the overall objectives of the AALCC's dispute settlement scheme included:

(i) Providing for arbitration under the auspices and rules of the Centres;

(ii) Assistance and provision of facilities for holding of proceedings in *ad hoc* arbitrations under UNCITRAL Arbitration Rules 1976;

(iii) Assistance in the enforcements of awards;

(iv) Rendering of advice and assistance to parties who might approach the Centres;

(v) Rendering of administrative services and secretarial assistance upon request to other institutions with which appropriate arrangements may have been made in regard to arbitral proceedings under the auspices of those institutions; and

(vi) Promotion work in association with the AALCC Secretariat.

Promotional Work concerning the Centres

Although in the beginning the promotional activities in regard to the Regional Centres for Arbitration were primarily carried on by the AALCC Secretariat in view of its established contacts with Governments, governmental agencies and international institutions, over the years such activities have been left to be carried out by the Centres themselves so as to build up their image and prestige. At the inception of the Dispute Settlement Scheme, the foremost task was publicising the establishment and functioning of the Centres worldwide and this naturally required preparation and wider dissemination of promotional literature. Monographs and leaflets about the aims and activities of the Centres were prepared jointly by the AALCC Secretariat and the Cairo and Kuala Lumpur Centres and distributed widely. An international panel of arbitrators drawn not only from the Afro-Asian region, but also from countries with which the region has close trading and commercial links, was prepared and circulated to chambers of commerce and business associations worldwide. Articles were contributed by the AALCC Secretariat as well as by the Directors of the Centres to eminent arbitral journals and yearbooks. These efforts helped in making the Centres internationally known.

To make Kuala Lumpur an attractive venue for international cases in the South-East Asian region, the AALCC recommended to the Government of Malaysia to amend its Arbitration Act of 1952 to exclude arbitrations under the auspices of the Kuala Lumpur Centre from the supervision of the local courts and to accede to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Responding to

these requests, the Government of Malaysia amended its Arbitration Act in 1980 and adhered to the 1958 New York Convention in 1985.

The AALCC Secretariat has been periodically organising Seminars and International Conferences aimed at publicising the role and functions of the Regional Centres for Arbitration. In March 1984, the Secretariat in collaboration with the United Nations Commission on International Trade Law (UNCITRAL) and the Indian Council of Arbitration organised a Regional Seminar on International Commercial Arbitration in New Delhi. At this Seminar the activities of the Kuala Lumpur and Cairo Centres were highlighted. In October 1989, the Secretariat in collaboration with UNCITRAL, UNCTAD, UNIDROIT and the Indian Council of Arbitration organised a Regional Seminar on International Trade Law which included the subject of International Commercial Arbitration as one of the topics. A presentation on the role and activities of the Regional Centres was made at the Seminar.

The Secretariat in co-operation with the Indian Council of Arbitration and with the technical support of UNCITRAL, UNIDO, WIPO and the World Bank, recently organised an International Seminar on "Globalization and Harmonization of Commercial Arbitration Laws" in New Delhi from March 31 to April 1, 1995. The Directors of the Cairo and Kuala Lumpur Centres were invited to make presentations on their Centres. A report of this Seminar has been reproduced in this Report under **the subject** "International Trade Law".

L. AALCC's Data Collection Unit

During the Twenty-eighth Session of the AALCC held in Nairobi (1989) the Government of the Republic of Korea proposed the establishment of a Centre for Research and Development entrusted with the task of attempting a possible harmonization of legal regimes applicable to economic activities in the Afro-Asian region to function under the auspices of the AALCC. The Government of the Republic of Korea requested the Secretary-General to initiate a feasibility study for the establishment of the proposed Centre and placed a sum of US $ 25,000 at the disposal of the AALCC for that purpose.

Thereafter, a computerized Data Collection Unit was set up as an integral part of the AALCC Secretariat for an initial period of two years as from 1 February 1992 to serve as a storehouse of information on the economic laws and regulations of the Member States. Operational expenses of the Unit were met from the grant extended by the Government of the Republic of Korea.

A Working Group was constituted consisting of the Liaison officers of Egypt, Malaysia, the Philippines, Republic of Korea and India to oversee and advise on the technical aspects of the operations of the Unit in April 1992, pursuant to the decision of the Heads of Delegations taken at the Islamabad Session (February 1992) that the operations of the Unit should be overseen by the Liasion officers. Mr. Asghar Dastmalchi, Assistant Secretary-General, was designated as the official overall incharge of the Unit.

The Secretariat approached certain regional and international institutions which had indicated their willingness to provide to the Unit materials available with them and to cooperate with the Unit through conclusion of mutual co-operation agreements. These institutions included the United Nations Secretariat, UNCTAD, UNCITRAL, UNCTC (which has now been reorganised as the Transnational Corporations and Management Division (TCMD) of the UN Department of Economic and Social Development, the regional Economic Commissions of the United Nations, (in particular ESCAP, ECWA and ECA), the World Bank, the IMF, UNIDO, WIPO, UNIDROIT, the Hague Conference on Private International Law, the Commonwealth Secretariat and the Preferential Trade Area of the Southern and Eastern African States. Most of these institutions have forwarded valuable materials to the Secretariat.

As for conclusion of cooperation arrangements, the AALCC has already concluded such arrangements with the OAU, UNIDO and the Commonwealth Secretariat. IMF has expressed an interest in concluding a cooperation agreement once the Unit becomes fully operational.

At the Tokyo Session (January 1994) the Committee expressed its satisfaction at the progress made by the Unit and decided to absorb the Unit in the AALCC Secretariat, its operational expenses being met from the regular budget of the AALCC. The AALCC, once again, urged the Member States to cooperate with the Unit by promptly furnishing the information and materials sought by it in English language which is the official language of the AALCC including copies of bilateral or multilateral agreements concluded, ratified or acceded to by them in the field of international trade and economic relations as well as national legislations enacting such agreements. The Committee also directed the Secretariat to take active measures to publicise the existence of the Unit so that the services available in the Unit could come to the knowledge of the private companies in the Member States.

Methodology adopted in indexing the available information/ documentation and formulation of the initial database.

The information/documentation received from the Governments in the Afro-Asian region and collaborating institutions as well as those which were available in the AALCC Secretariat have been arranged under the following Classification:

Legal Framework for International Trade

A. *Standard/Model Contracts for use in International Trade.*

B. *Legal Guides, Guidelines and Model Laws.*

C. *Legal Framework for Foreign Investment in Asia-Africa*

I. Multilateral Instruments;

II. Bilateral Treaties for Promotion and Protection of Investments.

III. Investment Codes and Legislation.

IV. Legislation for export processing zones, free zones and special economic zones.

D. *Trade Expansion, Economic Cooperation and Integration:*

I. Multilateral instruments concerning trade expansion, economic cooperation and integration in Asia and Africa.

II. Bilateral Agreements concluded by Asian and African Countries.

E. *Intellectual Property Rights*

I. International and Regional Conventions;

II. National legislation regulating inventions, industrial designs, trademarks and other industrial property rights.

F. *Exchange Control Arrangements and Exchange Restrictions.*

G. *Countertrade*:

I. Legal Guides

II. Bilateral Countertrade agreements concluded by Asian and African Countries.

H. *Arbitration*

I. International Legislative Instruments;

II. National Laws and

III. Arbitration Rules.

I. International Conventions in the field of International Trade and Transport.

The abovementioned scheme of classification is intended to be revised and expanded in the light of the further information that may be received from the Governments in the Afro-Asian region and collaborating institutions. As already mentioned, the Unit has already completed the task of indexing the documentation received and gathered indicating the source of the information, but this is an ongoing work. However, the present focus has been on the establishment of a database on Legal Framework on Foreign Investment in Asia and Africa.

M. AALCC Headquarters Agreement signed with the Government of the State of Qatar on 22nd April 1995 at Doha, Qatar

In pursuance of the Decision of the Kampala Session (1993), an Agreement concerning the relocation of AALCC Headquarters was signed between the Asian-African Legal Consultative Committee and the Government of the State of Qatar on the 22nd April 1995, at Doha.

The Agreement was signed on behalf of the AALCC by the Secretary-General, Mr. Tang Chengyuan and for the Government of the State of Qatar by Sheikh Jassim Bin Nasser Al Thani, Director of the Legal Affairs Department, Ministry of Foreign Affairs, the Government of the State of Qatar.

The text of the Agreement is as follows:

Headquarters Agreement between the Government of the State of Qatar and the Asian-African Legal Consultative Committee

Whereas the Asian-African Legal Consultative Committee (referred to hereinafter as "the Committee") decided at its thirty-second session held in Kampala from 1st to 6th February 1993 to accept the offer of the Government of the State of Qatar (referred to hereinafter as "the Government") to host the Headquarters of the Committee at Doha;

Whereas Article 6 of the Revised Statutes of the Committee provides for the conclusion of the Headquarters Agreement and the establishment of the Permanent Secretariat at the Headquarters of the Committee;

Desiring to conclude an agreement to establish the Permanent Headquarters of the Committee (referred to hereinafter as "the Secretariat") at Doha and to regulate matters arising as a result thereof;

The Government and the Committee hereby agree as follows:

Article 1
Use of Terms

For the purpose of this Agreement:

(a) "the Committee" means the Asian-African Legal Consultative Committee;

(b) "the Secretariat" means the Secretariat of the Asian-African Legal Consultative Committee;

(c) "the Secretary-General" means the Secretary-General of the Committee.

Article 2
Juridical Personality

The Committee shall possess juridical personality and shall have the capacity to contract, acquire and dispose of immovable and movable property and to institute legal proceedings in its name.

Article 3
Seat of the Committee

The Committee shall have its permanent Headquarters at Doha.

Article 4
Premises of the Secretariat

The Government shall provide suitable land to build the premises of the Secretariat and other facilities at no cost to the Committee.

The Government shall also arrange with a local bank the necessary loan without interest for the purpose of building the premises of the Secretariat and other facilities.

Article 5
Property, Funds and Assets

(1) The Committee, its property and assets in the territory of the State of Qatar, shall enjoy immunity from every form of legal process, except in so far as in any particular case the Committee has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

(2) The premises of the Committee, its property and assets as well as its archives in the territory of the State of Qatar and in general all documents belonging to it wherever located and by whomsoever held shall be inviolable and be immune from search, requisition, confiscation and expropriation.

(3) The Committee may hold funds or currency of any kind and operate accounts in any currency. It shall be free to transfer its funds or currency from the State of Qatar to another country or to convert any currency held by it into any other currency.

(4) The Committee, its assets, income and other property whether owned or occupied shall be:

(a) exempt from all direct taxes. It is understood, however, that the Committee shall not claim exemption from taxes which are, in fact, no more than charges for public utility services;

(b) exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by the Committee for its official use. It is understood, however, that articles imported under such exemption shall not be sold in the State of Qatar except under conditions agreed with the Government;

(c) exempt from customs duties and prohibitions and restrictions in imports and exports in respect of its publications.

Article 6
Public Services and Utilities

The Government shall assist the Committee in obtaining for its premises, the necessary public services and utilities.

Article 7
Flag and Emblem

The Committee shall be entitled to display its flag and emblem on its premises. The Secretary-General shall be entitled to display the Committee's flag on the vehicles used by him.

Article 8

Facilities in Respect of Communications

(1) The Committee and its Secretariat shall enjoy in the territory of the State of Qatar freedom of communication and no censorship shall be applied to the official correspondence of the Committee certified as such and bearing the official seal of the Committee.

(2) The Committee shall, subject to the approval of the Government, have the right to use codes and to dispatch and receive its official correspondence by courier or in bags, which shall have the same immunities and privileges as couriers and bags of the specialized agencies of the United Nations.

Article 9

Privileges and Immunities of the Secretariat Staff

(1) International category officials of the Secretariat shall:

(a) be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;

(b) be exempt from taxation on the salaries and emoluments paid to them by the Committee on the same conditions as are enjoyed by diplomatic envoys of comparable ranks;

(c) be immune from national service obligations;

(d) be immune, together with their spouses and children, from immigration restrictions and aliens registration;

(e) be accorded the same privileges in respect of exchange facilities as are accorded to officials of comparable rank of diplomatic missions;

(f) be given, together with their spouses and children, the same repatriation facilities in time of international crises as officials of comparable rank of diplomatic missions;

(g) have the right on their first arrival to import free of customs duties, taxes and other levies, furniture, other personal and household effects to establish residence in Qatar, and the right to export with similar privileges goods thus imported at the termination of their duties with the Secretariat.

(2) The Secretary-General shall hold the rank and status of Ambassador. In addition to the privileges and immunities specified in paragraph 1 (a) to (g) of this article, he shall be accorded in respect of himself, his spouse and children such other privileges and immunities as are accorded to the heads of diplomatic missions accredited to the Government.

(3) International category officials on secondment from the Participating States shall enjoy privileges and immunities commensurate with their rank through their respective diplomatic missions accredited to the Government.

(4) International category officials other than those mentioned in paragraphs (2) and (3) shall enjoy such privileges and immunities comparable to those granted to diplomatic envoys of comparable rank in the State of Qatar.

(5) Officials who are nationals of, or permanent residents in the State of Qatar shall be immune from legal process in respect of words spoken or written by them in their official capacity.

(6) The Secretary-General shall communicate the names of the Secretariat staff included in the aforesaid categories to the Government in accordance with the Statutory Rules of the Committee.

Article 10

Privileges and Immunities of Representatives of the Participating States, Associate Participating States and Observers

(1) Representatives of the Participating and Associate Participating States, including Members, Alternate Members and experts (as referred to in Article 2 of the Statutes of the Committee) as well as observers from non-participating States and International Organizations shall, during their stay in the State of Qatar for the purposes of attending sessions, other meetings and consultations of the Committee, enjoy the following;

(a) Immunity from personal arrest or detention and from seizure of their personal baggage and immunity from legal process in respect of words spoken or written and all acts done by them in their official capacity;

(b) Inviolability of all official papers and documents;

(c) The right to receive papers or correspondence in sealed covers;

(d) Exemption in respect of themselves and their spouses from immigration restrictions, aliens registration or national service obligations;

(e) The same facilities in respect of currency or exchange restrictions as are accorded to temporary official missions;

(f) The same immunities and privileges in respect of their personal baggage as are accorded to diplomatic envoys;

(g) Such other privileges and immunities and facilities not inconsistent with the foregoing as the diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of their personal baggage) or from excise duties or sales-taxes.

Provided always that the immunities specified in the foregoing clauses can be waived in any individual case in regard to a Member, Alternate Member, expert or observer by the government of the respective Participating or Associate Participating State or by the Government of the Observer or the concerned international organization.

(2) The competent authorities in the Government shall take all necessary measures to facilitate the entry into and sojourn in the territory of Qatar and shall place no impediment in the way of departure from the host country of the persons referred to in paragraph 1 of this Article.

(3) Visas which may be required by persons referred to in paragraph 1 of this Article shall be arranged and granted without charge as promptly as possible.

(4) It is understood that persons referred to in paragraph 1 of this Article shall not be exempt from the application of the internationally accepted rules governing quarantine and public health.

Article 11

Purpose of Privileges and Immunities

Privileges and immunities accorded in this Agreement are in the interests of the Committee and not for the personal benefit of the individuals themselves.

Article 12

Waiver of Privileges and Immunities

The Committee has the duty to waive immunity in any case where the immunity would impede the course of justice and can be waived without prejudice to the purpose for which the immunity is accorded.

Article 13

Cooperation between the Committee and the Government to Facilitate the Administration of Justice

(1) The Committee shall cooperate at all times with the appropriate authorities of the Government to facilitate the proper administration of justice, secure the observance of local laws and regulations and prevent any abuse of the privileges, immunities and facilities granted under this Agreement.

(2) If the Government considers that there has been abuse of any privilege or immunity conferred by this Agreement, consultations shall be held between the Government and the Committee to determine whether any such abuse has occurred and if so, the Committee shall take necessary measures to remedy the situation and to ensure that no repetition occurs.

Article 14

Identity Cards

The Secretariat staff shall be provided by the Government with a special identity card certifying the fact that they are officers or staff members of the Committee, enjoying the privileges and immunities specified in this Agreement.

Article 15

Interpretation

This Agreement shall be interpreted in the light of its primary objective and sole purpose of only enabling the Committee at its Headquarters at Doha to fully and efficiently discharge its responsibilities and fulfill its purposes and functions.

Article 16

Settlement of Disputes

(1) The Committee shall, by agreement with the Government, make provision for appropriate modes of settlement of :

(a) disputes arising out of contracts or other disputes of a private law character to which the Committee is a party;

(b) disputes involving any official of the Committee, who by reason of his official position enjoys immunity, if immunity has not been waived by the Committee.

(2) All differences arising out of the interpretation or application of the present Agreement shall be settled by mutual consultations between the parties unless in any case it is agreed by the parties to have recourse to another mode.

Article 17

Supplementary Agreements

The Government and the Committee may enter into such supplementary agreement (s) as may be necessary to fulfill the purposes of this Agreement.

Article 18

Entry Into Force

(1) This Agreement shall enter into force on signature.

(2) This Agreement may be terminated by agreement between the Government and the Committee.

In witness whereof the respective representatives of the Government and the Committee have signed this Agreement.

Done in duplicate at Doha this day Saturday 22nd of April 1995 in English and Arabic languages. In case of doubt the English text shall prevail.

(ii) Cooperation between the United Nations and the Asian-African Legal Consultative Committee

The General Assembly, by its resolution 35/2 of 13 October 1980, invited the Asian African Legal Consultative Committee (AALCC) to participate in its sessions and its work in the capacity of observer. A Permanent Observer Mission to the United Nations was thereafter established in New York. On the occasion of the commemoration of the Committee's twenty-fifth anniversary the Assembly, in its resolution 36/38 of 18 November 1981, requested the Secretary-General of the United Nations to carry out consultations with the Secretary-General of AALCC with a view to strengthening further and widening the scope of cooperation between the two organizations. In its resolution 39/47 of 10 December 1984, the Assembly commended AALCC for orienting its programme to strengthening its supportive role to the work of the United Nations in wider areas. The item had been considered by the Assembly annually until its forty-first session and then at its forty-third, forty-fifth and forty-seventh sessions.

In its resolution 47/6, the General-Assembly, inter alia, noted with satisfaction the continuing efforts of AALCC towards strengthening the role of the United Nations and its various organs, including the International Court of Justice, through programmes and initiatives undertaken by the Committee; the commendable progress achieved towards enhancing cooperation between the United Nations and AALCC in wider areas; and the decision of AALCC to participate actively in the programmes of the United Nations Decade of International Law. The Assembly decided to include the item entitled "Cooperation between the United Nations and the Asian-African Legal Consultative Committee" in the provisional agenda of its forty-ninth session.

Consultations on Matters of Common Interest

Pursuant to the cooperation framework agreed upon by the two organizations, consultations have routinely been held on matters of common interest, 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. During the period under review, meetings were held between the Secretary-General of the United Nations and the Secretary-General of AALCC. Pursuant to those 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 as well as in the field of international law.

Representation at Meetings and Conferences

During the period under review, AALCC was represented at various meetings and conferences held under the auspices of the United Nations and its organs and agencies, including the regular sessions of the General Assembly, the International Law Commission, the United Nations Commission on International Trade Law (UNCITRAL), the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea, the informal consultations on the Law of the Sea, the Preparatory Committee for the World Conference on Human Rights, the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, the 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, the Inter-governmental Committee for a Framework Convention on Climate Change, and the Commission on Sustainable Development.

At its thirty-second session held in 1993 at Kampala, AALCC established an open-ended Working Group on Human Rights with the mandate of preparing a draft declaration on human rights, which was subsequently adopted as the Kampala Declaration on Human Rights. The text was circulated at the fourth session of the Preparatory Committee for the World Conference on Human Rights.

The thirty-third session of AALCC was held in Tokyo in January 1994 and was attended by a representative of the U.N. Secretary-General, the Chairperson of the Sixth Committee of the General Assembly, the Chairman of International Law Commission and representatives of UNHCR and the World Bank.

Consideration of the item at the 49th Session of the General Assembly (1994)

On October 25, 1994, the 43rd Plenary Meeting of the Forty-ninth Session of the General Assembly of the United Nations reviewed the Agenda item 20 entitled "Co-operation between the United Nations and the Asian-African Legal Consultative Committee". The Report of the Secretary-General of the United Nations (Document A/49/262) and Draft Resolution (A/49/L.4) on this item had already been circulated to the delegates.

The representative of Japan made a statement in the course of which he introduced draft resolution (A/49/L.4) which was sponsored by China, Cyprus, Egypt, India, Indonesia, Japan, Kenya, Nigeria, Pakistan, Philippines, Qatar, Sudan and Uganda. Statements were also made by the representatives of Germany (on behalf of the European Union and Austria), Indonesia, Sri Lanka, Egypt, India, Pakistan and China.

In accordance with General Assembly resolution 35/2 of 13 October 1980, the Secretary-General of the Asian-African Legal Consultative Committee made a Statement.

Mr. C. Yamada (Japan) stated that since the granting of observer status to the AALCC, co-operation between the two organizations had grown. Currently, 44 countries were members of the Consultative Committee. He reviewed the AALCC's work on refugees and displaced persons, and in other areas. The Member States of the AALCC hoped for future growth

and expansion of co-operation with the United Nations. He hoped the draft resolution would receive unanimous approval.

Mr. Ernest Martens (Germany) speaking on behalf of the European Union and Austria, welcomed the activities of the AALCC in regard to the work of the Sixth Committee (Legal) and the United Nations Decade of International Law. In his view, the Committee's regional arbitration centres in Kuala Lumpur and Cairo had contributed to the settlement of disputes in economic and commercial transactions. He supported the opening of another centre in Nairobi. He was also of the view that many other aspects of the Committee's work, such as that connected with refugees, were directly relevant to the work of the United Nations and its agencies. He looked forward to the forthcoming AALCC study on Modular Legislation on the Rights and Duties of Refugees.

Mr. Gatot Suwardi (Indonesia) stated that the AALCC undertook work that was supportive of the United Nations in areas of the ratification of major conventions and treaties, and rendering assistance to the developing countries concerning items before the Sixth Committee. Indonesia, attaching great importance to the Law of the Sea, had suggested that the item be included on the AALCC agenda. The AALCC's initial work in that area had been to assist developing countries in their efforts relating to the United Nations Conference on the Law of the Sea. Since then it had focussed on the exclusive economic zone, breadth of the territorial sea, archipelagos, straits used for international navigation, marine population and scientific research. It had also supported the ratification and entry into force of the Convention on the Law of the Sea.

Generally, the AALCC had broadened its objectives to provide a forum for co-operation in trade and economic relations, he continued. In the field of economic and commercial transactions, two regional centres had been established, one in Kuala Lumpur and another in Cairo. Reviewing the AALCC's work in areas such as refugee problems and the control of narcotic drugs and psychotropic substances, he said that the AALCC had benefited the countries of the Asian-African Region, and had also had impact in projecting the interests of the international community.

Mr. Stanley Kalpage (Sri Lanka) said that the AALCC had developed as an invaluable forum for its members to discuss contemporary issues of international law and to provide an Asian-African dimension in the progressive development and codification of such laws. The AALCC's greatest impact had been made through its work relating to the Conference on the Law of the Sea; the Committee had a continuing crucial role to

play in that field. Noting the work undertaken in co-operation with the United Nations; he said, the work on the preparation of model legislation on the status and treatment of refugees, the examination of the novel concept on the establishment of a safety zone for displaced persons in their country of origin, would have a positive impact on the emerging law in those areas. Continuing co-operation between the United Nations and the AALCC was imperative if the Committee was to continue to discharge its invaluable task.

Mr. Karem Mahmoud (Egypt) said his country had always worked in close co-operation with the AALCC. The regional centre for arbitration in Cairo had made a great contribution. Egypt reaffirmed its full support for the work of the Committee.

Mr. Bhubaneswar Kalita (India) said the AALCC acted as a forum to project the views of Asian and African States in the evolution of new international legal regimes to suit the needs of the developing countries and the changed character of the international society. At a recent ministerial meeting of the Non-Aligned Movement, ministers had called upon the Secretariat to assist in reviewing ongoing codification and changes in international law in different spheres. He suggested that the co-operation between the United Nations and the AALCC should cover, as a matter of priority, the request made by the Non-Aligned Movement to the Secretariat. The Committee's work on International Economic Co-operation for Development was an area of special interest. The AALCC played a useful role in promoting the understanding by developing countries of developments in international law.

Mr. Khalid Jawed Khan (Pakistan) supported the draft resolution and noted with satisfaction the continuing efforts of the Committee towards strengthening the role of the United Nations and its various organs. The areas of co-operation between the two organizations had significantly widened and now covered matters in economic and humanitarian fields, as well as international law. His country attached importance to the active participation of the Committee in the sessions of the General Assembly, the International Law Commission, the United Nations Commission on International Trade Law (UNCITRAL) and in matters pertaining to the Law of the Sea. It also commended promotion by the Committee of wider recourse to the International Court of Justice. The establishment of two regional arbitration centres at Kuala Lumpur and Cairo for the settlement of disputes in economic and commercial transactions was a welcome step. Bilateral agreements for promotion and protection of investments generated wider flow of capital and technology to the

developing countries in the Asian-African region. Pakistan also welcomed the initiative of the Committee to prepare a legal guide on joint ventures, similar to the one prepared by UNCITRAL on drawing up international contracts for industrial works.

Mr. Li Zhaoxing (China) said that the AALCC had increased its influence in the international arena and made important contributions to the progressive development and codification of international law. Since 1980, the co-operation between the United Nations and the AALCC had grown closer. The AALCC had adjusted its work programme to give high priority to matters of immediate concern to the United Nations and attached great importance to its co-operation with the International Law Commission. In support of the decision by the General Assembly to hold a Decade of International Law, the AALCC had identified issues involved in and possible activities for the Decade. With the Government of Qatar, the AALCC had held a meeting on international law in Doha, in March 1994, to promote the Decade. The AALCC had also urged its members to accede to or ratify as soon as possible the United Nations Convention on the Law of the Sea. It continued to give priority to the international instruments adopted at the United Nations Conference on Environment and Development (UNCED), especially the implementation of Agenda 21. The AALCC had attended many international meetings in the field of environment and development, especially the meetings of the Inter-governmental Negotiating Committee to elaborate an International Convention to Combat Desertification. China hoped that the effective co-operation between the United Nations and the AALCC would be further strengthened.

Mr. Tang Chengyuan, Secretary-General of the AALCC, said the Committee had co-operated with the International Law Commission since its inception. It had provided assistance to the delegations of its Member States attending diplomatic conferences convened by the United Nations. In the context of the Third United Nations Conference on the Law of the Sea the Committee had also emerged as a global forum for the dialogoue between the industrialized and developing countries. Such concepts of the Convention on the Law of the Sea as the exclusive economic zone and archipelagic states had originated in its deliberations. The activities of the AALCC in the sphere of economic relations and trade law had also been complementary to the work of the United Nations, to the United Nations Conference on Trade and Development (UNCTAD) and to United Nations on International Trade Law (UNCITRAL). A Special Meeting on Privatization, convened by the AALCC in Tokyo in January, 1994 had

produced a text for legal and institutional guidelines for privatization programmes.

Lately the AALCC had focussed attention on the efforts of the United Nations in such areas as the Agenda for peace, Environment and Sustainable Development, international protection of refugees and the human rights. Referring to the Conference on International Legal Issues organised in co-operation with Qatar in March 1994, he said it had deliberated on such matters as the protection of the environment, peaceful settlement of disputes, the new international economic order and humanitarian law. The AALCC had also participated in the UNCED which had culminated in the adoption of Agenda 21, and the international conventions on climate change and biological diversity. It had attended the World Conference on Human Rights in Vienna in 1993 and had also been working with both the United Nations High Commissioner for Refugees (UNHCR) and the OAU for the development of international refugee law. At present, it was focussing on the establishment of safety zones for displaced persons and on the formulation of model legislation on refugee protection.

The Assembly then adopted, without a vote, the resolution 49/8 on co-operation between the United Nations and the AALCC, as orally amended. By the terms of the resolution, the General Assembly noted with satisfaction the continuing efforts of the AALCC towards strengthening the role of the United Nations and its various organs, including the International Court of Justice, through programmes and initiatives undertaken by the Consultative Committee. The Assembly also noted with satisfaction the progress towards enhancing co-operation between the two organizations in wider areas. The Assembly noted with appreciation the decision of the Committee to participate actively in the programmes of the United Nations Decade of International Law and of Environment and Sustainable Development. While requesting the Secretary-General to submit a report on continued co-operation at its fifty-first session, the Assembly decided to include in the provisional agenda of that session the item on co-operation between the United Nations and the AALCC.

Co-operation between the United Nations and the Asian-African Legal Consultative Committee, Resolution 49/8 adopted on 25 October 1994

The General Assembly

Recalling its resolutions 36/38 of 18 November 1981, 37/8 of 29 October 1982, 38/37 of 5 December 1983, 39/47 of 10 December 1984, 40/60 of 9 December 1985, 41/5 of 17 October 1986, 43/1 of 17 October 1988, 45/4 of 16 October 1990 and 47/6 of 21 October 1992.

Having considered the report of the Secretary-General on co-operation between the United Nations and the Asian-African Legal Consultative Committee.

Having heard the statement made by the Secretary-General of the Asian-African Legal Consultative Committee on the steps taken by the Consultative Committee to ensure continuing, close and effective co-operation between the two organizations,

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

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

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

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

5. *Requests* the Secretary-General to submit to the General Assembly at its fifty-first session a report on co-operation between the United Nations and the Consultative Committee;

6. *Decides* to include in the provisional agenda of its fifty-first session the item entitled "Co-operation between the United Nations and the Asian-African Legal Consultative Committee".

(iii) AALCC's Legal Adviser's meeting, New York : 27th October 1994

The AALCC Legal Adviser's Meeting was convened at the United Nations Headquarters in New York on 27th October 1994, under the Chairmanship of Mr. Chusei Yamada, Ambassador of Japan to India and the then President of the AALCC. The representatives from the following member and associate Member States participated in the meeting:— Bangladesh, China, Egypt, Ghana, India, Indonesia, Japan, Jordan, Libya, Malaysia, Myanmar, Nigeria, Pakistan, Philippines, Qatar, Republic of Korea, Saudi Arabia, Senegal, Uganda, Yemen and Botswana.

Permanent Observer: Australia

Non-Member States: Algeria, Canada, France, Malawi, Mexico, Morocco, Mozambique, Namibia, South Africa, Togo, Tunisia, United Kingdom, Zimbabwe.

Mr. Hans Corell, the Legal Counsel of the United Nations spoke on the topic 'Law of the Sea'. He stated that the entry into force of the Convention on the Law of the Sea would have impact on the activities of the United Nations in two major areas, one being the establishment of new institutions under the Convention, and the other being activities and functions to be carried out by the Secretary-General in direct response to and in accordance with provisions of the Convention. He said in the past, the Secretary-General of the United Nations had emphasized that the Law of the Sea was a specialized field of international relations on a global scale, encompassing important aspects of international law, political considerations and economic and social dimensions. This fact remained as true and valid as ever. He expressed the hope that AALCC would continue to support the implementation of the Convention on the Law of the Sea and fully carry out the mandate of the Secretary-General in that regard.

The President of the International Court of Justice, Mr. Mohammed Bedjaoui made a reference on some problems relating to the implementation of the decisions of the International Court of Justice. He said that it was no use wasting capital and energy if the final decision of the ICJ in general and in the peaceful settlement of disputes was not executed through the legal system. The decisions often were in the nature of advice, consultative opinions, which could be binding or decisive.

In this regard, he referred to the Headquarter's Agreement between the U.N. and the U.S.A. (Section 21) and the Convention on Privileges and Immunities of the U.N. (Section 30). He also touched upon the awards and ordinances of the Court and made mention of Articles 59, 60 of the Court's Statute. Speaking about the implementation of the Court's decisions he touched upon Article 93 of the Charter of the U.N. dealing with Member and Non-member States, Parties to the U.N. Charter and/ or to the ICJ and those not Parties thereto. He also referred to the territorial and border disputes and cited examples of Libya and Chad; Burkina Faso and Mali. Implementation difficulties were found in the case of Military and para-military activities in Nicaragua (Nicaragua versus US).

The Charter offered a mechanism through which a State with the help of the Security Council can obtain the implementation of the Court's order but there too the veto power intervened.

The Chairman of the International Law Commission, Prof. Vereschetins, while stressing the relationship between the ILC and AALCC introduced the development of a new constitutional law in Russia.

The Deputy Director of UNHCR liaison office at the UN Ms. Pirkko Kourula, said the long standing co-operation between the AALCC and UNHCR had always been most fruitful. She expressed "there is a continued need to develop legal norms and establish new standards for addressing the protection of uprooted populations and for searching durable solutions to their plight, we have no doubt that the AALCC's contribution to the development of such norms and standards will continue to be significant.

The Chairman of the Sixth Committee informed the meeting about the work carried out by the Sixth Committee and pointed out the documents being recommneded for adoption.

The Legal Advisers of India and China also addressed the meeting. They emphasised upon the significance and benefit of the meeting as well as the important role played by AALCC in respect of its efforts to popularise the rule of law in the Member States. They asked some questions relating to the recent development in the Russian Constitutional Law and the Convention on the Safety of United Nations and Associated Personnel.

The Secretary-General of the AALCC in his statement referred to the important legal issues on which the AALCC was presently focussing.

II. Law of the Sea

(i) Introduction

The topic 'Law of the Sea' was first taken up for study by the AALCC in 1970 at the initiative of the Government of Indonesia and has thereafter remained a priority item at the regular Sessions of the Committee. It has also been the subject of discussion at inter-sessional and working group meetings. Initially conceived as a programme of rendering assistance to Asian-African governments to prepare themselves for the Third United Nations Conference on the Law of the Sea through preparation of background papers and provision of opportunities for indepth discussions, the Committee has gradually emerged as a useful forum for a continuing dialogue on some of the major issues on this subject. Subsequent to the adoption of the United Nations Convention on the Law of the Sea 1982, the Committee at its Twenty-thjird Session held in Tokyo in May 1983, approved the future programme of work on this subject. This included a comprehensive set of broad issues such as (1) The encouragement of taking steps towards ratification of the Convention; (2) Undertaking of studies from time to time on specific matters or issues of practical importance to member governments for the purposes of the implementation of the Convention; (3) Assistance to Governments in regard to the work of the Preparatory Commission; and (4) The examination of the question of promoting regional or sub-regional co-operation taking into account the interests of landlocked and geographically disadvantaged States.

Four specific topics were subsequently included in the programme of work and discussed at the Kathmandu (1985) and Arusha (1986) Sessions on the basis of preliminary papers prepared by the Secretariat. Among the four topics included in the programme of work was an item entitled 'Report on the Progress of Work at the PREPCOM', established in accordance with the Resolution I of the Third United Nations Conference on the Law of the Sea. This item had been considered at successive sessions of the Committee.

The item was last considered at the Thirty-third Session of the Committee held in Tokyo in 1994 whereat the Committee considered the Secretariat brief on the progress of work in the Preparatory Commission for the International Seabed Authority and the International Tribunal for the Law of the Sea and the informal consultations under the auspices of the Secretary-General aimed at promoting dialogue and at addressing issues of concern to some States in order to achieve universal participation in the Convention. The Committee at that Session *inter alia* decided to inscribe on the agenda of its Thirty-fourth Session an item entitled "Implementation of the Law of the Sea Convention, 1982". The latest brief seeks to furnish an overview of some developments in the matters relating to the Law of the Sea.

This subject matter is one in which all the Member States of the AALCC are deeply interested and the significance of ratifying the Convention on the Law of the Sea cannot be over emphasized. This endeavour has hitherto been a modest step in the AALCC Secretariat's resolve to underscore the unified character of and to promote the universal adherence to the UN Convention on the Law of the Sea, 1982.

Thirty-fourth Session : Discussions

Introducing the item the *Deputy Secretary-General* (Mr. Essam Abdel Rehman Mohammed) recalled that the Committee at its Thirty-third session had *inter alia* decided to inscribe on the agenda of the Thrity-fourth session an item entitled "Implementation of the Law of the Sea Convention, 1982 and that the brief of documents prepared by the Secretariat Doc. AALCC/XXXIV/95/5 and 5A furnished an overview of developments relating to the entry into force of the United Nations Convention on the Law of the Sea, the establishment of the International Seabed Auhtority and the establishment of the International Tribunal for the Law of the Sea. Recalling that the Convention had entered into force on November 16, 1994, he pointed out that the General Assembly had in July 1994 adopted the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, 1982. Pointing out that the July Agreement and Part XI of the Convention on the Law of the Sea were to be interpreted and applied together as a single instrument and that in the event of any inconsistency between the Agreement and Part XI of the Convention the provisions of the former instrument are to prevail, he said that the Agreement relates to nine matters viz. (i) Costs to State Parties and institutional Arrangements; (ii) The Enterprise; (iii) Decision-making; (iv) Review Conference; (v) Transfer of Technology;

(vi) Production Policy; (vii) Economic Assistance; (viii) Financial Terms of Contracts and (ix) the Finance Committee.

Turning to the International Seabed Authority he said that the first session of the Authority held in November 1994 to coincide with the entry into force of the Convention was largely ceremonial. The second session of the International Seabed Authority held in March 1995 concluded with the adoption of the rules of procedure. Although the issue of election of the 36 members of the Council of the Seabed Authority had generated a lot of debate no consensus was reached.

The *Observer for the International Ocean Institute* (Mrs. Mann Borgese) said that the entry into force of the UN Convention on the Law of the Sea, 1982 was surrounded by developments which pose new challenges. In her view the Agreement relating to Part XI of the Convention was seriously flawed and did not conform to the highest standards of international law. The Agreement of July 1994 had created an International Seabed Authority which was not viable mainly because the Agreement generated contradictions and weaknesses. The difficulties expressed in the election of the members of the Council in March 1995 demonstrated their infirmity. She pointed out in this regarde that although the category of States to be included in the Council is taken from the Convention these categories of States are now treated as Chambers not only with regard to voting but even as regards the mode of their election. The chambers are in fact self-elected, since each group of States that qualified for each 'chamber' is allowed to nominate only as many candidates as will constitute that chamber. All the Assembly can do is, not to elect the members of the Council, but to rubber-stamp a self-election by the States that are to constitute the chambers. She emphasized that the danger on the horizon is that the Seabed Authority may come to be considered dysfunctional and die a quiet death. The Seabed Authority she stated is the only existing institutional embodiment of the principle of the Common heritage of Mankind. Advocating an evolutionary approach she said that the plan for the joint exploration of a first mine site for the Enterprise should be implemented if the Seabed Authority is to survive.

Referring to the dangers to the Law of the Sea Convention particulalry Part V thereof she proposed the strengthening of regional fisheries organizations within the context of regional co-operation and organization.

Mrs. Borgese stated that the process of ratification and implementation of the Law of the Sea Convention had been overtaken by the UNCED and that the confluence of UNCLOS and UNCED had not only reinforced each other but also begin to transform the UN system. The UNCLOS and

UNCED Conference had generated the Commission for Sustainable Development and added a new dimension to the UN structure.

The *Delegate of Ghana* stated that there was a lesson to be learnt from the impasse in the election of the members of the Council of the International Seabed Authority. The lesson for the developing countries was that they should endeavour to ensure that their interests are adequately considered and accepted in the formulation of international instruments that affect their interests. The interests of the developing countries should not be ignored and conclusions arrived at.

The *Delegate of India* endorsed the views expressed by the Chairperson of the International Ocean Institute and said that the International Seabed Authority was the embodiment of the principle of Common Heritage of Mankind. He emphasized that the impasse in the election of the Members of this Council of the Seabed Authority was bewildering. He took the view that the developing countries should not allow the Seabed Authority to dissipate and that the AALCC could play a significant role in this matter.

The *Representative of the Legal Counsel of the United Nations* stated that the election of the judges of the International Tribunal for the Law of Sea would be held in 1996 and that the Secretariat of the UN had already circulated a note inviting nominations from Member States of the UN.

(ii) Decision on the "Law of the Sea"

(Adopted on 22nd April 1995)

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

Having considered the Secretariat Brief on "The Law of the Sea" contained in documents number AALCC/XXXIV/DOHA/95/5 and 5A.

Having heard the comprehensive statement of Mrs. Elizabeth Mann Borgese the Chairperson of the International Ocean Institute;

1. *Notes* with great satisfaction that the United Nations Convention on the Law of the Sea entered into force on 16 November 1994;
2. *Notes* also the Establishment of the International Seabed Authority;
3. *Satisfied* with the decision relating to the Establishment of the International Tribunal for the Law of the Sea;
4. *Urges* the Member States who have not already done so to consider ratifying the Convention on the Law of the Sea;
5. *Expresses* its appreciation to the Secretariat of the Asian-African Legal Consultative Committee for the comprehensive brief and for its representation at the resumed sessions of the International Seabaed Authority held in March 1995;
6. *Urges* the full and effective participation of the Member States in the International Seabed Authority so as to ensure and safeguard the legitimate interests of the developing countries, and for the development of the principle of the Common Heritage of Mankind;

7. *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, and for the this purpose urges member States to take an evolutionary approach especially to the "initial function" of the Authority so as to make the International Seabed Authority useful to the international community and developing countries during this initial period;

8. *Urges* Member States to co-operate in regional initiative for the securing of practical benefits of the new ocean regime;

9. *Directs* the Secretariat to continue to co-operate with such international organiations as are competent in the fields of ocean and marine affairs and to consider assisting Member States in their representation at the ISBA.

10. *Decides* to inscribe on the agenda of its Thirty-fifth Session an item entitled "Implementation of the Law of the Sea Convention, 1982".

(iii) Secretariat Brief
The Agreement Relating to Part XI of the Convention on the Law of the Sea

The item "Law of the Sea" has been on the agenda of the General Assembly since its thirty-seventh session (1982) when it (the General Assembly) *inter alia* approved the assumption by the Secretary-General of the responsibilities entrusted to him under the United Nations Convention on the Law of the Sea, 1982, and the related resolutions adopted by the Third United Nations Conference on the Law of the Sea (hereinafter called UNCLOS III) in December 1982. By its resolution 37/66 the General Assembly authorized the Secretary-General to convene the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea (hereinafter referred to as the Preparatory Commission or PREPCOM) as provided for in Resolution I adopted by UNCLOS III and approved the financing of the expenses of the PREPCOM from the regular budget of the United Nations. The General Assembly has thereafter continued its consideration of the question at its successive sessions.

In the course of its consideration of the item at its forty-eighth session, the General Assembly had *inter alia* expressed its satisfaction at the increasing support for the Convention as evidenced by the one hundred and fifty-nine signatures and sixty ratifications or accessions required for entry into force of the Convention[1]. The Convention entered into force on

1. The Convention has since its adoption in 1982, been ratified by 71 States viz. Angola, Antigua and Barbuda, Australia, Bahamas, Bahrain, Barbados, Belize, Bouwana, Brazil, Bosnia and Herzegovina, Cameroon, Cape Verde, Comoros, Costa Rica, Cote d'Ivoire, Cuba, Cyprus, Djibouti, Dominica, Egypt, Fiji, Gambia, Germany, Ghana, Grenada, Guinea, Guinea-Bissau, Guyana, Honduras, Iceland, Indonesia, Iraq, Jamaica, Kenya, Kuwait, Macedonia, former Yugoslav Republic

November 16, 1994 and it may be stated that the resolution adopted by the forty-ninth session of the General Assembly *inter alia* expressed its profound satisfaction at the entry into force of the Law of the Sea Convention. By its resolution 49/28 the General Assembly called upon all States that had not already done so to become parties to the Convention and the Agreement Relating to the Implementation of Part XI of the Convention[2] in order to achieve the goal of universal participation. The Assembly while reaffirming the unified character of the Convention called upon States to harmonize legislation with the provisions of the Convention and to ensure consistent application of those provisions. The General Assembly also expressed its satisfaction at the establishment of the International Seabed Authority and at the progress being made in the establishment of the International Tribunal for the law of the Sea and the Commission on the Limits of the Continental Shelf.

General Assembly resolution viz. 48/28 had noted with appreciation the developments and the active participation of States in the consultations convened under the auspices of the Secretary-General aimed at promoting a dialogue and addressing issues of concern to some States in order to achieve universal participation in the Convention. The General Assembly resolution had then invited all States to participate in the consultations held under the asupices of the Secretary-General and to increase efforts to achieve universal participation in the Convention as early as possible. Paragraph 20 of that resolution had requested the Secretary-General to "continue and to accelerate the consultations in order to achieve universal participation in the Convention, as early as possible".

Pursuant to that mandate the Secretary-General convened consultations during 1994. At the end of the round of consultations held between May 30 and June 3 1994 the Member States indicated that they wished to convene a resumed forty-eighth session of the General Assembly of the United Nations from 27 July to 29 July, 1994 for the adoption of a resolution. They also wished that following the adoption of the resolution the "Agreement" be immediately opened for signature. Accordingly, a resumed forty-eighth session of the General Assembly was convened and

of, Mali, Malta, Marshall Islands, Mauritius, Mexico, Micronesia Federal States of, Namibia, Nigeria, Oman, Paraguay, Philippines, Saint Kitts and Nevis, Saint Lucia, Saint Vincent & The Grenadines, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone Singapore, Somalia, Sri Lanka, Sudan, Togo, Trinidad and Tobago, Tunisia, Uganda, Uruguay, United Republic of Tanzania, Vietnam, Yemen, Yugoslavia, Zaire, Zambia and Zimbabwe.

2. The Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea was adopted by General Assembly Resolution 48/263 on July 28, 1994.

by its resolution 48/263 adopted the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, 1982 (hereinafter referred to as the Agreement) the text of which (Agreement) was annexed to the resolution.[3] The Resolution *inter alia* called upon States which consent to the adoption of the Agreement to refrain from any act which would defeat its object and purpose and decided to fund the administrative expenses of the International Seabed Authority in accordance with section I Paragraph 14 of the Annex to the Agreement. This note endeavours to furnish an overview of the Agreement adopted by the resumed forty-eighth session of the General Assembly and the subsequent developments.

THE AGREEMENT

The Agreement relating to the implementation of Part XI of the UNCLOS *inter alia* signed by 68 States[4] and one international organization[5] calls upon the States Parties to the Agreement, to undertake to implement Part XI of the UN Convention on the Law of the Sea, in accordance with the Agreement. It stipulates that the Annex to the Agreement forms an integral part of the Agreement.[6]

The driving spirit of the articles and the Annex thereto may be found in preambulatory paragraphs 5, 6 and 7 of the Agreement wherein the States Parties noting the political and economic changes, including market-oriented approaches, affecting the implementation of Part XI of the Convention, and wishing to facilitate universal participation in the Convention, consider that an agreement relating to the implementation of Part XI would best meet that objective. Article 8 of the Agreement describes the term "States Parties" to this Agreement to mean States which have consented to be bound by this Agreement and for which (States) this

3. The resolution was adopted by a vote of 121 in favour none against and 7 abstentions.

4. The States Signatories to the Agreement are:—
Algeria, Argentina, Australia, Austria, Bahamas, Barbados, Belgium, Belize, Brazil, Canada, Cape Verde, China, Cyprus, Czech Republic, Denmark, Fiji, Finland, France, Germany, Greece, Grenada, Guinea, Iceland, *India, Indonesia*, Iceland, Italy, Jamaica, *Japan, Kenya*, Laos (People's Democratic Republic), Luxembourg, *Malaysia*, Maldives, Malta, Mauritania, Micronesia (Federated States of), Mongolia, Morocco, Namibia, Netherlands, New Zealand, *Nigeria, Pakistan*, Paraguay, *Philippines*, Poland, Portugal, *Republic of Korea, Senegal*, Seychelles, Slovakia, South Africa, Spain, *Sri Lanka, Sudan*, Swaziland, Sweden, Switzerland, Togo, Trinidad and Tobago, *Uganda*, United Kingdom, *United Republic of Tanzania*, United States of America, Uruguay, Vanuatu, Zambia, and Zimbabwe.

5. The European Community.

6. See Article 1 of the Agreement entitled "Implementation of part XI.

Agreement is in force. Paragraph 2 of Article 8 of the Agreement further provides that the Agreement applies *mutatis mutandis* to the following viz. (i) Self-governing associated States; (ii) all territories which enjoy full internal self-government; and (iii) relevant international organizations which become parties to the Agreement in accordance with the conditions relevant to each.

Article 2 of the Agreement defines the Relationship between the Agreement and Part XI. Paragraph 1 of Article 2 of the Agreement stipulates that the provisions of the Agreement be interpreted and applied together as a single instrument. It further provides that "in the event of any inconsistency between this Agreement and Part XI, the provisions of this Agreement shall prevail". The present Agreement, therefore, explicitly restricts its ambit and scope of application to Part XI of the Convention and the Annexes III and IV related thereto. A careful perusal of both the resolutions adopted by the General Assembly and the provisions of the Agreement as adopted in July 1994 would reveal that the remaining sixteen parts of the Convention remain unaffected and shall continue to be the governing principles and rules relating to such maritime areas as the territorial seas and contiguous zones of coastal States, the exclusive economic zone, the continental shelf, and the high seas as well as such issues as the right of access of land-locked States to and from the sea and freedom of transit, the protection and preservation of the marine environment; marine scientific research and the settlement of disputes. Nor do the provisions of the current Agreement affect the general or final provisions of the Convention. On the contrary, the Agreement explicitly refers to several provisions of Part XVII of the Convention (Final Provisions) as being applicable to it. The sum and substance of the foregoing is that the rights, and of course the concomitant obligations, that States derived from the UN Convention on the Law of the Sea 1982 remain unaltered. It is the provisions relating to the exploration and exploitation of the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction—commonly referred to as the Area—alone, viz., Part XI which are to be interpreted and applied together with the present Agreement as a single instrument. It may be stated that it follows therefrom that the Agreement *per se* does not seek to alter, amend, add or subtract from the provisions of the UN Convention on the Law of the Sea relating to the *nature* of the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction. This Area as well as of the resources thereof shall, as heretofore, continue to be the common heritage of mankind. It may be recalled that preambulatory paragraph 2 both of the resolution adopted by the General Assembly at its resumed forty-eighth session, as well as of the Agreement relating to the Implementation of Part XI of the Convention reaffirm the principle of 'common heritage of mankind' and lend credence to the above inference.

Paragraph 2 of Article 2 of the Agreement then goes on to stipulate that the provisions of Article 309 (Reservation and Exceptions); Article 310 (Declarations and Statements); Article 311 (Relation to other conventions and other international agreements); Article 312 (Amendment); Article 313 (Amendment by simplified procedure); Article 314 (Amendments to the provisions of this Convention relating exclusively to activities in the Area); Article 315 (Signature, ratification of, accession to and authentic texts of amendments); Article 316 (Entry into force of amendments); Article 317 (Denunciation); Article 318 (Status of Annexes); and Article 319 (Depositary) of Part XVII (Final Provisions) of the United Nations Convention on the Law of the Sea, 1982 shall apply to this Agreement as they do to the Convention. Some observations on the provisions of the Annex may be found in the next section of this brief.

The pith and substance of Article 2 of the Agreement is that it effectively amends the deep seabed mining provisions in Part XI of the United Nations Convention on the Law of the Sea, having stipulated that the provisions of the Annex to the Agreement relating to nine matters listed in the Annex viz. (i) Costs to State Parties and Institutional Arrangements; (ii) The Enterprise; (iii) Decision-making; (iv) Review Conference; (v) Transfer of Technology; (vi) Production Policy; (vii) Economic Assistance, (viii) Financial Terms of Contract; and (ix) the Finance Committee, shall prevail (upon the existing provisions of Part XI of the Convention).

Article 3 of the Agreement provides that the Agreement shall remain open for signatures at the United Nations Headquarters by States and entities referred to in Article 305 of the UN Convention on the Law of the Sea, 1982, for twelve months from the date of its adoption. The Agreement, it may be recalled, was adopted in July 1994 and has been signed by some 68 States. Only France, Italy, Japan, and the European Community have indicated their intention to provisionally apply the Agreement. Paragraph 3 of Article 4 of the Agreement entitled 'consent to be bound' stipulates that a State or entity may express its consent to be bound by this Agreement by a signature not subject to ratification, formal confirmation or the procedure set down in Article 5; b) signature subject to ratification or formal confirmation followed by ratification or formal confirmation; c) signature subject to the procedure set out in Article 5; or d) accesion.

The reference to "the procedure set out in Article 5" in subparagraphs

(a) and (c) above is the "Simplified Procedure" set out in Article 5(1) of the Agreement whereby a State or an entity which has, before the date of adoption of the present Agreement, ratified or acceded to the Convention and which has signed this Agreement shall be considered to have established its consent to be bound by this Agreement 12 months after the date of its adoption, unless that State or entity notifies the Secretary-General of the United Nations in writing before that date that it is not availing itself of the simplified procedure. Paragraph 2 of Article 5 further stipulates that where a State or entity notifies the Secretary-General in writing that it is not availing itself of the simplified procedure as set out in paragraph 1 of Article 5 its consent to be bound by the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea, 1982 shall be effected by an act of ratification or formal confirmation. All instruments of ratification, formal confirmation or accession are to be deposited with the Secretary-General of the United Nations.

It would have been observed that the simplified procedure is essentially designed for those States which have ratified the Convention on the Law of the Sea prior to the date of adoption of the present Agreement. Such States, as have ratified the Convention on the Law of the Sea, and signed the Agreement shall be considered to have established their consent to be bound by this Agreement 12 months after the date of its adoption unless such States notify in writing that their consent to be bound by the present Agreement is subject to an explicit act of ratification or formal confirmation in that regard.

The General Assembly had in operative paragraph 5 of its resolution 48/263 considered that future ratification or formal confirmation of or accessions to the Convention on the Law of the Sea shall represent also consent to be bound by the Agreement and that no State or entity may establish its consent to be bound by the Agreement on the Implementation of Part XI unless it had previously or simultaneously established its consent to be bound by the Convention. Paragraphs 1 and 2 of Article 4 of the Agreement (entitled Consent to be bound) make this explicit stipulation in respect of these two categories of States. Whilst paragraph 1 of Article 4 provides that any instrument of ratification or formal confirmation or accession after the adoption of this Agreement shall also represent consent to be bound by the Agreement, paragraph 2 of the Article reads "No State or entity may establish its consent to be bound by this Agreement unless it has previously established or establishes at the same time its consent to be bound by the Convention."

The Agreement is to enter into force 30 days after 40 States have

established their consent to be bound by the Agreement. Article 6 paragraph 1 explicitly provides in this regard that the States which establish their consent to be bound by this Agreement must include at least 7 of the States referred to in paragraph 1(a) of Resolution II of the UNCLOS-III and that at least five(5) of these States shall be developed States. If these conditions for entry into force are fulfilled before 16 November 1994, the Agreement is to enter into force on that date viz. the date of entry into force of the Convention. For States and entities establishing their consent to be bound by this Agreement after the abovementioned requirements have been fulfilled, the Agreement shall enter into force on the 30th day following the date of establishment of their consent to be so bound by the Agreement.

It would have been observed that Article 6 sets out three explicit requirements for the Agreement's entry into force viz. (1) that it must be ratified by 40 States; (2) that the States ratifying this Agreement should include at least 7 of the States referred to in paragraph 1(a) of Resolution II of UNCLOS-III; and (3) that at least five of these States should be developed States. It may be recalled in this regard that the States referred to in paragraph 1(a) of Resolution II on 'Governing Preparatory Investment in Pioneer Activities Relating to Polymetallic Nodules' adopted by the UNCLOS-III are: the pioneer investors and include Belgium, Canada, France, Germany, India, Italy, Japan, the Netherlands, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America. Some States, such as China and the Republic of Korea, although registered pioneer investors, are not mentioned in the said Resolution.

Article 7 of the Agreement had stipulated that if on 16 November 1994 the Agreement has not entered into force it shall be applied provisionally pending its entry into force by: a) States which have consented to its adoption in the General Assembly; b) States and entities which sign the Agreement; c) States and entities which consent to its provisional application by so notifying the Secretary-General in writing; and d) States which accede to the Agreement.

The provisional application of the Agreement is to terminate upon the date of entry into force of the Agreement. It is expressly provided that "In any event provisional application shall terminate on 16 November 1998 if at that date the requirement relating to consent to be bound by this Agreement by at least seven of the States (of which at least five must be developed States) referred to in paragraph 1(a) of Resolution II has not been fulfilled". Pending the termination of the provisional application

of the Agreement, all States and entities which consent its provisional application are obliged to apply this in accordance with their national or internal laws and regulations.

The Annex to the Agreement; an overview

It may be recalled that Article 1 of the Agreement on the implementation of Part XI stipulates that the "Annex form an integral part of this Agreement. The Annex to the Agreement relates to nine matters viz. (i) Costs to State parties and Institutional Arrangements; (ii) The Enterprise; (iii) Decision-making; (iv) Review Conference; (v) Transfer of Technology; (vi) Production Policy; (vii) Economic Assistance; (viii) Financial Terms of Contracts; and (ix) the Finance Committee. This part of the brief furnishes an overview of the nine sections of the Annex to the Agreement.

A. Costs to State Parties and Institutional Arrangements

It may be stated that the Agreement on the Implementation of Part XI the Convention adopted by the General Assembly on July 28, 1994 was negotiated over a period of four years in the course of informal consultations convened by the Secretary-General of the United Nations. The informal consultations had sought to overcome those difficulties that had stood in the way of universal participation in the Convention. They (the consultations) had addressed in particular the detailed seabed mining provisions of the Convention, replacing them with general principles geared more towards the emerging global consensus around market-oriented economic policies. In the course of informal consultations held it was generally agreed that:

1. Costs to State parties should be minimized;
2. The establishment and the operation of the various institutions should be based on an evolutionary approach, taking into account the functional needs of the institutions concerned in order to effectively discharge their responsibilities;
3. All institutions to be established under the Convention including the International Tribunal for the Law of the Sea—shall be cost-effective and no institution should be established which is not required: and
4. The meetings of the various institutions should be streamlined so as to reduce costs. This is to apply to the structure, size and functions of the institutions including the need to phase in the subsidiary bodies and to the frequency and scheduling of meetings of the various organs.

The other but by far the most significant provision in this regard is that States Parties shall not be under an obligation to fund a mining operation of the Enterprise. The Section on Cost to States Parties and Institutional Arrangements accordingly provides that the International Seabed Authority is the organization through which States Parties shall organize and control activities in the Area particularly with a view to administering the resources thereof. In addition to the powers and functions expressly conferred by the Convention the Authority is to have such incidental powers as are implicit in and necessary for the exercise of those powers and functions with respect to the activities in the Area.

Paragraph 2 of the Section 1 on Costs to States Parties and Institutional Arrangements provides that in order to minimize costs all organs and subsidiary bodies the agreement, shall be cost-effective. The principle of cost effectiveness is to apply also to the frequency, duration and schedule of meetings. It has further been agreed to apply an evolutionary approach to the setting up and the functioning of the organs and subsidiary bodies of the Authority. To this end the early functions of the Authority are to be carried out by the Assembly, the Council, the Secretariat, the Legal and Technical Committee and the Finance Committee. The functions of the Economic and Planning Commission are to be performed by the Legal and Technical Commission until either the Council decides otherwise or until the approval of the first plan of work for exploitation.

The Authority is to have its own budget but until one year after the Agreement comes into force the administrative expenses of the Authority shall be met through the budget of the United Nations. Thereafter the administrative expenses of the Authority are to be met by assessed contributions of its members including provisional members.

B. The Enterprise

In the course of the consultation during January 1993 a question was raised as to whether there would be an Enterprise or whether it would be replaced by some royalty system. The majority of the participants had then favoured the establishment of an Enterprise. Section 2 of the Annex to the Agreement accordingly provides that the Secretariat of the Authority shall perform the function of the Enterprise until it begins to operate independently of the Secretariat. It is further provided that the Secretary-General of the Authority shall appoint an interim Director-General to oversee the performance of the functions of the Secretariat relating *inter alia* to the trends and developments relating to deep seabed mining activities

and the assessment of the results of the conduct of marine scientific research with respect to activities in the area.

The Enterprise is to conduct its initial deep seabed mining operations through joint ventures. The issue of functioning of the Enterprise independently of the Secretariat of the Authority will however, be taken up upon the approval of a plan of work for the exploitation for an entity other than the Enterprise or upon receipt by the Council of the application for joint ventures operations with the Enterprises. In the event that the joint venture operations with the Enterprise accord with sound commercial principles the Council shall in accordance with article 170 paragraph 2 of the Convention issue directive for the independent functioning of the Enterprise. It is further provided that the obligation applicable to contractors shall apply to the Enterprise and an approved plan of work for the Enterprise shall be in the form of a contract between the Authority and the Enterprise.

The funding obligations for the first mining operation of the Enterprise will not arise since the exploitation is to be carried out in the initial phase through joint ventures and funds shall be provided pursuant to the provisions of joint venture arrangements. It is understood, however, that the fact that the operations of the Enterprise shall begin by joint venture shall be without prejudice to the future options of the Enterprise. However, the Enterprise shall always be free to revert to joint venture arrangements.

C. Decision-Making

The industrialized countries, had raised the issue of the procedure to be followed by the Assembly in respect of certain specific decisions which may require prior recommendations of the Council and where the Assembly does not agree with that recommendation. Section 3 of the Annex to the Agreement provides that the general policies of the Authority shall be established by the Assembly in collaboration with the Council. This section stipulates that decision-making in the organ of the Authority shall be by consensus. Where all efforts to reach a decision have been exhausted decision by voting in the Assembly on question of procedure are to be taken by a majority of members present and voting while the decision on the question of the substance, on the other hand, are to be taken by a two-third majority of Members present and voting as stipulated in Article 159 paragraph 8 of the Convention on the Law of the Sea.

The industrialized countries had raised the issue of procedure to be followed by the Assembly in respect of administrative, budgetary and

financial matters which may require prior recommendations of the Council. It is now agreed that the decisions of the Assembly on these matters shall be based on the recommendations of the Council. If the Asssembly does not accept the recommendations of the Council on any matter it is to return the matter to the Council for further consideration and the latter shall reconsider the matter in the light of the view expressed by the Assembly.

The Council would consist of 36 members elected by the Assembly according to a formula set out in the Convention. Half of the number would come from the four major interest groups, while the rest would be elected in such a way as to ensure equitable geographical representation in the Council as a whole. The four interest groups are: the largest investors in sea-bed mining (four States), the major consumers or importers of minerals found on the sea-bed (four States), major land-based exporters of the same minerals (four States) and "special interests" among the developing countries (six States). The "special interests" category of developing countries would include States with large populations, the landlocked or geographically disadvantaged, major mineral importers, potential producers of the minerals in questions, and the least developed States. No over-all geographical distribution is specified, but at least one country from each region would be represented among the 18 members chosen on the basis of geography.

With regard to decision-making in the Council it is agreed that in the event that voting is necessary, decisions on question of procedure shall be taken by a majority of members and that decisions on questions of substance shall be taken by a two-third majority of the members present and voting provided that such decisions are not opposed by the majority in any one of the chambers. Decisions within each chamber on matters of substance shall be taken by a simple majority. Further a special procedure for the approval of a plan of work is to apply which envisages that 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. Where the Council does not take a decision on a recommendation for approval of a plan of work within 60 days, the recommendation is deemed to have been approved by the Council at the end of that 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.

D. Review Conference

Section 4 of the Annex, is addressed to one of the most keenly debated issues viz. Review Conference. The provision of this section expressly stipulates the non-applicability of the provisions of paragraphs 1, 2 and 4 of Article 155 of the Convention and then goes on to provide that notwithstanding the provisions of Article 314, paragraph 2 of the Convention, the Assembly, on the recommendation of Council may undertake at any time a review of the matters referred to in Article 155 (1) of the Convention. Amendments relating to the present Agreement and Part XI of the Convention, by the Review Conference, shall be subject to the procedures incorporated in articles 314, 315 and 316 provided *inter alia* that the principle of the common heritage of mankind, the international regime of designed to ensure equitable exploitation of the Area for the benefit of all countries, especially the developing countries, and an Authority to organize, conduct and control activities in the area shall be maintained. The section also provides that the amendment adopted by the Review Conference shall not effect the rights acquired under existing contracts.

E. Transfer of Technology

Section 5 of the Annex is addressed to the question of transfer of technology and adds to Article 144 of the Convention on the Law of the Sea by stipulating that the Enterprises shall seek to obtain the technology required for its operations on fair and reasonable commercial terms and conditions on the open market or through joint venture arrangements. It also provides that if the technology is not available on the open market, the Authority may request all or any of the contractors or their respective sponsoring States or States to cooperate with it is facilitating acquisitions of technology or its joint venture on fair and reasonable commercial terms and conditions consistent to the effective protection of intellectual property rights. States Parties are to 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 in marine science and technology and the protection and preservation of the marine environment.

F. Production Policy

Section 6 of the Annex to the Agreement relating to Part XI of the Convention amends the seabed production policy as incorporated in the Convention on the Law of the Sea. This section of the Annex to the

Agreement which outlines the principles on which the production policy of the Authority is to based stipulates *inter alia* that the development of the resources in the area be in accordance with sound commercial policies. The other principles enumerated in the section provide that:

(a) The provisions of the General Agreement on Tariffs and Trade, its relevant codes and successor or superseding agreements, shall apply with respect to activities in the Area;

(b) There shall be no subsidization of production of minerals from the deep seabed. As far as anti-subsidy provisions are concerned, the application of the GATT rules shall be considered;

(c) There shall be no discrimination between minerals from land and from the deep seabed. There shall be no discrimination between seabed miners and land-based miners, nor between seabed miners. In particular, there shall be no preferential access to markets for minerals derived from the deep seabed by use of tariff or non-tarif barriers or for imports of commodities produced from such minerals, nor shall any preference be given by States to minerals derived from the deep seabed by their nationals;

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

(e) States parties which are Parties to such multilateral trade agreements shall have recourse to the dispute settlement procedures of such agreements. States which are not Parties to such agreements shall have recourse to the dispute-settlement procedures provided for under the Convention.

It is further provided that the plan for 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. The provisions of article 151, papragraphs 1 to 7 and 9, article 162, paragraph 2(q), article 165, paragraph 2(n) and Annex III, article 6, paragraph 5, and Article 7, of the Convention shall not apply.

G. Economic Assistance

Section 7 of the Annex endeavour to find solutions to the vexing question of economic assistance to developing countries which suffer

serious adverse effects on their export earnings or economics 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. In this regard the Authority shall establish an economic assistance fund from a portion of the funds of the Authority which exceeds those necessary to cover the administrative expenses of the Authority. Developing land-based producer States whose economies have been determined to be seriously affected by the production of minerals from the deep seabed shall be assisted from the economic assistance fund of the Authority.

The Authority shall provide assistance from the economic assistance fund to adversely affected developing land-based producer States where appropriate in cooperation with existing global or regional development organs which have the infrastructure and expertise to carry out such assistance programmes. The extent and duration 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 adversely affected developing land-based producer States.

H. Financial Terms of Contract

Section 8 of the Annex enumerates the 5 principles for the financial terms of contract for the commercial production of deep seabed minerals. These include:

(i) The system of payments to the Authority shall be fair both to be contractor and to the Authority and shall provide adequate means of determining compliances by the Contractor with such system;

(ii) The rates of 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 seabed miners an artificial competitive advantage, or imposing on them an competitive disadvantage.

(iii) The system should not be complicated and should not impose major administrative costs on the Authority or on the Contractor. Consideration is to be given to the adoption of a royalty system or a combination of royalty and profit sharing system. Any subsequent change in choice between the alternative systems is to be made by agreement between the Authority and the Contractor.

(iv) An annual fixed fee shall be payable from the date of commencement of commercial production. Such a fee shall be adjusted at the time of the approval of the plan of work in order

to take account of the anticipated delay in reaching the exploitation stage and the risks involved in establihsing an industry in a new and unstable environment.

(v) The system of financial payments may be revised periodically in the light of changing circumstances. Any changes shall be applied in a non-discriminatory manner. Such changes may apply to existing contracts only at the election of the Contractor.

(vi) 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.

In the application of the above provisions Articles 13 of the Annex III of the Convention shall not apply.

I. The Finance Committee

Section 9 of the Annex establishes a fifteen-member finance committee as a subsidiary body. Members of the Finance Committee shall be elected by the Assembly and due account shall be taken of the need for equitable geographical distribution and the representation of special interests. Each group of States referred to in the Section 3 of the Annex viz. the largest consumers, the largest investors, major net exporters and developing State parties representing special interests shall be represented on the Committee by at least one member. Until the Authority has sufficient funds other than assessed contributions to meet its administrative expenses, the membership of the Committee shall include representatives of the five largest financial contributors to the administrative budget of the Authority that the PREPCOM had envisaged the establishment of a finance committee. Decisions by the Assembly and the Council on the following issues shall take into account recommendations of the Finance Committee.

Meeting of the International Seabed Authority

The final session of the PREPCOM was held in New York in August 1994. The PREPCOM had two substantive items in its agenda viz. the implementation of Resolution II of UNCLOS and had then considered Matters arising from the imminent entry into force of the United Nations Convention on the law of the Sea. On the question of Implementation of Resolution II of the UNCLOS the PREPCOM *inter alia* considered (i) the relinquishment of pioneer areas; (ii) compliance with understanding on the fulfillment of obligations by the registered pioneer investor, Inter-Oceanmetal Organization (IOM) and its certifying States; (iii) waiver of

the annual fixed fee and the obligation of the three registered pioneer investors and of their certifying States to carry out stage I of the exploration work; and (iv) report of the Group of Technical Experts to the General Committee on the application of the Government of the Republic of Korea for registration as a pioneer investor.

On matters arising from the imminent entry into force of the Convention the issues before the PREPCOM included (i) consideration of the provisional agenda for the first session of the Assembly and of the Council of the Authority; (ii) consideration of the budget for the first financial period of the International Seabed Authority; (iii) date of the first session of the Assembly of the Authority; (iv) proposed meeting of the States parties to the Convention relating to the practical arrangements for the establishment of the International Tribunal for the Law of the Sea; and (v) final report of the PREPCOM to the Assembly of the International Seabed Authority at its first session.

It may be recalled that paragraph 3 of Article 308 of the Convention on the Law of the Sea provides that the Assembly of the Authority shall meet on the date of entry into force of the Convention and shall elect the Council of the Authority, which is the executive organ of the Authority comprising 36 members. Accordingly the Secretary-General of the United Nations Mr. Boutros-Boutros Ghali opened the first session of the International Seabed Authority in Kingston on 16 November 1994 to coincide with the coming into force of the Convention. The Three-day Session which was largely ceremonial in nature decided to convene a resumed session between 27th February and 17th March 1995. It may be stated that the Secretariat of the AALCC was represented at the resumed session of the Seabed Authority by the Assistant Secretary-General Mr. Asghar Dastmalchi. The report of that session has been reproduced herewith.

Report on the work of Assembly of the International Seabed Authority during the second part of its first session held in Kingston, Jamaica, 27th February-17th March 1995

The second part of the first session of the Assembly of the International Seabed Authority was convened in Kingston, Jamaica from 27 February to 17 March 1995. The first part, which was primarily of a ceremonial nature, had earlier been held in Kingston from 16 to 18 November 1994 to commemorate the establishment of the International Seabed Authority, which coincided with the entry into force of the United Nations Convention on the Law of the Sea. The third part of the first session is scheduled to be held in Kingston from 7 to 18 August 1995.

The Assembly was attended by delegates from 87 Member-States and one entity, the European Community. 15 states and 5 International Organizations took part in the Session as Observers. The AALCC was represented by the Assistant Secretary-General Mr. Asghar Dasmalchi.

Mr. Hans Corell, Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations, acting as the Temporary President of the Assembly, opened the second part of the first session. During the initial meeting the Assembly decided to commence its work under the draft rules of procedure recommended by the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea until such time as it adopted its own rules of procedure.

The Assembly had on its agenda the election of the President, the adoption of its rules or procedure, election of members of the Council of the Authority, the nomination and election of the Secretary-General of Authority and election of members of its other major organs (the Legal and Technical Committee and the Finance Committee). Consideration of the final report of the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea, and also the organization of a Secretariat, a provisional budget and other financial matters, and the transfer of property and records from the Preparatory Commission to the Authority were also on the agenda of the meeting.

The Assembly elected by acclamation, Dr. Hasjim Djalal (Indonesia) as President of its first session. On the election of Vice-Presidents for the Assembly, discussions generated on whether regional groups as well as special interest groups should be represented on the Bureau of the Assembly. Finally, four Vice-Presidents Algeria, Mexico, Russian Federation and Canada were elected by acclamation from the list of candidates drawn up by the President of the Assembly after consultations with regional Groups. The four Vice-Presidents represent all the regional groups except Asia, which holds the presidency.

The Assembly, following informal consultations held by the President, appointed the following 10 members to a Working Group assigned to develop the Assembly's rules of procedure Egypt (Chairman), Germany, United Kingdom, Russian Federation, Poland, Brazil, Jamaica, Republic of Korea, Indonesia and Senegal.

The Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea had recommended to the Assembly for its consideration draft rules of procedure contained

in document LOS\PCN\WP.20\Rev.3. In addition, and in the light of the adoption by the United Nations General Assembly on 28 July 1994 of the Agreement relating to the implementation of Part XI of the United Nations Concention on the Law of the Sea, the Secretariat had prepared document ISBA\A\WP.1 containing suggestions for revising the draft rules of procedure of the Assembly issued by the Preparatory Commission taking into account the provisions of the Agreement. At the request of the Assembly, the Secretariat then prepared a working paper by merging these two documents, and the new document (ISBA\A\WP\.2) was then considered by the Working Group. Following discussions, the working group submitted to the Assembly an updated version of the draft rules of procedure (document ISBA\A\W.3).

The Assembly in the course of discussing the draft rules of procedure recognized the difficulties and lack of agreement on the provision of Rule 85 on the terms of office of some Council members, which calls for determining by lottery which Council members will serve an initial two-year term. But finally the Assembly adopted the Rules of Procedure and decided that the determination of the members of the Council whose terms were to expire at the end of two years, should as a general rule, be left to the agreement of each group. If no agreement could be reached, the members whose terms were to expire at the end of two years should be chosen by lots to be drawn by the President of the Assembly immediately after first election.

The complexity of determining the criteria for membership in the various groups of States in the Council, caused great difficulties and consumed almost the entire time of the session. According to the Agreement Relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea, the Council shall consist of 36 members from five groups of States.

Group I would have four members from among those parties which, during the last five years, have either consumed more than 2 per cent in value terms of 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 international seabed area—the "Area". Of those four, one should be the State with the largest economy in eastern Europe in terms of gross domestic product, and the other having the largest economy in terms of gross domestic product on the date of the entry into force of the Convention.

Group II would have four members from among the eight parties which have made largest investments in preparation for and in the conduct of activities in the Area. *Group III* would consist of four 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.

Group IV would have six members from among developing States, representing special interests. The special interests to be represented would include those States with large populations, land-locked or geographically disadvantaged States, 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.

The last group, *Group V*, would have 18 members elected on the basis of equitable geographical distribution, provided that each geographical region shall have at least one member elected. For this purpose, the geographical regions shall be Africa, Asia, Eastern Europe, Latin America and the Caribbean, and the Western Europe and other States.

Different formulae and several criteria for membership in the Council were discussed in the Assembly. The President of the Assembly was asked to draw up a list of countries for applying for membership in the Council under specific interest categories defined by the Convention and the Agreement, to enable those States to start negotiating on nomination for the Council. As the number of potential candidates in each interest group exceeded the number of seats allotted for that group, so it seemed necessary that the principle of rotation, as mentioned in the Agreement should be applied as a general rule. States in those groups should themselves determine how to apply the principle. There was no doubt that a State could be nominated from only one group, even if that State met the criteria for membership in more than one group.

During the debate, it appeared that the questions of equitable geographical distributions of seats in the Council would be problematic. Many speakers said that the Council should provide both for representation among interest groups and for equitable geographic distribution. As both are important so it should be determined which countries fell into which categories, with countries specified for more than one category being listed in only one. It was argued by some developing countries that equitable geographical distribution must be an essential part of the final make-up of the Council. Out of the 36 members of the Council, the appropriate representation for each regional group had to determined. To some degree the allocation in Group I (a), II (b) and III (c) would affect membership in Group IV (d) and V (e).

In determining the appropriate representation in the Council there were divergent views, whether distribution of Council seats among the regional groups should be in proportion to their membership in the Assembly of the Authority or other criteria including the "so called North-South balance", the principle of fairness and flexibility to be considered economic weightage in determining seat allocations which measured the financial contribution of States to the Authority, the seriousness of members candidacy and the idea that distribution of seats should be forward-looking with no reference to past formulae were discussed extensively.

The representative of Sudan proposed that by dividing the number of members in the Assembly 139 by the 36 Council seats, each Council seat would represent 3.86 Assembly members. By dividing the number of member States in each region by that figure he calculated the following formula for proportional representation. Africa which has 44 members, would have 11.39 seats; Asia with 38 members, should have 9.84 seats; Eastern Europe, with 13 members States, should have 3.76 seats, Latin America and the Caribbean with 23 members, should get 5.96 seats, and the Western European and other States, with 21 members, would get 5.44 seats. Several representatives of developing countries explained that the Convention and the Agreement on the implementation of Part XI, provided clear guidance on how Council seats were to be allocated. The letter of those agreements should be adhered to. If the Assembly pursued the concept of "weighted voting", it would be opening up a Pandora's box and, in effect, going backwards.

The industrialized countries of the West believed that the principle of equitable geographical representation on the Council should not be based on proportionality, in other words, simply the number of members in each group. Although their group was small, it included powerful consumer and producer interests that should be adequately reflected on the Council. So the need to seek a proper balance between industrialized countries on the one hand and developing countries, on the other, should be properly adhered. The aim was that the majority of the South would not be in a position to automatically achieve a decision with a two-thirds majority, only to be voted in one of the chambers on the Council. The North-South "balance would also prevent a minority from constantly blocking decisions".

The representative of France speaking on behalf of the Western European and other States Group, said that he agreed that the Assembly must abide by the letter of the agreement which sopke of equitable geographical distribution. His Group was not trying to go back on the Agreement,but

the last category of members described in the Agreement dealt specifically with equitable geographical representation. There was no case for equitable geographical distribution in the Council to be based solely on the number of States in each regional group. Proportionality was not the sole parameter for applying the criterion of equitable geographical distribution. Criteria other than numbers should be used. The councils of other international organs, such as the Food and Agriculture Organization (FAO), had strong powers; therefore, the Council of the International Seabed Authority would have a very important character. The Assembly should take a closer look at the positive arguments in favour of the two ideas of his Group. The first was the question of partnership in the exploitation of the deep seabed to ensure that products were extracted and distributed. Partners should be equal and the notion of blocs should not be emphasized excessively. If that were to be the case, then the industrialized countries, which were in a minority, would not be keen to accede to the Convention. If the industrialized group were relegated to a minority, they would be frustrated.

The Assembly should base its decisions on real, international, objective criteria. For example, in the United Nations Development Programme (UNDP) and the United Nations Children's Fund (UNICEF), the Western European States had the largest number of seats. Those were facts that had meaning in the capitals of those States. The Western States would prefer to avoid the use of blocs and a North-South dichotomy. No party should be put in an uncomfortable, minority position.

Other representatives of the industrialized countries while endorsing the views put forward by France indicated that the composition of the Council should inspire confidence in those capitals where ratification of the Convention was still being considered. The application of equity in the present context required a political decision, taking into account a multitude of factors to achieve a balanced cooperation, not confrontation. It was mentioned that the Authority was not a political international organization like others, it was an economic body, dedicated to exploiting resources of the deep seabed. States such as the Western States should be able to bring to bear their economic weight in the work of the Authority. There was reference to other bodies in the United Nations system, in which proportionality had not been the basis for determining equitable geographical distribution of seats. The UNDP and the UNICEF governing bodies had distributions that were consistent with the desire of the Western States, to ensure the positive engagement of the Industrialized Countries to develop the technology for the mining of the deep seabed. If those States failed to undertake the work, there would be no benefits to be shared.

In essence, it was mentioned that, there were only two groups of States; those which undertook activities and those that did not do so, Partnership between both the groups was needed. The West had not put forward exaggerated proposals, because the Convention had made clear that there could be at least nine Council members from developed countries.

The developing countries surprised by the new demands of the industrialized States reminded that the North was not in danger of being swamped in the Council, in a manner similar to that of the United Nations Conference on Trade and Development. In fact many industrialized developing countries such as the Republic of Korea which were neither in the South nor in the North, were likely to be major operators in the International Seabed Area. There could not be any rigid dichotomy between two supposed categories of countries in respect of deep seabed mining. Many so called developing countries were more industrialized than countries in Europe and they were in fact in a state of a "in-betweenity". Many speakers from "the Group of 77" were of view that the Assembly should adhere to the clear formula dealing with the composition of the Council as contained in the Agreement and not reconsider the criteria for determining Council membership. It should work with the legal text before it, remembering that it was enacting legislation of a permanent nature. States that might lack the capability or technology today might develop those abilities in the future, and their interest should not be frustrated today.

The representative of Brazil proposed that the Assembly should try to evaluate the real interests of States and regions by assessing their presence at the current session, the very first of The International Seabed Authority. Based on the list of participants, there was a total of 75 States taking active part in the Assembly; 23 from Africa; 19 from Asia, 15 from Latin America and the Caribbean, 15 from Western European and other States; and 3 from Eastern Europe. That was a ratio of 2.08 Assembly member to each Council seat. based on a division by 2.08, therefore, 11 Council seats should be allotted to Africa; 9 to Asia; 7 to Latin America and the Caribbean, 7 to Western Europe; and 1 to Eastern Europe, for a total of 35 seats. The one seat outstanding in the Council could be allocated later.

Some developing countries recalled that they had made several concessions to ensure universal participation in the Convention by recognizing the interests of nations that had not ratified the Convention. Equitable geographical representation was necessary to secure cooperation

by all sides. No group of States should be allowed to exercise hegemony over the Council.

The comparison of the Authority with other International Organizations was odious as the Authority was different from other bodies. The Council should not elevate the interests of some groups above those of others to such an extent that they would dominate the Council at the expense of those who had ratified the Convention. The Authority was to govern a Common Heritage of Mankind that was why all interest must be kept in balance.

The President, after several lengthy discussions, proposed a formula for allocating the seats in the Council in respect of each regional group. His proposal took into account the concept of proportionality and the need to maintain a balance in the representation in the Council. The President made the following suggestions that:

(a) The distribution of seats among the geographical regions for this election of the members of the Council shall be without prejudice to the distribution of seats among the geographical regions for the next election of the members of the Council, which shall have to take into account the new membership of the Authority at that time:

(b) Representation by a member in the present Council of a particular group of States referred to in paragraph 15 (a) to (d) of section 3 of the Annex to the Agreement, shall, whether or not the principle of rotation is applied in that Group, be without prejudice to its representing other groups of States in the future; at the same time, the representation by members in the present Council of the various groups of States does not preclude the rights of other States to represent these groups in the future;

(c) The general balance of seats established in the present Council between developing and developed countries shall be maintained in the future.

The President's proposal regarding the allocation of seats in the Council was discussed extensively in meetings of regional groups. Since no unanimous decision emerged from the discussions of the proposal it was not possible to reach consensus on this issue.

The meetings of the group of States referred to in paragraph 15 (a) of the Agreement, "States parties which, during the last five years for which statistics are available, have either consumed more than 2 per cent

in value terms of 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", known as Group A or group I were attended by Belgium, Brazil, China, France, Germany, Italy, Japan, Republic of Korea, Russian Federation, United Kingdom and United States (Coordinator). The Group met to discuss the nomination of four States meeting the criteria contained in that paragraph for election to the Council.

The Group decided not to recommend a list of States meeting the criteria of paragraph 15 (a). Members of the Group held different views on the interpretation of the criteria. Some expressed the view that the criteria require that a consuming or importing State must meet the 2 per cent threshold for the value of each of the four minerals (manganese, copper, cobalt and nickel). Others expressed the view that the criteria require that States meet the threshold for the combined value of all four minerals. Without prejudice to the resolution of this question in regard to future elections, the Group decided to take a flexible and inclusive approach to its deliberations.

The Group took note of the fact that the United States, the United Kingdom, the Russian Federation, Japan, Germany, Belgium and Italy informed the President of the Assembly of their interest in being nominated for election to the Council. Belgium, Italy and Germany decided to withdraw their requests to be nominated by the Group on the understanding that, without prejudice to the interests of other States meeting the criteria in paragraph 15 (a), the application of the principle of rotation in future elections would provide opportunities for their election to the Council as representatives of the Group.

The Group agreed to the nomination of Japan, the Russian Federation, the United Kingdom and the United States. The Group agreed to nominate the Russian Federation and the United States for election for a two-year term and to nominate Japan and the United Kingdom for a four-year term. It should be noted that the acceptance by the Russian Federation and the United States of two-year terms is on the understanding that the Assembly will affirm, at the time of election, that paragraph 15 (a) requires the inclusion of one State from the Eastern European region having the largest economy in that region in terms of gross domestic product and of the State, on the date of entry into force of the Convention, having the largest economy in terms of gross domestic product, should those States seek re-election to the Council under that paragraph, and upon the understanding that the principle of rotation would apply to Japan and the United Kingdom after four years.

After the initial meetings of the group of States referred to in paragraph 15 (b), or Group II "which have made the largest investments in preparation for and in the conduct of activities in the Area, either directly or through their nationals", known as Group B or Group II, the coordinator of the Group, Canada, informed the President that after considering information provided by delegations with respect to investments by their States in preparation for and in the conduct of activities in the Area, the delegations unanimously agreed that the following States constitute the eight largest investors for purposes of paragraph 15(b): China, France, Germany (Coordinator), India, Japan, the Netherlands, Russian Federation and the United States.

The Group of the eight largest investors proceeded to discuss the nomination of the four candidates to represent the Group in the Council. Five States, China, France, Germany, India and the Netherlands, declared their intention to represent the Group in the Council. In consultations between the interested States as well as between them and the coordinator, it was not possible to reach agreement on which four States shall be nominated. It was also not possible to decide which of the candidates will be nominated to serve on the Council for a two-year term or for a four-year term. Also unresolved is the question of the application of the principle of rotation.

The meetings of the group of States referred to in paragraph 15 (c), or Group III, "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", known as Group C, were attended by Australia (Coordinator), Brazil, Canada, China, Chile, Cuba, France, Gabon, India, Indonesia, Mauritania, Mexico, Namibia, Philippines, Poland, Russian Federation, South Africa, United States and Zambia.

Six countries from this Group—Australia, Chile, Gabon, Indonesia, Poland and Zambia—presented their candidatures for the four seats available in this Group. Although some delegations indicated a willingness to be flexible, at this stage—and particularly in the light of the fact that other issues still need to be resolved—there has been no final agreement on the four candidtes.

It was also agreed that the principle of rotation should apply to future elections of candidates for the Group, and that this should be interpreted as meaning that there is a general expectation that members of this Group will move on and off the Council. This would not preclude the

possibility of individual countries making informal arrangements between themselves, such as reciprocal support arrangements. Nor would it preclude countries having consecutive terms on the Council, if this was agreed by the Group.

It was further agreed that at this stage it was not appropriate to make a definitive list of countries eligible for election to the Group. However, some delegations suggested that this was something which should be considered in the future. Reference was made to an informal understanding reached at the Third United Nations Conference on the Law of the Sea that the Group should reflect an equal balance between developing and developed countries. But some delegations challenged it and questioned the logic and reason to maintain an equal balance between the North and the South in this group exclusively. The issue of which candidates would be nominated for a two-year term and which would be nominated for a four-year term was not discussed.

The meetings of the group of States referred to in paragraph 15 (d), of the Agreement "developing States parties, representating special interests", which include those "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", known as Group D, were attended by Argentina, Bangladesh, Brazil, Burkina Faso, Cameroon, China, Costa Rica, Cuba, Egypt, Fiji, Gabon, India, Indonesia (Coordinator), Jamaica, Kuwait, Malaysia, Malta, Marshall Islands, Mauritania, Mexico, Mozambique, Myanmar, Nigeria, Oman, Paraguay, Philippines, Republic of Korea, Sudan, Trinidad and Tobago, United Arab Emirates, Viewtnam and Zambia. Several States declared their intention to seek nomination to the Council within this Group, and other States also expressed their interest interest in being nominated in either Group D or Group E. In view of the discussions taking place in other Groups, no definitive list of candidates of this Group has been drawn up.

The President, at the concluding meeting expressed the hope that during the third part of the first session of the International Seabed Authority which would be held in Kingston from 7 to 18 August 1995 the matter of the election of the Council members would be resolved. Some delegates, however, could not conceal their dissatisfaction, as no business was accomplished, except the adoption of the Rules of Procedure.

Ad hoc meeting of states parties to the United Nations Convention on the Law of the Sea

On the question of establishment of the International Tribunal for the Law of the Sea the PREPCOM at its session held in August 1994 had recommended that the Secretary-General convene an ad hoc meeting of the State parties to the Convention soon after the entry into force of the Convention. Following this recommendation of the PREPCOM relating to the establishment of the International Seabed Tribunal an ad hoc meeting of State Parties to the Convention on the Law of the Sea was convene in New York in November 1994. That meeting of the State Parties to the Convention decided on 22nd November 1994 *inter alia* that: (i) there will be a deferment of the first election of the Members of the Tribunal. The date of the first election of the 21 Members will be 1 August 1996. This will be a one-time deferment; (ii) Nominations would open on 16 May 1995. A State in the process of becoming a party to the Convention may nominate candidates. Such nominations shall remain provisional and shall not be included in the list to be circulated by the Secretary-General of the United Nations in accordance with Article 4(2) of Annex VI, unless the State concerned has deposited its instrument of ratification or accession before 1 July 1996; (iii) nominations will close on 17 June 1996; (iv) The list of the candidates will be circulated by the Secretary-General on 5 July 1996; (v) Subject to the above decisions all procedures relating to the election of the members of the Tribunal as provided for in the Convention shall apply; and (vi) no changes shall be made to this schedule unless the States Parties agree by consensus.

III. The United Nations Decade of International Law

(i) Introduction

The topic entitled "The United Nations Decade of International Law" was first 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 address itself to and respond to the resolution 44/23 of the General Assembly, The Committee at its Twenty-ninth Session after due consideration of the Secretariat Note 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 meeting of the Legal Advisers of the Member States of the Committee.

Introducing the item at the Thirty-third Session of the Committee held in Tokyo in 1994 the Secretary-General stated *inter alia* that the General Assembly Resolution 48/30 had invited all States and international organizations to provide, update or supplement 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. He pointed out that the Committee at its Thirty-second Session held in Kampala in 1993 had accepted the offer of the Government of the State of Qatar to host an International Conference on the International Legal Issues Arising under the United Nations Decade of International Law.

At the Tokyo Session the Committee *inter alia* 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 and requested the Secretary-General of the Committee to apprise the Secretary-General of the United Nations of the initiatives taken by the Committee in that regard. Whilst taking note with appreciation of the efforts of the Government of the State of Qatar to convene on International Conference on the International Legal Issues Arising under the United Nations Decade of International Law in March 1994 the Committee strongly recommended that all Member States participate therein at high level. The Committee directed the Secretariat to continue its efforts towards the realization of the objectives of the United Nations Decade of International Law and decided *inter alia* 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 Asian-African Legal Consultative Committee to be convened at the United Nations office in New York during the Forty-ninth Session of the General Assembly.

The Secretariat of the AALCC in active cooperation with the Government of the State of Qatar organized an International Conference on the International Legal Issues Arising under the United Nations Decade of International Law in Doha in March 1994.

Pursuant to the General Assembly resolution 48/30 entitled "United

Nations Decade of International Law", and the mandate given at the Thirty-third Session held in Tokyo the Secretariat of the AALCC forwarded to the office of the United Nations Legal Counsel a report on the activities of the Committee since its Kampala Session.

In furtherance of the decision of the Committee at its Tokyo Session a meeting of the Legal Advisers of Member States of the Asian-African Legal Consultative Committee was convened at the United Nations office in New York in October 1994. The United Nations Decade of International Law was one of the items on the agenda of the meeting of the Legal Advisers of Member States of the AALCC which *inter alia* was addressed by the Legal Counsel of the United Nations, the Registrar of the International Court of Justice; the Chairman of the Sixth (Legal) Committee of the Forty-ninth Session of the General Assembly, the Chairman of the International Law Commission and the Representatives of the Office of the United Nations High Commissioner for Refugees. It may be stated that the question of the Establishment of an International Criminal Court was the focus of attention both with the Sixth Committee and the abovementioned meeting of the Legal Advisers of Member States.

The Legal Counsel of the United Nations Mr. Hans Corell addressed the issue of recent development in the field of the Law of the Sea. He emphasized in his address that the entry into force of the United Nations Convention on the Law of the Sea, 1982 marked the beginning rather than the end of the road in matters relating to the Law of the Sea. He pointed out in this regard that the entery into force of the Convention will have a significant impact on the activities of the United Nations in two major areas viz. the establishment of new institution and the functions of the Secretary-General of the United Nations in direct response to and in accordance with the provisions of the United Nations Convention on the Law of the Sea, 1982.

The Registrar of the International Court of Justice Mr. Ospino Valencia in his statement at the meeting of the legal advisers of Member States of the AALCC addressed himself to the issues concerning the implementation of the decision of the International Court of Justice. He stated *inter alia* that "one can thus note with satisfaction that States have complied with the judgments of the International Court of Justice". He however, pointed out that the "speed with which States implement the judicial decisions, of course, is not always exemplary."

Thereafter the Secretariat of the Asian-African Legal Consultative Committee organized two Seminars in New Delhi. A Seminar in collaboration

with the office of the United Nations High Commissioner for Refugees was organized in September 1994 to consider the matter relating to the establishment of Safety Zones for Persons Displaced within their own country. The President of the Committee Ambassador Chusei Yamada of Japan chaired the Seminar. A report of the Seminar has been given in the brief of documents on the Establishment of Safety Zones (Refugees).

Reference was made above to the interest that the Legal Advisers of Member States of the AALCC had, in the course of meeting convened in October 1994, evinced in the Establishment of an International Criminal Jurisdiction. Mindful of the significance that the Member States attached to the Establishment of International Criminal Court and the draft statutes prepared by the International Law Commission the Secretariat organized a Seminar on the International Criminal Court. It may be stated that both the President, Ambassador Chusei Yamada, and the Vice-President Dr. Najeeb participated in the Seminar. The Secretariat has prepared and circulated a report of the proceedings of the Seminar.

It may be recalled that Paragraph 3 of Section V of the "Programme for the activities for the second term (1990-94) 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 operational 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[1] was considered by the Working Group of the Sixth Committee on the United Nations Decade of International Law. Following the recommendations of the Sixth Committee and its aforementioned working group on the United Nations Decade of International Law the General Assembly by its resolution 48/30 had *inter alia* decided that a United Nations Congress on Public International Law

1. A/48/435.

be convened in 1995. Accordingly a United Nations Congress on Public International Law was proposed to be held at the United Nations Headquarters in New York from March 13th to March 17th 1995 during the celebration of the United Nations Fiftieth Anniversary. The theme of the proposed Congress was "Towards the Twenty-first Century: International Law as a language for International Relations".

The Congress was proposed to be convened to afford the participants an opportunity to exchange views on the codification, progressive development and implementation of public international law both in theory and in practice, as well as on its dissemination and teaching. The purpose of the proposed Congress was to assist the international community in general and the legal profession, in particular, to meet the challenges and expectations of the contemporary world.

Within the broad parameters of the theme, viz. "Towards the Twenty-first Century: International Law as a language for International Relations" the proposed Congress on Public International Law would consider the following five sub-themes:

(i) The Principles of International Law: Theoretical and Practical aspects of their problems and Implementations;

(ii) The Means of Peaceful Settlement of Disputes between States, including resort to and full respect for the International Court of Justice;

(iii) Conceptual and Practical Aspects of the Codification and Progressive Development of International Law, New Developments and Priorities;

(iv) New Approaches to Research, Education, and Training in the Field of International Law and its wider appreciation; and

(v) Towards the Twenty-first Century: New Challenges and expectations.

The Secretariat of the Asian-African Legal Consultative Committee proposes during the year ahead, apart from having made its contribution to the United Nations Congress on Public International Law held at the United Nations Headquarters in New York during 13th March and 17th March 1995 to continue its modest endeavours to contribute to the attainment of the objectives of the United Nations Decade of International Law. The views of the Member States and the directive which the Committee at its Doha Session may wish to give would determine the course of the future programme of work on this item.

Introducing the item the Secretary-General stated that the item "United Nations Decade of International Law" had been on the agenda of the Committee since its Twenty-ninth Session held in Beijing in 1990 and had thereafter been considered at successive sessions and a report of the activities undertaken by the Secretariat was to be found in Doc. AALCC/XXXIV/Doha/95/8 prepared by the Secretariat. The item had also been discussed at the meeting of Legal Advisers of Member States convened at the UN Headquarters in New York. As in the previous years the Secretariat had in May 1994 forwarded a report, on its activities related to the objectives of the Decade, to the Office of the United Nations Legal Counsel and that report was annexed to the brief of the documents prepared by the Secretariat. Referring to the Public Congress on International Law held in New York in March 1995 he said that the Secretariat had been represented thereat. He further said that in the period since the Tokyo Session the Secretariat had convened three Seminars, one each on (i) The Status and Treatment of Refugees; (ii) The proposed International Criminal Court; and (iii) Globalization and harmonization of Commercial and Arbitration Laws. More recently, the Secretariat had been approached by the Registry of the International Court of Justice to organize a Seminar on the Role and Work of the International Court of Justice to Commemorate the Fiftieth Anniversary of the Sitting of the World Court. The Seminar on the International Court of Justice was proposed to be convened in September in collaboration with the UNITAR. He invited the views of the Member States on the subject.

The President recalled the contribution of the Secretariat in the International Conference on the Legal Issues arising out of UN Decade of International Law which was convened on Doha in March 1994.

The Delegate of the Islamic Republic of Iran stated that in his view it was imperative that all members of the AALCC endeavour to promote the objectives of the Decade and to facilitate the successful implementation of its programme of activities and uphold the supremacy of law in International relations. He further stated that the proposal to convene a Congress on Public International Law, advanced by his delegation at the Sixth Committee of the General Assembly in 1992 had received widespread support and that the Congress had been successfully convened at the Headquarters of the U.N. in March 1995. He pointed out that his delegation had proposed the convening of the Congress to enrich the programme of activities of the Decade. The Congress had attracted representatives of many institutions, academicians and interested individuals from every

corner of the world from the various sectors involved in Public International Law, to help spreading the objectives of the Decade throughout the world.

He observed that the convening of the Congress had provided a unique opportunity for the AALCC as the main legal organization in the region to publicise various activities it has undertaken in implementing the programme of the Decade. His delegation to the Congress of Public of International Law shared the view with other delegations that the Congress had a pivotal role in promoting the objectives particularly in strengthening the rule of law among nations. The Congress was an effort to introduce, consider and evaluate innovative ways and means for worldwide promotion and implementation of the objectives of the Decade that is: International Law as a Language for International Relations in the 21st Century.

He emphasized the role of the AALCC as a regional organization in the progressive development and codification of International Law and observed that the Committee had fulfilled its mandate by persuading the Member States to give serious attention to the observance and implementation of the Decade, and by assisting those Member States who have not acceded or ratified the key multilateral international conventions to do so. He expressed the hope that these efforts would continue.

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

(Adopted on 22nd April 1995)

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

Having taken note of the Report of the Secretary-General on the United Nations Decade of International Law contained in Doc. No. AALCC/XXXIV/DOHA/95/8.

1. *Reaffirms* the importance of strict adherence to the Principles of International Law as enshrined in the Charter of the United Nations;
2. *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;
3. *Welcomes* the various initiatives taken by Member States of the Committee in the implementation and observance of the Decade;
4. *Requests* Member States to continue to give serious attention to the observance and implementation of the Decade;
5. *Requests* the Secretary-General to apprise the Secretary-General of the United Nations of the initiatives taken by the Committee in this regard;
6. *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 Fiftieth Session of the General Assembly;

7. *Request* the Secretary-General to consider in consultation with Liaison Officers the relevant means for ratifying or acceding to the relevant Multilateral Conventions;

8. *Notes* with appreciation the efforts of the Secretary-General, in collaboration with the International Court of Justice and the United Nations Institute for Training and Research, towards organizing a seminar on the Role and Work of the International Court of Justice and strongly recommends that all the Member States participate in the proposed seminar;

9. *Directs* the Secretariat to continue its efforts toward the realization of the objectives of the UN Decade of International Law; and

10. *Decides* to place the item the "U.N. Decade of International Law" on the agenda of the Thirty-fifth Session.

(iii) Secretariat Brief

The United Nations Decade of International Law

The present report has been prepared pursuant to General Assembly Resolution 48/30 of December 9, 1993 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 to provide, undertake, update or supplement information on the activities they have undertaken on the implementation of the programme as well as to submit their views on possible activities for the next term of the Decade.

Following upon the adoption of the United Nations Decade of International Law the Asian-African Legal Consultative Committee (AALCC) has considered this item at its successive sessions since 1990 and proposes to do so at its Thirty-fourth session to be held in Doha, Qatar, in early 1995. The AALCC at its Thirty-third session held in Tokyo in 1994 requested its Member States to give serious attention to the observance and implementation of the Decade. It requested the AALCC's Secretary-General to apprise the Secretary-General of the United Nations of the initiative taken by the AALCC in that regard and directed the Secretariat of the AALCC to continue its efforts towards the realization of the objectives of the United Nations Decade of International Law. The Secretary-General of the AALCC held consultations, during the forty-ninth session of the General Assembly, as in the preceding years, with the legal advisers of the Member States of the United Nations.

The Secretariat of the AALCC in cooperation with the Government of Qatar organized an International Conference on the International Legal Issues Arising under the United Nations Decade of International Law in March 1994. The Conference held in March 1994 was designed to promote

the objectives of the United Nations Decade of International Law. The Conference furnished a forum for an informal exchange of views on such matters of public international law as the law of the Sea, the Peaceful Settlement of Disputes, the New International Economic Order and the New International Humanitarian Legal Order—including the question of the establishment of Safety Zones.

During the second term of the United Nations Decade of International Law the AALCC continued 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 and recommendatory functions pursued further 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 Convention on Climate Change, 1992, the international instruments on Human Rights and the Basel Convention on the Control of Transboundry Movement of Hazardous Wastes and Their Disposal, 1990, the Bio-diversity Convention 1992, the Refugee Convention, 1951 and the 1967 Protocol thereto, to name a few.

In the sphere of international economic and trade law matters, the AALCC, at its Thirty-third session held in Tokyo, urged Member States which have not already done so to consider adhering to the United Nations Convention on the Carriage of Goods by Sea, 1978 (the Hamburg Rules) since a wider acceptance of the Hamburg Rules would result in a better protection of shipper's interests and an early replacement of the Hague and Hague-Visby Rules by the Hamburg Rules would promote uniformity. The Committee also urged its Member States to consider the UNCITRAL Model Law on Procurement of Goods and Construction when they enact or amend their national law on procurement.

The AALCC continued and shall continue to furnish assistance to the 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 Secretary would strive to render whatever assistance it can in preparing for and participating in the United Nations Congress on Public International Law proposed to be held in 1995. To that end the Secretariat is examining the viewpoints of the member States of the AALCC on the purpose and object of the propsed Congress. In view of the material significance that the Member States attach to the proposed Congress the AALCC Secretariat will endeavour to make its modest contribution to the identification, development, and codification of legal

principles and norms that will govern harmonious inter-State relations in the coming millenia.

The AALCC has always attached 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 AALCC at its Thirty-second session held in Kampala in 1993 had *inter alia* appointed an open ended Working Group 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". During its Tokyo Session held in January this year the AALCC also endorsed the preparation of a draft text of an International Convention governing Safety and Security of International Personnel engaged in Peace Keeping and other Humanitarian Activities.

The Secretariat of the Committee has been following and, from time to time commenting on, the work of the Special Committee on the Charter of the United Nations and on the stengthening 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 earlier study on the wider use of the International Court of Justice including the settlement of environment disputes.

With regard 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 AALCC shall also endeavour to expand and enlarge the activities of its Regional Centres of Arbitration functioning at Cairo and Kuala Lumpur. Steps have been taken to establish and make operational a similar centre at Nairobi for serving the countries in Eartern and Sourthern Africa.

The Secretariat of the AALCC shall continue to study the progress of work of the International Law Commission (ILC) and to comment thereon as part of its modest contribution to the progressive development and codification of international law. The AALCC attaches great significance to the items currently on the agenda of the ILC as they are of particular

relevance to its Member States. In pursuance of the mandate of the Thirty-third session the Secreatary-General of the AALCC recently brought to the attention of the International Law Commission the views of the member Governments on the work of the International Law Commission at its previous session.

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 has now undertaken a study of the draft Convention on Combating Desertification and Mitigation of Drought as adopted by the Inter-governmental Negotiating Committee at its meeting held in Paris in June 1994. The proposed study is expected to assist and facilitate the representatives of the Member States in the adoption of the purposed Convention.

During the second term of the UN Decade of International Law the Secretariat of the AALCC studied, *inter alia*, the legal issues involved in Privatization of Public Sector Undertakings and liberalization of economic activities as a means to increasing economic efficiency, growth and sustainable development in the context of economic restructuring programmes. A Special Meeting on Developing Institutional and Legal Guidelines for Privatization and Post-privatization Regulatory Framework was convened during the Thirty-third session of the AALCC held in Tokyo last year. The World Bank rendered assistance in the convening of the Special Meeting and deputed two experts to facilitate the deliberations of the Special Meeting.

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 was intensified. Early this year the AALCC at its session examined a report on 'Model Legislation on Refugees' and following the offer of the UNHCR seconded on officer to work at the Headquarters of the UNHCR. The Secretariat of the AALCC is drafting a detailed modular legislation on the rights and duties of refugees in the light of the codified principles of international law and the practice of States in the region. The modular legislation is proposed to be transmitted to all Member States for their consideration and comments prior to its consideration at the next annual session of the AALCC. The Secretariat of the AALCC is also working in close cooperation with the Organization of African Unity in this matter.

In connection with the objective of encouraging study, dissemination and wider appreciation of international law, the AALCC continues to print the reports of its annual sessions and the verbatim records thereof.

During the period under review the Secretariat of the AALCC has published the report of its Thirty-second session held in Kampala (Uganda) in 1993. The report of the thirty-third session held in Tokyo (Japan) in 1994 has also been published. A noteworthy feature of these volumes is that the research studies prepared by the AALCC Secretariat on some selected topics have been reproduced therein.

The AALCC has also published the outcome and proceedings of the *Special Meeting on Developing Legal and Institutional Guidelines for Privatization and Post-Privatization Regulatory Framework*, held in Tokyo in January 1994. The Report contains the text of the draft legal and institutional guidelines on privatization and post-privatization regulatory framework. The Secretariat has taken steps to ensure the widest possible dissemination of the aforementioned reports in the Afro-Asian region. 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 cooperate with other competent regional organizations and specialized agencies of the United Nations in the fulfilment 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 Sixth Committee

Rapporteur : Mrs. Silvia A. Fernandez de Gurmendi (Argentina)

I. Introduction

The item entitled "United Nations Decade of International Law" was included in the provisional agenda of the forty-ninth session of the General Assembly pursuant to paragraph 15 of Assembly resolution 48/30 of 9 December 1993.

At its 3rd plenary meeting, on 23 September 1994, the General Assembly, on the recommendation of the General Committee, decided to include the item in its agenda and to allocate it to the Sixth Committee.

In connection with the item, the Sixth Committee had before it the following documents:

(a) Report of the Secretary-General (A/49/323 and Add. 1 and 2) on the implementation of the programme for the second term (1993-1994) of the Decade during the past year, containing also views on possible activities for the next term of the Decade and, as an annex, the revised guidelines for military manuals and instructions on the protection of the environment in times of armed conflict, prepared by the International Committee of the Red Cross;

(b) Letter dated 3 May 1994 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General (A/49/151/S/1994/537);

(c) Letter dated 18 November 1994 from the Permanent Representative of the Democratic People's Republic of Korea to the United Nations addressed to the Secretary-General (A/C.6/49/5).

At its previous session, the General Assembly, in paragrpah 1 of its resolution 48/30, had requested the Working Group on the United Nations Decade of International Law to continue its work at the forty-ninth session in accordance with its mandate and methods of work. Pursuant to that request, the Sixth Committee, at its 6th meeting, on 5 October 1994, elected Mr. Ernst K. Martens (Germany) Chairman of the Working Group for the session. The Working Group held three meetings between 2 and 11 November.

At the 34th meeting of the Sixth Committee, on 15 November, the Chairman of the Working Group introduced the report of the Working Group (A/C.6/49/L.10).

The Sixth Committee considered the item, as well as the report of the Working Group, at its 34th to 37th and 41st meetings, from 15 to 17 and on 29 November. The summary records of those meetings contain the views of the representatives who spoke during the Committee's consideration of the item (A/C.6/49/SR/34-37 and 41).

II. Recommendation of the Sixth Committee

The Sixth Committee recommends to the General Assembly the adoption of the following draft resolution:

United Nations Decade of International Law

The General Assembly

Recalling its resolution 44/23 of 17 November 1989, by which it declared the period 1990-1999 the United Nations Decade of International Law,

Recalling also that the main purposes of the Decade, according to resolution 44/23, should be, *inter alia:*

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

(b) 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;

(c) To encourage the progressive development of international law and its codification;

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

Recalling further its resolution 47/32 of 25 November 1992, to which was annexed the programme for the activities for the second term (1993-1994) of the Decade,

Expressing its appreciation to the Secretary-General for his report[1] submitted pursuant to resolution 48/30 of 9 December 1993,

1. A/49/323 and Add. 1 and 2.

Having considered the abovementioned report of Secretary-General, including the annex thereto,

Recalling, that at its forty-fifth session the Sixth Committee established the Working Group on the United Nations Decade of International Law with a view to preparing generally acceptable recommendations on the programme of activities for the Decade,

Noting that at its forty-sixth, forty-seventh, forty-eighth and forty-ninth sessions the Sixth Committee reconvened the Working Group to continue its work in accordance with resolutions 45/40 of 28 November 1990, 46/53 of 9 December 1991, 47/32 and 48/30.

Having considered the report of the Working Group submitted to the Sixth Committee.[2]

1. *Expresses its appreciation* to the Sixth Committee for the elaboration, within the framework of its Working Group on the United Nations Decade of International Law, of the programme for the activities to be commenced during the third term (1995-1996) of the Decade and requests the Working Group to continue its work at the fiftieth session in accordance with its mandate and methods of work;

2. *Also expresses its appreciation* to States and international organizations and institutions that have undertaken activities in implementation of the programme for the second term (1993-1994) of the Decade, including sponsoring conferences on various subjects of international law;

3. *Adopts* the programme for the activities for the third term (1995-96) of the United Nations Decade of International Law as an integral part of the present resolution, to which it is annexed;

4. *Invites* all States and international organizations and institutions referred to in the programme to undertake the relevant activities outlined therein and to provide information in this respect to the Secretary-General for transmission to the General Assembly at its fiftieth Session or, at the latest, its fifty-first session;

5. *Requests* the Secretary-General to submit, on the basis of such infromation as well as new information on the activities of the United Nations relevant to the progressive development of international law and

2. A/C.6/49/L.10.

its codification, a report to the General Assembly at its fiftieth session on the implementation of the programme;

6. *Encourages* States to disseminate at the national level, as appropriate, information contained in the report of the Secretary-General;

7. *Appeals* to States, international organizations and non-governmental organizations working in the field of international law and to the private sector to make financial contributions or contributions in kind for the purpose of facilitating the implementation of the programme;

8. *Requests* the Secretary-General to bring to the attention of States and international organizations and institutions working in the field of international law the programme annexed to the present resolution;

9. *Also requests* the Secretary-General to proceed with the organization of the United Nations Congress on Public International Law, to be held from 13 to 17 March 1995, within existing resources and assisted by voluntary contributions, taking into account the guidance provided at the forty-eighth and forty-ninth sessions of the General Assembly, and to keep the Member States informed of the status of the preparations;

10. *Recognizes* that international humanitarian law remains an area of particular relevance, and in this connection notes that an inter-governmental meeting of experts will be convened by the Government of Switzerland in January 1995 in order to prepare a report on practical means of promoting full respect for and compliance with international humanitarian law;

11. *Invites* all States to disseminate widely the revised guidelines for military manuals and instructions on the protection of the environment in times of armed conflict[3] received from the International Committee of the Red Cross and to give due consideration to the possibility of incorporating them into their military manuals and other instructions addressed to their military personnel;

12. *Invites* the International Committee on the Red Cross to continue to report on activities undertaken by the Committee and other relevant bodies with regard to the protection of the environment in times of armed conflict, so that the information received may be included in the report to be prepared pursuant to paragraph 5 of the present resolution;

13. *Decides* to include in the provisional agenda of its fiftieth session the item entitle "United Nations Decade of International Law".

3. A/49/323, annex.

Programme of the activities for the third term (1995-1996) of the United Nations Decades of International Law

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

The General Assembly, bearing in mind that maintenance of international peace and security is the underlying condition for the success of the implementation of the programme for the United Nations Decade of International Law, calls upon States to act in accordance with international law, and particularly the Charter of the United Nations, and encourages States and international organizations to promote the acceptance of and respect for the principles of international law.

States are invited to consider, if they have not yet done so, becoming parties to existing multilateral treaties, in particular those relevant to the progreessive development of international law and its codification. International organizations under whose auspices such treaties are concluded are invited to indicate whether they publish periodic reports on the status of ratifications of and accessions to multilateral treaties, and if they do not, to indicate whether in their view such a process would be useful. Consideration should be given to the question of treaties which have not achieved wider participation or entered into force after a considerable lapse of time and the circumstances causing the situation.

States and international organizations are encouraged to provide assistance and technical advice to States, in particular to developing countries, to facilitate their participation in the process of multilateral treaty-making, including their adherence to and implementation of multilateral treaties, in accordance with their national legal systems.

States are encouraged to report to the Secretary-General on ways and means provided for in the multilateral treaties to which they are parties, regarding the implementation of such treaties. International organizations are similarly encouraged to report to the Secretary-General on ways and means provided for by the multilateral treaties concluded under their auspices, regarding the implementation of such treaties. The Secretary-General is requested to prepare a report on the basis of this information and to submit it to the General Assembly.

The General Assembly, recognizing the importance of the protection of cultural property in the event of armed conflict, takes note of the

efforts under way to facilitate the implementation of existing international instruments in this field.

II. Promotion of Means and Methods for the Peaceful Setteemt of Disputes between States, including Resort to and Full Respect for the International Court of Justice

States, the United Nations system of organizations and regional organizations, including the Asian-African Legal Consultative Committee, as well as the Institute of International Law, the Hispano-Luso-American Institute of International Law and other international institutions working in the field of international law, and national societies of international law, are invited to study the means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the International Court of Justice, and to present suggestions for the promotion thereof to the Sixth Committee.

Taking into account the suggestions mentioned in paragraph 1 of the present section and with due regard to the recommendations contained in the report of the Secretary-General entitled "An Agenda for Peace",[4] the Sixth Committee should consider, where appropriate, on the basis of a report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, or of the Working Group on the United Nations Decade of International Law, the following questions:

(a) Strengthening the use of means and methods for the peaceful settlement of disputes, with particular attention to the role to be played by the United Nations, as well as methods for early identification and prevention of disputes and their containment;

(b) Procedures for the peaceful settlement of disputes arising in specific areas of international law;

(c) Ways and means of encouraging greater recognition of the role of the International Court of Justice and its wider use in the peaceful settlement of disputes;

(d) Enhancement of cooperation of regional organizations with the United Nations system of organizations in respect of the peaceful settlement of disputes;

(e) Wider use of the Permanent Court of Arbitration.

4. A/47/277-S/24111.

III. Encouragement of the Progressive Development of International Law and its Codification

International organizations, including the United Nations system and regional organizations, are invited to submit to the Secretary-General of the United Nations summary information regarding the programme and results of their work relevant to the progressive development of international law and its codification, including their suggestions for future work in their specialized field, with an indication of the appropriate forum to undertake such work. Similarly, the Secretary-General is requested to prepare a report on the relevant activities of the United Nations, including those of the International Law Commission. Such information should be presented in a report by the Secretary-General to the Sixth Committee.

On the basis of the information mentioned in papragraph 1 of the present section, States are invited to submit suggestions for consideration by the Sixth Committee and, as appropriate, recommendations. In particular, efforts should be made to identify areas of international law which might be ripe for progressive development of codification.

The Sixth Committee should study, taking into account General Assembly resolution 684 (VII) of 6 November 1952[5], its coordinating role with respect, *inter alia*, to the drafting of provisions of a legal nature and the consistent use of legal terminology in international instruments adopted by the General Assembly. States are invited to present proposals in this regard to the Sixth Committee.

The Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organizations should continue to study possible measures to strengthen the United Nations system for the maintenance of international peace and security. In that context, the Special Committee should bear in mind the debate within the United Nations, particularly within the General Assembly, on the report of the Secretary-General entitled "An Agenda for Peace".

IV. Encouragement of the Teaching, Study, Dissemination and Wider Appreciation of International Law

The Advisory Committee on the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law should, in the context of the Decade, continue to

5. See annex II to the rules of procedure of the General Assembly (A/520/Rev. 15).

formulate, as appropriate and in a timely manner, relevant guidelines for the Programme's activities and report to the Sixth Committee on the activities carried out under the Programme in accordance with such guidelines. Special emphasis should be given to supporting academic and professional institutions already carrying out research and education in international law, as well as to encouraging the establishment of such institutions where they might not exist, particularly, in the developing countries. States and other public or private bodies are encouraged to contribute to the strengthening of the Programme.

State should encourage their educational institutions to introduce courses in international law for students studying law, political science, social sciences and other relevant disciplines; they should study the possibility of introducing topics of international law in the curricula of schools at the primary and secondary levels. Cooperation between institutions at the university-level among developing countries, on the one hand, and their cooperation with those of developed countries, on the other, should be encouraged.

States should consider convening of conferences of experts at the national and regional-levels in order to study the question of preparing model curricula and material for courses in international law, training of teachers in international law, preparation of textbooks on international law, and the use of modern technology to facilitate research in international law.

States, the United Nations and regional organizations should consider organizing seminars, symposia, training courses, lectures and meetings and undertaking studies on various aspects of international law.

States are encouraged to organize special training in international law for legal professionals, including judges, and personnel of ministries of foreign affairs and other relevant ministries as well as military personnel. The United Nations Institute for Training and Research, the United Nations Educational, Scientific and Cultural Organization, The Hague Academy of International Law, the International Institute of Humanitarian Law, regional organizations and the International Committee of the Red Cross are invited to continue to cooperate in this respect with States.

In connection with the training of military personnel, States are encouraged to foster the teaching and dissemination of the principles governing the protection of the environment in times of armed conflict and should consider the possibility of making use of the guidelines for

military manuals and instructions prepred by the International Committee of the Red Cross.

Cooperation among developing countries, as well as between developed and developing countries, in particular among those persons who are involved in the practice of international law, for exchanging experience and for mutual assistance in the field of international law, including assistance in providing textbooks and manuals of law, is encouraged.

In order to make better known the practice of international law, States, and international and regional organizations should endeavour to publish, if they have not done so, summaries, repertories or yearbooks of their practice.

States and international organizations should encourage the publication of important international legal instruments and studies by highly qualified publicists, bearing in mind the possibility of assistance from private sources.

The Secretary-General of the United Nations, in cooperation with the Registry of the International Court of Justice, is encouraged to update the publication *Summaries of the Judgements, Advisory Opinions and Orders of the International Court of Justice (1949-1991)*, in all the official languages of the Organization and within the existing overall-level of appropriations.

Other international courts and tribunals, including the European Court of Human Rights and the Inter-American Court of Human Rights, are invited to disseminate more widely their judgments and advisory opinions, and to consider preparing thematic or analytical summaries thereof.

International organizations are requested to publish treaties concluded under their auspices, if they have not yet done so. Timely publication of the United Nations *Treaty Series* is encouraged and efforts directed towards adopting an electronic form of publication should be continued. Timely publication of the *United Nations Juridical Year-book* is also encouraged.

V. Procedures and Organizational Aspects

The Sixth Committee, working primarily through its Working Group on the United Nations Decade of International Law and with the assistance of the Secretariat, will be the coordinating body of the programme for the Decade. The question of the use of an intra-sessional, inter-sessional or existing body to carry out specific activities of the programme may be considered by the General Assembly.

The Sixth Committee is requested to continue to prepare the programme of activities for the Decade.

The Secretariat should proceed with the organization of the United Nations Congress on Public International Law to be held from 13 to 17 March 1995, within existing resources and assisted by voluntary contributions taking into account the guidance provided at the forty-eighth and forty-ninth sessions of the General Assembly, and keep the Member States informed of the status of the preparations.

All organizations and institutions referred to and invited to submit reports to the Secretary-General under sections I to IV above are requested to submit interim or final reports preferably at the fiftieth Session but not later than the fifty-first session of the General Assembly.

States are encouraged to establish, as necessary, national, regional and Sub-regional committees which may assist in the implementation of the programme for the Decade. Non-governmental organizations are encouraged to promote the purposes of the Decade within the fields of their activities, as appropriate.

It is recognized that, within the existing overall-level of appropriations, adequate financing for the implementation of the programme for the Decade is necessary and should be provided. Voluntary contributions from Governments, international organizations and other sources, including the private sector, would be useful and are strongly encouraged. To this end, the establishment of a trust fund to be administered by the Secretary-General might be considered by the General Assembly.

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 Thiry-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 organize 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 (UNHCR) to commemorate Twenty-five years of Working relationship between the two organizations. The Workshop entitled 'International Refugees and Humanitarian Law in the Asian-African Region' was held in New Delhi in October 1991, with an objective to promote general awareness and wider acceptability, among the Member States of

the Committee, of the Geneva Convention Relating to the Status of Refugees, 1951 and the 1967 Protocol thereto.

The workshop's proceedings were thereafter presented at the Thirty-first Session of the Committee held in Islamabad in 1992. While presenting the report, the attention of the Committee was drawn, *inter alia*, to two of the recommendations made by that workshop. The first recommendation 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.

During the course of deliberations on the Report of the Workshop, the Representative of the UNHCR stated that the Office of the UNHCR would cooperate with the AALCC Secretariat in the "elaboration of such a model, whether as a text, or principles to be considered in any such legislation or a combination of both". He added that the representatives of the UNHCR in the capitals of Member States would also be ready to assist. One delegate in supporting the formulation of model legislation of refugees by the secretariat expressed the view that the definition of the term "refugee" as stipualted in the Geneva Convention Relating to the Status of Refugees, 1951 and the 1967 Protocol thereto be amended so as to incorporate other qualifications and criteria such as those enumerated in the OAU Convention Governing the Specific Aspects of Refugee problems in Africa, 1969 and the Cartagena Declaration on Refugees, 1984.

The Committee at its Thirty-first Session adopted the aforementioned recommendations of the AALCC-UNHCR Workshop and approved of the suggestion to prepare a model legislation in cooperation with the office of the UNHCR.

At its Thirty-second Session in Kampala, in 1993, the Committee considered a "Preliminary Study on the proposed Model Legislation on Refugees" which presented an overview of the features of contemporary refugees law and a draft structure of the proposed model legislation on refugees. While introducing the brief prepared by the Secretariat the Deputy Secretary-General had stated *inter alia* that a comparative study of the definitions incorporated in the existing various international instruments did make out a case for the need to expand the scope of the term "refugee" to conform to the contemporary developments. The existing international instruments are: the Refugee Convention of 1951 and the 1967 Protocol thereto; the OAU Convention of 1969; the Cartagena

Declaration of 1984 and the Committee's Bangkok Principles of 1966 and Addendum I of 1970 thereto.

During the Thirty-second 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. In his view the incorporation of international standards for treatment of refugees into municipal law through domestic legislation would be an appropriate method and in some legal systems, perhaps, the only method of according international protection to refugees. He recalled that during the Arusha Conference on Refugees held in 1979 the African States had recommended that the Organization of African Unity (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 or refugees.

At that Session a view was expressed that since the 1951 Convention on the Status of Refugees does not cover all categtories of refugees, it may be useful to formulate a comprehensive framework to deal with new refugee situations. The Committe 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" and directed the Secretariat to include the item "The Status and Treatment of Refugees and Displaced Persons" on the agenda of the Thirty-third Session of the Committee.

Pursuant to that decision the AALCC Secretary-General held informal consultations with the representatives of the Organisation of African Unity (OAU) and the UNHCR, in 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.

A round-table meeting of the representatives of the AALCC and the UNHCR was held in June 1993. The focus of discussions at that meeting was the proposed model legislation on refugees. During that meeting it was observed that the model legislation would be much more meaninful if it was incorporated into national laws because these are far more effective 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 the principles of international protection and *non-refoulement* have at best been reduced to good intentions. The national legislation would be more respected since being law of the land, there were better chances of its implementation.

Therefore, a national legislation, keeping all the factors in mind, would be useful. Of-course, the question of the incorporation of the existing principles could be left to individual States. It was agreed *inter alia*, to evolve ways and means of elaborating the concerning Treatment of Refugees, 1966 (hereinafter called the Bangkok Principles) and to 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 in Geneva in June 1993 whereat it was agreed to continue to study further and to identify Islamic Law principles which could help in promoting existing principles of refugees law.

Thereafter at a tripartite meeting of the representatives of the AALCC, OAU and the UNHCR the view was expressed that it was necessary to update the OAU/UNHCR guidelines on the national refugee legislation prepared in 1980. This could be done by appointing a consultant or consultants, if necessary. The goal should be to formulate flexible principles which could be incorporated into existing national legislation and priorities would have to be set as to what is to be dealt with first. What could be done, was to "build on" the existing African model. It was suggested that the model legislation could be drafted in "Blocks".

At its Thirty-third Session held in Tokyo in 1994 the Committee considered *inter alia* a draft structure of the 'Model Legislation on refugees', which the Secretariat had been called upon to prepare. The document prepared for the Tokyo Session had invited the Committee to give consideration to the extent and scope of the key term 'refugees' around which the proposed model legislation was to be drafted.

It was pointed out in this regard that in recent times the terms 'refugees' and "displaced persons" had come to be used almost as synonyms and whether the scope of the proposed model legislation should extend to displaced persons. In sum, that document had examined the complexities of a generally acceptable definition of refugees and displaced persons. After due deliberations, in the course of which several delegates approved the establishment of a legal mechanism to govern the status and treatment of refugees, the Committee at its Thirty-third session decided *inter alia*

to continue with the task of the preparation of a model legislation in close cooperation with the UNHCR and the OAU in light of the codified principles of international law and the practice of States in the region.

Pursuant to the mandate of the Tokyo Session the Secretary-General addressed a Note Verbale to the Member States of the Committee seeking their cooperation and to ascertain the policies of their governments on the problem of refugees. Annexed to the Note was a questionnaire the response to which would give essential information about the opinion of the Member States and would assist in the formulation of the Model Legislation on the Status and the Treatment of Refugees.

Of the Nineteen AALCC Member States who are parties to the Convention regime only nine States in Asia have so far ratified the Convention Relating to the Status of Refugees, 1951* and its 1967 Protocol. The only guiding principles apart from the 1951 Convention and the 1967 Protocol thereto are Bangkok Principles, 1966 and 1970 addendum thereto which are recommendatory in nature. Therefore a regional solution to this problem is necessary.

The proposed model legislation could be particularly useful for the Asian region and could deal with both the question of the mass refugee status determination and individual determination. Once the mass admission of refugee is allowed it will not be difficult for individual persons seeking individual refugee status to do so. The model legislation will be much more meaninful if it is incorporated into national laws as international law principles lack enforcement procedures. It is hoped that refugee law principles will be incorporated as part of the alien or immigration laws already in existence. The national legislation would therefore guarantee better chances of implementation of international principles relating to the status and treatment of refugees including the question of their rights as well as their concommitant obligations.

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

The topic "The Establishment of Safety Zones for the displaced persons in their country of origin" was taken up for the first time in 1985 at the suggestion of the delegation from Thailand, who felt that this would lessen the burden imposed upon the international community under the

---

* Botswana, *China, Cyprus*, Egypt, Ghana, Iran, (Islamic Republic of) *Japan*, Kenya, Nigeria, *Philippines, Republic of Korea*, Senegal, Sierra Leone, Somalia, Sudan, *Turkey*, United Republic of Tanzania, Uganda and *Yemen*. See U.N. Document ST/LEG/SER.E/12, *The Multilateral Treaties Deposited with the Secretary-General, Status as on 31 December, 1993.*

broader principle of "Burden Sharing".[1] It was discussed at the Twenty-sixth (Bangkok) and Twenty-seventh (Singapore) sessions of the Committee. At the Twenty-eighth session held in Nairobi the Secretariat presented 13 principles[2] which provided a framework for the establishment of Safety Zone. It was however decided in 1989 to defer the consideration of the item to a future session.

During the Thirtieth Session the delegate of Thailand refered to the earlier proposal made by his Government on the question of establishment of Safety Zones for the displaced persons in the country of origin and suggested that bearing in mind the recent developments, the topic on Safety Zones should be put on the agenda of the next session of the Committee for further study. The topic was further discussed at the Thirty-first and Thirty-second sessions. The Thirty-third session mandated 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.

The concept of "Safety Zone" in refugee law is relatively more recent as compared to the parallel concepts of "hospital and Safety Zones", "neutralised zones" and "demilitarised zones" under humanitarian law. But the basic objective of all these concepts is the same i.e.; to provide protection and assistance to persons affected by violent conflicts. While the humanitarian law concepts relate more to conduct of war and the protection of civilians in areas engulfed in an armed conflict, the safety zone concept in refugee law is primarily aimed at protection of persons who are displaced by conflict and are likely to seek or remain in refuge abroad unless they are protected in safe areas elsewhere in the country itself. Depending upon the nature and extent of the conflict, however, the two concepts are, more often than not likely to be overlap.

For the Thirty-fourth Session the Secretariat has formulated a "Framework for the Establishment of a Safety Zone for Displaced Persons in their Country of Origin." This draft incorporates basic principles enshrined in international humanitarian laws and the decisions of international organisations. The framework adopts a simple and uncomplicated structure to outline a solution to a complex issue and comprises twenty (20) provisions arranged under seven broad headings. The framework stipulates (i) the aim of the establishment of a Safety Zone: (ii) conditions in accordance with which a Safety Zone may be established; (iii) the supervision and

1. Burden sharing principles were adopted in 1987 by the AALCC, they were, an addition and improvement on the Bangkok Principles of 1966.

2. Doc. No. AALCC/XXVIII/89/3. Annexure I

management of the proposed zone; (iv) duties of the Government and the Conflicting Parties concerned; (v) the rights and duties of the displaced persons in the Safety Zone; (vi) protection of the officials of the International Organisations; and (vii) the closure of the Safety Zone.

The twenty odd provisions arranged under the seven subjects or titles mentioned above rely heavily on the thirteen principles that the AALCC considered at its Twenty-eighth session held in Nairobi in 1989 (hereinafter referred to as the Nairobi Principles). A careful reading of the twenty provisons of the present framework and the Nairobi Principles would reveal that ten of the thirteen propositions that comprised the Nairobi Principles have been elaborated in the aforementioned framework.

The framework proposes the establishment of a Safety Zone to "protect the life and property of displaced persons in their country of origin from consequences of armed conflicts by placing them under a UN protection area" when a "considerable number of displaned persons arises as a result of *armed conflicts* or *civil wars* and their life and property are threatened". These two provisions (1.1 and 2.1) read together furnish the raison d'etre of the proposed Safety Zone. However the latter provisions quoted above (2.1) expands the purpose of the establishment of the proposed zone to provide safety and security from non-International Armed Conflicts.

The views expressed at the informal Seminar organised by the Secretariat in collaboration with the UNHCR in New Delhi on 23 September 1994[3] is given as an Annex with this Chapter.

Thirty-fourth session : Discussions

Introducing the item the Deputy Secretary-General (Mr. Tohru Kumada) said that the Secretariat had prepared two studies addressed to two specific aspects of the subject: (i) Model Legislation on the Status and Treatment of Refugees (Doc. No. AALCC/XXXIV/Doha/95/2); and Establishment of Safety Zones for the Displaced persons in their country of origin (Doc. No. AALCC/XXXIV/Doha/95/3).

The Model Legislation had been prepared by the Secretariat in close co-ordination with UNHCR, and had been circulated to Member Governments. It followed, by and large, the structure of the proposed legislation presented at the Kampala Session and the debate on the term "Refugee" at the subsequent session held in Tokyo in 1994. The model

3. Summary Record of the Seminar on the "Establishment of a Safety Zone for the displaced persons in their country of origin" held in New Delhi on 23rd September 1994. Annexure II.

legislation comprises a preamble and thirty-six sections arranged in three parts viz. General Provisons; Rights and Obligations of Refugees; and, Organizational Arrangements; Read together they set out the *ratione personae and ratione materiae* of the proposed legislation and also provide for the establishment of an administrative/executive organ to deal with matters relating to the determination of refugee status as well as the rights and duties of refugees in the receiving state. The last part also makes provision for quasi-judicial review of decisions in matters relating to the status and treatment of refugees. The Secretariat had fulfilled its mandate and it was now for the Member Governments to give consideration to this model legislation and to make known to the Secretariat their comments and views thereon.

Turning to the subject of establishment of safety zones for displaced persons in their country of origin he said that the item had been taken up at the request of the Government of Thailand. At the Twenty-eighth Session (Nairobi) in 1989 the Secretariat had presented a set of 13 principles which provided a basic framework for the establishment of safety zones.

The study prepared for the current session focussed on the basic principles to establish the Safety Zone for the internally displaced persons during armed conflict. It dealt with the circumstances, under which a Safety Zone could be established, the involvement of the United Nations in the management of safety zones and the status of safety zones in international law.

The framefork formulated by the Secretariat incorporate basic principles enshrined in international humanitarian laws. The framework adopts a simple structure to outline a solution to a complex issue and comprises a total of twenty provisions arranged under seven broad headings. The framework stipulates:

(i) The aim of the establishment of a safety zone; (ii) Conditions in accordance with which a safety zone may be established; (iii) The supervision and management of the proposed zone; (iv) duties of the Government and the conflicting parties concerned; (v) The rights and duties of displaced persons in the safety zone; (vi) Protection of the officials of the International organizations; and (vii) the closure of the Safety Zone.

This framework was substantially built upon the 13 principles that the AALCC had considered at its Twenty-eighth Session held in Nairobi in 1989.

The Representative of the UNHCR observed that of the world's total

present refugee population of some 24 million, the overwhelming majority were found in the countries represented in the AALCC. The majority of the world's internally displaced population were also found in these countries. It was therefore, imperative for the countries of the Afro-Asian region to continue to evolve a common approach to the humanitarian problems of refugees and displaced persons which continued to confront them.

He stated that it is in that context that the efforts of the AALCC in evolving legal principles and new approaches in dealing with the refugee problem in the African-Asian region assumed particular importance. In his view the need for a legal basis in relation to the status and treatment of refugees instead of *ad-hoc* approaches, which exist in many countries of the AALCC could not be overemphasized. He pointed out that the UNHCR was involved in the elaboration of background papers on both the subjects under consideration.

Commending the efforts of the Secretariat in elaborating the model legislation, he drew attention to the difficulties in attempting to produce one undifferentiated model text for use in all countries in the region since countries differed in their domestic norms and legal traditions and in addition may or may not be signatory to the 1951 Refugee Convention. In his view, it was therefore preferable to have a model legislation adapted to specific legal or regional system and concerns. He proposed establishing a working group comprising the AALCC Secretariat, the UNHCR, and Member States including both parties and non-parties to the 1951 Refugee Convention.

Finally, he stated that the UNHCR attached a great deal of importance to the AALCC since its membership included a large number of refugee producing and refugee-receiving countries and without whose co-operation the refugee problem could not be solved. A significant aspect of the Afro-Asian region, he pointed out was that it contained not only a large number of countries which were parties to the 1951 Refugee Convention but also many, particularly those from Asia, who were not. It had always been the hope that more exchanges between these two groups of countries would lead to more accessions to the 1951 Refugee Convention.

The *Delegate of Egypt* stated that the Seminar on the question of Establishment of Safety Zones held in New Delhi had provided an opportunity for an exchange of views among member-countries and academicians. In his view codification of legal norms in this field was premature. he was of the view that reconciliation of legal and humanitarian aspects is necessary as practice does not reflect a common minimal legal content. The practice hitherto had been on a case to case basis, and it was

premature to codify *ad hoc* practices. In his opinion the idea should be to bring safety to people rather than people to safety; this required comprehensive study of the reasons and origin of conflicts. Besides, the topic had a deep cultural dimension, and the AALCC should promote concentration of regional aspects and regional organizations as they are best equipped to deal with the problem. The UNHCR, ICRC and NGO's in his opinion could working on the functional rather than a legal level elaborate operational guidelines based on the past practices and taking into account the particular characteristics of each conflict and situation.

The *President* intervened to say that there was a great responsibility on the International Community to deal appropriately with the growing problem of refugees and displaced persons. It should not be dealt with on an *ad hoc* basis but on the basis of an International convention. As further steps were needed on the legal aspects, this could be done by way of discussions or by exchange of views in working group.

The *Delegate of the People's Republic of China* expressed the view that the Model Legislation on the Status and Treatment of Refugees would provide a suitable basis for the enactment of domestic legislation on refugees for AALCC member states and would be an appropriate supplement to the 1951 Refugees Convention and its Protocol of 1967. Its contents reflect the comprehension of the definition of refugees and the position and practice of the majority of the Asian-African States on the issue of refugees. The fundamental principles and provisions established in the model legislation would exert a positive influence for the solutions of the issue of refugees by Asian-African States, if they were incorporated into national laws.

Referring to the issue of Establishment of Safety Zones for displaced persons in the country of origin the delegate stated that it involved not only the problem of the legal status of the safety zones, but also the problem of the jurisdiction and the State Sovereignty of the Country of Origin and therefore needed a more profound and cautious study.

He was of the view that greater emphasis should be put by the International Communities upon the issue of refugees and continuous efforts should be made for the early resolution of the refugee problem. Permissible, timely and effective measures should be taken to facilitate the return of the refugees with safety and dignity.

The *Delegate of Ghana* was of the view that the model legislation on the status and treatment of refugees was complementary to the proposal for the establishment of a legal framework for the establishment of a

safety zones for the displaced persons in their countries of origin. He was of the view that the main problems involved in the establishment of the Safety Zones included those related to the conditions for the establishment of the Safety Zones, breakdown of the Central Government, the geographical area of the zone, State sovereignty etc. He wished more discussion on the topic.

The *Delegate of the Islamic Republic of Iran* observed that keeping in view the scope of the refugee problem for the world in general and the Asian-African countries in particular the effort of the AALCC's Secretariat in providing the model legislation was commendable. It had been sent to the concerned authorities of his Government for consideration and comments, but a brief review of its contents showed that many concerns of Asian and African countries in connection with the refugee problem had been taken into account and received proper attention of the Secretariat. He hoped that the studies provided by the Secretariat would provide better prospects for the Asian/African countries in dealing with the Refugee problems and help in its elimination.

The *Delegation of Sudan* was of the view that the study on the establishment of the Safety Zone should consider carefully as to whose consent was needed in establishing the Safety Zone, especially where a decision by the Security Council would have to be invoked. In such cases it would be preferable if the Security Council decision was invoked after consultations with the concerned parties.

The *Delegate of Palestine* commenting on the refugee problem felt that unless the requirements of the UN resolution 149 dealing with compensation to Palestinian refugees, and the restoration of family unity were not met the refugee problem in that area would remain unsolved. He felt that the AALCC was an important body which should espouse the cause of its member states, and voice them at the appropriate fora.

The *Delegate of Japan* considered it essential that States become parties to the Convention Relating to the Status of Refugees, 1951 and its Protocol of 1967, and take appropriate domestic legislative measures to implement them. The model legislation would be more helpful if it included more detailed provisions concerning refugee recognition procedures. He was of the view that the wider definition of refugees in the model legislation did not seem realistic, as it might lead to imposing additional burden on neighbouring countries, which provided protection and assistance to refugees, along with UNHCR.

He urged a more careful study of the proposed legal framework for

establishing the safety Zone. Although the proposed legal framework envisaged that the establishment of a Safety Zone was subject to the consent and co-operation of the Government and that of the conflicting parties. Such consent was not easy to obtain. There was a need to further study the establishment of safety zone without the consent of the Government and the conflicting parties concerned. Account needed also to be taken of the difficulties arising from the establishment of the Safety Zone controlled and supervised by foreign authorities in a territory of a sovereign State.

The *Delegate of Jordan* was of the view that the AALCC should support the Arab stand in solving the problems of refugees, displaced persons and deportees.

The *President* intervened to say that the topics of Status and Treatment of Refugees and the Deportation of Palestinian were two different items to be dealt with separately.

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

(Adopted on 22nd April 1995)

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

Having considered the Secretariat briefs on Model Legislation on the Status and Treatment of Refugees Doc. No. AALCC/XXXIV/Doha/95/2 and the Establishment of Safety Zones for the Displaced Persons in their Country of Origin Doc. No. AALCC/XXXIV/Doha/95/3;

Appreciative of the statement and assistance of the Representative of the United Nations High Commissioner for Refugees;

Noting the proposals advanced by the Representative of the Office of the UNHCR.

1. *Appeals* to Member States to take all possible measures to eradicate the causes and conditions which force people to leave their countries and cause them to suffer unbounded misery;
2. *Urges* Member States who have not already done so to ratify or accede to the Convention relating to the Status of Refugees, 1951 and the 1967 Protocol thereto;
3. *Commends* the Secretariat for having prepared the Model Legislation on the Status and Treatment of Refugees in cooperation with the Office of the UNHCR.
4. *Also commends* the Secretariat for revising the Nairobi Principles of 1989 and for formulating the "Legal Framework for the Establishment of a Safety Zone for Displaced Persons in their Country of Origin".

5. Requests the Member-Governments to send in their observations and comments on (i) the questionnaire sent by the Secretary-General in March 1994 and (ii) Model Legislation set out in Doc. No. AALCC/XXXIV/Doha/95/2;

6. *Also requests* the Member-Governments to send their comments and observations on the proposed Legal Framework for the Establishment of Safety Zones for Displaced Persons in their Country of Origin prepared by the Secretariat;

7. *Directs* the Secretariat to study further the concept of Safety Zones in light of the comments received; and

8. *Decides* to include the item "Status and Treatment of Refugees" in the Agenda of the Thirty-fifth Session of the Committee.

(iii) Secretariat Briefs

A. Model Legislation on the Status and Treatment of Refugees

a. STRUCTURE

The Model Legislation on the Status and Treatment of Refugees proposed by the Secretariat comprises a preamble and Thrity-one sections arranged in Three Parts viz. General Provisons; (Sections 1-9); Rights and Obligations (of Refugees)—(Sections 10-24); and Organizational Arrangements (Section 25-31). Read together they set out the rationae *personae, and rationae materiae*, of the proposed legislation and also provide for the establishment of an administrative/executive organ to deal with matters relating to refugee status determination and the rights and duties of refugees in the receiving State. The last part also makes provision for quasi-judicial judicial review of decisions in matters relating to the status and treatment of Refugees. The text of the Model Legislation on the Status and Treatment of refugees prepared by the Secretariat has already been circulated amongst Member States and has been annexed with this study.

b. GENERAL PROVISIONS (Sections 1-9)

Part I of the Model Legislation comprising nine sections addresses itself to such matters as (i) title, purpose and scope fo the proposed Act (Section 1-3); (ii) Definitions or use of terms (Section 4) (iii) the basic principles of the treatment of refugee (Section 5); (iv) Meaning of the term "refugees" (Section 6), (v) determination of a class of persons as refugees (Section 7); and (vi) exclusion and cessional clauses (Sections

8 and 9). Sections 1 and 3 dealing with the title and territorial applicability of the proposed legislation are self-explanatory and require no comment.

Section 2 of the proposed legislation in setting out the purpose seeks to reinforce and fortify the norm identified in the preamble of the proposed legislation i.e. the protection of persons who seek refuge. One criticism hitherto levelled against the legislative approach adopted by States to regulate refugees has been that the issue of refugee protection is approached as one of defining not the rights (of the refugees) themselves but rather the powers vested in refugee officials. It has been argued in this regard that the protection of refugees rights becomes an exercise of powers and discretion of those officials rather than enforcement of specific rights identified and generalized by law. In other cases, it is further argued, the realization of refugee rights is left to depend ultimately on the Ministerial descretion.

Mindful of this lacuna in some of the existing national legislations the AALCC Secretariat has proposed the couching of the purpose of the Act as establishing "a procedure for granting of refugee status to asylum seekers, to guarantee to them fair and due treatment and to establish the requisite machinery therefor".

(i) Basic principles

Section 5 of the Model Legislation whilst enumerating the basic principles of the treatment of refugees seeks to ensure that an asylum seeker receives fair and due treatment from state officials engaged in relief and assistance work for the refugees. The other principles enumerated in this section are *non-refoulement* non-discrimination, and the principle of family unity.

(a) Non-refoulement

The principle of *non-refoulement* has been incorporated in all regional and international instruments relating to the status and treatment of refugees, including the AALCC Bangkok Principles and thus requires no explanation or justification for its inclusion. It may be stated, however, that the principle of *non-refoulement* is neither absolute nor universal. The clauses allowing exceptions to the principles of *non-refoulement* are incorporated in the 1951 Convention, the 1967 Declaration on Territorial Asylum as well as the Bangkok Principles of 1966 are a pointer that this principle is not absolute. In Japan—which has acceded to the 1951 Convention—the Courts are known to allow refoulement when the Minister of Justice finds the application of the principle of *non-refoulement* "seriously detrimental to the interests of Japan and security thereof".

(b) Non-Discrimination

The principle of non-discrimination has hitherto been incorporated in the Universal Declaration of Human Rights, 1948 and the OAU Convention Governing the Specific Aspects of Refugee problems in Africa, 1969. The International Convention on the Elimination of all forms of Racial Discrimination, 1965, the International Covenant on Civil and Political Rights, 1966 and the practice of States more than affirm that the principle of non-discrimination is a generally accepted principle of international law and that discriminatory practices of States are not permissible. However, as much as the reference to a "membership of a particular social group or political opinions" found in Article IV of the OAU Convention is omitted in the present clause the principle of non-discrimination incorporated herein may be considered as narrow and restricted in its scope and therefore may require further consideration.

(c) Family Unity

As regards the principle of family unity, it draws its strength from the Universal Declaration of Human Rights, 1948, the practice of competent international organizations in the field of humanitarian affairs as well as from the practice of States. The International Covenant on Economic, Social and Cultural Rights 1966; the International Convention on the Protection of all Migrant Workers and Members of their Families, 1990 and the 1984 Declaration of Cartagena adopted by Central and South American States and the African Charter on Human and People's Rights, 1981 all incorporate the principle of family unity. It may be stated that the concept of family unity may be found in Article 37 of the Vienna Convention on Diplomatic Relations, 1961, which admits of and allows immunity in respect of the family of a diplomatic agent. More recently the Convention of the Rights of Child, 1990 reaffirmed the principle of family unity.

(ii) Definition of Refugee (Sections 6 and 7)

Sections 6 and 7 define the *rationae personae* of the proposed legislation and are at the core of the matter of refugee status determination both in respect of individuals and—in the event of a large influx—the determination of the status of a group or class of persons as refugees. 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 those instruments no reference to persecution in the sense that this term is currently employed.

The first formal reference to persecution as part of the refugee definition came in the 1946 Constitution of the International Refugee Organization (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"* 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 country 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 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 Refugees 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, restict 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.

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 as to who should receive international protection.

* Section B

This need also became very apparent in regard to the 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 the independence movements in Africa.

Consequently there were 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 offices" 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 in 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 of Refugees in Africa in 1979, been endorsed by the General Assembly as applying to UNHCR's activities in the African continent.

Sections 6 and 7 of the model legislation are based on these considerations. An additional factor in the favour of the term refugee adopted in section 6 is that most of the African States that have during the 1980s enacted legislation relating to the status and treatment of refugees have adopted somewhat similar definitions.

(iii) Exclusion clause (Section 8)

The previous conduct of an asylum seeker is a significant input in the decision concerning his refugee status to the point of automatically excluding

him from the protective umbrella of the international instruments. Thus, where a person has committed a crime against peace, a war crime or a crime against humanity or a serious non-political crime outside the country of refuge *prior* to his admission to that country as a refugee, or has been guilty of acts contrary to the Purposes and Principles of the United Nations, he can not claim refugee status under the proposed Act. Nor can the benefit of the principle of *non-refoulement* be claimed by a person who on reasonable grounds is regarded as a danger to the security of the country in which he is, or who having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. Such serious offences as the Unlawful Seizures of Aircraft, the Taking of Hostages and murder are just and fair grounds for extradition or expulsion of the individual.

This exclusion clause as incorporated in Article 1 (F) of the 1951 Convention has since been adopted in several national laws, for instance Article 8 of the Malawi Refugee Act, 1989; Section 3(4) of the Zimbabwe Refugee Act, 1983 and Section 3(2) of the Lesotho Refugee Act 1989. Article 33 paragraph 2 of the 1951 Convention, Article 3 of the General Assembly Declaration on Territorial Asylum 1967 and the 1966 Bangkok Principles are among the instruments which affirm the exception to the rule of *non-refoulement*. In sum, the principle of *non-refoulement* is not absolute and the term "refugee" excludes fugitives from justice.

Among the primary duties of a refugee is not to have committed a common crime. For if he has, he can be excluded from the country of refuge. The aim of the exclusion clause Article 1 F of the 1951 Convention is to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime and to ensure that he does not enjoy the benefit of refugee status so as to exonerate himself from justice. It also seeks to render due justice to a refugee who has committed a common crime of a less serious nature or has committed a political offence. Only a crime committed or presumed to have been committed by an applicant "outside the country of refuge prior to his admission to that country as a refugee" is a ground for exclusion.

A refugee committing a serious crime in the country of refuge is subject to due process of law in that country. Article 32 of the 1951 Geneva Convention provides that a refugee lawfully in the territory of a contracting State shall not be expelled "save on grounds of national security or public order". Such a refugee shall be expelled only in pursuance of a decision reached in accordance with due process of law. Except

where compelling reasons of national security otherwise require the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority". Further Article 33 which prohibits expulsion or return however provides in paragraph 2 that under extreme circumstances a refugee may be expelled when "there are reasonable grounds for regarding (him) as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime constitutes a danger to the community of that country".

(iv) Cessation Clause

When the circumstances in connection with which a person has been recognized as a refugee have ceased to exist he can no longer continue to refuse to avail himself of the protection of the country of his nationality or return to the country of his nationality or to return to the country of his habitual residence. In such case the 1951 Convention ceases to apply. The Convention a *fortiori* does not apply to persons receiving protection or assistance from organs or agencies other than the UNHCR. This cessation clause of the 1951 Convention has *inter alia* been incorporated in Section 3 paragraph 5(1)(a) of the Zimbabwe Refugee Act 1983 and Article 4 of the Lesotho Refugee Act, 1983.

The Statute of the UNHCR envisages, it may be recalled, two forms of permanent solution for the problem of refugees viz. voluntary repatriation or their assimilation into new national communities paras a, b, and c of Section 9 of the propsed model conform to these objectives and draws its strength *inter alia* from Article II of the AALCC Bangkok Principles, 1966.

c. RIGHTS AND OBLIGATIONS OF REFUGEES (Sections 10-24)

(i) Rights of Refugees

Part II of the Model Legislation comprising *fifteen sections (10 to 24)* addresses itself to the Right and Obligations of Refugees whilst in the territories of the State affording them protection. The first of these viz. section 10 addressed to the rights of refugees offers alternative formulations. *Option A* is based on the express recognition of all rights set out in the regional and universal conventions to which the State is a party and recognizes and accepts the references to the term 'refugees' in those instruments as references to refugees recognized and protected by and under the proposed Act. This formulation draws its inspiration from

Section 12 of the Zimbabwe Refugee Act, 1983. This alternative would require that either the specific provisions of the instruments which are to be given effect be set out in a schedule or annexed to the proposed act or be identified and included in the corpus of the Statute.

The Second alternative i.e. *option B* is somewhat restrictive in its scope of application and apart from fair and due treatment without discrimination restricts the rights of the refugees to those that are generally accorded to aliens in particular such matters as right to property, right to transfer assets, and the rights to engage in agriculture industry etc. It may be recalled in this regard that the Bangkok Principles concerning Treatment of Refugees adopted by the AALCC had included the minimum standard of treatment and that Article VI of those Principles provided *inter alia* that a State shall accord to refugees treatment in no way less favourable than that accorded to aliens and that the standard of the treatment shall include the rights relating to aliens to the extent that they are applicable to refugees.

A refugee whether he is in the territory of the State of asylum, transit, or in the receiving State for resettlement enjoys certain basic civil rights. Article 14(1) of the Universal Declaration of Human Rights stipulates: "Everyone has the right to seek and to enjoy in other countries asylum from persecution". The Preamble to the 1951 Convention relating to the Status of Refugees reaffirms that "human beings shall enjoy fundamental rights and freedoms without discrimination" and the Convention endeavours to assure refugees the widest possible exercise of these fundamental rights and freedoms.

The rights and protection to be afforded or granted to a refugee by a State are obligatory not only under the Convention but also under customary international law and general principles recognized by nations. It may be recalled in this regard that the Bangkok Principles adopted by the AALCC in 1966 recognizes this principles and a State, party to the 1951 Geneva Convention and its 1967 Protocol thereto, is obliged to grant the protection and rights to the refugees as described in the instruments. The 1951 Geneva Convention primarily codified the then existing international custom and general principles of law on the international legal rights and obligations of refugees.

(ii) Established Standards of Treatment

While the Convention on Refugees 1951 envisages the same treatment as is accorded to aliens generally, it goes a little further with respect to some specific rights, in respect of which refugees are granted more favourable

treatment than that accorded to aliens. The four established standards of treatment are: (i) National treatment i.e. the treatment accorded to nationals; (ii) The treatment accorded to nationals of the country of habitual residence; (iii) Most-favoured-Nation treatment accorded to nationals of a foreign country; and (iv) Treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

(a) National treatment

This standard is generally accorded to refugees as regards (a) freedom to practice their religion and the religious education of their children (Article 4); (b) access to courts (Article 16, paragraphs 1 and 2); (c) wage-earning employment of refugees who have completed three years residence in the country or who have a spouse or one or more children possessing the nationality of the country (Article 17, paragraph 2); (d) rationing (Article 20) (e) elementary education (Article 22, paragraph 1); (f) the right to public relief and assistance (Article 23); (g) matters of labour legislation and social security (Article 24) and (viii) taxation (Article 29).

(b) The standard of treatment accorded to nationals of habitual residency

This treatment is accorded to refugees with regard to (a) the protection of their intellectual property, such as inventions, trade marks and trade names, and of their rights in literary, artistic and scientific works (Article 14), (b) access to courts, (c) legal assistance and (d) exemption from *cautio judicatum solvi* in countries other than that of their habitual residence (Article 16, paragraph 3).

(c) Most-favoured-nation treatment

This treatment is granted to refugees as regards (a) their right to form and join non-political and non-profit making associations and trade unions (Article 15), (b) the right to engage in wage-earning employment, if the refugees concerned do not fulfil the conditions necessary for the enjoyment of national treatment (Article 17, paragraph 1).

(d) Treatment not less favourable than that accorded to aliens

The principles of treatment as favourable as possible and in any event not less favourable then that accorded to aliens is applied to refugees

with regard to (a) acquisition of movable and immovable property, property rights and interests (Article 13); (b) the right to engage on their own account in agriculture, industry, handicrafts and commerce, and to establish commercial and industrial companies (Article 18), (c) to practice liberal professions (Article 19); (d) to obtain housing (Article 21); and (e) to benefit from higher education (Arfticle 22, paragraph 2).

(iii) Obligations of Refugees (Section 12)

The principle of national sovereignty requires that all persons including refugees, conform to the laws and regulations of the country of asylum as well as to the measures taken for the maintenance of public order. Section 11 of the Model Legislation draws its strength from Article 2 of the 1951 Convention and Article 3 of the OAU Convention of 1969.

(iv) Provisional Measures (Section 14)

Article 8 of the 1951 Convention stipulates that in time of war or other grave and exceptional circumstances a State may take provisional measures essential to national security in the case of a particular person pending a determination that the person is in fact a refugee and that the continuance of such measures is necessary in his case in the interest of national security. The stipulation of Article 8 of the Convention Relating to the Status of Refugees, 1951 should be read together with Article 44 of the Fourth Geneva Convention relating to the Protection of Civilian Persons in Time of War, 1949. Article 44 of the Fourth Geneva Convention, *inter alia* stipulates that in applying the measures of control the power in whose jurisdiction protected persons find themselves shall not treat refugees as enemy aliens, exclusively on the basis of their nationality.

d. ORGANIZATIONAL ARRANGEMENTS (Sections 25-36)

States generally determine their own policies regarding the admission of refugees and displaced persons and there are no international conventions which require the admission of refugees and displaced persons. States are free to enact their own laws and regulations governing such admissions. In deciding whom to admit, States are often guided by generally acceptable humanitarian principles of international law.

Several States are also known to screen refugees at the border and many reject refugees without any procedural review. The right of refugees to appeal, adverse or negative refugee status determination is unevenly available. According to a UNHCR report on the procedures employed by

States Parties to the 1951 Convention and to the Protocol of 1967 thereto, only 28 States permitted appeals. In Malawi, for instance, any person who is dissatisfied with a decision of the Refugee Committee in regard to his application for refugee status or revocation of its decision granting him refugee status may appeal to the Minister and the Minister may confirm, set aside or vary the decision.

The two-fold thrust of Part III of the Model Legislation is to provide a machinery for refugee status determination by a Bureau,/Department,/ Division or Unit of the receiving State. In practice, however, the refugee status determination machinery varies from State to State. Thus, in Thailand the Government officials involved in the refugee status determination process for the Vietnamese Boat People were all drawn from the Ministry of Interior, who based their decisions on the recommendations of lawyers and the appeals considered by more senior officials from the same Ministry. In Malaysia the responsibility of refugee status detemination both in the initial stages and the review stages was entrusted to the National Task Force for Vietnamese Illegal Immigrant composed of officials from the Army, Navy and Police. There the National Task Force, in turn, is known to have appointed officers to interview asylum seekers and both the first instance and review decisions were taken by senior officials of the National Task Force. In the Philippines the asylum seekers were interviewed and first instance decisions made by immigration officials. Appeals against the first instance decisions were reviewed by an Appeal Board comprising senior Government officials.

The African State practice is not very divergent. In Nigeria, a National Commission for Refugees, an Eligibility Commission and an Appeal Board for refugee Status determination and safeguarding the rights of asylum seekers were established in 1989. In Zimbabwe the Refugees Act of 1983 provides that any person who is aggrieved by a refusal of the Commissioner to recognize him as a refugee may appeal in writing to the Minister "The right to appeal against a negative decision of the Commissioner may also be executed in the event of withdrawal of recognition of a person as a refugee. In Malawi too, as mentioned above, any person dissatisfied with a decision in regard to his application for a refugee Status or revocation of the decision granting refugee status to him may appeal to the Minister who may confirm, set aside or vary the decision.

The Lesotho Refugee Act incorporates somewhat detailed provisions in this regard and establishes an Inter-ministerial Committee for the determination of Refugee Status, and a Refugee Advisory Board. Under that Act where the Minister on the advice of the Inter-ministerial Committee

for the Determination of Refugee Status decides not to recognize an asylum seeker as a refugee that person has the right to re-apply to the Minister to reconsider his application and the Minister may refer the matter to the Advisory Board who (the Board) shall then make recommendation on the same to the Minister for a final decision. The Lesotho Act goes on to stipulate that where after the reconsideration of the applicant's case the Minister decides to reject the recommendation of the Committee or the Board the applicant shall have the right to seek an appropriate relief from the High Court of Lesotho regarding his application.

It is against this backdrop that Part III of the draft of the Model Legislation entitled Organizational Arrangements aims at establishing an institutional and administrative machinery for matters dealing with refugee status determination. This part of the draft proposes the establishment of an executive organ and a review/appellate body for the purpose of judicial or quasi judicial review of the decisions, or orders of the executive body (Sections, 25, 26 and 27). This part also explicitly provides the composition and functions of both the executive organs as well as the review/appellate authority and other matters allied to their functioning. (Section 28 to 36).

ASIAN AFRICAN LEGAL CONSULTATIVE COMMITTEE

Model Legislation on the Status and Treatment of Refugees

An Act for the recognition and protection of persons who seek refugee status within the territory of this country.

Be it enacted by (as, for example, the Parliament, or the President and Parliament, etc of the concerned country) as follows:

GENERAL PROVISIONS

1. **Short title**—This Act/Law shall be called the Refugees (Recognition and Protection) Act, (year of enactment).

2. **Purpose of the Act**—The purpose of this Act is to establish a procedure for granting of refugee status, to asylum seekers, to guarantee to them fair and due treatment and to establish the requisite machinery therefor.

3. **Scope of the Act**—This Act shall apply throughout the territory of this State or in such areas of the State as the Government may notify.

4. **Definitions**—In this Act, unless the text otherwise requires—

(1) Asylum seeker' means an alien who in need of protection, seeks recognition and protection as a refugee.

(2) Member of his family', in relation to a refugee includes—

(a) the spouse (s) of the refugee;

(b) any unmarried child of the refugee under the age of majority;

(c) the father and mother of the refugee who, by reason of age or disability, are, mainly dependent upon the refugee for support; and

(d) any other person related to the refugee by blood or marriage who is solely dependent upon him;

(3) 'Identity Card' means a document issued under the provisions of this Act to a recognized refugee.

(4) 'Refugee' means a refugee as defined in Article 6;

(5) 'Refugee Committee' means the Committee established as an administrative organ by and under the provisions of this Act.

(6) 'Refugee Appellate Authority' means the appellate authority established by and under the provisions of this Act to hear appeals against orders passed by the Refugee Committee as provided under the rules framed by and under the provisions of this Act;

(7) 'Voluntary repatriation' means the voluntary return of refugees to their country of origin on their own free and voluntary decision;

(8) 'Travel document' means a document which is issued by the Refugee Committee for the purpose of enabling a refugee to travel outside this country in accordance with the procedure established by the rules framed by and under the provisions of this Act.

(9) 'Country of origin' signifies, as appropriate, the refugee's country of nationality, or, if he has no nationality, his country of former habitual residence.

5. **Basic Principles for the Treatment of Refugees**—In the application of this Act due regard shall be had to the following principles;

(a) A refugee shall neither be expelled nor returned to the frontiers of territories where his life or freedom would be threatened.

(b) A refugee shall not be discriminated against on the basis of his race, religion or nationality.

(c) A refugee shall have the right to receive fair and due treatment by the officials of the Government or its agencies who are engaged in relief and assistance work for the refugees.

(d) As far as practicable, the principle of family unity shall be preserved and due consideration shall be given to the refugee women and children.

6. **Meaning of refugee—**

OPTION A

Subject to the provisions of this section a person shall be regarded as a refugee if :

(a) owing to a well-founded fear of being persecuted or prosecuted for reasons of race, religion, nationality, sex, membership of a particular group or political opinion, he is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or

(b) not having a nationality and being outside the country of the his former habitual residence, he is unable or, owing to a well-founded fear of being persecuted or prosecuted for reasons of race, religion, membership of a particular social group or political opinion is unwilling to return to it;

(c) owing to external aggression, occupation, foreign domination, internal conflicts, massive violation of human rights or other events seriously disrupting public order in either part or whole of his country of origin, he is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin;

(d) he has been considered a refugee under any other law in force at the time of commencement of this Act.

OPTION B

The term 'Refugee' shall mean a person who owing to a well-founded fear of being persecuted or prosecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such event, is unable or, owing to such fear, is unwilling to return to it.

7. **Declaration of class of persons as refugees—**

(1) Notwithstanding anything above, the Refugee Committee may declare a class of persons under clauses (a), (b), (c) or (d) of section 6 to be refugees and may at any time amend or revoke such declaration.

Provided that no such amendment or revocation shall affect the right of any asylum seeker or any other person who is a member of the class of persons concerned and who entered this country before the date of such amendment or revocation, to continue to be regarded as a refugee for the purposes of this Act.

(2) The Refugee Committee shall cause any declaration in terms of this section, and any amendment or revocation thereof, to be publicized in a manner as it considers will best ensure that it is brought to the attention of authorized officers and persons to whom it relates.

8. **Persons not regarded as refugees**—A person shall not be regarded a refugee for the purposes of this Act if—

(a) he is alleged to have committed a crime against peace and security of mankind, a war crime or a crime against humanity, regardless of the time it was committed; or

(b) he is alleged to have committed a serious non-political crime outside this country prior to his admission to this country as a refugee.

9. **Persons who shall cease to be refugees**—A person shall cease to be a refugee for the purposes of this Act if :

(a) he voluntarily re-avails himself of the protection of the country of his nationality; or

(b) having lost his nationality, he voluntarily re-acquires it; or

(c) he becomes a citizen of this country or acquires the nationality of some other country and enjoys the protection of the country of his new nationality or

(d) he can no longer, because the circumstances in connection with which he was recognized as a refugee have ceased to exist; provided that the provisions of this clause shall not apply to a person who satisfies the Refugee Committee that he has compelling reasons, arising out of previous persecution, for refusing to avail himself or so to return as the case may be.

(e) he is alleged to have committed a serious non-political crime outside this country after his admission into this country as a refugee.

RIGHTS AND OBLIGATIONS

10. **Rights of Refugees—**

OPTION A

The rights of refugees stipulated by International Conventions to which this State is a party and those customarily recognized by States will be respected and guaranteed as far practicable as possible.

OPTION B

Every refugee, till the time he stays within this country, shall have the right—

(a) to a fair and due treatment, without discrimination as to race, religion, sex or political opinion, or country of origin;

(b) to receive the same treatment as is generally accorded to aliens relating to—

(i) movable and immovable property, other similar rights pertaining thereto, and also to leases and other contracts relating to movable and immovable property;

(ii) education, other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges, provided however he is accorded the same treatment as is accorded to nationals with respect to elementary education;

(iii) the right to transfer assets held and declared by a refugee at the time of his admittance into the country, subject to the laws and regulations;

(iv) the right to engage in agriculture, industry, handicrafts and commerce and establish commercial and industrial companies in accordance with applicable laws and regulations;

(c) have the same right as nationals of this country with respect to practicing their religion and the religious education of their children;

(d) to have free access to courts of law, including legal assistance and exemption from *cautio judicatum solvi*;

11. **Obligations of refugees—**

(1) Every refugee shall conform to the laws of this country.

(2) A refugee shall not engage in activities which may endanger the State security, harm public interests or disrupt public order.

(3) A refugee is prohibited from engaging in activities contrary to the principles of United Nations in particular from undertaking any political activities within the territory of this country against any country including his country of origin.

12. **Personal status—**

(1) The personal status of a refugee shall be governed by the law of the country of his nationality or domicile or by the law of the country of his residence.

(2) Rights acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by this country, subject to compliance, if this be necessary, with the formalities required by the law of this country, provided that the right in question is one which would have been recognized by the law of this State had he not become a refugee.

13. **Exemption from exceptional measures—**

OPTION A

With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, this country shall/may not apply such measures to a refugee who is a national of the said State solely on account of such nationality.

OPTION B

With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, this country shall in appropriate cases, grant exemptions in favour of such refugees.

14. **Provisional measures**—Nothing in this Act shall prevent the Government, in time of armed conflict or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the authority concerned that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

15. **Industrial property and artistic rights**—In respect of the protection of industrial property, such as inventions, patents, designs or models, trade marks, trade names, and of rights in literary, artistic and scientific works, a refugee shall be accorded the same protection as is accorded to nationals of this country.

16. **Right of association**—As regards the right of association refugees lawfully staying in the territory of this country shall/may be accorded the most favourable treatment accorded to aliens, in the same circumstances.

17. **Liberal professions**—Refugees who hold degrees or diplomas recognized by the competent authorities of this country and are desirous of practicing a liberal profession, shall be accorded treatment as favourable as possible as is accorded to aliens generally in the same circumstances.

18. **Rationing**—Where a rationing system exists, which regulates the general distribution of essential commodities in short supply, refugees shall be accorded the same treatment as practicable as possible as is accorded to nationals/aliens.

19. **Housing**—As regards housing, refugees shall be accorded treatment as favourable and/or as practicable as possible, as is accorded to aliens generally in the same circumstances.

20. **Identity cards**—An identity card shall be issued to any person recognized as a refugee in accordance with sections 6 and 7 of this Act.

21. **Travel documents**—A refugee lawfully staying in this country shall be issued travel documents for the purpose of travel outside the territory of this country unless compelling reasons of national security or public order otherwise require.

22. **Fiscal charges**—No duties, charges or taxes of any description whatsoever, shall be imposed on refugees, other or higher than those which are levied on nationals in similar situations.

23. **Transfer of acquired assets**—Favourable consideration may be accorded to an application of a refugee for permission to transfer assets which he has acquired by lawful means during his stay in this country.

24. **Families of refugees—**

(1) The members of the family of a refugee shall be permitted to enter this country and, subject to the provisions of this Act, shall be entitled to remain herein as long as the refugee is permitted to remain, and necessary documents be issued to them.

(2) Where a member of the family of a refugee within this country ceases to be a member of such family by reason of marriage, attaining the age of majority or the cessation of dependence upon the refugee, he shall be permitted to continue to remain in this country subject to the relevant laws and regulations.

(3) Upon the death of a refugee, or upon his divorce from any spouse, every person who, immediately before such death or divorce was within this country as the member of the family of such a refugee, shall be permitted to continue to remain and

regularize his status in accordance with the provisions of this Act or any other applicable law.

(4) Nothing in this section shall prevent a member of the family of a refugee, or a person who has, in terms of sub-sections (2) and (3), been permitted to continue to remain in this country from himself applying for recognition and protection as a refugee under the provisions of this Act.

ORGANIZATIONAL ARRANGEMENTS

25. In order to implement the provisions of this Act, the Government shall establish or identify, [by notification in the Official Gazette].

OPTION A

(1) A [Division/Bureau/Department/Unit] to receive and consider applications for refugee status and to make decisions; and

(2) A *quasi* judicial Authority vested with the power to revise or review the above decisions and to make final orders thereon.

OPTION B

(1) A Refugee Committee as the principal executive organ; and

(2) an appellate authority to be known as the Refugee Appellate Authority.

26. **Composition of Refugee Committee**—The Refugee Committee shall consist of the following members, namely:

(a) a high ranking official designated by the Minister-in-charge of refugee affairs in the Government who shall be its Chairman; and

(b) such number of other officials from the immigration social welfare, law and justice and other relevant departments.

27. **Functions of the Refugee Committee**—The functions of the Refugee Committee shall include:

(1) to designate such officials as may be necessary to receive and consider applications for refugee status and to grant (or refuse) asylum seekers refugee status according to the relevant provisions of this Act;

(2) to supervise the observance of the refugees rights and duties as stipulated in this Act;

(3) to propose the refugee policy and make appropriate proposals and recommendations to the Government concerning the refugee matters; and

(4) to coordinate the activities or policies of the various Government ministries and departments relating to refugees.

28. **Consideration of applications by the Refugee Committee**—The Refugee Committee shall consider every application referred to it in terms of Article 27 within a reasonable time (sixty days) of the application being so referred. It may, within that period of time make such inquiry or investigation as the Committee may consider necessary.

29. **Withdrawal of refugee status**—

(1) If at any time the Refugees Committee considers that there are reasonable grounds for believing that a person who has been recognized as a refugee for the purposes of this Act, should not have been recognized on account of such person having made his application for recognition based on fraud, false and deliberate misrepresentation or any other abusive grounds, the Committee shall cause a written notice to be served upon the person whose status as a refugee is under reconsideration:

(a) informing such person of the fact that his status as a refugee is to be reconsidered; and

(b) inviting such person to make written representation to the Committee within a period of fourteen days from the date of service of the notice, regarding his status as a refugee.

(2) The Committee shall consider every written representation made before it and where appropriate the views of the representative of the UNHCR and, may cause such inquiry or investigation to be made as it thinks necessary.

(3) Upon receipt of the report on the inquiry or investigation and after giving an apportunity to the person against whom proceedings are taken, the Refugee Committee may withdraw the recognition of the person concerned as a refugee; and shall cause the person concerned to be notified of the decision in the matter.

(4) Any person who is aggrieved by the decision of the Refugee Committee withdrawing his recognition as a refugee may, within

fourteen days of being notified of such withdrawal, appeal to the Refugees Appellate Authority.

(5) If a decision is taken to withdraw the status of refugee he should be given an opportunity to remove himself from this country or to get his status regularized under any other law of this country.

30. **Expulsion of refugees—**

(1) The Refugee Committee may order expulsion of any refugee in accordance with relevant laws and procedures if it considers it to be necessary or desirable on grounds of national security or public order.

(2) Before making an order in terms of sub-section (1), the Refugee Committee shall cause a written notice to be secured upon every refugee whom it intends to expel and affording him the right to make a representation to the Committee.

(3) Before ordering expulsion of any refugee under sub-section (1) the representative of the UNHCR shall be informed.

APPELLATE AUTHORITY

31. **Refugee Appellate Authority**—The Government may, by notification in the Official Gazette, establish with effect from such date as it may specify an appellate authority to be known as the Refugees Appellate Authority.

32. **Composition of the Refugee Appellate Authority**—(1) The Refugee Appellate Authority shall consist of:

(a) an eminent person preferably a jurist (judge of the Supreme Court) who shall be its President

(b) four other members who shall have adequate knowledge or experience of dealing with matters relating to immigration, foreign affairs and national security.

33. **Jurisdiction of the Refugees Appellate Authority—**

(1) The Refugee Appellate Authority shall have exclusive jurisdiction over all matters arising out of the application, interpretation and implementation of the provisions of this Act.

(2) Any asylum seeker or, as the case may be, any refugee aggrieved by any order made by the Refugee Committee in respect of sections 29 and 30 may appeal to the Refugee Appellate Authority within fourteen days from the date of the order.

Provided that the Refugee Appellate Authority may entertain an appeal after the expiry of the stipulated period if it is satisfied that there was justifiable cause for not filing it within that period.

34. **Power to make rules and disposal of appeals**—The Refugee Appellate Authority shall determine its own rules of procedure relating to matters referred to it. In so far as possible the Refugee Appellate Authority shall dispose of an appeal made before it within a period of sixty days.

35. **Finality of orders**—Every order of the Refugee Appellate Authority shall be final.

36. **Rules and regulations**—The Government may adopt such rules and regulations as are required or are necessary or expedient to give effect to the provisions of this Act.

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

People have been uprooted by persecution, conflict and famine in all ages. What is unique at the present time is the massive scale of such movements. The world's refugee population is estimated to be 17 million,[1] while the displaced within the borders of their own countries are 24 million people, largely women and children, who have abandoned their homes in search of food and water. Armed conflict, forced relocation, communal violence, natural and ecological disasters, systematic violations of human rights, as well as traditionally recognized sources of persecution combine to produce these massive involuntary movements within and outside state borders. There is nothing to suggest that this trend will be reversed in the immediate future.

The problems faced by the internally displaced persons are to be seen in the larger context of the post-cold war period in which long suppressed ethnic and religious conflicts have been unleashed in many parts of the world. At the same time, there is a greater willingness on the part of the international community to address these problems and to try and develop

1. UN Document, ECOSOC, Commission on Human Rights, E/CN. 4/1992/23, para 5.

for the internally displaced persons standards and mechanisms comparable to those that assist and protect refugees.[2]

The crisis of the internally displaced persons from the perspective of the international community is that they fall within the domestic jurisdiction and are therefore not covered by the protection normally accorded to those who cross international borders and become refugees. International responses to emergencies involving them have been taken up by agencies like UNHCR, UNICEF or the ICRC, but in the absence of a clear mandate and an international body with special responsibility for the protection of internally displaced, the international response has been *ad hoc* in the appointment by the Secretary-General in 1991 of an Emergency Relief co-ordinator to improve the provision of relief and assistance to those caught up in humanitarian emergencies.[3]

Principles of existing law : Human rights and humanitarian law may be seen as the principal sources of existing protections for the internally displaced persons; along with refugee law, they also may be the foundation for articulating a basis for further protections. While these bodies of law are conceptually distinct, they have influenced and informed each other and also contributed to a general corpus of laws capable of application to the problems experienced by the internally displaced.

Unlike refugee law, which largely applies only when a border is crossed, or humanitarian law, which applies to situations of armed conflicts, human rights law proclaims broad guarantees for fundamental rights of all human beings. *The International Bill of Human Rights*, composed of (a) Universal Declaration of Human Rights; (b) International Covenant on Economic, Social and Cultural Rights; and (c) International Covenant on Civil and Political Rights, represents the basic body of human rights law, which recognizes the inherent dignity and equality of all human beings and setting a common standard for achievement of their rights. Although human rights law provides a basis for protection and assistance for internally displaced persons, it does not directly address some of the situations affecting the internally displaced, such as forcible displacement and access to humanitarian assistance.

Since the UN has established protected areas or Safe Zones in time of armed conflicts such as in Cambodia, Bosnia, Rwanda, Somalia, the

2. There is adequate legal protection provided to refugees by virtue of the 1951 Convention and the 1967 Protocol, the 1969 OAU Convention, 1984 Cartagena Declaration as well as the Bangkok Principles, 1966.

3. U.N. ECOSOC Commission on Human Rights (Res 1991/25), 1991.

AALCC's study on the question has concentrated on the legal concept of a Safety Zone for internally displaced persons in the armed conflicts and to formulate basic principles. The Committee has been focussing on legal aspects of the following issues:

1. The circumstances under which a Safety Zone could be established.
2. Whether international organizations should be entrusted with the responsibility of the management of a Safety Zone.
3. The status of the Safety Zone.

The formulation of a legal framework for the establishment of a Safety Zone for Displaced Persons

The AALCC in co-operation with the UNHCR has formulated "A Legal Framework for the Establishment of a Safety Zone for Displaced Persons in their country of origin" in order to incorporate basic principles agreed upon by the international humanitarian laws and the decisions of international organizations. As is shown in the following document, the framework is divided in seven parts, namely (1) the aim of establishing a Safety Zone; (2) conditions of the establishment; (3) supervision and management; (4) duties of the Government and the conflicting parties concerned; (5) rights and duties of the displaced persons in a safety zone; (6) protection of the officials of the international organizations who manage the safety zones; (7) closure of the safety zone.

The legal aspects of these issues

The answers to some aspects of the three issues raised by the Committee are found in the framework.

(1) The circumstances under which a Safety Zone could be established.

A Safety Zone shall be stablished only when a considerable number of displaced persons arises as a result of armed conflicts or civil wars, and when their life and property are threatened as the consequence. Mass voluntary exodus or forced displacement of thousands of people from their places of residence will be necessary conditions for the establishment of a Safety Zone. The Safety Zone shall be established only by the decision of the Security Council of the United Nations with the consent of the Government concerned and of the parties to the conflict. The Security Council must judge the conflict as a threat to the peace or a mass violation of human rights. Both the Government and the conflicting party should regard the measures as taken for the protection of the life

and property of the civilians by international organizations. They must admit those actions as of neutral character. The establishment of a Safety Zone is a form of a humanitarian measure by the UN. The action will not violate the sovereignty of the state concerned. It will not affect or threaten the territorial integrity of the State.

(2) Whether neutral bodies like international organizations should be entrusted with the responsibility for the management of the Safety Zone.

The Safety Zone should be placed under the supervision of the UN as it is established by the decision of the Security Council. The Security Council should designate an international organization to manage the Safety Zone. The designated international organization like UNHCR or ICRC should be responsible for the supply of the shelter, food, medical care and other essential basic civic amenities for the internally displaced persons. It will cooperate with other international organizations like FAO, WFP, WHO, UNICEF etc and Member States for the implementation of its work.

The Safety Zone is desirable to be protected by Security Forces to keep off armed attacks by the conflicting parties. The arrangement must be done by the Security Council.

(3) The Status of the Safety Zone

The Safety Zone should be an integral part of the country. However due to armed conflicts, actual administrative power of the state is restricted and must be supplemented by the management of a designated international organization.

The area surrounding a Safety Zone should be demilitarized. The armed forces of both conflicting parties should be withdrawn from the area so that the Safety Zone should be immune from hostile activities.

Proposed Legal Framework for the Establishment of a Safety Zone for Displaced Persons in their Country of Origin

1. **The aim of establishing a Safety Zone**

(1) to protect the life and property of displaced persons in their country of origin from consequences of armed conflicts, by placing them under a U.N. protection area.

(2) to prevent the exodus of refugees to neighbouring countries.

(3) to realise the principle of "burden sharing" in the assistance of displaced persons.

(4) to develop the idea of the Geneva Conventions for the Protection of War Victims (1949) and the Protocol (1977).

2. **Conditions**

(1) The Safety Zone shall be established when a considerable number of displaced persons arises as a result of armed conflicts or civil wars, and their life and property are threatened as the consequences.

(2) The Safety Zone shall be established by the decision of the Security Council of the United Nations with the consent of the Government concerned and of the parties to the conflicts.

(3) An agreement should be signed between the U.N. and the Government concerned or among the U.N. and conflicting parties, in case of the lack of unified government, to secure a specified geographical area for the Safety Zone.

(4) The area should be demilitarized and be immune from hostile activities. The armed forces of the state and the conflicting parties should be withdrawn from the area.

(5) The establishment of the Safety Zone should not violate the sovereignty of the state concerned. It should not threaten the territorial integrity of the State.

3. **The supervision and the management**

(1) The Safety Zone should be placed under the supervision of the U.N.

(2) The Security Council will designate an international organization to manage the Safety Zone.

(3) A UN-designated international organization should be responsible for the supply of the shelter, food, medical care and other essential basic civic amentities for the displaced persons. It will cooperate with other international organizations and member states for the implementation of its work.

(4) The U.N. may provide multinational security forces, if necessary and practicable, for the protection of the displaced persons in the Safety Zone.

(5) The cost of the maintenance of the Safety Zone should be met by voluntary contribution of:

(a) the Member States of the U.N.

(b) the U.N. Agencies

(c) the Inter-governmental and Non-governmental Organizations.

4. **Duties of the Government and the conflicting parties concerned**

(1) The Government of the State and the conflicting parties should have duties to cooperate with the international organizations to establish and to manage the Safety Zone.

(2) The life and property of the displaced persons should be guaranteed and be strictly protected by the Government and of the conflicting parties concerned.

5. **Rights and Duties of the Displaced Persons**

(1) The rights of the displaced persons for receiving fair and just treatments by the officials who supervise and manage the Safety Zone should be respected.

(2) The rights and duties of the displaced persons in the Safety Zone should, as practicable as possible, be in accordance with those which are applied to the nationals in the state.

6. **Protection of the officials of the International Organizations**

The Safety and Security of the officials of the International Organizations engaged in supervising and managing the Safety Zone should be guaranteed by both the Government of the State and the conflicting parties.

7. **Closure of the Safety Zone**

The establishment of a Safety Zone should be of temporary nature and should be closed down by the decision of the Security Council. In the case of the closure all the displaced persons should be returned safely to their permanent places of residence.

Some Examples of the Establishment of a "Safety Zone" by the UN in the armed conflicts

Country	*Year*	*Name of the protected zone*	*Location*	*Management*	*Strength of military forces involved*	*Remarks*
Cambodia	1992	UN Pro-Protected Area	West of the country	UN Transitional Authority in Combodia	22,000	To promote repatriation and resettlement of refugees and displaced persons
Bosnia & Herzegovina	1992	Safe Area	Sarajevo, Serbrenica and other four cities	UN Protection Force NATO Forces also involved	24,000	To protect Safe Areas and Activities of the UNHCR
Rwanda	1994	Protected Zone	South-West of the country	France afterward UN	1,400 6,000	To accommodate mainly displaced persons who lost the government protection

AALCC's principles which were presented at the Nairobi Session in 1989

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

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

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

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

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

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

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

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

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

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

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

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

ANNEX II

SUMMARY RECORD OF THE SEMINAR ON THE "ESTABLISHMENT OF A SAFETY ZONE FOR DISPLACED PERSONS IN THEIR COUNTRY OF ORIGIN" HELD IN NEW DELHI ON 23rd SEPTEMBER, 1994

The Secretariat of the Asian-African Legal Consultative Committee in collaboration with the office of the United Nations High Commissioner for Refugees (UNHCR) orgnized a seminar on the Establishment of a Safety Zone for Displaced Persons in their country of origin, in New Delhi on the 23rd of September 1994. The seminar chaired by Mr. Chusei Yamada, the President of the AALCC, had for its objective the discussion of the legal guidelines for the establishment of safety zones for the internally displaced by armed conflict or internal disturbances. The seminar was informal in nature, wherein all the participants spoke in their individual capacities, and no formal conclusions or resolutions were adopted. First the panelists gave their presentations followed by General Discussions.

The seminar was attended by participants from 27 member States of the AALCC, viz Arab Republic of Egypt, China, Cyprus, Ghana, India, Indonesia, Islamic Republic of Iran, Iraq, Japan, Kenya, Republic of Korea, Myanmar, Mongolia, Nepal, Nigeria, Oman, Philippines, Qatar, Saudi Arabia, Sri Lanka, Sudan, Syria, Tanzania, Thailand, Turkey, Uganda and Republic of Yemen. In addition, Mr. B. Sen the former Secretary-General of the AALCC, and the officials of the United Nations High Commissioner for Refugee, International Committee of the Red Cross, were also present. Some eminent professors of the Jawaharlal Nehru University and the Delhi University also participated in the seminar.

In his welcome address the Secretary-General of the AALCC Mr. Tang Chengyuan observed *inter alia* that in view of the number of armed conflicts, which the world has unfortunately experienced in the recent years, the problem of refugees and internally displaced persons has assumed serious dimensions. Establishment of Safety Zones has been initiated and used as a temporary and partial solution to tackle this problem. However, such a move involves complex legal and political considerations. He stated that the main purpose of organizing the Seminar was to discuss legal issues related to the Safety Zone in an informal manner.

Mr. Chusei Yamada in his address stated that the reason behind the proposal for the establishment of a Safety Zone was that it would be easier and more effective to protect displaced persons in their country

rather than outside. Though the proposal entails many difficult problems, it was indeed a farsighted proposal while considering the events which followed. The concept of a Safety Zone originally referred to by the Government of Thailand has relevance not only to alleviating the burden of the refugees reaching neighbouring countries but also to extending humanitarian assistance to displaced persons who have not crossed the border. He cautioned that the compatibility of this concept with the right to seek asylum and free movement, what should be the relationship to the sovereignty of the State where such a zone is to be established? Could the neutrality of international humanitarian assistance be maintained. Legal principles for the protection of the internally displaced are not clear and that is the area which should be focussed by the AALCC.

Mr. Toru Iwanami, Deputy Secretary-General of the AALCC presented the basic working paper, which while dealing with the background, proposed a legal framework for the establishment of a safety zone for displaced persons in their country of origin. The guidelines were given under seven headings namely (1) the aim of establishing a safety zone; (2) conditions; (3) supervision and management of such a zone; (4) duties of the government and the conflicting parties concerned; (5) rights and duties of the displaced persons; (6) protection of the officials of the International organizations and (7) the closure of the safety zone.

Dr. K. Cheluget, the Acting High Commissioner for Kenya presented a broad overview of the refugee situation in Kenya. He observed that unrest in Somalia and Rwanda had brought great difficulties and suffering upon the population of the country. The creation of a Safety Zone in Somalia would have definitely helped the fleeing people and would also not have imposed a heavy burden on Kenya. The critical question which needed attention was that in the case of Somalia no government existed, but in a situation where a government does exist, the question of sovereignty would have to be dealt with very carefully. On the other hand in the case of Rwanda the concept of a Safety Zone could prove effective. But if such zones were created they would contradict the principle of non-refoulement as governments would be tempted to send back the fleeing persons to their countries, where perhaps they would not be secure.

Mr. Minabere Tom-George, Minister from the Nigeria High Commission stated that the Fourth 1949 Geneva Convention relating to the protection of civilians in time of war recognizes the protective umbrella of States during belligerency. He was of the view that it was the obligation of the State of origin to create a Safety Zone, but where the State of origin failed to declare a Safety Zone during armed conflict, that State shall be

deemed to have abdicated its sovereign responsibility by failing to take measures necessary for the protection of life, liberty and security of persons, thus violating Article 3 of the UN Declaration of Human Rights, which incorporates the right to life liberty and security of every person. Where the Government failed to establish a Safety Zone the United Nations General Assembly can by a resolution establish a Safety Zone for the displaced person in any territorial area of the State of origin it deemed fit. However, where there was grave threat to "peace and security" during a national armed conflict in or around the State of origin i.e. in that region, the United Nations Security Council can direct the UN Secretary-General to establish a Safety Zone in the country of origin of displaced persons.

Citing the examples in Somalia, former Yugoslavia and Rwanda he stated that experience had shown that during civil war, especially where the Government becomes involved with one of the warring factions, consent for humanitarian intervention had normally been delayed for purposes of political or military scores. Where such a delay situation arose the world community which guarantees global human rights and right to life and security, should on humanitarian grounds assure a Safety Zone authority and act expeditiously. He regretted the frequent violation of Human Rights and emphasized the necessity of creating a Permanent International Criminal Tribunal having jurisdiction over crimes against humanity so that it might have a meaningful impact on those who intend to commit crimes against humanity and war crimes.

The Chief of Mission of the UNHCR Mr. S. Bari stated that the basic objective behind the emergence of the concept of Safety Zone in refugee law is to find an alternative to asylum and protection abroad. The UNHCR had increasingly assumed greater responsibilities for the internally displaced at the behest of the international community. UNHCR's involvement in Sri Lanka, Iraq, Former Yugoslavia and Afghanistan are examples of its comprehensive approach.

How should the international community proceed on the subject? It would appear from recent experience that the existing international legal order is not ready to accept the humanitarian concept of Safety Zone as a full-fledged legal concept yet. It conflicts with too many other legal concepts of contemporary international law. The best course would be to agree on some operational criteria and apply the concept in any situation where the criteria are met. Where conditions are suitable, safety zones can indeed provide a humanitarian alternative to displacement abroad.

The UNHCR has adopted the following criteria for its own involvement with any internally displaced situation:

(a) UNHCR's involvement must not in any way detract from the possibility to seek and obtain asylum;

(b) UNHCR must have full unhindered access to the affected population;

(c) adequate provision must be made for the security of staff of UNHCR and its operating partners and for acceptable operating conditions; and

(d) UNHCR's involvement should have the consent of all concerned parties and enjoy the support of the international community.

Mr. Studer Meinrad, the Deputy Regional Director of ICRC, New Delhi, in his statement on behalf of the International Committee of the Red Cross observed that the creation of a protected zones within the framework of International Humanitarian Law must be contemplated first and foremost as an instrument serving the general requirement of providing the best possible protection and assistance to populations during arms conflicts. To that effect the creation of a protected zone must in no way lessen the protection of the populations not in those zones. He observed that practice has demonstrated the importance of remaining very flexible as to the form and definition of such zones, which must be adopted to the requirements of the moment. In his view the misgivings of States with regard to the preparation in peacetime of places which might serve as protected zones in wartime are therefore understandable. He pointed out that while the express agreement of the parties in conflict may be difficult to secure it must nonetheless be understood that such agreement is essential for obvious security reasons. Those seeking to set up a protected zone bear a heavy responsibility in that respect. He further emphasized that the creation of protected zones must be accompanied by clear information to the potential beneficiaries, who must not be misled by false hopes, in particular, refuge in a Safety Zone does not bestow any right to amnesty; and whenever populations have been caught up in a process of mutual hatred, the possibility of creating protected zones must be considered with special attention to their political implications and security.

Mr. B. Sen the former Secretary-General of the AALCC was of the view that the proposal of the Government of Thailand for the establishment of a Safety Zone in 1986 before the United Nations and then to the AALCC was essentially then seen in the context of preventing refugee situations from arising, and was linked in a way to the doctrine of State

responsibility. It was a novel idea at that time and it is still regarded as a new concept yet to be accepted into international law. In his view the following issues and questions needed to be examined—

(i) What are the objectives and purposes for which the establishment of a safety zone may be deemed necessary?

(ii) In what situation could a state be expected to establish safety zone within its territory having regard to the objectives and purposes for establishment of such zones?

(iii) What modalities should be adopted in the establishment of a safety zone; and

(iv) What kind of a legal regime should be applicable to the administration of a safety zone.

Prof. P.K. Das of the Jawaharlal Nehru University addressed himself to the question as to how safe were these Safety Zones? In his opinion the Safety Zones themselves were controlled by warring political parties and unless the political differences were settled it would be as difficult for refugees to stay within them or outside. Secondly, unless the Safety Zone is politically neutralized, it would be very difficult to enforce the regime of Safety Zone. He favoured the establishment of a permanent International Criminal Tribunal having jurisdiction over crimes against humanity.

Dr. P.S. Rao, Joint Secretary, Ministry of External Affairs, Government of India, pointed out that the Safety Zones which had been established so far had been created on individual basis, hence no firm conclusions should be drawn as to the status of the concept of Safety Zones in International Law. Any attempt towards codification of existing principles would be fraught with difficulties, and such codification could well be detrimental to the cause of the suffering people. What was actually required was to have an extremely cautious view on the legal front. Safety Zones did serve a humanitarian need but in the creation of Safety Zone it was absolutely necessary to have the consent of the state concerned particularly where a Government was in a position to do so. On the question of establishment of an international criminal court, he expressed the views that it was necessary to have a court as the instance of genocide was increasing as is illustrated by the examples of Bosnia, Rwanda, Cambodia etc.

Dr. Salama, First Secretary from Egyptian Embassy in New Delhi agreed with Dr. Rao and stated that the legal framework for a safety zone

should not be confused with the humanitarian needs of people in distress. International Law does not recognize the status of Safety Zones and what exists is only the protection of the 1949 Geneva Convention. In the post-cold war period what is required is flexibility and not rigidity and the consent of the State is the cornerstone of the establishment of the Safety Zone and what is actually required is to bring Safety to people and not people to Safety.

Mr. Tom George, Minister from Nigeria High Commission emphasized the relevance of the work of the AALCC in the progressive development of international refugee law relating to the establishment of Safety Zones. The AALCC had all along held the view that displaced persons were different from refugees. A safe Place was required for persons displaced by armed conflicts. An international criminal court was necessary to ensure that the perpetrator of genocide would not go unpunished.

Mr. I.B. Ojobo, First Secreatary of Nigeria High Commission, New Delhi, observed that just as the 1951 Refugee Convention, 1969 OAU Convention and the 1984 Cartegena Declaration, had been adopted and enforced to protect refugees, similarly displaced persons who were victims of armed conflicts required Safety Zones. The principles applicable to the Safety Zones should be recognized and regularized. The needs of the internally displaced persons had to be safeguarded.

Mr. Paitoon Songkaeo, Second Secretary from Embassy of Thailand stated that it was at the request of his Government that the topic was taken up at the Kathmandu Session of the AALCC and that at present there were no refugees in his country as all of them had voluntarily returned to their own country.

Mr. Bari, Chief of the Mission, UNHCR, reiterated that though the time was not yet ripe to codify the principles on the creation of a Safety Zone, but there was a recognized need to consider the application of the idea in various situations which present themselves. In his view what was required were operational guidelines similar to those which had been adopted by the UNHCR, and that the Safety Zones should not be used for ulterior purposes.

The delegate of ICRC stated that it was necessary that existing international humanitarian law be applied and respected in a better manner. Pending the codification of the principles and rules applicable to Safety Zones, there was a need to ensure better respect for existing international law.

Mr. Iwanami (AALCC) pointed out that while it certainly [illegible] easy to codify principles for the establishment of Safety Zone, what was desirable was a model framework which provided minimum standards of protection for the internally displaced. At the same time there was a need to define situations where the concept of Safety Zone would be applicable.

The AALCC Secretary-General thanked the participants for their valuable views and observed that these would help the Secretariat in its future work on the subject.

V. Agenda for Peace : Convention on the Safety of United Nations and Associated Personnel : An Overview

(i) Introduction

The item Agenda for Peace: Convention on the Safety of the United Nations and Associated Personnel has been on the agenda of the Committee since the Kampala Session (1993). At the Tokyo Sesson (1994) the Committee approved the Secretariat's proposal to initiate preparation of detailed studies on two specific issues raised in the United Nations Secretary-General's report entitled "Agenda for Peace" namely, (i) examination of legal issues in the context of demining and (ii) developing the framework of an International Convention on the Protection of personnel engaged in peace-making, peace-keeping and other humanitarian activities undertaken by the United Nations.

With regard to the second issue, it will be recalled that on 9th December 1994, the General Assembly on the recommendation of the Sixth Committee adopted and opened for signature the Convention on Safety of United Nations and Associated personnel. The Convention will enter into force 30 days after the deposit of the twenty-second instrument of ratification or accession. The Secretariat Brief prepared for consideration at the Doha Session contains a note on this Convention including its legislative history and brief comments on its substantive provisions.

Thirty-fourth Session: Discussions

The Assistant Secretary-General (Mr. Asghar Dastmalchi) introducing the Document AALCC/XXXIV/Doha/95/9 stated that this item has been under consideration of the Committee since the Kampala Session. Against the background of the recommendations made in the United Nations Secretary-General study "Agenda for Peace" submitted to the 47the Session of the General Assembly, the Committee at its Kampala Session established

a Working Group to consider and advise the Secretariat in the Preparation of a Study, which, it was envisaged, could be a contribution of the AALCC to the Commemoration of the Fiftieth Anniversary of the United Nations. The Working Group met only once and held preliminary discussion.

At the Tokyo Session, the Committee directed the Secretariat to prepare studies on two specific issues namely (i) examination of legal issues in the context of demining and (ii) developing the framework of an international convention on the Protection of Personnel engaged in Peace-making, Peace-keeping and other humanitarian activities undertaken by the United Nations.

With regard to the first item, the Secretariat prepared a detailed note which was included in the Brief submitted for the consideration of the AALCC's Legal Adviser's Meeting held in New York on 27th October 1994.

As for the second item, the Secretariat, taking into account the discussions at the Sixth Committee during the 48th Session of the General Assembly, prepared a note which was also included in the Brief for the AALCC's Legal Advisers Meeting.

Subsequently, in the light of the developments at the 49th Session of the General Assembly, which culminated in the adoption of the "United Nations Convention on Safety of United Nations and Associated Personnel", the Secretariat prepared an Overview of the Convention. This could be found in the Document referred to earlier.

As for the Preparation of a Study for submission on the occasion of the Fiftieth Anniversary of the United Nations, the Secretariat proposed that a study entitled "AALCC's Supportive Role to the United Nations' be undertaken. In that study besides a compilation of the AALCC's various initiatives over the last 15 years in relation to the work of the United Nations and its Agencies, its future role in this context could be considered. It will be a 25 to 30 pages booklet, which could be circulated on the occasion of Fiftieth Anniversary. He placed this proposal for the consideration and approval of the Member Governments.

The *Delegate of Japan* welcomed the adoption of the Convention on the Safety of United Nations and Associated Personnel as a step for increased international cooperation in preventing the danger and in establishing the framework to punish those who violated laws. He said that the Convention should be applied not only to the personnel of the U.N. Peace-keeping operations, but also to those who were involved in other activities for humanitarian purposes, and also to the members of

non-governmental organizations which support the activities of the United Nations. Therefore, a declaration by the Security Council or the General Assembly, as stated in the Article 1, (c)(ii) of the Convention, should be actively and flexibly utilized in order to ensure the applicability of this Convention to the aforementioned personnel.

In addition, the assurance of the effect of this Convention in the host country was also crucial. In that respect, he emphasized the importance of the cooperation with the United Nations and other State Parties in case a Host State was unable itself to take the required measures and intended to actively participate in such cooperation.

On the issue of mines, he mentioned that Japan contributed 2.5 million dollars to CMAC (Cambodia Mine Action Center) last March. He believed that this is an important exercise and his Government would continue to support the on-going preparation for the review conference on the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, in order to restrict the use of anti-personnel mines and to promote general acceptance of the obligation of mine clearance in the International Community. Lastly, the Government of Japan welcomed the "Supplement to an Agenda for Peace", and hoped that those principles would be respected in the International Community as essential elements for the successful Peace-keeping operation.

(ii) Decesion on "Agenda for Peace"

(Adopted on 22nd April 1995)

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

Having considered Document No. AALCC/XXIV/DOHA/95/9 which contained a preliminary analysis of the Convention on the Safety of the United Nations, and Associated Personnel;

Taking Note of the Secretariat initiative to undertake preparation of study on Legal Issues concerning demining;

1. *Directs* the Secretariat to consider initiating joint programme in co-operation with the International Committee on Red Cross (ICRC) and other organizations engaged in similar work;

2. *Decides* to include on the Provisional Agenda of its Thirty-fifth Session, the item entitled "Agenda for Peace and Related matters".

(iii) Secretariat Brief
Agenda for Peace : Convention on the Safety of United Nations and Associated Personnel : An Overview

The Secretary-General of the United Nations in his Report entitled "An Agenda for Peace" made several recommendations with a view to strengthening the role and capacity of the United Nations in four areas namely, Preventive diplomacy, Peace-making, Peace-keeping and Peace-building. He drew attention to the issue of the Safety and Security of Personnel involved in these operations. In a resolution adopted at the 47th Session, the General Assembly endorsed the concern expressed by the Secretary-General and condemned any hostile actions against United Nations personnel, including deliberate attacks against United Nations personnel, including deliberate attacks against United Nations peace-keeping operations and those engaged in humanitarian operations. It requested the Secretary-General that while planning future peace-keeping operations and in making recommendations for their deployment, to give particular attention to adequate protection for peace-keeping and other United Nations personnel.[1]

Subsequently, the President of the Security Council in his statement made on 31 March 1993, on behalf of the Security Council recognized the need for all relevant bodies of the Organization to take concerted action to enhance the safety and security of United Nations forces and personnel.[2]

The Secretary-General submitted a report to the General Assembly's

1. U.N. General Assembly Resolution 47/72, 14 December 1992.
2. U.N. Security Council S/25493.

forty-eighth session entitled "Security of the United Nations Operations"[3]. He recognized that there were certain gaps in the existing system which needed to be strengthened in certain areas. He observed:

> "The main new development concerns the kind of conditions in which United Nations personnel are expected to operate and the level of risk considered acceptable. In fulfilment of the responsibilities entrusted to them by Member States, the personnel of the organizations of the United Nations system have increasingly been required to perform their functions in extremely hazardous conditions where decisions regarding their safety assume an immediacy not normally encountered in the past. This is particularly true in areas where government authority is not adequately exercised or is lacking altogether. Whereas in the past personnel were assured protection by virtue of their association with the work of the United Nations, this is no longer the case. On the contrary, personnel are more and more often at risk because of such association."[4]

Further, in his view:

> "Another development, which has brought to light gaps in the existing security system, is the establishment of multidimensional operations involving military operations, humanitarian assistance, electoral assistance, human rights monitoring and development projects. In order to achieve a coherent approach to the security of those operations, a number of practical issues regarding differing priorities between the various components have to be resolved in each case."[5]

The Secretary-General outlined various measues, both long-term and short-term, including elaboration of a new international instrument in order to codify and further develop international law relating to security and safety of the United Nations forces and personnel.

Consideration at the Forty-eighth Session of the General Assembly

At the initiative of New Zealand, an item entitled "Question of responsibility for attacks on United Nations and associated personnel and measures to ensure that those responsible for such attacks are brought to justice" was placed on the agenda of the Forty-eighth Session of the General Assembly. Item 152 was allocated to the Sixth Committee. During

3. U.N. G.A. A/49/349.
4. U.N. G.A. A/48/340.
5. U.N. G.A. A/48/349.

the consideration of the item in the Sixth Committee, *New Zealand* submitted a "Proposal for a draft Convention on responsibility for attacks on United Nations personnel" (A\C.6\48\L.2) and *Ukraine* submitted the text of "the Draft International Convention on the Status and Safety of the personnel of the United Nations Fores and Associated Civilian Personnel." (A\C.6\48\L.3). After general statements by several delegtions it was decided to constitute a Working Group which met under the Chairmanship of Mr. Kirsch from Canada. The Chairman in his Report drew attention to the various issues raised in the context of the conclusion of an international legal instrument.

By its resolution adopted on 9 December 1993, the General Assembly expressed grave concern at the increasing number of attacks on United Nations personnel that have caused death or serious injury. It recalled the reports of the Secretary General, the report of the Special Committee on Peace- keeping Operations and the resolution of the Security Council 868 of 29 December 1993, and noted with appreciation the oral report of the Chairman of the Working Group and the draft proposals submitted by the delegations of New Zealand and Ukraine. It decided to establish an *Ad Hoc* Committee open to all Member States to elaborate an international convention dealing with the safety and security of United Nations and associated personnel, with particular reference to responsibility for attacks on such personnel. It authorized the *Ad Hoc* Committee to hold a session from 28 March to 8 April 1994 and if necessary a further session from 1 to 12 August 1994 to prepare the text of a draft Convention taking into account any suggestions and proposals from States as well as comments and suggestions that the Secretary-General may wish to provide. Finally, it requested the *Ad Hoc* Committee to report to the General Assembly at its Forty-ninth Session on the progress made towards the elaboration of the draft convention. (Resolution 48/37).

Work of the Ad Hoc Committee

In a Note submitted by the Secretary-General for the consideration of the *Ad Hoc* Committee, he referred to the General Assembly Resolution 48/37 and observed that "the Assembly has made it clear that the subject matter of the future convention should not be limited to the issue of responsibility for attacks on the said personnel, and it has mandated the Committee to broaden the approach, reflected in the draft submitted by New Zealand by giving consideration to other ideas, including those contained in the draft put forward by Ukraine." (A\AC.242\1). The Secretary-General was of the view that the proposed Cor.vention "should incorporate the set of principles and obligations contained in current multilateral and

bilateral treaties and codify customary international law as reflected in the recent practice of the United Nations and Member States." (A\AC.242\1). In that context, he drew attention to the model Status of Forces Agreement, which is being used by the United Nations as a basis for concluding bilateral agreements with the Member Governments on the matters concerning United Nations operations.

The *Ad Hoc* Committee held its First Session from 28 March to 8 April 1994. Apart from the Note submitted by the Secretary-General, it had a set of proposals for consideration. New Zealand and Ukraine jointly submitted a draft combining their respective proposals submitted earlier. Another working document was submitted jointly by Denmark, Finland, Iceland, Norway and Sweden. This document contained a set of elements which the sponsors believed should be included in any new legally binding instrument concerning the safety and security of the United Nations and associated personnel.

The *Ad Hoc* Committee decided to constitute itself as a Working Group of the whole for consideration of various proposals before it. During the meetings of the Working Group, a number of amendments and proposals for new articles were submitted by delegations which included, India, China, Guyana, Russian Federation and the United States. The Working Group established two consultation Groups which prepared a "Negotiating text" consisting of articles 3 to 27, as no text could be prepared on article 1 (definitions) and 2 (Scope of the Convention).

The *Ad Hoc* Committee's second Session was held from 1 to 12 August 1994. The 'Negotiating text' prepared earlier at the first session was taken as a basis for further discussion. It established an open-ended informal Working Group with the mandate to negotiate the texts of articles 1 and 2. At the 5th meeting of the Working Group, the Chairman of the informal Working Group submitted a single article on scope and definitions which paved the way for the preparation of a consolidated negotiating text which contained the texts of article 1-2 and articles 3 to 27 of the negotiating text as prepared at the first Session of the *Ad Hoc* Committee.

Consideration at the Forty-ninth Session

During the 49th Session of the General Assembly, the Sixth Committee at its third meeting on 26 September 1994, re-established the Working Group which took up for consideration a "Revised negotiating text". The Working Group in its 11 meetings held between 3 to 14 October, elaborated a draft preamble and reviewed the articles in the "Revised negotiating text". Apart from the editorial and technical changes, the Working Group also agreed to make certain structural changes in the text under negotiation.

At its 11th meeting on 14 October 1994, the Working Group decided to submit to the Sixth Committee the text of the draft Convention for adoption. On the recommendation of the Sixth Committee the General Assembly on 9th December 1994 adopted the text of the Convention on the Safety of United Nations and associated personnel.

The Convention on the Safety of United Nations and Associated Personnel

As the title indicates the Convention deals with the Safety of the United Nations and Associated Personnel. The elaboration of a legal instrument against the backdrop of growing concern over the attacks on United Nations and associated personnel is a significant step towards the codification and progressive development of international law. The preamble of the Convention among other things acknowledges the important contributions that United Nations and associated personnel make in respect of United Nations efforts in the fields of preventive diplomacy, peace-making, peace-keeping, peace-building and humanitarian and other operations. It recognizes the urgent need to adopt appropriate and effective measures for the prevention of attacks against United Nations and associated personnel and for the punishment of those who have committed such attacks. In order to achieve this two-fold objective the Convention contains a set of 28 articles which elaborate certain preventive measures and the parameters within which an international legal regime could operate effectively.

The scope of the Convention extends to the protection of broad categories of personnel which are grouped as United Nations and associated personnel. "United Nations personnel" as defined in article 1(a) comprises various categories of personnel engaged or deployed by the Secretary-General of the United Nations which include military, police, civilian and other officials and experts on Missions of the United Nations, its Specialized Agencies or the International Atomic Energy Agency. Article 1(b) stipulates the definition of "associated personnel" comprising three categories of personnel namely, (i) those assigned by a Government or an inter-governmental organization pursuant to an agreement of the competent organ of the United Nations; (ii) those engaged by the Secretary-General of the United Nations or by a Specialized Agency or by the International Atomic Energy Agency; and (iii) persons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations.

A key provision dealing with the scope of the Convention is article 1(c) containing the definition of "United Nations Operation". It means an

operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control for the purpose of maintaining or restoring international peace and security., In addition, if the Security Council and the General Assembly consider that there exists an exceptional risk to the safety of the personnel participating in any operation, that operation could also be declared as United Nations operation within the purview of this Convention.

Article 2 of the Convention limits the scope of the Convention. It specifies that any United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces, will not be covered under this Convention. Such operations will be governed by the law of international armed conflicts.

The text of Article 3 on 'identification' which has been borrowed from the Geneva Conventions of 1949 and its two Additional Protocols provides that the military and police personnel, their vehicles, vessels and aircraft should be properly identified. As regards other categories of personnel, their vehicles, vessels and aircraft, it has been left to the judgement of the Secretary-General. If he considers that such an identification would entail risk, the involved personnel may carry only appropriate identification documents.

Article 4, establishes the legal basis for carrying out the United Nations operation. It provides for the conclusion of an agreement between the Host State and the United Nations on the status of the United Nations operation and the personnel engaged in that operation. Such an agreement among other things, would provide for privileges and immunities for military and police components of the operation. It may be mentioned that the officials of the United Nations and experts on United Nations missions are covered by the United Nations Convention on Privileges and Immunities and the Convention on Privileges and Immunities of the officials of the Specialized Agencies. Further, the Vienna Convention on Diplomatic Relations (1961) and Vienna Convention on Consular Relations (1963) contain elaborate provisions concerning inviolability of diplomatic missions and consular premises. The Status of forces Agreement concluded between the United Nations and the host Government provides for the privileges and immunities of armed forces and other personnel deployed by the United Nations. The inclusion of such a provision in this Convention has been considered desirable with a view to strengthen this practice on a firm legal basis.

Article 5 concerning the duty of transit State does not contemplate conclusion of any specific agreement. It only provides that a transit State should facilitate the unimpeded transit of United Nations and associated personnel and their equipment to and from the host State.

Article 6 obligates the United Nations and associate personnel to abide by the laws and regulations of the host State and transit State and to perform their duties in an impartial manner. Without elaborating the consequences of any breach of such an obligation, the Convention entrust the Secretary-General the responsibility to take appropriate measures to ensure the observance of these obligations by the United Nations and associated Personnel.

Article 7 sets forth the general obligations of the States and specific obligations of the host States parties to the Convention. The gist of the provision in paragraph 1 is that it is the duty of all States to ensure that United Nations and associated personnel, their equipment and premises should not be made the object of attack or of any action that prevents these personnel from discharging their mandate. As regards the specific obligation as envisaged in paragraph 2, the State parties to the Convention should take all appropriate measures to ensure the safety and security of United Nations and associate personnel. Further, the State party in whose territory these personnel are deployed should take all appropriate steps to protect them from the crimes listed in article 9 of the Convention. With a view to promote international co-operation for the effective implementation of the Convention, paragraph 3 exhorts State parties to co-operate with the United Nations and among themselves, particularly when the host State is unable to take the required measures by itself.

Article 8 provides that if United Nations and associated personnel are captured or detained while performing their duties and their identification duly established, they should be promptly released and returned to United Nations or other appropriate authorities. Further until their release, they should be treated in accordance with universally recognized standards of human rights and the principles and spirit of the Geneva Conventions of 1949.

The thrust of the Convention is found in article 9 which deals with two matters. First, paragraph 1 contains a list of crimes against United Nations and associated personnel, and second the obligation of the State party to make these crimes punishable under its national law by appropriate penalties taking into account their grave nature.

It may be mentioned that this is not a novel provision. Similar provisions

are set out in earlier Conventions dealing with aspects related to suppression of terrorism and punishment of the offenders. Those include: The Convention for the suppression of unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971, the Convention for the Suppression of Unlawful Seizure of Aircraft signed at the Hague on 16 December 1970, the Convention on the Protection and Punishment of Crimes againt Internationally Protected Persons, including Diplomatic Agents, New York, 14 December 1973 and the International Convention Against the Taking of Hostages, 17 December 1979.

The key elements of article 9 are: (i) it is the intentional act by the offender; (ii) principle of universality for the assertion of jurisdiction; (iii) serious nature of the crimes; (iv) the concept of threat and attempt to commit such crimes; (v) participation of accomplice; and (vi) duty of States to make these crimes punishable under their national laws by appropriate penalties keeping in view their grave nature.

Article 10 deals with the problem of national jurisdiction. It follows the precedents established by the earlier conventions in addressing issues such as concurrent jurisdiction on grounds of territorial effectiveness and active and passive nationality. Any State party which takes appropriate measures to establish its jurisdiction would inform the Secretary-General of the United Nations. Subsequently, if that State party rescinds its jurisdiction, it would inform the Secretary-General accordingly. Paragraph 4 of the article deals with the exercise of jurisdiction by a State party in whose territory the alleged offender is present and it does not extradite such person to another State which has already established its jurisdiction. Lastly, paragraph 5 specifies that this convention does not exclude those already existing under national law.

Article 11 envisages promotion of co-operation among State parties in the prevention of crimes against United Nations and associated personnel by way of taking all practical measures to prevent preparations in their respective territories the commission of those crimes within and outside their territories and exchange of information in this regard.

Article 12 provides that information regarding commission of a crime listed in article 9 should be promptly sent to the Secretary-General of the United Nations.

Article 13 is based on the provisions incorporated in earlier conventions uch as The Hague and the Montreal Conventions. Any State party to the Convention is obliged to take appropriate measure under its national law alleged to ensure that alleged offender does not escape from its territory.

Article 14 obligates any State party in whose territory the alleged offender is present, if it does not extradite that person, to initiate promptly prosecution proceedings in accordance with its national law.

Article 15 dealing with the extraditions of alleged offenders follows the precedents established by the earlier conventions.It imposes no obligations and leaves the question of extradition to be governed by national law. The State parties however, undertake to include the crimes listed in article 9 as extraditable offence in their future extradition treaties. If any State party receives a request for extradition from another State party with which it has no extradition treaty, it may consider this convention as a legal basis for extradition.

Article 16 envisages co-operation among State parties in connection with criminal proceedings brought in respect of the crimes set out in article 9.

Article 17 guarantees fair treatment, a fair trail and full protection of rights of the alleged offender at every stage of the proceedings.

Under Article 18, the State parties would communicate to the Secretary-General of the United Nations the final outcome of the proceedings.

Article 19 provides for the wider dissemination of this convention, and inclusion of its provisions in the programmes of military instruction.

Article 20 entitled "Saving clauses" provides that this Convention would not affect: (a) The applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standards; (b) The rights and obligations of States, consistent with the Charter of the United Nations, regarding the consent to entry of persons into their territories; (c) The obligation of United Nations and associated personnel to act in accordance with the terms of the mandate of a United Nations operations; (d) The right of States which vountarily contribute personnel to a United Nations operation to withdraw their personnel from participation in such operation; or (e) The entitlement to appropriate compensation payable in the event of death, disability, injury or illness attributable to peace-keeping service by persons voluntarily contributed by States to United Nations operations.

Article 21 recognizes that this Convention would not be construed in such a way as to derogate from the right to act in self-defence.

Article 22 dealing with settlement of disputes concerning application

or interpretation of the convention provides for recourse to arbitration and subsequent reference to the International Court of Justice. However, it also considers the possibility of entering reservation by a State party to such a reference to the International Court of Justice.

Article 23 envisages convening of a meeting of the State parties to review the implementation of the Convention and any problems encountered with regard to its application.

Articles 24 to 29 contain final clauses dealing with signature, ratification, accession, entry into force, denunciation and authentic text.

This convention is open for signature by all States, until 31 December 1995 at the United Nations Headquarters in New York. It will come into force thirty-days after twenty-two instruments of ratification, acceptance, approval or accession have been deposited with the Secretary-General of the United Nations.

General Comments

Over the last few years, there has been increasing involvement of the United Nations in dealing with crises and conflict situations. There are as many as 16 peace-keeping operations where the United Nations has deployed nearly 75,000 personnel both civilian and military. The number of violent attacks and commission of other types of crimes against these personnel have increased manifold.

The Convention on the Safety of the United Nations and associated personnel provides a useful legal framework.

The Convention would apply to any operation mandated by the United Nations whether it is peace-keeping or humanitarian. It would extend its coverage to the different categories of United Nations personnel, including military personnel, police personnel and civilian personnel. Such a broad coverage is in line with the increasing involvement of the United Nations in various kinds of operations. The involvement of non-governmental organizations and its personnel in any United Nations operations should be carefully executed.

It is the established practice to seek consent of the host State prior to the beginning of any United Nations operation in the concerned State. The problem, however, would arise where because of the circumstances, the host government may not be in full control of the situation. Similarly, whether the conflict situation is one of an international character, or a non-international armed conflict would also pose difficulties in obtaining such a consent.

The States which agree to send their military pesonnel to join the UN operation do it on a voluntary basis. The provisions of the United Nations Charter impose no such obligation. It has been the practice of the United Nations to conclude bilateral agreements with the concerned states on the basis of status-of forces agreement. Of late, it has been a model for concluding bilateral agreements for the deployment of civilian personnel as well. It is for consideration whether the personnel deployed pursuant to a mandated United Nations operation should remain under the command and control of the United Nations. While it is recognized that there is certain distinction between the direct operation by the UN and UN authorized operations, however, the recent events have shown that unilateral withdrawal of the military contingents by certain States put the entire United Nations operation in jeopardy. Such a situation would pose grave risk for the safety and security of other United Nations personnel engaged in that operation.

The main thrust of the Convention is to establish the duty of States to take all appropriate measures to ensure the safety and security of the United Nations personnel. The host State, in particular, would assume the responsibility to protect United Nations personnel who are deployed in its territory from attacks or other acts of violence. The host State should give due respect to the international character of the United Nations operation, respect privileges and immunities of the United Nations operation, and immunities of the United Nations Personnel and take all necessary measures to ensure safety and security of the personnel deployed to carry out that operation.

Article 105(1) of the United Nations Charter stipulates that "The organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes". Further, the General Convention on the Privileges and Immunities of the United Nations, approved by the General Assembly on 13 February 1946 and the Convention on Privileges and Immunities of the Specialized Agencies approved on 21 November 1947 elaborate provisions dealing with the privileges and immunities of the United Nations and the Specialized Agencies respectively. The 'Status of forces' agreement incorporate relevant provisions from these Conventions and provide for certain privileges and immunities of the military and civilian personnel deployed in the United Nations operations. Further, as regards the civilian contractors and non-governmental organizations and their personnel who are engaged in United Nations operations through contractual or other arrangements, it may be pointed out that the Security Council in its resolution 868 of 29 September 1993, decided that the safety and security arrangements undertaken by

the United Nations or the host country should extend to all persons engaged in operations authorized by the Security Council (A\AC.242\1). A word of caution is necessary in this regard. Extension of privileges and immunities to such a wide category of people may open the door to its abuse. Identification of such personnel and keeping their track record will not be an easy job, especially when they are engaged in humanitarian operations. If proper measures are not taken, there might exist a certain risk of undermining the rights of sovereign states. The host government may not agree to extend privileges and immunities to locally employed or to any non-governmental organizations whose credibility is questionable.

VI. Follow-up of the United Nations Conference on Environment and Development

(i) Introduction

The General Assembly at its Forty-seventh Session by its resolution 47/190 adopted on 22 December 1992, endorsed the Rio Declaration on Environment and Development, Agenda 21 and the Non-legally Binding Authoritative statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all types of forests as adopted at the Rio Summit on 14 June 1992.

At the AALCC's Kampala Session held in early 1993, the Committee took note of the outcome of the Rio Summit and the subsequent developments at the 47th Session of the General Assembly. It directed the Secretariat to continue the follow-up work on certain areas which included, the Work of the Commission on Sustainable Development, particularly in relation to the implementation of Agenda 21. The follow-up of the successful conclusion of the Framework Convention on Climate Change and the Convention of Bio-diversity was considered another priority area on which the AALCC's work should be focussed.

At the AALCC's Thirty-third Session held in Tokyo in January 1994, the Committee directed the Secretariat to continue monitoring the developments in these areas and submit a report for the consideration of the Member Governments at the Doha Session. It also took note of the progress in respect of the negotiations on the Convention to Combat Desertification and asked the Secretariat to work in co-operation with the Organisation of African Unity (OAU) in the preparation of a study on this Convention. The Secretariat study for Doha Session contains a brief Note on the major developments during the year 1994 and detailed Notes on three Environment Conventions namely, the Framework Convention

on Climate Change, the Convention on Bio-diversity and the Convention to Combat Desertification.

Thirty-fourth Session : Discussions

The Assistant Secretary-General (Mr. Asghar Dastmalchi) introduced this topic and recalled that the item 'Environmental Law' had been on the agenda of the AALCC over the last two decades. From Stockholm Conference of 1972 to the Rio Conference of 1992 the AALCC's work programme had kept pace with the development of Environmental Law. It had been the endeavour of the AALCC Secretariat to prepare studies and reports on major environmental law conferences with a view to assist Member Governments in their effective participation in those Conferences.

The Rio Summit of 1992 heralded in a new era of international co-operation in the field of environmental matters. The successful conclusion of three recent environmental law Conventions namely the Framework Convention on Climate Change, the Convention on Bio-diversity; and the United Nations Convention to Combat Desertification provided for new legal regimes in their respective areas. He recognized that the Environmental law in general and the Implementation of Agenda 21 including the legal regimes established by recent environment convention were of great importance. How far these new legal regimes have met with the expectations of the developing countries needed to be considered.

He drew attention to the Secretariat Document No. AALCC/XXXIV/ Doha/95/7 which contained Notes on the outcome of the first meeting of the Conference of the Parties of the Bio-diversity Convention held in Bahamas from 28 November to 9 December 1994 and the progress made subsequent to the adoption of the Convention to Combat Desertification. He said that the Secretariat had not prepared any study on the Framework Convention on Climate Change as the first meeting of the Conference of Parties to the Climate Change Convention was held recently in Berlin from 28 March to 7 April 1995.

Mr. Dastmalchi observed that on two crucial issues namely, the financial mechanism and the transfer of technology to the developing countries, much remains to be done. The AALCC Member States have vital stakes in the implementation of these three Conventions. The Doha session provided a good opportunity to identify the issues which were of key importance and arrive at common position among the Member States.

Turning to the AALCC's Work Programme, the Assistant Secretary-General stated that during the year 1995, because of the financial constraint, the AALCC Secretariat could not participate in any environmental meetings.

He hoped that the Member Countries would find ways to strengthen and support the AALCC's Work Programme in this field. It was an area where the AALCC has a great potential role. The United Nations Environment Programme (UNEP) was keen to join the AALCC in its initiatives and provide expertise. Other United Nations Agencies, International and Non-governmental Organizations were equally keen to lend their support. How the Committee should utilize this opportunity was for the Member Governments to reflect and direct the Secretariat accordingly.

The *Delegate of Philippines* gave an account of the outcome of the first conference of the parties to the Framework Convention on Climate Change held in Berlin recently. Among the substantive matters taken up by the conference included, adequacy of commitments, joint implementation, financial mechanism and transfer of technology. With regard to adequacy of commitments, the conference decided to issue a mandate to start the process of strengthening commitments of developed country parties. It established a pilot phase for joint implementation activities among the developed country parties and on a voluntary basis for the developing country parties. It underscored the importance to developing countries of technology transfer and financial resources. He informed the meeting about his country's initiatives to deal with the effects of climate change.

The *Delegate of Sudan* recognized the crucial role which the AALCC could play in assisting Member States in the environmental matters, especially in the follow-up to the implementation of the recently adopted environmental Conventions. He gave an example of the reservations inserted by several countries in the context of ratification of the Bio-diversity Convention. The AALCC Secretariat could examine these reservations and advise the Member States about their validity. It could thus play a key role in promoting wider acceptance of the environmental conventions among the AALCC Member States.

The *Delegate of China* observed that there was consensus that resources and environment should be harmonized with economic development so as to bring the society and economy onto a path of sustainable growth. It was against this background that the United Nations Conference on Environment and Development (UNCED) was held in Rio de Janeiro in June 1992.

While recognizing that since Rio Summit, the World community and the International Organizations concerned have made a lot of efforts in carrying out various resolutions of the UNCED, the delegate expressed the view that the efforts made by the international community, especially

by the developed countries were not enough in comparison with the requirements of the effective implementation of various decisions of the UNCED. Instead of taking substantive actions, the developed countries have obviously retrogressed from their original commitments made at the UNCED. He hoped the developed countries would fulfill their commitments of providing new and additional financial resources and transferring environmentally sound technology under most favourable terms to developing countries.

Climate Change was a major environmental issue confronting the world community. The United Nations Convention on Climate Change was a legal instrument concluded by the international community after 18 months of hard negotiations. It identifies the objective of "Stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system", and stipulated that the developed country Parties should take the lead in combating climate change and the adverse effects thereof. It also forged the global partnership, i.e. the developed countries have the responsibility to provide financial and technological assistance to the developing countries in order to help them comply with their obligations. Regrettably, one year after the entry into force of the Convention, the developed countries have not adequately complied with their obligations, and they have failed to honour their commitment of providing new and additional financial resources and transferring technology. He stressed that practical and effective compliance with the obligations as set out in the Convention was the top priority.

With regard to the issue of "joint implementation" provided for in Article 4, 2 (a) and (d), it applied only to the developing country Parties. In his view, no developing country Party has any limitation commitment under the Convention; a developing country Party may participate in the pilot joint implementation activity on a voluntary basis, but the developed country Parties should not shift their emission limitation commitments onto the developing country Parties by means of joint implementation. Further joint implementation could only be regarded as an auxiliary means for the developed country Parties to implement the Convention. They should fulfil their commitments of reducing the emission of greenhouse gases mainly by adopting measures in their domestic departments. The fund and technology used by the developed country Parties in a project of joint implementation could not be taken as part of the obligations they should fulfil in terms of providing fund and technology. He stressed that joint implementation should be carried out on a voluntary and equal basis of all the parties and should fully respect the sovereignty of the developing

countries. It was a means in which the developing country Parties help the developed country Parties to implement the Convention.

With regard to the Convention on Biological Diversity he said that the developed country Parties should provide new and additional financial resources to enable the developing country Parties to meet the agreed full incremental costs to them of implementing measures which fulfil the obligations of this Convention. In his view, the amount of the fund needed by the Convention should be decided by the Conference of Parties according to the requirements of implementing the Convention, and should be raised by the future financial mechanism in accordance with its replenishment procedure. The developed country Parties should honour their obligations under the Convention through the future replenishment procedure of the financial mechanism. As an interim financial mechanism, GEF should set the ratio of the fund used for the Convention and take immediate measures to make sure that it will obtain the fund in order to implement the Convention. He informed the meeting that his country has formulated the action plan on biological diversity and formulating the country studies with the help of the UNEP.

As regards the United Nations Convention to combat Desertification in those Countries Experiencing serious Drought and/or Desertification, Particularly in Africa it will facilitate the international cooperation in this field. He pointed out that the rights and obligations provided under the Convention were uneven, because the developed country Parties did not undertake any substantive obligations to implement the Convention particularly in terms of financial resources and mechanism. He appealed to the world community especially the developed countries to fulfil their commitments made at Rio Summit and provide fund and technology to the developing countries. Only in this way could the global desertification be halted for the benefit of the mankind.

"The *Delegate of the Republic of Korea* drew attention to the fact that there seems to be no problem about the transfer of technology in the public domain and the transfer of privately-owned technology, although the latter would raise intellectual property rights issues. However, in case of the publicly-owned technology such as the ones owned by the government poses special problems. He suggested that the AALCC could identify these problems and prepare a framework and certain guidelines to help transfer of such technology. This could be useful for the countries in this region and facilitate the transfer of needed technology.

The *Delegate of Kuwait* referred to Principles 15, 23 and 24 of the Rio Declaration on the Environment and Development. She recognized

that Agenda 21 represented a work programme for the next century and addressed the environmental issues within a developmental framework. She informed the meeting that the Environment Protection Council, the Agency responsible for the environmental matters in Kuwait, established a sub-committee to review and assess her Government policies and legislations concerning environment protection in the light of recommendations made in Agenda 21. She said that her country actively participated in the meetings of the Inter-governmental Negotiating Committee for Climate Change, including the recent Berlin Conference. Among the issues stressed by her delegation included the constitution of the Members of the Bureau which should include a representative of the developing oil producing countries to protect the interests of this small vulnerable group; adoption of protocols by consensus, joint implementation strictly between developed countries and implementation of the current commitment by the developed countries.

The *Delegate of Sri Lanka* said that there was a global consensus that environment and development were closely interwoven. In his view, while the high level of consumption was the main cause of environment degradation in the developed countries, poverty, under development and lack of resources resulted in environmental degradation in the developing countries. Further, while there was common responsibility of the international community, the developed countries should share the greater responsibility in taking corrective measures to protect the environment.

The *Delegate of India* recognized that the UNCED established the importance of sustainable development which enveloped the two concepts of development and environmental protection. It also forged the foundations of a global partnership for environmental protection based on the fact that the environment of the entire world was common and both the developed and developing countries had a responsible role to play in ensuring sustainable development.

He observed that developing countries found it difficult to adequately pursue concerted approach to development in situations where protectionism was rising, the debt burden was increasing, terms of trade were continuing to deteriorate and reverse financial resource flows were taking place. Moreover, unless widespread poverty in developing countries was tackled head-on, we would be avoiding at our own peril tackling an important cause of environmental degradation in the developing world.

He said that decisions regarding development strategies in pursuance of sustainable development were matter of national decision-making. The role of international cooperation should be to support and supplement,

and not supplant, such national efforts. Review of national policies or plans by external agencies, or imposition of mandatory guidelines in sectors as forestry or energy would not be acceptable.

Environmental standards applicable to developed countries may have inappropriate and unwarranted social or economic costs in developing countries and harmonized or uniform global environmental standards may not, therefore, be applicable.

In his view the integration of environmental concerns into policies and programmes concerning economic development should be carried out without introducing a new form of conditionality in aid or development financing. It should also not be used as a pretext for erecting new trade barriers.

Moreover, provision of adequate, new and additional funding to developing countries would by itself not suffice; the transfer of environmentally sound technologies to countries which do not possess them would have to be ensured.

Lastly, multilateral funding institutions or mechanisms to tackle environmental problems should be democratically administered, and not donor dominated.

(ii) Decision on "The United Nations Conference on Environment and Development—Follow-up"

(Adopted on 22nd April 1995)

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

Having considered the Document No. AALCC/XXXIV/Doha/95/7 on matters concerning the follow-up on the United Nations Conference on Environment and Development held in Rio in June 1992;

Recognizing the need to monitor the ongoing work in relation to the Convention on Bio-diversity, the Framework Convention on Climate Change, and the United Nations Convention to Combat Desertification;

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 on 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. *Request* the Member Governments to consider ratifying or acceding to the UNCED Conventions;

4. *Urges* Member Governments to make voluntary contributions to the Special Fund on Environment; and

5. *Directs* the Secretariat to continue to monitor the progress in environmental matters, particularly towards the implementation of Agenda 21 and the follow-up work to the recent Environmental Conventions and submit a report at the Thirty-fifth Session of the AALCC.

(iii) Secretariat Brief

Follow-up of the United Nations Conference on Environment and Development

Major Developments during the year 1994

The year 1994 was an important year as the Framework Convention on Climate Change came into force on 21 March, 1994, the first conference of the Conference of the Parties of the Convention on Bio-diversity was held in Bahamas in November 1994, and on 16 November 1994, the United Nations Convention on the Law of the Sea came into force, which added a new Chapter in the book of Environmental Law Conventions.

The Commission on Sustainable Development at its second session in New York in May 1994 launched its review of first cluster of issues as envisaged in its multi-year programme of work based on 40 Chapters of Agenda 21. This programme covered cross-sectoral chapters 2 (accellerating sustainable development; 4 (consumption patterns); 33 (financial resources and mechanisms); 34 (technology-co-operation and transfer); 37 (capacity building); 38 (institutions); 39 (legal instruments); and 23-32 (role of major groups). In addition, other chapters considered were: Chapter 6 (health); 7 (human settlements); 18 (fresh water resources); 19 (toxic chemicals); 20 (hazardous wastes); 21 (solid wastes and sewage); and 22 (radio-active wastes). The high-level segment, which was held during the last two days of the session, was attended by over 40 ministers. The decisions adopted by the Commission on these matters would accelerate the implementation of Agenda 21.

Another event of great importance was the convening of the Global Conference on Sustainable Development of small Island Developing States at Bridgetown (Barbados) from 25 April to 6 May 1994. The Barbados Declaration and the Programme of Action for the Sustainable Development

of Small Island Developing States adopted at that conference will contribute significantly towards the implementation of Agenda 21, particularly its Chapter 17, Section G. Further, the ongoing work of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks is expected to conclude in August 1995 when the Convention will be ready for adoption. Numerous regional and international meetings were also held on matters relating to the implementation of Agenda 21 at the initiative of individual Governments, United Nations and its Agencies and several non-governmental organisations. A number of governments have launched preparation of national sustainable development strategies programmes and action plans. While all these measures are important steps towards the implementation of the Agenda 21, however, it is a matter of concern that the availability of financial resources, which is necessary to achieve success, has not been there. The resolution adopted by the General Assembly at its forty-ninth session on 19 December 1994, while considering the Report of the Commission on Sustainable Developments, reflects this view point.

The General Assembly by this resolution, "Expresses its deep concern that the financial recommendations and commitments of Agenda 21, including those regarding official development assistance, despite an increase in private investment in some countries, are short of expectations and requirements and that the current availability of financial resources for sustainable development and the limited provision of adequate and predictable new and additional financial resources will constrain the effective implementation of Agenda 21 and could undermine the basis of the global partnership for sustainable development, in this context, expresses its concern that overall official development assistance has even decreased since the United Nations Conference on Environment and Development" (Para 5, GA resolution 49/11).

CONVENTION ON BIOLOGICAL DIVERSITY

Progress of Implementation at National and International Levels

The Convention on Biological Diversity was opened for signature at the Earth Summit held in Rio de Janeiro (Brazil), on 5 June 1992. The Convention entered into force on 29 December 1993 and as on 21 December 1994 had 108 Parties thereto.*

* From the Afro-Asian region, the States which have signed the Convention but have not yet ratified are as follows: *Asia* : Afghanistan, Bahrain, Bhutan, Iran, Kuwait, Oman, Qatar, Singapore, Syria, Thailand, Turkey and United Arab Emirates. *Africa* : Algeria, Angola, Botswana, Burundi, Cape Verde, Central African Republic, Congo, Gabon, Guinea-Bissau, Lesotho, Liberia, Libya, Madagascar, Mali, Mauritania, Morocco, Namibia, Niger, Rwanda, Sao Tome and Principe, South Africa, Sudan, Tanzania and Togo.

This Convention may be regarded as a framework Convention for two reasons. The first one; it leaves up to individual Parties to determine how most of its provisions are to be implemented. The main thrust of the Convention is to place main decision-making at the national level. The second reason is that it is a framework agreement because emphasis is placed on the possibility for the Conference of the Parties (COP) to further negotiate annexes and protocols.

In order to prepare the operational phase of the implementation process, interim mechanisms and measures were called for by Resolution of the Conference for the Adoption of the Convention. This resolution invited the UNEP to consider requesting its Executive Director to convene meetings of an Intergovernmental Committee on the Convention on Biological Diversity (ICCBD) to operate until the first meeting of the COP at the end of 1994. The first meeting of the ICCBD, in Geneva in October 1993, was preceded by the meetings of four experts panels convened by the UNEP Executive Director for preparing recommendations on specific issues for the first meeting of the ICCBD. UNEP also created an interim Secretariat.

The first meeting of the ICCBD was held in Geneva from 11 to 15 October 1993 and it addressed the long list of tasks mandated to it. The ICCBD established two Working Groups. Working Group I dealt with the conservation and sustainable use of biological diversity, the scientific and technical work between meetings and the issue of biosafety. Working Group II tackled issues related to the financial mechanism, the process for estimating funding needs, the meaning of "full incremental costs", the rules of procedures for the COP and technical cooperation and capacity building. Despite several sessions, the Working Groups were not able to produce reports that could be approved. The Plenary adopted only two decisions: the establishment of a scientific and technical committee to meet before the second session of the ICCBD; and a request to the Secretariat to use the unadopted Working Groups' reports as guidance during the intersessional period.

The second meeting of the ICCBD was held in Nairobi from 20 June to 1 July 1994. The issues addressed at this session in preparation for the first meeting of the COP included: institutional, legal and procedural matters; scientific and technical matters; and matters related to the financial mechanism. Progress was made on issues including rules of procedure; the subsidiary body on scientific, technical and technological advice (SBSTTA); and the clearing-housing mechanism. However, on such critical issues as the need for a biosafety protocol, ownership and access to *ex*

situ genetic resources, farmers' rights and the financial mechanism, no headway was made.

The first meeting of the Conference of the Parties (COP) was convened in Nassau, the Bahamas, from 28 November to 9 December 1994. In addition to the organizational matters, the agenda included the following substantive items:

(i) Policy, strategy, programme priorities and eligibility criteria regarding access to and utilization of financial resources;

(ii) Institutional structure to operate the financial mechanism under the Convention;

(iii) List of developed country Parties and other Parties which voluntarily assume the obligations of developed country Parties;

(iv) Clearing-house mechanism for technical and scientific cooperation;

(v) Selection of a competent international organisation to carry out the functions of the Secretariat;

(vi) Financial rules governing funding for the Secretariat;

(vii) Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA);

(viii) Preparation for the Third Session of the Commission on Sustainable Development (CSD);

(ix) Medium-term programme of work of the COP;

(x) Budget for the Secretariat; and

(xi) Location of the Secretariat.

Following discussions in the Plenary, three Contact Groups were established to resolve the outstanding issues related to the aforementioned agenda items. Agenda items (i) to (iii), namely policy, strategy, programme priorities and eligibility criteria regarding access to and utilization of financial resources; institutional structure to operate the financial mechanism; and the list of developed country Parties and other Parties, were allocated to a Contact Group chaired by Antigua and Barbuda. The draft decision adopted by this Contact Group stipulated: the Global Environmental Fund (GEF) to continue as the interim financing structure to operate the financial mechanism; the GEF to support the policy, strategy, programme priorities and eligibility criteria as stated in Annex I of the draft decision; the Interim Secretariat to consult with the GEF on the MoU to be considered at the second meeting of the COP; listed in Annex III of the draft decision interim guidelines for evaluation of the GEF and requested the Interim

Secretariat to prepare a report on the financial mechanism and a study on the availability of financial resources additional to those provided by the restructured GEF for the second meeting of the COP; and listed in Annex II of the draft decision the developed country Parties and other Parties that assume the developed country Parties' obligations. There were, however, no countries in the latter category. The draft decision was subsequently adopted by the Committee of the Whole with the understanding that Annex II (list of developed country Parties) will be reviewed and adjusted at COP II.

Items (iv), (vii) and (viii), namely the clearing-house mechanism, SBSTTA and preparation for the third session of the Commission on Sustainable Development (CSD) respectively, were allocated to the Contact Group chaired by Canada. The Group agreed that the Interim Secretariat would prepare a study to assist the COP in the establishment of a clearing-house mechanism. SBSTTA, the Group chose the priority items from the draft medium-term work programme as the basis for the SBSTTA's first meeting which was to be held in Paris from 4 to 8 September 1995. The matters selected for advice from the SBSTTA for the second meeting of the COP (6 to 17 November 1995) included: the components of bio-diversity under threat and the action to be taken; ways and means to promote technology transfer; scientific and technical information to be contained in national reports regarding implementation; contribution of the Convention to the preparation of the 1996 International Technical Conference on the Conservation and Utilization of Plant Genetic Resources; and conservation and sustainable use of coastal and marine biological diversity. As regards agenda item (viii), preparation for the third session of the CSD (11 to 28 April 1995), it was agreed to refer to the relationship between poverty and bio-diversity and to contribute to discussions in the CSD on forest principles. The draft decisions on these items were subsequently adopted by the Committee of the Whole.

Items (v), (vi), (ix) and (x) of the agenda, namely, selection of a competent international organisation to carry out the secretarial functions, financial rules governing funding for the Secretariat, medium-term programme of work of the COP and budget for the Secretariat respectively, were allocated to the Contact Group coordinated by Mauritania. On agenda item (v), the Group favoured continuation of the Interim Secretariat until the permanent Secretariat was established. There was also near unanimous agreement that the UNEP was best suited to take on the permanent secretariat role. On agenda item (vi), financial rules for funding the Secretariat, there were protracted negotiations on the unresolved issue of the scale of contributions. As for agenda item (ix), viz. the medium-term programme

of work of the COP, it was agreed to develop the same on the basis of standing and rolling issues. Standing issues were to include matters relating to the financial mechanism, report from the Secretariat on the administration of the Convention and budget for the Secretariat; report from, and consideration of recommendations to the SBSTTA; reports by the Parties on implementation of the Convention; report on assessment and review of the operation of the clearing-house mechanism; relationship of the Convention to the CSD and bio-diversity-related conventions, other international agreements, institutions, and processes of relevance to agenda items of the COP. The rotating agenda was to be developed in a flexible manner, in accordance with the decisions of the COP, the SBSTTA and any working groups established by the COP. On the basis of the recommendations made by the Contact Group and subsequent deliberations thereon in the Committee of the Whole, the financial rules governing the funding of the Secretariat were adopted as also the Secretariat's budget with the scale of contributions for 1995 being included in an appendix to the budget. The medium-term work programme for the period 1995 to 1997 was also endorsed.

On agenda item (xi), i.e. location of the Secretariat, no decision was taken. The draft decision submitted by Kenya, Spain and Switzerland, each of which has offered to host the Secretariat, proposing that the decision be taken at the COP-II, was adopted. However, a positive note has been that UNEP has been chosen to host the Secretariat. Although this represents a welcome demise of the suggestion that a consortium of international organisations should provide secretariat services for the UNCED Conventions and related agreements, the idea of a 'co-location' in Geneva is still under consideration as there are significant similarities between the Bio-diversity Convention and the 'Greenhouse' Convention. This premise is, however, not convincing. The latter Convention deals with the global commons—the atmosphere—and obviously needs global action strategies to be implemented primarily by industrialized countries. The Bio-diversity Convention, on the other hand, deals with resources under the sovereign control of States requiring national action, especially by developing countries.

Another important decision taken at COP-I was that 29 December is to be observed as the International Day for Bio-diversity, every year.

An Overview of Conference of Parties (COP)-I

The Conference of Parties (COP-I) achieved some accomplishments as also setbacks. On the plus side, despite an onerous agenda, COP-I has been able to lay the necessary groundwork for proceeding with the

implementation of the conservation of bio-diversity and sustainable use of its components. This is reflected in some of the key decisions taken by it. A medium-term work programme has been put in place to guide the work of the COP over the next three years. The Interim Secretariat has been transformed into a permanent body entrusted with important work in advance of COP-II. Way has also been paved for the establishment of a clearing-house mechanism, although the scope of its operations is yet to be given a final shape. The Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) has been given a clear mandate and work programme to deal with such issues as identification of threatened bio-diversity; technology transfer; national reporting; costal and marine bio-diversity; and the FAO initiative on plant genetic resources. SBSTTA is expected to provide important objective scientific inputs including definitions, criteria, indicators and guidelines into the political decision-making process.

Another positive note has been that there has been a tentative agreement on the designation of the GEF as the interim financial structure to operate the financial mechanism envisaged in the Convention. In the beginning, there was a great deal of controversy on whether the GEF should be selected as the interim or permanent institutional structure for the financial mechanism under the Convention. Industrialized countries argued that since GEF had been adequately restructured, it should be retained as the permanent financial mechanisms. Developing countries, however, felt that the restructuring did not meet their concerns. They were also concerned about the limited ability of the COP to influence the GEF project decisions. They were of the view that the restructured GEF instrument only mentioned guidance and accountability but was silent on the issue of authority of the COP. It was stressed that the financial mechanism must function under the authority and guidance of, and be accountable, to the COP. It was, nevertheless recognised that the GEF, although far from perfect, could play a significant role in funding bio-diversity projects, and that any delay in that respect could affect its future replenishments. It was, therefore, agreed that in the best interests of the Convention, a concrete relationship needed to be forged between the COP and GEF so that the COP could exert a positive influence on GEF decision-making.

On the minus side, it needs to be pointed out that there has been lack of adequate attention being paid to such important issues as the biosafety protocol, indigenous issues, financing of the medium-term work programme and the forest principles. Although COP I did provide for the establishment of an *ad hoc* Working Group for the adoption of a protocol on biosafety, no provision for its funding from the general budget was made and it was

left to operate on the basis of voluntary funds. Lack of financial support could adversely affect the work of this Working Group.

Indigenous issues have been deferred in the medium-term programme of work until 1996. Such delay is not appropriate.

A notable concern relates to the financing of the medium-term programme of work on account of the inadequacy of the budget therefor. The budget does not reflect the enormous workload given to the Secretariat in the medium-term work programme and it also does not provide for preparatory work for the SBSTTA. Yet another disquieting feature is that despite the COP's intended input on forest principles to the third Session of the CSD, the medium-term work programme contains no reference to the forest principles. The consideration of forests in the context of terrestrial bio-diversity has been delayed until COP-II in 1996. This is problematic because COP-III will be meeting about 1½ years after the forest issues will have been considered by the CSD and the initiation of the negotiating process for a Forest Convention.

The challenges that await COP-II in November 1995 include the biosafety protocol, the location of the Secretariat, the GEF and other important issues related to the Convention's implementation, namely, implementing Article 6 (national plans and strategies); action on bio-diversity components under threat; implementing Article 8 (*in situ* conservation); coastal and marine bio-diversity; access to genetic resources and benefit-sharing; access to and transfer of technology (Articles 16 and 18); study on financial resources (additional to GEF); national reports-frequency and context/scope; progress by FAO on the International Technical Conference on the Conservation and Utilization of Plant Genetic Resources scheduled to be held in 1996; and FAO's progress on dealing with *ex situ* genetic resource collections.

THE UNITED NATIONS CONVENTION TO COMBAT DESERTIFICATION IN THOSE COUNTRIES EXPERIENCING SERIOUS DROUGHT AND/OR DESERTIFICATION, PARTICULARLY IN AFRICA

Background

The General Assembly, at its forty-seventh session by its Resolution 47/188, adopted on 22 December 1992, established an Intergovernmental Negotiating Committee (hereinafter called 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 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. Mr. Bo Kjellen of Sweden was elected as Chairman.

The first substantive session of the INC-D was held in Nairobi from 24 May to 3 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 desertification and mitigation of drought.

During the second week of the session, the discussion 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 had prepared a document entitled "Format and Possible Elements of the Convention" (U.N. Doc. No. 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 1 July 1993. The Secretariat was mandated to prepare a compilation of those 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 (U.N. Doc. A/AC.241/12) held in Geneva from 13 to 24 September 1993.

After the conclusion of the second session, the INC-D Secretariat prepared a draft negotiating text contained in U.N. document A/AC.241/15 which was taken as a basis for discussion during the INC-D third session held in New York from 17 to 28 January 1994. Considerable progress was made in identifying the areas where there was a broad consensus. The issues concerning commitments, financial resources and mechanisms and the conclusion of regional annexes were the key issues on which there were divergent views.

The Fourth Session of the INC-D was held in Geneva from 21 to 31 March 1994. The discussion focussed on a revised text of the Draft Convention contained in U.N. document A/AC.241/15/Rev.1.

The Fifth Session of the INC-D was held in Paris from 6 to 17 June 1994. The session marked the final and the most difficult phase of negotiations in formal and informal meetings. Success was achieved when the INC-D was able to narrow down the differences and adopted the final text of the Convention together with the four regional implementation annexes for Africa, Latin America and the Caribbean, Asia and the Northern Mediterranian. The INC-D also adopted two resolutions. The resolution on urgent measures for Africa, called on affected African States to take urgent action including the preparation of regional and sub-regional action programmes. The second resolution outlined the interim arrangements and follow-up measures for the continuance of the INC-D's work until the first session of the Conference of Parties.

The Government of France organised an impressive ceremony in Paris on 14th and 15th October 1994, during which 87 countries and one regional organization signed the Convention.

The General Assembly, at its forty-ninth session by its resolution 49/234 of 23 December 1994, welcomed the adoption of the Convention and its signing by a large number of States. It urged the States that have not yet signed the Convention to do so. It recognised that in conformity with article 33 of the Convention, it will remain open for signature until 13 October 1995. It also urged the signatories of the Convention to proceed to its ratification so that it may enter into force as soon as possible. It decided that the INC-D would continue to function and laid down its tasks as follows:

(a) To prepare for the first session of the Conference of the Parties to the Convention, as specified in the Convention;

(b) To facilitate the implementation of the provisions of resolution 5/1 on urgent action for Africa, through the exchange of information and review of progress made therein;

(c) To initiate measures relating to identification of an organisation to house the global mechanism to promote action leading to mobilization of substantial financial resources, including its operational modalities;

(d) To elaborate the rules of procedure of the Conference of the Parties;

(e) To consider other relevant issues, including measures to ensure the implementation of the Convention and its regional annexes.

As for the future meetings of the INC-D, the General Assembly decided that in addition to the Sixth Sesion of the INC-D scheduled for two weeks in New York from 9 January 1995, another two weeks session will be held in Nairobi from 7 to 18 August 1995. In addition, pending the entry into force of the Convention, further necessary sessions might be held in 1996 and 1997 at such venue and timing as will be recommended by the INC-D.

In another resolution adopted by the General Assembly on 19 December 1994 (Res. 49/115), it was considered that among the ways to promote action to implement the Convention would be to raise awareness at local, national, sub-regional, regional and international levels. It decided to proclaim 17 June as the World Day to Combat Desertification and Drought to be observed beginning in 1995.

The Sixth Session of the INC-D was held in New York from 9 to 18 January 1995. The Session was devoted mainly to discuss the future organisational work and follow-up promotional measures related to the Convention including the implementation of the resolution on urgent action for Africa. After a brief general discussion and informal consultations it was decided to establish two Working Groups.

Working Group I chaired by Mr. Mourad Ahmia (Algeria) would consider the issues which include: initiating measures relating to the identification of an organisation to house the Global Mechanism, making recommendations for the designation by the Conference of the Parties of a Permanent Secretariat and arrangements for its functioning; and financial rules, programmes and budget.

Working Group II chaired by Mr. Takao Shibata (Japan) would consider matters including: Organization of scientific and technological co-operation;

rules of procedures for the Conference of the Parties; procedures on question of implementation; procedures for conciliation and arbitration and procedures for communication of information for the review of implementation of the Convention.

The two Working Groups will begin substantive discussions at the Seventh Session of the INC-D scheduled to be held at Nairobi from 7 to 18 August 1995.

As on 18 January 1995, 97 countries have signed the Convention.* These signatories include:

Algeria, Angola, Argentina, Armenia, Australia, Bangladesh, Benin, Bolivia, Brazil, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, China, Colombia, Comoros, Congo, Costa Rica, Cote d'Ivoire, Croatia, Cuba, Denmark, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, European Union, Finland, France, Gambia, Georgia, Germany, Ghana, Guinea, Guinea Bissau, Greece, Haiti, India, Indonesia, Iran, Ireland, Israel, Italy, Japan, Kazakhstan, Kenya, Lebanon, Lesotho, Libya, Luxembourg, Madagascar, Malawi, Mali, Malta, Mauritania, Mexico, Micronesia, Mongolia, Morocco, Namibia, Netherlands, Nicaragua, Niger, Nigeria, Norway, Pakistan, Paraguay, Peru, Philippines, Portugal, Republic of Korea, Saint Vincent and the Grenadines, Senegal, Seychelles, Sierra Leone, South Africa, Spain, Sudan, Sweden, Switzerland, Syria, Tanzania, Togo, Tunisia, Turkey, Uganda, United Kingdom, United States, Uzbekistan, Zaire, Zambia and Zimbabwe.

An Overview of the Convention

The text of the Convention is spread into 26-Paragraphs, a Preamble and 40 articles. The Preamble addresses several issues in general terms. Some of them have been incorporated as specific articles. The set of 40 articles are divided into six parts. Part I entitled 'introduction' contains articles on definition, objective and Principles. Part II containing 'General Provisions' sets out general obligations of all Parties; obligations of affected Country Parties; obligations of developed country Parties and priority action for Africa. Part III stipulates the details concerning action Programmes, scientific and technical co-operation and supporting measures at the national, sub-regional, regional and international levels. Articles 20 and 21 are the two key provisions which deal with financial resources and financial mechanisms. Article 21(4) provides for the establishment of a Global Mechanism which would function under the authority and guidance of

* Earth Negotiations Bulletin, Vol. 4, No. 65, 20 January 1995.

the Conference of the Parties and be accountable to it. Part IV dealing with Institutions provides for the establishment of the Conference of Parties, Permanent Secretariat and a Committee on Science and Technology. Part V is concerned with Procedures. Article 26 elaborates a reporting mechanism by the Parties to the Convention on the measures they have taken for the implementation of the Convention. Part VI sets out the final Provisions. Article 36 provides that the Convention would enter into force on the ninetieth day after the date of deposit of the fiftieth instrument of ratification, acceptance, approval or accession. Lastly, four annexes set out the details concerning implementation of the Convention regionally in Africa, Asia, Latin America and the Caribbean and the Northern Mediterranean respectively.

General Comments

It will be recalled that during the United Nations Conference on Environment and Development held in Rio in June 1992, the African States forcefully argued for elaboration of an International Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, particularly in Africa. The General Assembly at its forty-seventh session by its resolution 47/188 endorsed this proposal and established an Intergovernmental Negotiating Committee (INC-D) and mandated it to complete the elaboration of the Convention by June 1994.

When the INC-D began its work it had the advantage of valuable experience gained in the context of the Convention on Climate Change and Bio-diversity. In addition, since the desertification issues had been discussed extensively for over two decades in the UNEP and other forums, a vast amount of scientific and technical material was in hand. The experience in the implementation of the UNEP 1977 Plan of Action to Combat Desertification provided a useful reference. Against this background, the task of the INC-D was much easier as compared to the Climate Change and Bio-diversity Conventions negotiations. It was, therefore, a correct approach by the INC-D to elaborate the desertification Convention on the pattern of these two Conventions.

The submission of a negotiating draft text by the INC-D at its very first substantive session in Nairobi helped a focussed discussion on relevant issues. By the time, the INC-D held its second session in Geneva, there was a broad consensus on less contentious issues. The divergent views emerged on at least four main issues namely, the commitment of the developed countries, the establishment of new institutional arrangements, the financial resources and mechanisms and the regional annexes. The reluctance on the part of some of the developed countries to accept the

global nature and common concern about the desertification issues marred the progress on several aspects of the Convention. They were neither prepared to support the proposal to establish new institutions nor make any substantial financial commitments to assist the developing countries affected by the menace of desertification and drought. Regrettably the developing countries themselves were divided on the time-table and priority concerning the development of regional annexes. Be that as it may, the successful conclusion of the negotiations at the INC-D fifth session and the adoption of the text of the Convention on 17 June 1994 as mandated by the General Assembly resolution 47/188 is a historic achievement.

The United Nations Convention to Combat Desertification happens to be the first international convention in the post-Rio period. Like the Conventions on Climate Change and Bio-diversity, this Convention also addresses the issues of vital importance in the context of sustainable development, which was one of the basic themes of the United Nations Conference on Environment and Development held in Rio in June 1992. In addition to creating a legal framework for concerted action, the Convention provides for the participatory approach at national, regional and international levels involving Governments, inter-governmental and non-governmental organisations and different sections of people. The most important follow-up work will be to bring the Convention into force. The African States have taken the initiative to implement the Convention provisionally even prior to its entry into force. A similar initiative could be taken by the States of other regions as well.

The pattern of international economic relations has great impact on undertaking effective action concerning environmental issues. The debt burden of the developing countries and the distortion in international trade restrict the ability of developing countries, particularly those experiencing serious drought and desertification to divert their meagre financial resources from other pressing national commitments. The crucial test for the successful implementation of the programmes to combat desertification and mitigation of drought would be the availability of new and additional financial resources.

The financial and technical support for the formulation and implementation of national action programmes is one of the key objectives of the Convention. An integrated approach emphasising the national commitment to ecologically sustainable development issues covering all sectors would help accelerate the achievement of these objectives. Participation of different groups of concerned people and non-governmental organisations in the planning and implementation of national action plans needs to be encouraged.

The developed countries have demonstrated their willingness to consider and appreciate the concern of the developing countries on the priority issues such as poverty eradication, sustainable development, debt burden etc. The Convention reflects this concern in a reasonable manner. However, on the key issue concerning financial resources and mechanism the lack of express commitments by several developed countries, the less said the better. Establishment of an International Fund for this purpose would have evinced keen interest among the developing countries. Instead, in a roundabout manner Articles 20 and 21 of the Convention express the pious resolve to augment the financial resources to meet the challenges posed by desertification and drought.

The focus of restructured GEF would continue on four areas namely climate change, biological diversity, international waterways and ozone layer depletion. As regards the financing for combating desertification, it is envisaged that the agreed incremental costs of activities concerning land degradation, primarily desertification and deforestation as they relate to the four focal areas would be eligible for funding. It is hoped that some ways would be found to broaden the GEF's support to the activities concerning combating desertification and mitigation of drought. The implementation of the Climate Change Convention may be a priority for the developed countries, but the priority for most of the developing countries, particularly in Africa, lies in taking effective action to deal with the desertification and drought issues. The relationship between the climate change and its impact on desertification needs no elaboration. Effective co-ordination in the implementation of the two Conventions would be meaningful only when due recognition is given to their respective objectives and priorities without drawing an artificial line dividing them.

The commitment to environmental and sustainable development issues by the United Nations system has increased significantly. The recent international conventions dealing with ozone layer, climate change, biological diversity, hazardous wastes, marine pollution and toxic chemicals have established a solid framework for collective action at national, regional and international levels. It is hoped that the United Nations Convention on Combating Desertification would receive the requisite ratifications and come into force in the near future. While the legal regimes established by these Conventions would function independently, it would be desirable to harmonize and facilitate the implementation process in such a way that the legislative machinery at the national levels is not over burdened. The lack of infrastructure and the inadequate manpower especially in many developing countries might pose difficulties in achieving this objective. The priority, therefore, should be to strengthen the capacity of the developing

countries by providing financial and technical support, including organisation of training courses and building-up national institutions.

During the consideration of the Report of the INC-D's fifth session, by the General Assembly at its forty-ninth Session, while there was unanimous appreciation for the historic achievements several delegations from the developing countries expressed concern over the lack of enthusiasm on the part of certain developed countries to accelerate the measure to implement the convention's objectives: Any attempt to downgrade the convention in comparison with the conventions on Climate Change and the Bio-diversity should not be encouraged. The sustainable development could be achieved only by an integrated approach.

VII. Deportation of Palestinians in Violation of International Law, Particularly the 1949 Geneva Convention and the Massive Immigration and Settlement of Jews in Occupied Territories

(i) Introduction

The subject "Deportation of Palestinians in Violation of International Law, particularly the Geneva Conventions of 1949" was taken up by the AALCC consequent upon a reference made by the delegation of the Islamic Republic of Iran at the Twenty-seventh Session of the Committee, held in Singapore in March 1988. The delegate of the Islamic Republic of Iran in his introductory statement pointed out that the Zionist entity (Israel) had deported a number of Palestinians from Palestine as a brutal response to the upheaval by the people in the occupied territory. The deportation, both in the past and in recent times, of people from the occupied territory constituted a severe violation of the principles of International Law and also violated in letter and spirit the provisions of such international instruments and conventions as the Hague Convention of 1899 and 1907, the Charter of the United Nations, 1945 and the Geneva Convention relative to Protection of Civilian persons in Time of War, 1949, all of which either implicitly prohibited deportation as a form of punishment of deterrent factor especially in an occupied territory. The Islamic Republic of Iran's primary interest, appeared to be related to two basic issues viz:

(i) the enunciation of the duties, commitments and obligations of occupying forces, in accordance with international law; and

(ii) their violation by the Zionist entity in Palestine.

The delegate accordingly requested the Committee to consider the

item. After a preliminary exchange of views at that Session[1] the Committee called upon the Government of the Islamic Republic of Iran to furnish the Secretariat with a memorandum which it (the Secretariat) might take as a basis to conduct its study and accordingly directed the Secretariat to conduct a study of the matter.

The Islamic Republic of Iran submitted a memorandum to the Secretariat of the Committee[2] whereby it called upon, *inter alia,* the Secretariat:

(i) "to study the fact that in accordance with the international law, the deportation of the residents of the occupied territories is illegal and condemned"; and

(ii) "to examine the violations by the occupation regime of al-Qods of the above case, which had taken place since the very inception of this regime, that has not been recognized by many of the member States of the international community including Iran."

The memorandum also requested the Secretariat to submit "an interim report to the member States before embarking on carrying out its comprehensive studies". A cursory reading of the Memorandum as well as the introductory statement of the delegate of the Islamic Republic of Iran would reveal that the Secretariat was called upon to study the legal consequences of the deportation of Palestinians from the occupied territories.

Thirty-fourth Session: Discussions

The Deputy Secretary-General (Mr. Essam Abdel Rehman Mohammed) stated that the item "Deportation of Palestinians was first placed on the work programme of the Secretariat following upon a reference made by the Government of Islamic Republic of Iran, at the Twenty-seventh Session of the Committee and had been considered thereafter at successive sessions of the Committee. He pointed out that the item had not been included in the agenda of the Thirty-third Session held in Tokyo in 1994 but at the instance of representatives of some Member States a resolution was adopted whereby the Committee requested the Secretary-General of the Committee to continue to monitor the events and developments on the occupied territories and decided to include the item in the agenda of the thirty-

1. For details of the deliberation see the Verbatim Records of the Plenary Meeting of the Twenty-seventh Session of the AALCC held in Singapore, March 1988.
2. The full text of the Memorandum of the Government of the Islamic Republic of Iran drafted in the form of a Report entitled "Deportation of the Residents of Occupied Territories from the stand-point of International Law" may be found in Deportation of Palestinians in Violation of International Law, in particular the Geneva Conventions of 1949. Doc. No. AALCC/XXVIII/89/2.

fourth Session. He stated that in view of the recent development and the resolution of the Committee at its Thirty-third Session the Committee may wish to consider whether the Secretariat has exhaustively dealt with the legal aspects of the item referred to it and determine the course of future work of the Secretariat on the matter.

The *Delegate of Uganda* wanted the Committee to go deeper into the topic on refugees and to address the fundamental questions of examining the causes of refugee flows. He wanted the member States to adopt a culture of constitutionalism as a long range solution to the problem. He also pointed out that the model legislation was a temporary measure in dealing with the refugee problem. He felt that there was need in the Afro-Asian States to develop a culture of political accommodation and reconciliation.

The *Delegate of India* commenting on the model legislation was of the view that no one model could serve as an answer to particular or special problems faced by any member State. More time was required by States to study the various concepts involved in the model legislation and no purpose would be solved by establishing a Working Group to study this model legislation. A preliminary view of the value of this model should be taken first by member States before deciding on any further action. The concept of safety zone had neither legal sanction in International Law nor moral appeal.

The *Delegate of Syria* referring to the proposed merger of the two topics on the Status and Treatment of Refugees and the Deportation of Palestinians expressed the view that the two items should be dealt with separately. He said that his country had not participated in the Multilateral Peace Conferences. Referring to the large number of Palestinians in Syria he said that this Government gives them all the rights as Syrian citizens, but it does not give them the Syrian nationality because they have their home land and a separate and distinct entity. He emphasized the retention of the item "The Deportation of Palestinians in violation of International Law on the work programme of the Committee.

The *Delegation of Sri Lanka* observed that the creation of a Safety Zone should be subject to the consent of the State of origin and not imposed upon it. Dealing with the internally displaced persons he said that it was the humanitarian mandate of the UNHCR and ICRC. To make it more effective what was required was additional funding rather than mechanisms to deal with this problem.

The *Representative of the UNHCR* clarified that he had not meant in any way to offend the Delegate of the State of Palestine. What he had

said was that a process had begun with regard to solving the Palestinian refugee problem and the UNHCR looked forward to the political process. Referring to the statement made by the Ugandan Delegate, he stated that since 1951 the refugee problem had spread all over the world. There was some improvement after the end of the cold war, but at present there was no indication of this problem ending. The present refugee population of 24 million were the refugees as determined by the definition criteria and what percentage of them were migrants was difficult to ascertain.

(ii) Decision on "Deportation of Palestinians in Violation of International Law Particularly the Fourth Geneva Convention of 1949 and the Massive Immigration and Settlement of Jews in the Occupied Territories"

(Adopted on 22nd April 1995)

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

Having considered the Report of the Secretary-General contained in Document No. AALCC/XXXIV/DOHA/95/6. and taken cognizance of the hardships suffered by Palestinian refugees.

And having heard the statement of the Deputy Secretary General;

1. *Thanks the Secretary-General* for his report on the Deportation of Palestinians;

2. *Directs* the Secretariat to continue to monitor the developments in the occupied territories from the view point of relevant legal aspects;

3. *Decides* to place the item on the agenda of the Thirty-fifth Session of the Committee and to consider this item in conjucntion with the item the Status and Treatment of Refugees.

(iii) Secretariat Brief
Deportation of Palestinians in Violation of International Law Particularly the Fourth Geneva Convention of 1949 and the Massive Immigration and Settlement of Jews in the Occupied Territories

A preliminary study prepared by the Secretariat which among other things, dealt with the customary and codified law relating to occupied territories and outlined the duties of the occupying power was considered at the Twenty-eighth Session held in Nairobi in 1989. That brief concluded that deportation of Palestinians did indeed constitute a flagrant violation of customary international law of armed conflicts as well as contemporary international humanitarian law.[1] The Committee at its Nairobi Session *inter alia*, affirmed that the occupying authorities were acting in flagrant violation of international law in deporting Palestinians from the occupied territories. It also affirmed the inalienable rights of the Palestinian people of self determination and the right to return to their land and directed the Secretariat to undertake a further study including the question of payment of compensation to Palestinians.

Pursuant to that decision the Secretariat study for the Twenty-ninth Session endeavoured to establish that payment of compensation for deportation is both a matter of customary International Law as well as an explicit stipulation of contemporary international law as codified in the Hague Convention of 1907, the Fourth Geneva Convention of 1949 and the 1977 Protocols thereto. The brief of documents prepared by the Secretariat for the Twenty-ninth Session of the Committee *inter alia*

1. See AALCC Brief Deportation of Palestinians in Violation of International Law in particular the Geneva Convention of 1949. Doc. No. AALCC/XXVIII/89/2.

emphasized that not only had the Palestinian people been denied the exercise of their fundamental human rights and freedoms but grave injustice at the destruction of these rights had been perpetrated against them.[2] During the Twenty-ninth Session the discussion on the subject by and large revolved around the massive immigration of Jews from Soviet Union and the Israeli practice of settlement of the Jews in occupied Palestinian territories. After the deliberations the Committee *inter alia*, decided that the Secretariat should update the brief prepared for that Session with a comprehensive study taking into consideration all legal aspects of the matter of resettlement of large numbers of Jewish migrants in Palestine in violation of international law by the State of Israel. The Committee at its Beijing Session after due consideration of the Secretariat brief directed it to follow it up with the consideration of the legal aspects of the matter of the resettlement in violation of international law, by the State of Israel, of large number of Jewish migrants in Palestine.

The brief of documents prepared by the Secretariat for the Thirtieth Session held in Cairo in 1991 focussed on the Israeli Settlements in the occupied territories since 1967 through expropriation of Palestinian lands and the issue of massive immigration of jews from the Former Soviet Union and their resettlement in the occupied territories of Palestine. The right of the Palestinian people to return to their homeland was also discussed in the Secretariat study.[3] After due consideration of the brief the Committee at its Thirtieth Session expressed its concern at the continuing denial and deprivation of the inalienable human rights of the Palestinian people including the right of self-determination and right to return and establish independent State on their national soil. The Committee at its Thirtieth Session requested the Secretary-General to continue to monitor the events and developments in the occupied territories of Palestine and decided to include the item on the agenda of the Thirty-first Session.

Pursuant to the decision of the Thirtieth Session the brief prepared for the Thirty-first Session held in Islamabad (1992) reflected the developments in respect of massive immigration and settlement of Jews from the former Soviet Union in the occupied territories of Palestine. The brief of documents prepared for the Islamabad Session *inter alia* made reference to the Middle East Peace Conference convened in Madrid in October 1991.[4]

2. See AALCC brief Deportation of Palestinians in Violation of International Law in particular the Geneva Convention of 1949. Doc.No. AALCC/XXIX/90/10.
3. See AALCC/XXX/91/Cairo/11.
4. See AALCC/XXXI/92/Islamabad/11.

The Committee at its Islamabad Session requested the Secretary-General to continue to monitor the events and developments in the occupied territories of Palestine. It also directed the Secretariat to study the question of the forced changes in the demographic composition of the occupied territories including Jerusalem, West Bank and the Gaza Strip.

Thereafter, following the conclusion of a Cooperation Agreement with the League of Arab States the Secretariat convened in conjunction with the office of the League of Arab State in New Delhi a two-day workshop on the question of deportation of Palestinians and the Israeli policy and practice of immigration and settlement of Jews in New Delhi. The brief for the Thirty-second Session held in Kampala in 1993, besides, reflecting the developments since the Islamabad Session included a report of the abovementioned workshop for which the Secretariat had prepared a Working Paper on the Legal Aspects of the Palestine Question. The brief of documents prepared by the Secretariat for consideration at the Committee's Thirty-second Session held in Kampala in 1993 established that the Hague Conventions of 1899 and 1907 are applicable to the territories occupied by the Israelis since 1967, as their occupation stems from acts of aggression and invasion. It also demonstrates that the 1949 Geneva Conventions are also applicable to these occupied territories, particularly since Israel is a High Contracting Party to those Conventions and that therefore the Palestinians in the occupied territories are protected persons, by virtue of the applicability of the principles of International Humanitarian Law. Further it demonstrated that contemporary International Law prohibits the deportation of the civilian population in occupied territories to the territory of the occupying power or any other State. It also pointed out that the International Law Commission had in its Draft Code of Crimes Against the Peace and Security of Mankind expressly stipulated that the deportation of people, and the resultant demographic change are crimes against humanity.[5] The Committee at its Kampala Session directed the Secretariat to continue to monitor the events and developments in the occupied territories of Palestine and decided to include the item in the Agenda of the Thirty-third Session.

The item was however, not included in the agenda of the Thirty-third Session held in Tokyo in 1994 but at the instance of representatives of some Member States a resolution was adopted whereby the Committee requested the Secretary-General of the Committee to continue to monitor

5. Deportation of Palestinians in Violation of International Law particularly the 1949 Geneva Conventions and the Massive Immigration and Settlement of Jews in the occupied Territory. DocNo.AALCC/XXXII/Kampala/93/8.

the events and developments on the occupied territories and decided to include the item in the Agenda of the Thirty-fourth Session.

It may be recalled that on September 13, 1993 the PLO Chairman and the Israeli Prime Minister had signed the Declaration of Principles on Interim Self-Government Arrangements.[6] The Agreement opened the way for Palestinian self-rule providing for Israel withdrawal and the establishment of an interim Palestinian self-government, first, in the Gaza Strip and in the West Bank town of Jericho and later in the rest of the West Bank. The Declaration of Principles deferred the issue of Israeli settlements to the permanent status negotiations which are to begin no later than the beginning of the third year after the start of the interim period. In the meantime Israel retains legal and administrative authority over these settlements and their inhabitants and is responsible for their security. Under the terms of the Declaration of Principles on Interim self-Government arrangements the permanent status negotiations on the issue of Jerusalem are to start not later than the beginning of the third year of the interim period. Other sensitive issues such as the return of Palestinian refugees, future boundaries and the status of Palestine are envisaged for further negotiations which are to commence no later than two years after the Israeli withdrawal marks the beginning of a five-year interim period at the end of which it is expected that the negotiations will lead to a permanent settlement implementing security resolutions 242 (1969) and 338. It may be stated that the Committee at its Thirty-third Session *inter alia* welcomed the signing of the abovementioned accord of September 1993.

Thereafter on May 4, 1994 the Palestine Liberation Organization and the State of Israel signed an Agreement on the Gaza Strip and the Jericho Area. The accord concluded in Cairo *inter alia* provided for Israelis withdrawal from the Gaza Strip and Jericho Area and granted Palestinians a measure of self-government. The accord of May 4, 1994 grants Palestinia is control over their internal political arrangements and daily affairs including elections, tax collection and the adoption and enforcement of legislation. The Agreement marks the beginning of the five-year interim period for negotiating a settlement of the permanent Status of the Occupied territory. Since then a twenty-four members Palestinian authority vested with legislative and executive powers has been established. A Palestinian police force has also been established.

The Middle East Peace Conference convened at Madrid on October 31, 1991 and the mutual recognition between the State of Israel and the

6. A/48/486-S/26560, Annex. Also in *International Legal Materials* Vol. (1993) p. 1525.

Palestine Liberation Organization, as the representatives of the Palestinian people was welcomed by the General Assembly by its resolution 48/58 when it expressed its full support for the "achievements of the peace process thus far, in particular the Declaration of Principles on Interim Self-Government Arrangements signed by Israel and the PLO and the Agreement between Israel and Jordan on the common Agenda. The General Assembly went on to term these developments an important initial step in achieving a comprehensive, just, and lasting peace in the Middle East and urged all parties to implement the agreements reached.

The General Assembly at its Forty-eighth Session in its resolution on the Peaceful Settlement of the Question of Palestine *inter alia* stressed the significance of upcoming negotiations on the final settlement and reaffirmed the following principles for the achievement of a final settlement and comprehensive peace:

(a) The realization of the legitimate national rights of the Palestinian people; primarily the right to self-determination;

(b) The withdrawal of Israel from the Palestinian territory occupied since 1967, including Jerusalem, and from other occupied Arab territories;

(c) Guaranteeing arrangements for peace and security of all States in the region including those named in Resolution 181 (III) of 29 November 1947, within secure and internationally recognized boundaries;

(d) Resolving the problem of the Palestinian refugees in conformity with the General Assembly resolution 194 (III) of 11 December 1948 and subsequent relevant resolutions;

(e) Resolving the problem of the Israeli Settlement which are illegal and an obstacle to peace, in conformity with relevant United Nations resolutions; and

(f) Guaranteeing freedom of access to Holy Places, religious building and sites.[7]

Similar resolutions were also adopted at the Forty-ninth Session of the General Assembly.[8]

It may be mentioned that the resolution entitled "Middle East Peace

7. See General Assembly Resolution 48/158 D on the Peaceful Settlement of the Question of Palestine.

8. See General Assembly Resolution 49/62-D of 14 December 1994 and 49/88 of 16 December, 1994.

Process" was sponsored by more than 100 States and received an unprecedented majority and that the resolution on *intifadah* which the General Assembly had adopted every year since its Forty-third Session (1988) was deferred.

Against this backdrop of the progress of work since the item was first placed on the work programme of the Secretariat, the recent developments and the resolution of the Committee at its Thirty-third Session the Committee may wish to consider whether the Secretariat has exhaustively dealt with the Legal Aspects of the item referred to it and determine the course of future work of the Secretariat on the matter.

RESOLUTION ON DEPORTATION OF PALESTINIANS IN VIOLATION OF INTERNATIONAL LAW, PARTICULARLY THE GENEVA CONVENTION OF 1949 AND THE MASSIVE IMMIGRATION AND SETTLEMENT OF JEWS IN THE OCCUPIED TERRITORIES.

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

Recalling the resolutions adopted by the previous AALCC sessions on the Palestinian question;

Conscious of the responsibility of AALCC to uphold International Law and support peoples fundamental rights; and

Taking into consideration the United Nations Charter provisions concerning the right of self-determination, the fourth Geneva Convention of 1949 and the various UN General Assembly and Security Council resolutions on the question of Palestine in particular those relating to deportation and building of settlements;

Taking note of the historic accord of principles signed on 13th September 1993 between P.L.O. and Israel;[1]

1. *Expresses* its concern at the continuing denial and deprivation of the inalienable legitimate rights of the Palestinian people including *inter alia* the right of self-determination, return and the establishment of an independent state on their national soil.

2. *Supports* the just cause of the Palestinian people and their struggle for self-determination and freedom;

3. *Condemns* Israels policy in the Arab occupied territories and the deportation of Palestinian people from their indigenous homes and demands the repatriation of all Palestinians deported since 1967 in flagrant violation of Geneva Convention and the Declaration on Human Rights;[2]

4. *Strongly condemns* Israel's policy of immigration and the Settlement

---

1. The *Delegate of Islamic Republic of Iran* expressed the following reservation on this decision: "My delegation does not acknowledge the accord between P.L.O. and the other party, and while seeking the full realization of the inalienable rights of the Palestinian People would like to put on the record its reservation on some paras of this resolution which refer to this accord."

2. The *Delegate of Japan* expressed the following reservation on this decision:

"Since the Committee met in Kampala last year, a historic event took place in the long history of the Middle East Peace Process. On the 13th September, 1993 "Declaration of Principles" has been signed between PLO and Israel at White House, Washington, in the presence of PLO

of Jews in the Palestinian and other Arab occupied territories in Golan Heights and South Lebanon and consider it an obstacle towards erecting just and comprehensive peace;

5. *Demands* that Israel respect the principles of International Law and all International Conventions which have a bearing on these matters including the release of prisoners and detainees in Israel jails and concentration camps;

6. *Condemns* Israel's policy of appropriation and illegal exploitation of the natural resources (particularly water) and the archaeological explorations of the occupied territories in contradiction to the principles of permanent sovereignty over natural resources;

7. *Welcomes* the signing of Accord of Principles between Palestine Liberation Organization and the Govt. of Israel and *consider* it an important breakthrough and a first step towards erecting a just durable and comprehensive peace in the Middle East.

8. *Calls upon* Israel to expedite its withdrawal from Gazza and Jericho areas to enable the P.L.O. establish the Palestinian National Authority over these territories;

9. *Requests* member states as well as other states and U.N. organs to extend moral and material support to the Palestinian National Authority in Gaza and Jericho;

10. *Requests* the Secretary-General of the Committee to continue to monitor the events and developments in the occupied territories of Palestine; and

11. *Decides* to include the item in the agenda of its 34th Session.

(Adopted on January 21, 1994)*[3]

Chairman Yasser Arafat and Israeli Prime Minister Ishaq Rabin. Japan strongly supports this peace process and the agreement reached between PLO and Israel. The Japanese Government maintains the position that deportation in question is not justifiable under the international law. However, the issues taken up in this draft resolution, including the question of deportation of Palestinians are now being negotiated as a part of its peace process between the parties concerned. Since the peace process is at a very crucial and sensitive juncture, we believe that the Committee, as a forum of legal experts, should not take a decision which may prejudge the on-going negotiations. For this reason, the Japanese delegation reserves its position on the resolution as a whole."

3. The *Delegate of Singapore* expressed the following reservation on this decision:

"Singapore takes the view that this draft resolution does not fall within the purview of the AALCC. The AALCC is a Legal Consultative Committee constituted to provide an advisory role to Member Governments on various international legal issues. A political statement such as the Palestinian draft resolution is not appropriate for consideration in this forum; it is more appropriate to be considered in a political forum such as the UN General Assembly.

Furthermore, no notice was given of the tabling of this draft resolution until this evening. It is not possible for Singapore to fully consider the draft and formulate the position.

VIII. Report on the Work of The International Law Commission at Its Forty-Sixth Session

(i) Introduction

The International Law Committion (hereinafter called the Commission or the ILC) established by General Assembly Resolution 174 (III) in 1947, is the principal organ of the United Nations to promote progressive development of international law and its codification. The Commission held its Forty-sixth Session in Geneva from May 2 to July 22, 1994. There were four substantive topics on the agenda on this Session. These included:

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

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

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

(iv) State Responsibility.

It may be recalled that the General Assembly had by its Resolution 47/31 of December 9, 1993, *Inter alia* requested the Commission to continue its work on the draft statute of an international criminal court, as a matter of priority, with a view to elaborating a draft statute if possible at its Forty-sixth session in 1994. The General Assembly had called upon the Commission in this regard, to take into account the views expressed during the debate in the Sixth Committee, as well as any written comments that the Commission may have received on the draft articles proposed by the Working Group on a draft statute for an international criminal court established by the ILC at its Forty-fifth Session. That resolution had also requested the Commission to resume, at its Forty-

sixth Session, the consideration of the draft Code of Crimes Against the Peace and Security of Mankind. Finally, by that resolution the General Assembly had also welcomed the decision of the Commission to endeavour to complete in 1994 the second reading of the Draft Articles on the Non-Navigational Uses of International Watercourses.

Accordingly, the Commission held substantive discussions on these two subjects viz. the Non-Navigational Uses of International Watercourses and the Draft Code of Crimes Against the Peace and Security of Mankind. The Commission completed its second reading of the draft articles on the Non-Navigational Uses of International Watercourses and adopted the same together with commentaries thereto. It also adopted a set of draft articles on the Statute of an International Criminal Court and commenced the second reading of the draft Code of Crimes Against the Peace and Security of Mankind as adopted on first reading at its Forty-third Session in 1991. The Commission agreed that the work on the draft Code and on the draft Statute for an International Criminal Court should be coordinated. The other two items on the substantive agenda of the Commission viz. State Responsibility and International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law were also considered and are at different stages of work. Some notes and comments on these items which were subjected to detailed discussions during the Commission's Forty-sixth Session are contained in this chapter.

It may be stated that the AALCC attaches particular significance to the question of Non-Navigational Uses of International Watercourses as this topic is also on its work programme. The topic of Draft Code of Crime Against the Peace and Security of Mankind is also one to which the AALCC attaches great importance in view of the current international developments.

Finally, it may be recalled that the General Assembly had by its resolution 47/33 *inter alia* requested the Commission to consider 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 Commission acting in pursuance of that request had at its forty-fifth session *inter alia* proposed to incorporate in its agenda the topics "The Law and Practice relating to Reservations to Treaties" and "State Succession and Its Impact on the Nationality of Natural and Legal Persons". The General Assembly at its forty-eighth session had by its resolution 48/31 *inter alia* endorsed the decision of the Commission to include in its agenda the abovementioned topics on the understanding that the final form to be given to the work on these topics

shall be decided after a preliminary study is presented to the General Assembly. Pursuant to the aforementioned endorsement the Commission at its recently concluded forty-sixth session, among other things, appointed Mr. Alain Pellet (France) Special Rapporteur for the topic "The Law and Practice relating to Reservations to Treaties". It also appointed Mr. Vaclav Mikulka (Czech Republic) Special Rapporteur for the topic "State Succession and its Impact on the Nationality of Natural and Legal Persons."

Thirty-fourth Session: Discussions

The *Secretary-General* while introducing the documents prepared by the Secretariat said that monitoring the progress of work of International Law Commission at its annual sessions was a Statutory obligation and as in previous years the Secretariat had prepared a brief of documents (AALCC\XXXIV\DOHA\95\1) on the work of the ILC at its forty-sixth session held in 1994. Recalling that an item entitled "The Statute of an International Criminal Court" was among the items on the agenda of the International Law Commission and the significance that member States of the AALCC attached to the establishment of an International Criminal Court and the debate that this topic had generated in the Sixth (legal) Committee of the General Assembly the Secretariat had organized a seminar on this topic. A report of the Seminar and on the debate in the Sixth Committee have been given in this Chaptter.

The *Vice Chairman of the International Law Commission* (Ambassador Francisco Kramer) in his account of the progress of work on the forty-sixth session of the Commission stated that the Commission had examined three basic issues viz. (a) the Code of International Crimes; (b) the creation of an international criminal court; and (c) the difference between wrongful acts of an international nature and international crimes in regard to the international responsibility of States. As regards the draft code of crimes against the peace and security of mankind he said that the question of the scope of the draft code was of immediate relevance since the wording of certain provisions of the first part would necessarily differ depending on whether the code covered a large number of offences under international law or only those crimes that involved a fundamental infringement of the International public order. In that context the appropriateness of the current title of the draft Code had been raised, since while aggression could be considered a crime against the peace and security of mankind it was more difficult to characterise genocide or crimes against humanity as such, unless the concept of peace and security was very extensively interpreted.

Turning to the International Criminal Court he said that the Statute of the Court envisaged two categories of crimes over which the Court

had jurisdiction. The first was that of crimes under general international law namely genocide, aggression, serious violations of the laws and customs of war and crimes against humanity. The precise definition of which had been left to the draft Code of Crimes against the peace and Security of mankind. The second was that of crimes referred to in the treaties listed in the annex, which had been expanded to include the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The two categories were not mutually exclusive. On the contrary, there was considerable overlapping between them.

As for the difference between crimes and other wrongful acts he said that the Commission had adopted three articles on the question of countermeasures which had long been debated by the Commission. The Commission had adopted three articles on the subject: Article 11, which outlined the broad framework within which a State was entitled to resort to countermeasures: article 13, which dealt with proportionality; and article 14, dealing with prohibited countermeasures. Article 12, on the conditions to be met by the injured State for recourse to countermeasures to be lawful, was still outstanding, and article 11 might have to be reviewed in the light of the text that would eventually be adopted for article 12. Although articles 11, 13, and 14 had been adopted at the previous session, they had not been formally submitted in view of the fragmentary results that had been achieved on the issue.

The *Secretary-General* also introduced the item "The law of International Rivers" (Doc. No. AALCC\XXXIV\DOHA\95\4). He outlined initially the background of the whole study since 1966. The initial reference was to outline the following: (a) definition of the terms "International Rivers" and (b) rules relating to utilization of waters of international rivers by the States concerned for agricultural, industrial and other purposes not connected with navigation. He also informed that a few draft articles were also prepared which, however, could not be finalized due to certain unclear provisions. The Secretary-General noted that, after a brief deferment, the item was revived upon a suggestion by the Government of Bangladesh to consider the item excluding areas which were under the consideration of the AALCC. Subsequently, it was noted, the AALCC Secretariat initially identified five areas for consideration.

These five areas for consideration were: (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 otherwse of any objection that may be

raised by one Watercourse State in relation to projects sought to be undertaken by another Watercourse State; (c) study the matter relating to navigational uses and timber floating in international watercourses; (d) study of other areas of international rivers such as agricultural uses; (e) study of State practice in the region of user agreements and examining the modalities employed in the sharing or waters in such watercourses as the Gambia, Indus, Mekong, Niger and Senegal.

He pointed out that the study before the Committee briefly outlined the route taken by this item in the last decade. He also pointed out that the study briefly highlighted the various studies prepared by the Secretariat in the light of ILC deliberations. With a view to update the study, the Secretary-General noted, a brief outline of the views of the AALCC Member Governments had also been included, particularly the discussions which had taken place at the Thirty-third Session. The summation of the study, he noted, incorporated the decision taken at the Sixth Committee.

The *Delegate of Egypt* noted that the topic concerning acts not probibited by International Law giving rise to liability in future would be of greatest importance to the developing countries of Asia and Africa. In his view the interpretation of "significant harm" was crucial as many of the Asian-African States were technologically less equipped to foresee and manage the future risks. As regards the establishment of an International Criminal Court, the delegate wished to know the major conventions which deal substantively with the criminal legal aspects and applicable law adopted by them. Secondly, in his view, a case-by-case approach could be adopted to apply the criminal legal principles. He also noted that the ILC's draft was a proposal to the whole world and accordingly he wished for the treatment of the topic particularly for the AALCC, Member States.

Prof. Francisco Kramer the Vice-Chairman of ILC in his intervention referred to the Framework of the European Convention as a good basis in such areas as crime and its procedural mechanism,. He also referred to the Antarctics. Treaty which he noted provided a broad-based principles regarding the regulation and management of risks and damages, particularly concerning ecological elements. He drew the attention of the Committee towards the basic approach of the ILC i.e. not to create new principles, but only to provide mechanism for preventing future risks. He outlined various approaches, although divergent, between the developed and developing countries, such as concerning theory of fault as pursued by the West and the theory of direct responsibility favoured by the developing countries. As regards the methodological approach to be adopted by the countries of Asia and Africa, he stated that all of them should

the events and developments on the occupied territories and decided to include the item in the Agenda of the Thirty-fourth Session.

It may be recalled that on September 13, 1993 the PLO Chairman and the Israeli Prime Minister had signed the Declaration of Principles on Interim Self-Government Arrangements.[6] The Agreement opened the way for Palestinian self-rule providing for Israel withdrawal and the establishment of an interim Palestinian self-government, first, in the Gaza Strip and in the West Bank town of Jericho and later in the rest of the West Bank. The Declaration of Principles deferred the issue of Israeli settlements to the permanent status negotiations which are to begin no later than the beginning of the third year after the start of the interim period. In the meantime Israel retains legal and administrative authority over these settlements and their inhabitants and is responsible for their security. Under the terms of the Declaration of Principles on Interim self-Government arrangements the permanent status negotiations on the issue of Jerusalem are to start not later than the beginning of the third year of the interim period. Other sensitive issues such as the return of Palestinian refugees, future boundaries and the status of Palestine are envisaged for further negotiations which are to commence no later than two years after the Israeli withdrawal marks the beginning of a five-year interim period at the end of which it is expected that the negotiations will lead to a permanent settlement implementing security resolutions 242 (1969) and 338. It may be stated that the Committee at its Thirty-third Session *inter alia* welcomed the signing of the abovementioned accord of September 1993.

Thereafter on May 4, 1994 the Palestine Liberation Organization and the State of Israel signed an Agreement on the Gaza Strip and the Jericho Area. The accord concluded in Cairo *inter alia* provided for Israelis withdrawal from the Gaza Strip and Jericho Area and granted Palestinians a measure of self-government. The accord of May 4, 1994 grants Palestinia is control over their internal political arrangements and daily affairs including elections, tax collection and the adoption and enforcement of legislation. The Agreement marks the beginning of the five-year interim period for negotiating a settlement of the permanent Status of the Occupied territory. Since then a twenty-four members Palestinian authority vested with legislative and executive powers has been established. A Palestinian police force has also been established.

The Middle East Peace Conference convened at Madrid on October 31, 1991 and the mutual recognition between the State of Israel and the

6. A/48/486-S/26560, Annex. Also in *International Legal Materials* Vol. (1993) p. 1525.

Palestine Liberation Organization, as the representatives of the Palestinian people was welcomed by the General Assembly by its resolution 48/58 when it expressed its full support for the "achievements of the peace process thus far, in particular the Declaration of Principles on Interim Self-Government Arrangements signed by Israel and the PLO and the Agreement between Israel and Jordan on the common Agenda. The General Assembly went on to term these developments an important initial step in achieving a comprehensive, just, and lasting peace in the Middle East and urged all parties to implement the agreements reached.

The General Assembly at its Forty-eighth Session in its resolution on the Peaceful Settlement of the Question of Palestine *inter alia* stressed the significance of upcoming negotiations on the final settlement and reaffirmed the following principles for the achievement of a final settlement and comprehensive peace:

(a) The realization of the legitimate national rights of the Palestinian people; primarily the right to self-determination;

(b) The withdrawal of Israel from the Palestinian territory occupied since 1967, including Jerusalem, and from other occupied Arab territories;

(c) Guaranteeing arrangements for peace and security of all States in the region including those named in Resolution 181 (III) of 29 November 1947, within secure and internationally recognized boundaries;

(d) Resolving the problem of the Palestinian refugees in conformity with the General Assembly resolution 194 (III) of 11 December 1948 and subsequent relevant resolutions;

(e) Resolving the problem of the Israeli Settlement which are illegal and an obstacle to peace, in conformity with relevant United Nations resolutions; and

(f) Guaranteeing freedom of access to Holy Places, religious building and sites.[7]

Similar resolutions were also adopted at the Forty-ninth Session of the General Assembly.[8]

It may be mentioned that the resolution entitled "Middle East Peace

7. See General Assembly Resolution 48/158 D on the Peaceful Settlement of the Question of Palestine.

8. See General Assembly Resolution 49/62-D of 14 December 1994 and 49/88 of 16 December, 1994.

Process" was sponsored by more than 100 States and received an unprecedented majority and that the resolution on *intifadah* which the General Assembly had adopted every year since its Forty-third Session (1988) was deferred.

Against this backdrop of the progress of work since the item was first placed on the work programme of the Secretariat, the recent developments and the resolution of the Committee at its Thirty-third Session the Committee may wish to consider whether the Secretariat has exhaustively dealt with the Legal Aspects of the item referred to it and determine the course of future work of the Secretariat on the matter.

RESOLUTION ON DEPORTATION OF PALESTINIANS IN VIOLATION OF INTERNATIONAL LAW, PARTICULARLY THE GENEVA CONVENTION OF 1949 AND THE MASSIVE IMMIGRATION AND SETTLEMENT OF JEWS IN THE OCCUPIED TERRITORIES.

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

Recalling the resolutions adopted by the previous AALCC sessions on the Palestinian question;

Conscious of the responsibility of AALCC to uphold International Law and support peoples fundamental rights; and

Taking into consideration the United Nations Charter provisions concerning the right of self-determination, the fourth Geneva Convention of 1949 and the various UN General Assembly and Security Council resolutions on the question of Palestine in particular those relating to deportation and building of settlements;

Taking note of the historic accord of principles signed on 13th September 1993 between P.L.O. and Israel;[1]

1. *Expresses* its concern at the continuing denial and deprivation of the inalienable legitimate rights of the Palestinian people including *inter alia* the right of self-determination, return and the establishment of an independent state on their national soil.

2. *Supports* the just cause of the Palestinian people and their struggle for self-determination and freedom;

3. *Condemns* Israels policy in the Arab occupied territories and the deportation of Palestinian people from their indigenous homes and demands the repatriation of all Palestinians deported since 1967 in flagrant violation of Geneva Convention and the Declaration on Human Rights;[2]

4. *Strongly condemns* Israel's policy of immigration and the Settlement

---

1. The *Delegate of Islamic Republic of Iran* expressed the following reservation on this decision: "My delegation does not acknowledge the accord between P.L.O. and the other party, and while seeking the full realization of the inalienable rights of the Palestinian People would like to put on the record its reservation on some paras of this resolution which refer to this accord."

2. The *Delegate of Japan* expressed the following reservation on this decision:

"Since the Committee met in Kampala last year, a historic event took place in the long history of the Middle East Peace Process. On the 13th September, 1993 "Declaration of Principles" has been signed between PLO and Israel at White House, Washington, in the presence of PLO

of Jews in the Palestinian and other Arab occupied territories in Golan Heights and South Lebanon and consider it an obstacle towards erecting just and comprehensive peace;

5. *Demands* that Israel respect the principles of International Law and all International Conventions which have a bearing on these matters including the release of prisoners and detainees in Israel jails and concentration camps;

6. *Condemns* Israel's policy of appropriation and illegal exploitation of the natural resources (particularly water) and the archaeological explorations of the occupied territories in contradiction to the principles of permanent sovereignty over natural resources;

7. *Welcomes* the signing of Accord of Principles between Palestine Liberation Organization and the Govt. of Israel and *consider* it an important breakthrough and a first step towards erecting a just durable and comprehensive peace in the Middle East.

8. *Calls upon* Israel to expedite its withdrawal from Gazza and Jericho areas to enable the P.L.O. establish the Palestinian National Authority over these territories;

9. *Requests* member states as well as other states and U.N. organs to extend moral and material support to the Palestinian National Authority in Gaza and Jericho;

10. *Requests* the Secretary-General of the Committee to continue to monitor the events and developments in the occupied territories of Palestine; and

11. *Decides* to include the item in the agenda of its 34th Session.

(Adopted on January 21, 1994)*[3]

Chairman Yasser Arafat and Israeli Prime Minister Ishaq Rabin. Japan strongly supports this peace process and the agreement reached between PLO and Israel. The Japanese Government maintains the position that deportation in question is not justifiable under the international law. However, the issues taken up in this draft resolution, including the question of deportation of Palestinians are now being negotiated as a part of its peace process between the parties concerned. Since the peace process is at a very crucial and sensitive juncture, we believe that the Committee, as a forum of legal experts, should not take a decision which may prejudge the on-going negotiations. For this reason, the Japanese delegation reserves its position on the resolution as a whole."

3. The *Delegate of Singapore* expressed the following reservation on this decision:

"Singapore takes the view that this draft resolution does not fall within the purview of the AALCC. The AALCC is a Legal Consultative Committee constituted to provide an advisory role to Member Governments on various international legal issues. A political statement such as the Palestinian draft resolution is not appropriate for consideration in this forum; it is more appropriate to be considered in a political forum such as the UN General Assembly.

Furthermore, no notice was given of the tabling of this draft resolution until this evening. It is not possible for Singapore to fully consider the draft and formulate the position.

VIII. Report on the Work of The International Law Commission at Its Forty-Sixth Session

(i) Introduction

The International Law Committion (hereinafter called the Commission or the ILC) established by General Assembly Resolution 174 (III) in 1947, is the principal organ of the United Nations to promote progressive development of international law and its codification. The Commission held its Forty-sixth Session in Geneva from May 2 to July 22, 1994. There were four substantive topics on the agenda on this Session. These included:

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

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

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

(iv) State Responsibility.

It may be recalled that the General Assembly had by its Resolution 47/31 of December 9, 1993, *Inter alia* requested the Commission to continue its work on the draft statute of an international criminal court, as a matter of priority, with a view to elaborating a draft statute if possible at its Forty-sixth session in 1994. The General Assembly had called upon the Commission in this regard, to take into account the views expressed during the debate in the Sixth Committee, as well as any written comments that the Commission may have received on the draft articles proposed by the Working Group on a draft statute for an international criminal court established by the ILC at its Forty-fifth Session. That resolution had also requested the Commission to resume, at its Forty-

sixth Session, the consideration of the draft Code of Crimes Against the Peace and Security of Mankind. Finally, by that resolution the General Assembly had also welcomed the decision of the Commission to endeavour to complete in 1994 the second reading of the Draft Articles on the Non-Navigational Uses of International Watercourses.

Accordingly, the Commission held substantive discussions on these two subjects viz. the Non-Navigational Uses of International Watercourses and the Draft Code of Crimes Against the Peace and Security of Mankind. The Commission completed its second reading of the draft articles on the Non-Navigational Uses of International Watercourses and adopted the same together with commentaries thereto. It also adopted a set of draft articles on the Statute of an International Criminal Court and commenced the second reading of the draft Code of Crimes Against the Peace and Security of Mankind as adopted on first reading at its Forty-third Session in 1991. The Commission agreed that the work on the draft Code and on the draft Statute for an International Criminal Court should be coordinated. The other two items on the substantive agenda of the Commission viz. State Responsibility and International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law were also considered and are at different stages of work. Some notes and comments on these items which were subjected to detailed discussions during the Commission's Forty-sixth Session are contained in this chapter.

It may be stated that the AALCC attaches particular significance to the question of Non-Navigational Uses of International Watercourses as this topic is also on its work programme. The topic of Draft Code of Crime Against the Peace and Security of Mankind is also one to which the AALCC attaches great importance in view of the current international developments.

Finally, it may be recalled that the General Assembly had by its resolution 47/33 *inter alia* requested the Commission to consider 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 Commission acting in pursuance of that request had at its forty-fifth session *inter alia* proposed to incorporate in its agenda the topics "The Law and Practice relating to Reservations to Treaties" and "State Succession and Its Impact on the Nationality of Natural and Legal Persons". The General Assembly at its forty-eighth session had by its resolution 48/31 *inter alia* endorsed the decision of the Commission to include in its agenda the abovementioned topics on the understanding that the final form to be given to the work on these topics

shall be decided after a preliminary study is presented to the General Assembly. Pursuant to the aforementioned endorsement the Commission at its recently concluded forty-sixth session, among other things, appointed Mr. Alain Pellet (France) Special Rapporteur for the topic "The Law and Practice relating to Reservations to Treaties". It also appointed Mr. Vaclav Mikulka (Czech Republic) Special Rapporteur for the topic "State Succession and its Impact on the Nationality of Natural and Legal Persons."

Thirty-fourth Session: Discussions

The *Secretary-General* while introducing the documents prepared by the Secretariat said that monitoring the progress of work of International Law Commission at its annual sessions was a Statutory obligation and as in previous years the Secretariat had prepared a brief of documents (AALCC\XXXIV\DOHA\95\1) on the work of the ILC at its forty-sixth session held in 1994. Recalling that an item entitled "The Statute of an International Criminal Court" was among the items on the agenda of the International Law Commission and the significance that member States of the AALCC attached to the establishment of an International Criminal Court and the debate that this topic had generated in the Sixth (legal) Committee of the General Assembly the Secretariat had organized a seminar on this topic. A report of the Seminar and on the debate in the Sixth Committee have been given in this Chaptter.

The *Vice Chairman of the International Law Commission* (Ambassador Francisco Kramer) in his account of the progress of work on the forty-sixth session of the Commission stated that the Commission had examined three basic issues viz. (a) the Code of International Crimes; (b) the creation of an international criminal court; and (c) the difference between wrongful acts of an international nature and international crimes in regard to the international responsibility of States. As regards the draft code of crimes against the peace and security of mankind he said that the question of the scope of the draft code was of immediate relevance since the wording of certain provisions of the first part would necessarily differ depending on whether the code covered a large number of offences under international law or only those crimes that involved a fundamental infringement of the International public order. In that context the appropriateness of the current title of the draft Code had been raised, since while aggression could be considered a crime against the peace and security of mankind it was more difficult to characterise genocide or crimes against humanity as such, unless the concept of peace and security was very extensively interpreted.

Turning to the International Criminal Court he said that the Statute of the Court envisaged two categories of crimes over which the Court

had jurisdiction. The first was that of crimes under general international law namely genocide, aggression, serious violations of the laws and customs of war and crimes against humanity. The precise definition of which had been left to the draft Code of Crimes against the peace and Security of mankind. The second was that of crimes referred to in the treaties listed in the annex, which had been expanded to include the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The two categories were not mutually exclusive. On the contrary, there was considerable overlapping between them.

As for the difference between crimes and other wrongful acts he said that the Commission had adopted three articles on the question of countermeasures which had long been debated by the Commission. The Commission had adopted three articles on the subject: Article 11, which outlined the broad framework within which a State was entitled to resort to countermeasures: article 13, which dealt with proportionality; and article 14, dealing with prohibited countermeasures. Article 12, on the conditions to be met by the injured State for recourse to countermeasures to be lawful, was still outstanding, and article 11 might have to be reviewed in the light of the text that would eventually be adopted for article 12. Although articles 11, 13, and 14 had been adopted at the previous session, they had not been formally submitted in view of the fragmentary results that had been achieved on the issue.

The *Secretary-General* also introduced the item "The law of International Rivers" (Doc. No. AALCC\XXXIV\DOHA\95\4). He outlined initially the background of the whole study since 1966. The initial reference was to outline the following: (a) definition of the terms "International Rivers" and (b) rules relating to utilization of waters of international rivers by the States concerned for agricultural, industrial and other purposes not connected with navigation. He also informed that a few draft articles were also prepared which, however, could not be finalized due to certain unclear provisions. The Secretary-General noted that, after a brief deferment, the item was revived upon a suggestion by the Government of Bangladesh to consider the item excluding areas which were under the consideration of the AALCC. Subsequently, it was noted, the AALCC Secretariat initially identified five areas for consideration.

These five areas for consideration were: (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 otherwse of any objection that may be

raised by one Watercourse State in relation to projects sought to be undertaken by another Watercourse State; (c) study the matter relating to navigational uses and timber floating in international watercourses; (d) study of other areas of international rivers such as agricultural uses; (e) study of State practice in the region of user agreements and examining the modalities employed in the sharing or waters in such watercourses as the Gambia, Indus, Mekong, Niger and Senegal.

He pointed out that the study before the Committee briefly outlined the route taken by this item in the last decade. He also pointed out that the study briefly highlighted the various studies prepared by the Secretariat in the light of ILC deliberations. With a view to update the study, the Secretary-General noted, a brief outline of the views of the AALCC Member Governments had also been included, particularly the discussions which had taken place at the Thirty-third Session. The summation of the study, he noted, incorporated the decision taken at the Sixth Committee.

The *Delegate of Egypt* noted that the topic concerning acts not probibited by International Law giving rise to liability in future would be of greatest importance to the developing countries of Asia and Africa. In his view the interpretation of "significant harm" was crucial as many of the Asian-African States were technologically less equipped to foresee and manage the future risks. As regards the establishment of an International Criminal Court, the delegate wished to know the major conventions which deal substantively with the criminal legal aspects and applicable law adopted by them. Secondly, in his view, a case-by-case approach could be adopted to apply the criminal legal principles. He also noted that the ILC's draft was a proposal to the whole world and accordingly he wished for the treatment of the topic particularly for the AALCC, Member States.

Prof. Francisco Kramer the Vice-Chairman of ILC in his intervention referred to the Framework of the European Convention as a good basis in such areas as crime and its procedural mechanism,. He also referred to the Antarctics. Treaty which he noted provided a broad-based principles regarding the regulation and management of risks and damages, particularly concerning ecological elements. He drew the attention of the Committee towards the basic approach of the ILC i.e. not to create new principles, but only to provide mechanism for preventing future risks. He outlined various approaches, although divergent, between the developed and developing countries, such as concerning theory of fault as pursued by the West and the theory of direct responsibility favoured by the developing countries. As regards the methodological approach to be adopted by the countries of Asia and Africa, he stated that all of them should

move ahead and examine these carefully without losing initiatives to the West.

The *Delegate of Japan* informed the Committee about the recently concluded Ad-hoc meeting on the International Criminal Court held in New York from 3 April to 13 April, 1995. He informed the Committee about the focus of the discussions in the following major items; (1) Organizational aspects; (2) Jurisdiction—applicable laws; (3) Criminal procedure—Due process; (4) Budget and Administrative issues.

As regards the 'Organizational aspects, the delegate noted that most countries favoured the establishment of an ICC by treaty and in order to ensure universality, favoured to require a substantial number of countries ratifying the treaty for the treaty to come into force. As regards the relationship of the ICC with the UN, he noted that majority of the countrires recognized that the ICC should have a relationship by concluding an agreement. The delegate pointed out that as regards jurisdiction the principle of *nullum crimen sine lege and non bis in idem* were emphasized. He also noted that most countries identified crimes listed in Article 20 of the ICC draft statute as too vague and insufficient for the implementation of the criminal justice. The delegate also referred to discussions concerning some of substantive aspects of jurisdiction. He noted that there were no concurrence of views on the role of the Security Council. As regards the procedure and due process, the delegate pointed out, there was a consensus that criminal procedures must be drafted and approved by States rather than leave it to the judges as embodied in the ILC draft. He informed the Committee of the establishment of an Expert Group to identify these procedures. As regards the budget and administration, the delegate noted, countries preferred, on the one hand, the Court to be financed by the States parties in the Treaty and on the other hand, some advocated for the general budget of the UN to support the court. He noted that the August meeting would discuss in-depth issues on jurisdiction and due process among others.

The *Delegate of Syria* favoured the adoption of the draft on Non-navigational Uses of International Watercourses as a framework convention. He also submitted the following observations for the consideration of the Committee; (1) To apply the present articles to cases of closed groundwater constituting a hydrological unitary whole; (2) To keep the definition of international watercourses as it is in article 2 and not to delete the term "flowing into a common terminus"; (3) To add to article 5 the text from its interpretation concerning what actually constitutes 'equitable and reasonable utilization and participation'; (4) provision for an International

Observer if one of the watercourse states sees such a necessity and this to be incorporated in article 17 and (5) Adding a new article i.e., article 34, equating the 'water' as valuable as 'territory' and therefore to apply measures according to UN Character.

The delegate outlined his comments on second report of the Special Rapporteur. The delegate did not agree with the deletion of the word 'flowing into a common terminus". As regards the confined groundwater the delegate also agreed with the principle of not causing harm to others as envisaged in article 16.

The *Delegate of Sri Lanka* favoured the establishment of an International Criminal Court which must be impartial and with an objective criteria. While outlining these principles, the delegate noted, the issues concerning sovereignty and territorial integrity should be taken into account. He also commended on this count the flexible approach adopted by the ILC. He also briefly referred to the evolution of ICC principles and its reflection in the present draft text.

The *Delegate of People's Republic of China* viewed the establishment of an international criminal court as an issue which was politically sensitive and legally and technically complicated. In principle, the delegate noted, China maintained that the future International Criminal Court should only be complementary to domestic courts which would play the primary role in this regard. According to him the basis of jurisdiction of the Court should lie in the prior consent of and voluntary submission of cases by States. While calling for the revision of the draft the delegate noted areas which needed emphasis such as concerning the jurisdiction of the court and the role of Security Council. In the view of his delegation the diplomatic conference to establish an ICC should not be convened until the conditions were ripe and a consensus on the draft statute was generally reached among states.

The *Delegate of Ghana* referred to the importance of and need for an International Criminal Court. He noted, however, that the new world political and economic order in which might and influence play an important role in international relationship and particularly in the resolution of conflicts and violence in the world. According to the delegate, Africa has had to contend with conflict and violence with less degree of interest being shown in these conflicts situations as those shown by some members of the international community elsewhere. He stressed that the conflict situations in Africa were serious developments that had led to the commission of serious crimes of an international nature. He pointed out that it was because of the disparity and apparent discrimination in the treatment of

various aspects of international situations relating to international crime and violence that the relationship between the International Criminal Court and the United Nations should be carefully looked at and discussed by the AALCC. He indicated that his delegation was concerned with the international recognition of municipal trials of offences of an international nature which are also cognisable by the ICC. He referred in this respect to the applicability of the double jeopardy principle by the ICC in relation to crimes already handled by national courts. He observed that there appeared to be severe differences of opinion on the jurisdiction of the ICC and urged the Committee to come out with a common and consensual stand which all members of the AALCC could support at the world forum or conference to discuss the treaty or statute for the establishment of the ICC. Consequently he suggested that the Committee and the AALCC Secretariat should look into these aspects more critically. Referring to the issue of intervention, the delegate requested the Committee to consider interventions by regional or sub-regional organizations in circumstances in which there was absolute breakdown of Central Government and mass suffering and deaths of the civil population. It was his view the Committee should give general guidelines on what constitutes legitimate intervention. It was his hope that the Committee and the AALCC Secretariat would come out with a consensus position for member countries.

The *Delegate of India* noted that the draft code of crimes was equally important as the International Criminal Court. He also stressed the necessity to accord and respect the primacy of the national jurisdiction. In his view the *sui generis* system as envisaged needed careful consideration. While dealing with the issue of international liability, the delegate noted that it was an extremely important topic which directly linked itself with the survival of the mankind itself. While outlining norms for liability, the delegate pointed out that the experience of highly integrated societies such as Europe might not always be useful. He also referred briefly to the issues concerning settlement of disputes and Convention countermeasures. As regards the draft on international rivers, he observed that his government was examining the issue with all seriousness and would respond in due course.

The *Delegate of Pakistan* noted the divergent views expressed by the ILC Members on the question of the establishment of the International Criminal Court. In his view, many complex and difficult issues remained unsolved, such as the jurisdiction—whether the court should have compulsory or optional jurisdiction, whether the jurisdiction should be exclusive, concurrent or of review character and whether it should be linked with code or not. He also referred to the questions concerning complaint, who

could bring it before the Court and the State consent required for that complaint to be entertained.

Referring to the basic principle of Criminal Law, the delegate noted the requirement to define the offences clearly and punishment provided for. Investigation, he pointed out, would be under the local laws of States. He proposed a Code of Criminal Procedure to try the alleged perpetrators of Criminal offences providing the following: registration of crimes, arrest of the accused, interrogation of the accused\suspects, recording of statement of witnesses, recovery of articles used in the commission of crime, collection of expert evidence when required, confession, recording of pretrial statements of witnesses. He also referred to the powers and functions of the prosecutor and the investigating officers and wanted these to be clearly defined. He also noted the need for States to amend their existing laws to accommodate the proposed Court. This, he noted, might not be acceptable to many countries.

To ensure a fair trial of the accused, the delegate sought the codification of law of evidence so as to draw a line between admissible and inadmissible evidence at the time of trial. He also sought the safeguards to preserve the rights of the accused such as place of the trial, services of a competent lawyer and the language of the Court etc. He also referred to the question of appeal and sought the creation of an appellate authority with necessary time limits for appealing.

The *Delegate of Sudan* viewed the draft statute of the ICC as very crucial to all states. He particularly referred to two main areas, namely, the issue of jurisdiction and the consequent encroachment of sovereignty. In order to outline an effective and objective draft concerning international criminal court, he stressed on the need to build a trust in the operation of the international system itself. He also proposed a discussion of these areas in a seminar.

The *President* drew the attention of the delegate of Sudan to one day seminar held on the Establishment of International Criminal Court at New Delhi in collaboration with the Indian Society of International Law. He also informed the delegation that many new ideas emerged from that seminar and the report of the seminar was also before the Committee.

The *Delegation of the Republic of Korea* suggested that the categories of jurisdiction should be clearly outlined. He also referred to the need for outlining in the draft the specific offences which evoked the jurisdiction of the ICC.

The *Vice-Chairman of the ILC, (Prof. Francisco Kramer)* while

responding to the views expressed by the members noted that sanctions were very crucial and he felt that even the compensation as a method of sanction was very important. In his view trust in the implementation of the ICC should come from the detailed cooperation and coordination of the governments.

The *Delegate of Kuwait* referred to the pollution of the environment and the problems consequently created to thousands of labourers to leave the jobs and assignments and return. He noted that his government was not bound to compensate all that.

The *Representative of the Legal Counsel of the United Nations (Dr. Adede)* drew the attention of the members of the Committee to the meeting of the *Ad hoc* Working Group from August 13 to 24 to consider the draft Statute of the International Criminal Court at the UN. He requested the member governments of the AALCC to make use of this forum to effect necessary changes in the draft statute. In his view the process was only in the early stages and there was a political and legal choice for the Governments to effect necessary changes.

(ii) Decision on the "Work of the International Law Commission"

(Adopted on April 22, 1995)

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

Having taken note with appreciation the report of the Secretary-General on the work of the International Law Commission at its Forty-sixth Session (Doc. No. AALCC\XXXIV\Doha\95\1) and 1A;

Having heard the comprehensive statement of Ambassador Francisco V. Kramer, the Vice Chairman of the International Law Commission;

1. *Expresses* its felicitations to the International Law Commission on the achievements of its Forty-sixth Session;

2. *Acknowledges* and appreciates the contributions of the Chairman of the International Law Commission Hon'ble Judge V.S. Vereshchetin, and the Vice-Chairman, Ambassador Francisco V. Kramer 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-sixth 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 during the Thirty-fourth Session of the AALCC; and

Also request the Secretary-General to convey to the International Law Commission the Committee's appreciation on the completion of its work on the Non-Navigational Uses of International Watercourses and the Statute of an International Criminal Court.

Decides to inscribe on the agenda of the Thirty-fifth Session of the Committee an item entitled "The Report on the work of the International Law Commission at its Forty-seventh Session."

(iii) Secretariat Brief

A. Report on the Work of the International Law Commission (ILC)

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

I Background

The work programme of the International Law Commission (ILC) had accorded priority to the topic "Draft Code of Crimes Against the Peace and Security of Mankind". This was necessitated on account of paragraph 6 of the General Assembly resolution 48/31, which had requested the ILC to continue its work "as a matter of priority" on the question of the draft statute for an international criminal court with a view to elaborating a draft statute, if possible at the forty-sixth session. Considering this the enlarged Bureau had recommended that the first week of the Session should be devoted to a discussion of that subject in the plenary. The discussion of this topic in the plenary had been reflected beiefly in this note along with the comments provided by the AALCC Secretariat. In other words, there is no separate section providing a summary of these discussions. This was found essential as there could be some changes in the view points of the Members after the completion of the work by the Working Group.

For reasons of clarity, it would be appropriate to briefly examine first the Twelfth Report on the Draft Code of Crimes Against the Peace and Security of Mankind provided by the Special Rapporteur Mr. Doudou Thiam. While presenting this report, the Special Rapporteur had outlined

Crimes Against the Peace and Security of Mankind will focus, this year, on the general part of the draft-definition, characterization and general principles". And he had also informed that Part II of the Draft Code, concerning the crimes themselves, would be dealt with in next year's report." While terming the twelfth report as the shortest, the Special Rapporteur briefly noted the reasons for this. The concepts it dealt with had already been discussed at considerable length both in the Commission and in the Sixth Committee, and he had therefore decided to take the course of simply reproducing the text of each draft article as adopted on first reading, without reverting to the discussion on it, except in those cases where no clear view had emerged in the Commission.

It would be too simplistic to say that this report merely reproduced articles as the Special Rapporteur further clarifies that this report on Part I of the draft is presented in such a way that it reproduces, article by article, each draft adopted on first reading, followed by comments from Governments, then by the Special Rapporteur's opinions and conclusions. The observations of Governments are presented sometimes in full, and sometime partially, depending on their significance; more often than not, they are presented in full. With one or two exceptions, all the observations are reflected. When they are not, that is because, the questions raised in the observations of Governments have already been dealt with at length in the Special Rapporteur's earlier reports and in discussion in plenary meetings.

The Chairman, while recalling the agreement reached pointed out that the consideration of the topic would be broken down into two parts, beginning with a general discussion that would take only one meeting and followed by an examination of the individual articles, some of which dealt with questions also treated in the Working Group on a Draft Statute for an International Criminal Court. In order to avoid excessively fragmenting the second part of the debate he proposed taking up five clusters of articles successively, namely Articles 1, 2, 3 and 4 first, followed by Articles 5, 6 and 7, Articles 8, 9 and 10, Articles 11, 12 and 13, and lastly Articles 14 and 15.

II. Draft Code of Crimes Against the Peace and Security of Mankind

A. Articles 1 to 4

Although the Members addressed specifically each of the Articles in the general discussion, the emphasis was limited primarily to the few conceptual questions. As regards the definitional part one Member found

some problems with the idea of combining a conceptual definition with an enumerative one. There was a fundamental issue of the adequacy of the title itself of the Code of Crimes Against the Peace and Security of Mankind. It was pointed out that the title was appropriate for certain crimes, such as aggression, but was much more debatable for others, such as genocide or crimes against humanity, that did not come under the peace and security of mankind unless the concept was given a very broad meaning. The AALCC Secretariat seeks to consider the view that the definition of the crimes by the Code should be very specific and definite so that any wide discretion on the interpretation and the application of the Code by the Court could be minimized.

The other crucial problem dealt with by a few Members concerned the relationship between the Code and the Statute for the Court, which affected less the drafting of the Code, that was perfectly viable with or without the Court, than it did the establishment of the Statute for the Court, for which it was still uncertain whether it would have jurisdiction for applying the Code. Accordingly, it was stressed by some Members that the Working Group should take the draft Code fully into account for the drafting of the Statute and, assuming that the Code was to be adopted on second reading prior to the completion of the draft Statute, the Working Group must use the wording of the Code.

There were other Members who did not specifically agree with this viewpoint. Some of them requisitioned clarifications as regards the interrelationship between the Code and Court, particularly in areas where national jurisdictions were involved. This question was discussed by some Members from the point of relationship between international law and internal law. In their view Article 2 affirmed the primacy of the international law over the internal law, and that was clearly essential if the Code was to be properly implemented. Some other Members attempted to build a harmonious approach. It was suggested that the Commission should adopt exactly the same wording in both instruments for the provisions on the indispensable judicial guarantees in order to ensure minimal standards of protection of the individual. Some Members, while in favour of retaining draft Article 2, considered that the Commission should avoid suggesting that there was a conflict between international law and internal law. The crimes that the Commission had chosen were punishable in the internal law of all civilized States and, as such, were not completely independent of internal law. Nevertheless, it was pointed out that the characterization provided for in the draft Code was independent of the characterization in the internal law of any given State.

In his twelfth report, the Special Rapporteur indicated that draft Article 3 set forth the principle of international criminal responsibility of the individual, a principle which has been accepted in international criminal law since the judgment of the Nuremberg Tribunal. Regarding this Article some Members had problems, particularly concerning certain terminologies. In view of this, they preferred the original version. Many Members of the Commission supported the Special Rapporteur's proposal that draft Article 4 should be deleted. The reasons for this could be briefly summarized. It was pointed out by some Members that a distinction was usually drawn between motive and intent, or *mens rea*, with motive not forming part of the elements making up the offence. Thus, the characterization of motive was not very useful, because it came into play only in determining the degree of responsibility. Political motives usually worked to reduce the penalty normally assigned, for example, by preventing the death penalty from being imposed in criminal justice systems where it still existed. However, some other Members while considering Article 4 did not believe that motives could be incorporated in extenuating circumstances or in the category of exceptions. In their view, persons who committed crimes against the peace and security of mankind should not be able to argue that they had done so for political reasons and therefore should not be punished, or that their crime was political in nature.

B. Articles 5 to 7

Members were generally in agreement with draft Article 5 as adopted on first reading. It was pointed out by some of them that the Article embodied the very sensible and fundamental principle that the international criminal responsibility of the individual should not *ipso facto* exclude the international responsibility of the State for a crime against the peace and security of mankind. It was also recalled that the principle had been enshrined in treaties, including Article IX of the 1948 Convention on Genocide. Some Members, although agreed with the underlying principle of draft Article 5, found that its wording was not very appropriate. As regards draft Article 6 on the "obligation to try or extradite", although there was no disagreement, governments were concerned about its applicability. With regard to draft Article 7 on the non-applicability of statutory limitations, the Special Rapporteur had pointed out in his twelfth report the written comments received from Governments had demonstrated that the rule of the non-applicability of statutory limitations was not universally accepted by States. There were other practical difficulties also. Some Members had pointed out that the rule of the non-applicability of statutory limitations could not be applied to all the crimes covered in

the Code and that Article 7 dealt with a question that basically had to be decided by Governments in view of the various elements that they had to take into account when making general policy decision. Further, it was also pointed out that an absolute rule of the non-applicability of statutory limitations could in certain cases, hamper reconciliation between two communities that might have been at odds in the past or even hamper amnesty granted by a Government with the democratically expressed consent of a national community with a view to the definitive restoration of internal peace. It had been asked whether there was any point in bringing to justice the perpetrator of a crime against the peace and security of mankind 30 or 40 years after the crime had been committed. In view of the AALCC Secretariat, the questions relating to statutory limitation need careful consideration. It would be essential to consider long statutory limitation period in view of the recent tendency of national reconciliation and the amnesty of the crimes implemented by some countries.

C. Articles 8 to 10

Article 8 had received broad consensus, especially since it merely conformed to the provisions of the Universal Declaration of Human Rights and the International Convenant on Civil and Political Rights. In the view of many Members Article 8 set forth the minimum guarantees to which any accused person must be entitled and which constituted one of the fundamental rules of international law and of human rights instruments. Nevertheless, it was also remarked that a balance should be maintained between the judicial guarantees offered to the accused and the security of the international community. There were, however, diverse opinions regarding Article 9 (*non-bis in idem*). It had provided that no one should be tried or punished twice for a crime under the Code for which he had already been finally convicted or acquitted by an international criminal court. The Special Rapporteur justified the applicability of this provision on the ground that it would destroy the authority of the international court if national courts had jurisdiction over cases already tried under the international jurisdiction. Some Members welcomed the possibility of exclusion of States having a case tried by their own courts where it had already been tried by an international court. While expressing reservations, some Members considered that it would be difficult to apply the *non bis in idem* principle at the international level. Since States were generally reluctant to accept the jurisdiction of an international court except in cases, where, in view of the seriousness of the crimes committed, exclusive jurisdiction should be conferred on an international court. As regards draft Article 10, concerning non-retro-activity, the Special Rapporteur pointed out that there was no disagreement.

D. Articles 11 to 13

As regards draft Article 11, "Order of a Government or a Superior", the Special Rapporteur observed in his twelfth report that the principle embodied in this draft provision had already been affirmed in the "principles of international law recognized in the Charter and Judgement of the Nuremberg Tribunal". In his opinion this principle should not be called into question without good reason and he therefore proposed that the draft Article should be retained. Some Members, however, made suggestions for improving its wording. Similar opinions were expressed as regards draft Article 12 which concerned "Responsibility of the Superior". There were two major suggestions, namely, (a) the concept of presumption of responsibility referred to by the Special Rapporteur in his twelfth report warranted further considerations, bearing in mind the rule stated in Article 8 concerning the presumption of innocence; and (b) the Commission should consider the sources of the draft Article. With regard to draft Article 13 concerning "Official position and responsibility", the Special Rapporteur was of the view that although it was difficult to provide in detail for the various cases in which heads of State or Government should be prosecuted, what could be said was that whenever a head of State or Government committed a crime against the peace and security of mankind, he should be prosecuted. The proposal to retain Article 13 unchanged was generally welcomed in the Commission. It was pointed out that the draft Article was based directly on Principle III of the Principles of international law recognized in the Charter of the Nuremberg Tribunal.

E. Articles 14 and 15

The draft Article 14 concerning "Defences and extenuating circumstances" consisted of two paragraphs on first reading. The first paragraph had provided that the competent court should determine the admissibility of defences under the general principles of law in the light of the character of each crime. The second paragraph provided that the court, where appropriate, take account of extenuating circumstances. The Special Rapporteur, expressed his agreement with those Governments which, in their written responses, had considered that the concept of defences and that of extenuating circumstances should be dealt with separately. The criticism, however, was centred around the question of self-defence. It was said that the new text was an oversimplification of the previous text and was likely to give rise to a regrettable confusion between self-defence in the case of an individual and that provided for in Article 51 of the Charter. In the view of the Special Rapporteur "extenuating circumstances" as found in new draft Article 15, was generally

admitted in criminal law that any court hearing a criminal case was entitled to examine the circumstances in which an offence had been committed and to determine whether there were any circumstances that diminished the responsibility of the accused. At the conclusion of the discussion, the Special Rapporteur summarized the main ideas that had emerged during the debate and gave his opinion on some of the issues.

III. Draft Statute for an International Criminal Court

In order to expedite its work on the subject, the Commission took a decision to reconvene the Working Group on a Draft Statute for an International Criminal Court. It held 25 meetings between 10 May and 7 July 1994.

In its 'introductory note' the Report of the Working Group had listed the documents which were before it to perform the mandate assigned. It, *inter alia*, included the followintg: the Report of the Working Group on the Question of an International Criminal Jurisdiction (A/47/10, Annex), the Report of the Working Group on a Draft Statute for an international criminal court (A/43/10, Annex): the eleventh report on the topic "Draft Code of Crimes Against the Peace and Security of Mankind" presented by Special Rapporteur, Mr. Doudou Thiam; the Comments of Governments on the Report of the Working Group; Chapter B of the topical summary prepared by the Secretariat of the discussion held in the Sixth Committee of the General Assembly during the forty-eighth Session; the Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (document S/25704); the Rules of Procedure and Evidence adopted by the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (document IT/32 of 14 March 1994) as well as the following informal documents prepared by the Secretariat of the Working Group: (a) a compilation of draft statutes for an international criminal court elaborated in the past either within the framework of United Nations or by other public or private entities; (b) a compilation of conventions or relevant provisions of conventions relative to the possible subject matter jurisdiction of an international criminal court; and (c) a study on possible ways whereby an international criminal court might enter into relationship with the United Nations.

The Working Group, while considering the Draft Statute for an International Criminal Court, took into account, *inter alia*, (a) the need

to streamline and simplify the articles concerning the subject matter jurisdiction of the Court, while better determining the extent of such jurisdiction; (b) the fact that the Court's system should be conceived as complementary to national systems which function on the basis of existing mechanism for international cooperation and judicial assistane, and (c) the need for coordinating the common articles to be found in the Draft Statute for an International Criminal Court and in the Draft Code of Crimes Against the Peace and Security of Mankind. The draft Statute prepared by the Working Group is divided into eight main parts: Part 1 on establishment of the Court; Part 2 on composition and administration of the Court; Part 3 on Jurisdiction of the Court; Part 4 on investigation and prosecution; Part 5 on the trail; Part 6 on appeal and review; Part 7 on international cooperation and judicial assistance; and Part 8 on enforcement.

Before examining the overall structure of the Draft Statute, it may be worthwhile to note the clarification provided by the Working Group in drafting the Statute. It, *inter alia*, stated, "the Working Group did not purport to adjust itself to any specific criminal legal system but rather, to amalgamate into a coherent whole the most appropriate elements for the goals envisaged, having regard to existing treaties, earlier proposals for an international court or tribunals and relevant provisions in national criminal justice systems within the different legal traditions". The Working Group also took careful note of the various provisions regulating the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991. Furthermore, the objective of the Working Group in conceiving the Statute for an International Criminal Court was to be "as an attachment to a future international convention on the matter" and accordingly, the Commission drafted the Statute's provisions.

A. Preamble

The Preamble to any statute sets out the main purpose intended to be achieved. The draft Statute, keeping this in view, intends further cooperation in international criminal matters, to provide a forum for trial and, in the event of conviction, to provide for appropriate punishment of certain persons accused of crimes of significant international concern. Significantly, the Court envisaged does not purport to run parallel to the national criminal justice systems. Instead, it intends to be complementary to the national systems, particularly in cases where such trial procedures maynot be available or may be ineffective. It is clarified in the Commentaries that

it does not affect the right of States to seek extradition and other forms of international judicial assistance under existing arrangements.

The purpose set out in the Preamable, the Commentaries provide, is intended to assist in the interpretation and application of the Statute, and in particular in the exercise of the power conferred by Article 35. Article 35, it may be noted, deals with the substantive aspects of admissibility. In other words, it allows the Court to decide, having regard to certain specified factors, whether a particular case is admissible. This is different from exercising jurisdiction *per se*. The Court, it is pointed out, should exercise jurisdiction only over the most serious crimes, such as crimes of concern to the international community as a whole.

B. Establishment of the Court

The establishment of the Court and its subsequent operation has certain implications. The crucial issue concerning this is the "relationship of the Court to the United Nations. There were divergent opinions between the Members of the Commission in this regard. Some favoured the Court becoming a subsidiary organ of the United Nations by way of resolutions of the Security Council and General Assembly, without the need for any treaty. Others had strongly preferred that it be created as an organ of the United Nations by amendment to the Charter. Those who did not agree with these two arrangements advocated another kind of link such as a relationship agreement along the lines of that concluded between the United Nations and the International Atomic Energy Agency. However, the Working Group concluded that it would be extremely difficult to establish the Court by resolution of a UN body, without the support of a treaty. It is further pointed out that the General Assembly resolution did not impose binding legal obligations on States in relation to conduct external to the functioning of the UN itself. In view of this, the obligation of a State, for instance, to transfer an accused person from its own custody to the custody of the Court which would be essential to the Court's functioning could not be imposed by a resolution. A treaty commitment, the Working Group felt, would be essential for this purpose. More importantly, a treaty accepted by a State pursuant to its constitutional procedure would normally have the force of law within that State—unlike a resolution and that may be necessary if that State needed to take action *vis-a-vis* individuals within its jurisdiction pursuant to the Statute. The Working Group also noted that the resolutions could be readily amended or even revoked, that would scarcely be consistent with the concept of a permanent judicial body. Accordingly, the relationship agreement proposed by the Working Group would be concluded between

the Presidency, acting on behalf of and with the prior approval of States parties, and the UN, and it would provide, *inter alia*, for the exercise by the UN of the powers and functions referred to in the Statute.

Some members of the Commission had strongly put forward the view that the Court could only fulfil its proper role if it was made an organ of the UN by amendment of the Charter. This, it has been pointed out, had substantial implications for the operation and financing of the Court. Despite some of these problems, it was agreed that the Court could only operate effectively if brought into a close relationship with the UN, for administrative purposes, in order to enhance its universality, authority and permanence, and because in part the Court's jurisdiction could depend upon decisions by the Security Council. The Working Group, however, did not consider budgetary arrangements as it should be worked out satisfactorily in the context of an overall willingness of States to proceed to the establishment of the Court.

As regards the "Seat of the Court", the Working Group, *inter alia* referred in its Commentaries to some of the crucial issues such as provision of the prison facilities for the detention of persons convicted under the Statute, in the absence of other arrangements. There were also some crucial questions as regards the "status and legal capacity" of the Court. The Working Group sought to bring in Article 4 the goals of flexibility and cost reduction set out in its earlier report in 1992 which had laid down the basic parameters for the draft Statute. Although there was a substantial agreement in the Working Group as regards the permanent nature of the Court and that it would sit only when required to consider a case submitted to it, some Members continued to feel that this was incompatible with the necessary permanence, stability and independence of a true international criminal court.

C. Composition and Administration of the Court

Article 5 specifies the structure of the international judicial system to be created and its component parts. The Working Group briefly noted the functions to be performed by each component, namely, (a) strictly judicial functions are to be performed by the Presidency of the Court and its various chambers; (b) the crucial function of the investigation and prosecution of offenders is to be performed by an independent organ, the Procuracy, and (c) the principal administrative organ of the Court is the Registry. In the view of the Working Group, for conceptual, logistical and other reasons, the three organs are to be considered as constituting an international judicial system as a whole, notwithstanding the necessary independence

which has to exist, for ethical and fair trial reasons between the judicial branch and the prosecutorial branch.

The Working Group notes carefully the problems in the way of electing qualified judges with criminal law and criminal trial experience and expertise in the field of international law. Further, the relatively long period of 12 years for the term of office of the judges was also dealt with by the Working Group. This was criticized by some States as too long, and has been reduced to nine years, the same term as judges of the ICJ. The Working Group favoured the principle that judges should not be eligible for re-election considering the special nature of an international criminal jurisdiction. However, it found necessary to provide limited exceptions to this principle to cope with transitional cases and casual vacancies.

While commenting on Article 8 concerning the Presidency, the Working Group noted that the President and the two Vice-Presidents (with two alternates) will have to perform important functions in the administration of the Court, in particular as members of the Presidency. In addition to its overall responsibility for administration, the Presidency has pre-and post-trial functions of judicial character under the Statute. Further, it is clarified by the Working Group that the manner in which these functions are exercised would be subject to more detailed regulation in the rules. The Working Group discusses briefly the possible involvement of any one judge in pre-trial functions. This, according to the Working Group, raises the question whether such an involvement might prevent the judge sitting as a member of a Trial or Appeals Chamber, on the basis of an appearance of lack of impartiality. In this regard, it refers briefly to the practice and case law of the European Court of Human Rights. In the specific view of the Working Group the functions actually conferred by the Statute in the pre-trial phase are consistent with the involvement of members of the Presidency in Chambers subsequently dealing with that case.

In order to allow for specialization, an Appeals Chamber is envisaged, consisting of the President and six judges, at least three of whom are to be drawn from judges nominated as having recognized competence in international law. This, the Working Group points out, ensures that a majority of judges with criminal trial experience would be available to serve on Trial Chambers. Some members of the Working Group had argued strongly that the Court should have a full-time President, who would reside at the seat of the Court and be responsible under the Statute for its judicial functioning. Others, however, stressed the need for flexibility, and the character of the Court as a body which would only be convened

as necessary. In their view, a requirement that the President be full-time might unnecessarily restrict the range of candidates for the position. The Working Group although dealt with these matters fairly briefly, thought that this was a matter which could be left to the Rules to be framed.

While dealing with the question of independence of the judges, some members of the Working Group strongly preferred a permanent court, believing that only permanence would give full assurance of independence and impartiality. Considering the non-permanent nature of judges, the Working Group sought to outline the nature of activities which might compromise the independence of the judges. For instance, it was clearly understood that a judge could not be, at the same time, a member of the legislative or executive branch of a national government. Similarly, a judge should not at the same time be engaged in the investigation or prosecution of crimes at the national level. On the other hand, the Working Group noted, national judges with experience in presiding over criminal trials would be most appropriate persons to act as judges.

The provision of "exercising and disqualification of judges" is unique. Although judges have a general obligation to be available to sit on the Court, at his request, the Presidency may excuse that judge from the exercise of a function under this Stature and may do so without giving any reason. This, in the view of Working Group, would be necessary for good reason to excuse a judge from sitting and where the interests of justice would not be served by disclosing the reason. For instance, this might be so in the case of grave security risks to the person or family of a judge.

The Procuracy, dealt in Article 12, is an independent organ composed of the Prosecutor, one or more Deputy Prosecutors and such other qualified staff as may be required. The importance of the independence of the Procuracy is underlined by the provision that the election of the Prosecutor and Deputy Prosecutors be carried out not by the Court but by an absolute majority of the States Parties. The Prosecutor must not seek or receive instructions from any Government or any other source, but act as a representative of the international community as a whole. The Registrar, who is elected by the Court, is the principal administrative officer of the Court and is, unlike the judges, eligible for re-election. The Working Group had no difficulty in formulating a unanimous opinion on these aspects.

Article 16 refers to the privileges, immunities and facilities to be extended to judges. Officers and staff of the Court as well as counsel, experts and witnesses appearing before it. A composition made by the

Working Group to the similar provisions of the Statute of ICJ in Article 19 and Article 30 of the Statute of the International Tribunal for the Former Yugoslavia. The provision relating to "allowances and expenses" reflects the fact that the Court is not a full-time body. The English and French are to be the working languages of the Court. But this is, it is noted, without prejudice to the possibility that a particular trial be conducted concurrently in the languages of the accused and of the witnesses, together with the working languages. Article 19 refers to rules of the Court relating to pre-trial investigations as well as the conduct of the trial itself. It extends to matters concerning the respect of the rights of the accused, procedure, evidence etc. In these matters the Working Group had difficulty in formulating a substantial agreement as most of these were procedural in nature. The major and crucial questions arose in the substantive aspects such as jurisdictional issues.

D. Jurisdiction of the Court

One of the central elements in the draft Statute concerns the question of "jurisdiction". Part 3 deals with this aspect and limits the range of cases which the Court may deal with, so as to restrict the operation of the Statute to the situations and purposes referred to in the Preamble. The basic ideas regarding the jurisdictional strategy as expressed in the 1992 Working Group Report should be recounted briefly. It had two strands, namely, (a) the Court to exercise jurisdiction over crimes of an international character defined by existing treaties; and (b) acceptance of substantive jurisdiction in a particular case. However, there were a few difficulties of identifying the exact limits of application of these strands of jurisdiction. For instance, the distinction between treaty crimes and crimes under general international law could be difficult to draw. To cite an example, it cannot be doubted that genocide as defined in the Genocide Convention could be regarded as a crime under general international law. The majority of the Working Group in 1993 concluded that crimes under general international law could not be entirely excluded from the draft Statute. However, this formulation was met with considerable criticism in the Sixth Committee and in the comments of States, on the gronds that a mere reference to crimes under general international law was highly uncertain and that it would give excessive power to the proposed Court to deal with conduct on the basis that it constituted a crime under general international law. With a view to minimizing these possibilities the Working Group sought to limit the Court's jurisdiction over crimes under general international law to a number of specified cases, without prejudice to the definition and content of such crimes for other purposes.

The 1993 draft distinguished between two "strands" jurisdiction in relation to treaty crimes: (a) jurisdiction over crimes of an international character; and (b) crimes under what were referred to as suppression conventions (e.g. the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988). As pointed out by the Report of the Working Group the draft Statute adopted a course which has jurisdiction limited provisions so as to eliminate such crimes which may not exhibit international concerns. The Annex to the Statute lists multilateral treaties in force clearly defining as criminal specified conduct of international concern and extending the jurisdiction of States over such conduct. The Court's jurisdiction extends to certain crimes defined by those treaties, whether or not they are "suppression conventions" as mentioned earlier. By the combination of a defined jurisdiction in Article 20 the draft Statute seeks to ensure, in the words of the preamble, that the Court will be "complementary to national criminal justice system in cases where such trial procedures or may not be available or may be ineffective".

Some members of the Working Group had expressed their dissatisfaction at the restrictive approach taken to the jurisdiction of the Court (other than in cases of genocide). In their view the various restrictions imposed on the Court, and in particular the restrictive requirements of acceptance contained in Article 21, were likely to frustrate its operation in many cases, and even to make the quest for an international criminal jurisdiction negatory. On the contrary, there were other members of the Working Group who thought that the State went too far in granting "inherent" jurisdiction even over genocide, and that in the present state of the international community, the Courts jurisdiction should be entirely consensual. Suggestions were also made that the Court should also have an advisory jurisdiction in matters of international criminal law, either on reference from UN organs or from individual States. However, the Working Group has not made any provision for such a jurisdiction.

The Working Group, for the reasons stated above, concluded that it should not confer jurisdiction by reference to the general category of crimes under international law, but should refer only to the specific crimes warranting inclusion under that category. It has included four such: genocide, aggression, serious violations of the laws and customs applicable in armed conflict and crimes against humanity. Of these, the Working Group finds that "genocide" was clearly and authentically defined in the 1948 Convention and it had envisaged that cases of genocide could be referred to an international criminal court. Further, in the view of the

crime of genocide. On the other hand, it had difficulty in accommodating the crime of "agression" in the same category as there was no treaty definition comparable to genocide. It should be noted that the General Assembly resolution 3314 (XXIX) dealt with aggression by States, not with the crimes of individuals, and was designed as a guide for the Security Council, not as a definition for judicial use. References were also made to Article 2(4) of the Charter of the UN and the Nuremberg Tribunal in 1946. It was, *inter alia*, felt that it would seem retrogressive to exclude individual criminal responsibility for aggression 50 years after Nuremberg. Considering the number of principles incorporated in the Charter of the International Military Tribunal of 1945 (the Nuremberg Charter), some members of the Working Group took the view that not every single act of aggression was a crime under international law giving rise to the criminal responsibility of individuals. With respect to the crimes against humanity the Working Group noted that there were unresolved issues about the definition of the crime. Nevertheless, in the understanding of the Working Group the definition of crimes against humanity encompassed inhumane acts of a very serious character involving widespread or systematic violations aimed at the civilian population in whole or part. As regards the listing of crimes under general international law, in the view of the Working Group, raised questions as to why other international crimes, such as apartheid and terrorism were not also included.

Article 21 spells out the States which have to accept the Court's jurisdiction in a given case under Article 20 for the Court to have jurisdiction. The modes of acceptance are spelt out in Article 22. The Working Group, *inter alia*, referred to the aspects of Article 21 and how it differed from the equivalent provision of the 1993 draft Statute. It noted: first, the focus was specifically on the custodial State in respect of the accused, as distinct from any State having jurisdiction under the relevant treaty. Second, it required the acceptance by the State on whose territory the crime was committed, thus adopting the acceptance requirement in the 1993 Statute for crimes under general international law. Third, it also required the acceptance of a State which had already established, or eventually established its right to the extradition of the accused pursuant to an extradition request. Article 22, it should be noted, is concerned with the modalities of that acceptance, and is drafted so as to facilitate acceptance both of the Statute as a whole and of the Court's jurisdiction in individual cases. Article 23 refers to the "action by the Security Council". In other words, it allows the Security Council, in circumstances where it might have authority to establish an *ad hoc* tribunal under Chapter VII of the Charter of the UN, instead to trigger the Court's jurisdiction

by dispensing with the requirement of the acceptance by a State of the jurisdiction of the Court under Article 21.

E. Investigation and Prosecution

The procedure regarding the "investigations and prosecution" begins with the complaint. In the view of the Working Group the Court is envisaged as a facility available to States Parties to its Statute, and in certain cases to the Security Council. These aspects could be seen in the various provisions relating to this procedural aspect. In the case of genocide, where the Court has jurisdiction without any additional requirement of acceptance, the complainant must be a Contracting Party to the Genocide Convention and thus entitled to rely on Article VI of the Convention. The Working Group while supporting the idea of keeping the Court open for only States had stated two main reasons namely: (a) this may encourage States to accept the rights and obligations provided for in the Statute; and (b) to share in the financial burden relating to the operating costs of the Court. The members of the Working Group were not in agreement with the suggestion that the Prosecutor should be authorized to initiate an investigation in the absence of a complaint if it appeared that a crime apparently within the jurisdiction of the Court would otherwise not be duly investigated.

The Draft Statute specifies the procedure concerning the mode of investigating alleged crimes by taking into account the norms of natural justice and equity. Nevertheless, while conducting the investigation, the Procuracy has the power to question suspects, victims and witnesses, to collect evidence, to conduct on-site investigations, etc. In this regard, the Prosecutor may seek the cooperation of any State and request the Court to issue orders to facilitate the investigation. At the investigation phase, a person who is suspected of having committed crime may be questioned, subject however, to following rights, namely the right not to be compelled to testify or to confess guilt; the right to remain silent without reflecting guilt or innocence; the right to have the assistance of counsel of the suspect's choice; the right to free legal assistance if the suspect cannot afford a lawyer, and the right to interpretation during questioning, if necessary. The Working Group had also felt that it was important to include a separate provision to guarantee the rights of a person during the investigation phase, before the person has actually been charged with a crime. It also found the necessity to distinguish between the rights of the suspect and the rights of the accused since the former were not as extensive as the latter. For instance, the suspect does not have the right to examine

witnesses or to be provided with all incriminating evidence, rights which are guaranteed to the accused.

The procedures relating to the "commencement of prosecution", and "Arrest", commence, if after investigation the Prosecutor concludes that there was a *prima facie* case against the suspect in respect of a crime within the Court's jurisdiction. There is an elaborate provision concerning pre-trial detention or release", which *inter alia* provides for the judicial determination of proceedings concerning "prosecution" and "arrest". The Working Group has generally taken the view to minimize any unnecessary and disproportional harm to the alleged offenders. Even it sought to provide for compensation in cases where there was an unlawful detainment. Considering the principles of natural justice, as soon as an accused is arrested on a warrant, the Prosecutor is obligated to take all necessary steps to notify the accused of the charge by serving the necessary documents, such as, statement of the ground for the arrest etc.

F. The Trial

It is provided that trials will generally take place at the seat of the Court. In the view of Working Group, the Court may decide. In the light of the circumstances of a particular case, that it would be more practical to conduct the trial closer to the scene of the alleged crime, for example, so as to facilitate the attendance of witnesses and the production of evidence. The provision relating to "applicable law" mentions two sources which are the Statute itself and applicable treaties. The third source which refers to national law acquires special importance in the light of the inclusion in the Annex of treaties which explicitly envisage that the crimes to which the treaty refers are nonetheless crimes under national law. As pointed out by the Working Group the dictates of the *nullum crimen* (i.e. principle of legality as enunciated in Article 39) requires that the Court be able to apply national law to the extent consistent with the Statute, applicable treaties and general international law. This, the Working Group notes, would be essential as international law does not yet contain a complete statement of substantive criminal law and the Court would need to develop criteria for the application of rules of national criminal law, to the extent to which they were properly applicable to a given situation. At the trial stage, the questions of jurisdiction and admissibility are addressed in the Draft Statute in order to ensure that the Court only deals with cases in the circumstances outlined in the Preamble i.e. where it is really desirable to do so. Further, the question whether trial *in absentia* should be permissible under the Statute had been discussed extensively. One view, according to the Working Group, was that trial in

absentia should be excluded entirely, on the ground, *inter alia*, that the Court should only be called into action in circumstances where any judgement and sentence could be enforced, and that the imposition of judgements and sentences *in absentia* with no prospect of enforcement would bring the Court into disrepute. On the other hand, another view would allow such trial only in very limited circumstances. The Working Group deals extensively with the formulations of the 1993 draft Statute which, *inter alia*, had provided that an accused should have the right "to be present at the trial, unless the Court, having heard such submissions and evidence as it deems necessary, concludes that the absence of the accused is deliberate". The discussion in the Working Group brings in various decisions incorporated in the Selected Decisions of the Human Rights Committee under the Optional Protocol and the European Court of Human Rights. However, the Working Group was attracted to the solution adopted in the Rules of the International Tribunal for the Former Yugoslavia which contemplates that the accused will be present at the trial. However, it provides for a form of public confirmation of the indictment in cases where the accused could not be brought before it.

Article 38 deals with the general powers of the Trial Chambers with respect to the conduct of the trial. The Trial Chamber has a full range of powers in respect of the proceedings. The Working Group has given elaborate comments on the applicability of these procedures. In its view the overriding obligation of the Trial Chamber is to ensure that every trial is fair and expeditious and is conducted in accordance with the Statute, with full respect for the rights of the accused and due regard for the protection of victims and witnesses. The principle of legality (*nullum crimes sine lege*), the fundamental principal of criminal law, is incorporated in Article 39. It specifies that an accused shall not be held guilty: (a) in the case of a prosecution... unless the act or omission in question constituted a crime under international law; (b) in the case of a prosecution... unless the treaty in question was applicable to the conduct of the accused at the time the act or omission occurred. Further, Article 40 recognizes that in a criminal proceeding the accused is entitled to a presumption of innocence and that the burden of proof rests with the Prosecution. The Working Group stresses the fact that the Prosecutor should have the burden of proving every element of the crime beyond reasonable doubt. In furtherance of this, Article 41 specifically provides for the "rights of the accused". In other words, it states the minimum guarantees to which an accused is entitled in relation to the trial, namely (a) to be informed promptly and in detail of the nature and cause of the charge; (b) to have adequate time and facilities for the preparation of the defence, and to communicate with

counsel of the accused's choosing; (c) to be tried without undue delay; (d) to examine and have examined in the Court proceedings; (e) necessary language interpretations; and (f) not to be compelled to testify or to confess guilt; Accordingly, Article 42 recognizes the important principle of criminal law, *non bis in idem* which *inter alia*, means that no person shall be tried for the same crime twice.

Considering the international importance of the Court's proceedings there is a provision for the "protection of the accused, victims and witnesses". The draft Statute in other articles attempts to take care of all the procedural aspects of criminal justice, such as evidence, sentencing and applicable penalties. As regards the determination of the appropriate punishment in a particular case, there is a term of imprisonment up to and including life imprisonment and a fine of a specified amount. The Court is not authorized to impose the death penalty. While determining these, the Working Group notes, the Court may consider the relevant provisions of the national law of the States which have a particular connection to the person or the crime committed, namely the State of which the convicted person is a national, the State where the crime was committed and the State which had custody of and jurisdiction over the accused.

G. Appeal and Review

Appeals may be, as enunciated in Article 48, brought either against judgement or sentence. In view of the Working Group the right to appeal should exist equally for the Prosecutor and the convicted person. The grounds for appeal may relate to one or more of the following: procedural unfairness, errors of fact or law, or disproportion between the crime and the sentence, proceedings on appeal are regulated by Article 49. Further, a person convicted of a crime may, in accordance with the Rules, apply for revision of a judgment on the ground that a new evidence has been discovered, which was not known to the accused at the time of the trial or appeal and which would have been a decisive factor in the conviction. This provision for "revision" is provided in Article 50.

H. International Cooperation and Judicial Assistance

For an effective functioning of the Court, States Parties to the Statute should cooperate wih the criminal investigations conducted by the Prosecutor and respond without undue delay to any request from the Court regarding, for example, the location of persons, the taking of testimony, the production of evidence, the service of documents etc. Some members of the Working Group, it is pointed out, thought that Article 51 went too far in imposing

a general obligation of cooperation on States Parties to the Statute, independently of whether they are parties to relevant treaties or have accepted the Court's jurisdiction with respect to the crime in question. They would therefore prefer Article 51 to state that parties would use their best efforts to cooperate. Provisional measures, specified in Article 52 allow the Court to request States to take provisional measures to present an accused from leaving its territory or the destruction of evidence located there.

Article 53 deals with the crucial question of "transfer of an accused to the Court". As provided in this provision, the Registrar may request any State to cooperate in the arrest and transfer of an accused pursuant to a warrant issued under Articlec 28. As to States not parties to the Statute, no obligation of transfer can be imposed, but cooperation can be sought in accordance with Article 55. The Working Group in its comments points out that the term "transfer" has been used to cover any case where an accused is made available to the Court for the purpose of trial, in order to avoid any confusion with the notion of extradition or other forms of surrender of persons (e.g. under status of forces agreements) between two States. The Working Group briefly dealt with the question of relationship between extradition and transfer. In its view, these provisions provide adequate guarantees that the Statute will not undermine existing and functional extradition arrangements. Accordingly, Article 55 recognizes that all States as members of the international community have an interest in the prosecution, punishment and deterrence of the crimes covered by the Statute.

I. Enforcement

It is provided that the States Parties to the Statute must recognize the judgments of the Court. As regards the prison sentences imposed by the Court these are to be served in the prison facilities of a State designated by the Court or, in the absence of such a designation, in the State where the Court has its seat. It is also provided that since the limited institutional structure of the Court, in initial stages at least, would not include a prison facility, States Parties would be requested to offer the use of such facilities to the Court. With the suggestion coming from the Working Group, a provision was incorporated to provide for the possibility of pardon, parole and commutation of sentence. The Annex to the Draft Statute includes crimes which are found in the treaties in force of universal character. Treaties which merely regulate conduct, or which prohibit conduct but only on an inter-State basis are included.

IV. Comments:

It should be recalled that at its forty-third session in 1991, the Commission provisionally adopted on first reading the Draft Code of Crimes against the Peace and Security of Mankind. At the same session, the Commission decided to transmit the Draft Code to Governments for their comments and observations with a request that such comments and observations be submitted by 1 January 1993. The Commission noted that the draft it had completed on first reading constituted the first part of the Commission's work on the topic of the Draft Code of Crimes Against the Peace and Security of Mankind; and that the Commission would continue at forthcoming sessions to fulfil the mandate the General Assembly had assigned to it in paragraph 3 of resolution 45/41 of 28 November 1990, which invited the Commission in its work on the Draft Code of Crimes Against the Peace and Security of Mankind to consider further and analyse the issues raised in its report concerning the question of an international criminal jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism. Similar ideas were reiterated by the General Assembly in its resolution 46/54 of 9 December 1991. Accordingly, at its forty-fourth session in 1992, the Commission had before it the Special Rapporteur's tenth report on the topic which was entirely devoted to the question of the possible establishment of an international criminal jurisdiction. In furtherance of this mandate, a Working Group was also set up to consider the issues concerning international criminal jurisdiction.

Remarkable progress could be seen in the work of the Working Group to establish an acceptable international criminal jurisdiction. In fact, priority was accorded to the "draft Statute for an International Criminal Court". However, there were various comments concerning the need to reconcile the expeditious completion of the draft Statute, given its priority, with the care required to draft an instrument that would be generally acceptable to States and provide for the establishment of a viable and effective institution. In AALCC Secretariat's view the work on the completion of the Draft Code and the International Criminal Court should progress simultaneously. The Draft Code, in AALCC Secretariat's view, provides the broad substantive criminal normative structure to operate an international criminal jurisdiction. For the reasons expressed by many of the members the main question always remains jurisdictional. Even there were various comments regarding the general approach to be taken by the Commission as it continued its work on the draft Statute. The AALCC Secretariat concurs with the view that the relationship between the substantive law to be applied by the Court and the procedural law represented by the

Statute had received insufficient attention. The AALCC Secretariat also seeks to consider the view that the functions of the Court should be precisely defined so that the States can accept a transfer of its sovereignty to the Court more easily.

The AALCC Secretariat notes that while stressing more on the draft Statute of the criminal court, the Commission should not attempt to create norms whose legal validity at the international level needed further clarification. This was, in fact, the initial mandate given by the General Assembly. Keeping some of these difficulties in view, several members had expressed the opinion that it would be preferable to take more time, if necessary, to draft an instrument for a better, more useful and permanent institution bearing in mind the unlikelihood that the Court would be established by States upon receipt of the draft Statute by the General Assembly.

As regards the nature of the Court, the AALCC Secretariat would like to support a realistic and pragmatic approach. In its view, a balance should be struck between a non-standing permanent body and full-time organ. It is for consideration whether a Court remaining permanently in session would help in encouraging uniformity and further development of law. In this regard, it would be necessary to clearly outline the nature of its relationship with the national courts. It may be necessary to have more output to consider this aspect. The AALCC Secretariat, however, finds no great difficulty in harmonizing the pure procedural aspects of the Court. Nevertheless, this calls for a greater amount of flexibility in applying these norms. In the view of AALCC Secretariat resolution of any disagreement in this regard should be solely left to the Court itself.

The AALCC Secretariat notes that there were some unclear areas with regard to the issue of what laws should be applied by the Court. One dominant view suggested that the Statute should be drafted in such a way as not to foreclose the future application of the Code. Some members, it should be noted, attributed particular importance to the applicability of national law, not only in instances where a treaty did not define a crime with the necessary precision, but also with respect to rules of evidence and penalties. Although there is some kind of balance in the structure of the draft Statute, the AALCC Secretariat seeks to note with care the erosion of "sovereignty". It is not clear as to how far the State can go to limit themselves and it is here that the success of the Statute and Code depends. The three mainstreams of the criminal, judicial process i.e. the investigation, the trial and the punishment, need at one level or the other, to intrude into national sovereignty. These questions, in the view of AALCC Secretariat, are crucial for the countries of Asia and Africa.

THE LAW OF NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

The topic "the Law of the Non-navigational Uses of International Watercourses" was taken up by the International Law Commission (ILC) in response to the recommendation of the General Assembly in resolution 2669 (XXV) of 8 December 1970. The work on this topic progressed steadily through the contributions made by five Special Rapporteurs. 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 a request that such comments and observations be submitted to the Secretary-General by 1 January 1993. Accordingly, at its forty-fifth session, the Commission considered the first report (A/CN.4/451) of the Special Rapporteur. The Commission also had before it the comments and observations on the draft articles received from Governments (A/CN. 4/447 and Add. 1-5). While concluding its debate, the Commission referred Articles 1 to 10 to the Drafting Committee established by the Commission. At its forty-sixth session, the Commission considered the second report of the Special Rapporteur and referred the draft articles covered in the second report to the Drafting Committee established by the Commission. It invited the Drafting Committee to proceed with the consideration of the draft articles without the amendments introduced by the Special Rapporteur on unrelated confined groundwater, and to submit suggestions to the Commission on how the Commission should proceed on the question of unrelated confined groundwater. Finally, on the basis of the Drafting Committee's report, the Commission adopted the final text of a set of 33 draft articles on the Law of the Non-Navigational Uses of International Watercourses and a resolution on confined transboundary groundwater. The present study, to the extent necessary, reflects these overall developments in the work of ILC concerning this topic.

In his second report, the Special Rapporteur was making suggestions for what could be regarded as substantive changes. The first was to delete the phrase "flowing into a common terminus", a concept that had not been present in the drafts submitted by the earlier Special Rapporteur. Reference has been made in this context to the Water Resource Committee of the International Law Association, which had stated in 1993 in response to the draft produced on first reading that the "notion that the waters of a watercourse must always flow into a common terminus cannot be justified in the light of today's knowledge of the behaviour of water". As noted in the report by way of an example, the waters of the Danube at certain

times of the year flowed into Lake Constance and into the Rhine, something that had, in the view of the Special Rapporteur, now been recognized for more than half a century.

The Special Rapporteur's second suggestion concerned the inclusion of unrelated groundwater. While noting the importance of the confined groundwater, the Special Rapporteur refers to the existing dependence on groundwater in such diverse areas as Scandinavia and North Africa and the increasing demand due to population growth and industrial use; thus making the case for the elaboration of rules beyond debate. He also refers to calls for such action from the Water Conference held in Mar de Plata in 1977, the interregional meeting in Dakar in 1982 and from elsewhere underscored the timeliness of the issues. According to him the only question that could be debated was whether the Commission should cover such waters in its current exercise or should initiate a new exercise to respond to the need. In his view, the Commission should undoubtedly do so at the current exercise. In his view, the two most detailed efforts to elaborate rules for groundwater in general were the 1986 Seoul Rules on International Groundwater elaborated by the International Law Association and the 1989 Bellagio Draft Treaty on Transboundary Waters—a model bilateral agreement. There were also bilateral and regional arrangements to which reference was made in the annex to the second report. A detailed study of those instruments, as pointed out by the Special Rapporteur, revealed no rule applicable to related confined groundwater that was not applicable to unrelated confined groundwater and no rule applicable to the latter that was not applicable to the former.

The third suggestion proposed by the Special Rapporteur related to notice. Article 12 established an obligation on the part of a State that intended to implement or permitted the implementation of planned measures which might have an adverse effect on other watercourse States to provide them with "timely notification" and Articles 13, 14, 15 and 16 contained the outline for the process. It is pointed out that the problems with the regime contained in those articles was that it did not provide a notifying State with protection from potential harms caused by the failure of notified State to respond. Further, whereas failure to respond should not diminish the responsibility of the notifying State, neither should it increase that responsibility nor create an undue burden for the notifying State. Considering these, the new paragraph (b) in Article 16 was an attempt to safeguard the notifying State from damage flowing exclusively from the failure of the notified State to respond.

In the view of the Special Rapporteur the definitional aspects of Article 21 could have been dealt within the ambit of definitions in Article 2. Leaving this to the discretion of the Drafting Committee, he proposed to add the word "energy" in paragraph 3 of Article 21 while outlining the possible areas of pollution. By way of an example, he referred to a scheme devised by Consolidated Edison to pump water from the Hudson River in the New York State to the top of the abuting palisade during off-peak periods of use and then to generate power during peak periods by allowing the water to fall back into the Hudson River. Although there had been no loss of water from the river, and no substance had been added to the water, the ecology of the stream had been adversely affected because the water returned to the river had been significantly warmer.

The Special Rapporteur's fifth suggestion concerned dispute settlement. The Commission could not, in his view, propose articles which depended on cooperation between States without making provision for resolving differences that would inevitably ensue. He also referred to the joint management arrangements which were, however, not accepted by the Commission. In his comments he had reffered to the Bellagio Groundwater Treaty which had proved indispensable in solving most of the water-related problems that had arisen between the United States and Canada and between the United States and Mexico. He also noted that not all regions enjoyed the fraternal relations that existed between the States Parties to the Bellagio Treaty. He preferred the proposal by the previous Special Rapporteur, Mr. McCaffrey under which arbitration or judicial settlement would be made binding and would not be dependent on the agreement of the parties. He also drew some inspiration from the municipal law arena, particularly the Inter-State Water Disputes Act of 1956 whereby the Government of India was empowered to establish a tribunal if a negotiated settlement among States in its federal system proved impossible. While referring to his proposal in the Report, the Special Rapporteur hoped that the discussion in the plenary would indicate where the centre of gravity lay as between Mr. McCaffrey's proposal and his own.

The major part of the Commission's discussion was concerning "unrelated confined groundwater". There were also different shades of opinions as regards the definition of "common terminus". References were made by the members both to the report and the annex where the question of "unrelated confined groundwater" was discussed elaborately by the Special Rapporteur. In the view of some members the distinction between "confined" and "unconfined" groundwater was essential and must be maintained if the word "*aquifer*" was used. According to the

Special Rapporteur, "*aquifer*" means a substance, water-bearing geologic formation from which significant quantity of water may be extracted, and the waters therein contained. This definition, according to some members, gave rise to the impression that the *aquifer* essentially concerned with only "confined groundwater". Members found that the provisions to regulate the totally independent systems of confined groundwater and *aquifer* posed certain unique problems. There was a general argument as regards the need to require States to cooperate in order to regulate the uses of groundwater when they are situated below international borders. Considering these viewpoints some members had proposed a complete framework Convention or overall model of all water resources in an integrated manner. In the view of certain other members the need for general acceptability of the draft proposal to include provisions on unrelated confined groundwater should be thoroughly examined.

The idea proposed by the Special Rapporteur to delete the notion of "common terminus" did not get complete support. While substantiating his arguments, the Special Rapporteur had illustrated many more examples of rivers where the term "common terminus" was inapplicable. For example, the Irrawaddy River in Myanmar separated into a number of streams, some of which reached the sea over 300 kilometers away from the point where the others terminated. The Ganges, the Mekong and to a lesser extent the Nile, ran into a number of streams that reached the sea at great distances from one another, some as many as 250 kilometers away. They were each unitary systems, but did not have a common terminus.

Some members were critical about the dispute settlement mechanisms as provided in Article 33. Paragraph 2(c) of the article had provided that where neither fact-finding nor conciliation had resolved the dispute, "any of the parties may submit the dispute to binding arbitration by any permanent or *ad hoc* tribunal that has been accepted by all the parties to the dispute". Some members had referred to the "uncertainty" factors existing in the arbitration mechanism where there was no *compromis d'arbitrage*, in other words, an agreement defining the issue to be litigated. In order to overcome some of these uncertainties, some members had suggested an additional clause to Article 33 to supplement the initial agreement to arbitrate by a clear commitment by the parties to the new Convention that it should be read as an agreement to refer all disputes arising from the interpretation or application of the new Convention to the arbitral process. In addition, some members had also proposed the insertion of an additional provision for a referral of a dispute to the International Court of Justice

for a judicial settlement. However, there were some difficulties concerning "voluntary acceptance of jurisdiction". In order to overcome this problem, some members had seen the need for another provision to the effect that States Parties could express reservations on the jurisdiction of the International Court of Justice. In that way, it was felt, the draft articles would command broad acceptance.

Having considered the various strands of opinions existing within the Commission, it would be appropriate now to examine briefly the draft articles from the point of view of Asian-African States, with the available information. First, Drafting Committee to which the draft articles were referred had retained the texts as recommended with the exception of a few minor changes, based on suggestions made by the Special Rapporteur in his second report. Secondly, as pointed out by the Chairman of the Drafting Committee, the Committee had examined on second reading Article 5 and Article 7 which had been left pending, as well as all the articles that the Commission had referred to it at the current session, namely Articles 11 to 32 and the new Article 33 proposed by the Special Rapporteur to deal with the settlement of disputes. Lastly, in accordance with the mandate entrusted to it by the Commission, the Drafting Committee had adopted a draft resolution in which it suggested how the Commission should proceed if it should decide to deal with the confined groundwater in the draft articles.

The AALCC Secretariat concurs with the view of the Drafting Committee to retain the phrase "flowing into a common terminus". This term is qualified by the term "normally" in order to make it clear that there were cases to which this requirement did not apply. The retention of the phrase "common terminus" is crucial for Asian-African States as it involves the whole question of determining the limits of "watercourse". This outlining of limits has a direct impact on the activities undertaken in relation to a river. In the view of the AALCC Secretariat the Drafting Committee was correct when it stated that "the common terminus" requirement did not mean that the watercourse must terminate at a precise geographic location. There was, however, no unanimity in accepting this proposition within the Commission. For instance, it was pointed out that the inclusion of the word "normally" would broaden the scope of the draft articles to such an extent that a smaller country' entire territory might be covered. That, according to one member, would make the draft less acceptable to "States". Some other members had also pointed out that the expresson "common terminus" was inaccurate in hydrological terms. Article 2 was finally adopted on the understanding that watercourses such as Danube and

Rhine would not form one large system but would retain their existence as two separate systems.

Article 5 which incorporates a customary norm relating to law of international rivers, namely, "equitable and resonable utilization and participation" was adopted by the Drafting Committee without any change.Nevertheless, there was no agreement on the use of the term "optimal utilization" in paragraph 1, which according to one member seemed to impose an obligation on States to work to achieve optimal utilization with a view to squeezing the last drop of use out of a watercourse. It was felt that the term "sustainable" would be better as it reflected the new approach taken by States to the use of natural resources. This change was not supported on the ground that it would destroy the balance of the article. There was separate provision in Article 24 which referred to "planning the sustainable development of an international watercourse". Several members while agreeing with this view pointed out that "optimal utilization" did not necessarily mean "maximum utilization". Accordingly, after due deliberations, Article 5 was adopted without any change on the understanding that a reference to sustainable development would be made in the commentary. The AALCC Secretariat concurs with this viewpoint.

Article 6 outlines the "factors relevant to equitable and reasonable utilization". The Drafting Committee added a factor to the list of factors in paragraph 1: the dependency of the population on the watercourse, as an element which watercourse States must take into account to ensure that their conduct was in conformity with the obligation of equitable utilization contained in Article 5. In its view, the concept of dependency was both quantitative and qualitative in that both the size of the population dependent on the watercourse and the extent of its dependence were to be taken into account. This factor was accepted in an amended form to read: "the population dependent on the watercourse in each watercourse State". The AALCC Secretariat finds this addition acceptable and feels that it would enhance the utility of the article.

The Draft Committee had noted that there were opinions which had sought the deletion of Article 7 on the grond that the principle of "equitable and reasonable utilization" provided sufficient protection and incorporated the obligation not to cause "significant harm". However, it was pointed out that despite the existence of the concept of "reasonable and equitable utilization", the watercourse States should not be relieved from the specific obligation not to cause significant harm to other watercourse States. It is also important to note that the matter of utilization and development is related to the life of a vast number of the population living alongside the

watercourse having indigenous and local character. In view of this, due importance could be given to inter-governmental agreement. Considering the examples outlined in the commentaries the AALCC Secretariat finds that there could be situations which may need specific mention so as not to cause significant harm. It is rather difficult to outline such possibilities. Flexibility in defining such situations would be helpful. The proposition of an adequate consultation would be welcome. Some members, however, felt that Article 7 as proposed only obliges a State to make an effort to prevent the occurrance of significant harm; if that effort was not made, the obligation was breached, even before any result had occurred. The effort must fit the "technical and scientific standards commonly accepted by the States". The Commission had to undertake at this stage a fairly long debate on the substantive aspects of the word "significant" and "due diligence". The implication of any reformulation was also discussed. There were some members who preferred the deletion of this article as it was unclear. Finally, it was adopted on the understanding that the views of the members would be reflected adequately in the summary record.

Articles 8 to 31 were adopted by the Commission without any major modification. Article 16 which dealt with "absence of reply to notification", in the view of the Drafting Committee, took some account of the possible hardship caused to the notifying State and to provide an incentive for the notified State to reply to the notification so as to encourage that State to seek solution to problems of conflicting uses consistent with equitable and optimal utilization of watercourses and to protect the interests of the notifying State. It had, therefore, included in Article 16 paragraph 2 which provided that any claim to compensation by a notified State which had failed to reply within the period prescribed by Article 13 might be offset by the costs incurred by the notifying State for action undertaken after the lapse of such period which would not have been undertaken if the notified State had reacted in a timely fashion. Accordingly, as pointed out by the Drafting Committee, the tardy reaction of the notified State would result in the amount to which it was entitled by way of compensation for any damage it had suffered being reduced by the amount of any cost incurred by the notifying State due to the lack of timely response.

Article 32 concerning "non-discrimination" provides "for the protection of the interests of persons, natural or juridical, who have suffered or are under a serious threat of suffering significant transboundary harm as a result of activities related to an international watercourse". It also further provides that these persons should not be discriminated on the basis of

nationality or place where the injury occurred, in granting to such persons in accordance with its legal system access to judicial or other procedures or a right to claim compensation or other relief in respect of significant harm caused by such activities carried on under its jurisdiction. In the view of Drafting Committee, the opening phrase, reading that unless the watercourse States concerned have agreed otherwise, preserved the freedom of the watercourse States to agree on different arrangements such as resort to diplomatic channels. Nevertheless, one member of the Drafting Committee had found the article as a whole unacceptable on the ground that the draft article dealt with relations between States and should not extend into the field of actions by natural or legal persons under domestic law. In his opinion, the article dealt inadequately and possibly in a misleading way with the complex problem of private remedies in the context of international law.

The AALCC Secretariat endorses, at the outset, the procedures envisaged in Article 32. It has however, been pointed out that it would be inappropriate to give access to foreigners in the national legal systems without realizing its full implications. To that extent, the AALCC Secretariat finds the minority view of one of the Commission members acceptable. Nevertheless, Article 32 creates enough space for the States to take necessary action through their diplomatic and other channels. Legal remedy to a real sufferer in any system of law should be welcome. It is important to note that a legal system has its own balancing methods to regulate the misuse of such concessions. Such situations are difficult to envisage in the systems of many developing countries.

Article 33 deals with the "settlement of disputes". It provides a basic rule for the settlement of watercourse disputes. The provisions of this article are applicable in cases where the Watercourse States concerned do not have an applicable agreement for the settlement of disputes. First, it obliges watercourse States to enter into consultations and negotiations in the event of a dispute arising concerning a question of fact or the interpretation or application of the present articles. It is one of the unique features of this provision that it provides for the increasing utilization of joint watercourse institutions established by the concerned States while carrying out such consultations and negotiations. These consultations and negotiations should be conducted in good faith and in a meaningful way that could lead to an equitable solution of the dispute. This is a well established principle of international law. Secondly, it sets forth the right of any watercourse State concerned to request the establishment of a fact-finding commission. According to the Commission the purpose of

this provision is to facilitate the resolution of disputes through the objective knowledge of facts. This provision, in the view of AALCC Secretariat, has far-reaching implications. It is uncertain as to how objectively the fact-finding commission can work, particularly while dealing with very sensitive issues. Some States may find it difficult to endorse the constitution of fact-finding missions as its findings may pose problems in the amicable resolution of disputes. The composition of the fact-finding Commission needs to be commented upon. It is composed of one member nominated by each State concerned and in addition a member not having the nationality of any of the States concerned, but chosen by the nominated members shall serve as Chairman. Fact-finding, in a sense, is a highly subjective affair. Nominated members may have problems with the objective assessment of available data. In such instances, it is the Chairman who will be a major deciding factor. Considering the importance of the Chairman, States concerned may not agree with the choice of the Chairman in a given case. However, consultations and negotiations may help in clearing such problems. Nevertheless, it is important to note that the fact-finding commissions are very useful, particularly when the dispute mainly involves a crucial aspect of fact and law. Some of the difficulties mentioned above could be overcome through specific mandate of the fact-finding commission itself.

The next stage in the settlement of disputes deals with the resolution of problems in constituting the fact-finding commission itself. The provision gives the nominated members a period of four months after the establishment of the Commission to agree on a Chairman. If they fail to agree on a Chairman, any party to the dispute may request the Secretary-General of the United Nations to appoint the Chairman. The rule also provides for any of the parties to the dispute to request the Secretary-General of the United Nations to appoint a single member Commission if any of the parties fails, within four months, to nominate a member. The person to be appointed may not be a national of any of the States concerned. These provisions, it may be noted, are intended to avoid the dispute settlement mechanisms being frustrated by the lack of cooperation of one of the parties. Furthermore, there is also a provision which obliges all the watercourse States concerned to provide the Commission with the information it may require.

This article also sets out a rule for the submission of the dispute to arbitration or judicial settlement. It is provided: "If, after twelve months from the initial request for fact-finding mediation or conciliation commission has been established, six months after receipt of a report from the

Commission, whichever is later, the States concerned have been unable to settle the dispute, they may by agreement submit the dispute to arbitration or judicial settlement". In order to encourage the acceptability of the dispute settlement mechanism, it is provided in the commentaries certain exceptions to the criteria of jurisdiction. It is stated "in the event that there are more than two watercourse States Parties to a dispute and some but not all of those States have agreed to submit the dispute to a tribunal or the International Court of Justice. It is to be understood that the rights of the other watercourse States who have not yet agreed to the referral of the dispute to the tribunal or the International Court of Justice. It is to be understood that the rights of the other watercourse States who have not yet agreed to the referral of the dispute to the tribunal or the International Court of Justice cannot be affected by the decision of that tribunal or the International Court of Justice."

Some members sought to show certain contradictions in the terminologies. For instance, it was pointed out that the meaning was obscure in the phrase "any of them may... submit" and suggested the idea of a unilateral application, whereas the phrase "subject to the agreement of the States concerned" suggested referral by way of a *compromis*. In the view of the Special Rapporteur, he had intended the phrase to cover several possible cases: a special or *ad hoc* agreement, an agreement within the framework of a watercourse agreement, the case in which the States concerned were parties to an agreement for the peaceful settlement of disputes covering, *inter alia*, that type of problem or the case in which the States concerned had individually accepted the jurisdiction of the International Court of Justice. It should be noted that the Special Rapporteur had proposed this article with a view to providing for the better functioning of the Convention. As already stated, the Commission while sharing this view considered that the proposed dispute settlement mechanism should be simple and realistic and should not depart from the overall tone of the draft which was based on consent and cooperation among riparian States. Furthermore, the dispute settlement mechanism should have room for some different procedures of settlements taking into account regional conditions without imposing a series of fixed procedures.

It is necessary to briefly deal with the resolution adopted by the Commission while concluding its meeting, particularly concerning unrelated confined groundwaters. The resolution recognized that confined groundwater, that is groundwater not related to an international watercourse, was also a natural resource of vital importance for sustaining life, health and the

integrity of ecosystems. It also recognized the need for continuing efforts to elaborate rules pertaining to confined transboundary groundwater and expressed its view that the principles contained in its draft articles on the law of non-navigational uses of watercourses may be applied to transboundary confined groundwater; it recommended States to be guided by the said principles, where appropriate, in regulating transboundary groundwater; it further recommended States to consider entering into agreements with the other State or States in which the confined transboundary groundwater was located; it recommended also that in the event of any dispute involving transboundary confined groundwater, the States concerned should consider resolving such dispute in accordance with the provisions contained in Article 33 of the draft articles, or in such other manner as may be agreed upon.

Several members of the Commission had felt that the confined groundwater needed more indepth study. The Special Rapporteur while responding to this question pointed out that he had submitted a study at the current session on the question of the feasibility of including confined groundwater in the draft articles. The subsequent discussion in the Commission, he noted, showed that there were three broad threads of opinion, such as (a) that the draft articles as a whole should be expressly extended to cover confined groundwater; (b) that confined groundwater should not be included within the scope of the draft articles; and (c) that a provision should be incorporated in the draft articles providing that the principles embodied in them would apply *mutatis mutandis* to confined groundwater. In the view of AALCC Secretariat the resolution balances all these views and also does not foreclose the possibility of a future detailed study on this topic. The Secretariat endorses the views of the Commission that the work on this specific topic simply reflects the current level of knowledge of the members of the Commission on the question. Nevertheless, it offers a useful frame of reference to States for the management of confined transboundary groundwater to which the obligations, *inter alia* not to pollute, not to cause harm, and to exercise due diligence in joint and equitable utilization could be applied.

With these views the Commission adopted on second reading the draft articles on the Law of the Non-Navigational Uses of International Watercourses on the understanding that it would decide at a later stage on the recommendation to be addressed to the General Assembly concerning the follow-up action on the draft articles. The Commission also expressed its deep appreciation and warm congratulations to the Special Rapporteur for his outstanding contribution.

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

Introducing his tenth report at the Forty-sixth Session of the Commission, the Special Rapporteur, Mr. Julio Barboza recalled that the International Law Commission had at its forty-fourth session, *inter alia*, decided that the draft articles on "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law" should deal first with preventive measures in respect of activities creating a risk of causing transboundary harm and then with the necessary remedial measures when such activities have caused transboundary harm. Once the Commission has completed consideration of the proposed articles on these two aspects of activities having a risk of transboundary harm, it will then decide on the next stage of the work.

The Special Rapporteur expressed the view that once the Commission had completed the consideration of the issue of prevention in the context of the response measures that he had proposed in the second chapter of his report the Commission would need to examine the "two types of liability viz. State Liability for the failure to fulfil obligations of prevention, which constitutes liability for a wrongful act, and the liability in principle of the private operator" i.e. Civil Liability. The Commission in the view of the Special Rapporteur, would also need to consider the relationship between the two types of liability as well as the provisions common to them. Apart from considering these issues the Special Rapporteur also dealt with the issue of "the available *procedural means of enforcing liability*".[1]

The Special Rapporteur, Mr. Julio Barboza, proposed to employ the term "*response measures*" in referring to prevention *ex post facto* since such measures cannot factually and methodologically be dealt with within the sphere of reparation. In doing so, he recalled that several members of the Commission had, during the Forty-fifth Sesson, expressed the view that prevention *ex post* or, to put it differently, measures adopted after the event to prevent or minimize transboundary harmful effects, should not be regarded as preventive measures, as the latter (i.e. preventive measures) always came before the event and not after. Although the Drafting Committee had at the previous session opted for the approach advocated by some members and hence draft article 14 had dealt only with prevention *ex ante*, or measures to prevent incidents, the Special

1. See A/CN.4/459.

Rapporteur, however believed that what had been identified as "prevention *ex post*" is nonetheless not reparation and therefore cannot be included in the chapter on reparation without making a methodological error. In his view, prevention involves two different things— (i) the incident itself; and (ii) the damage it might cause. The *ex post* preventive measures to which he referred are taken *after* the occurrence of an incident but *before* all the damage had materialized. The objective of such *ex post* measures was to control, or intercept, the chain of events that had been set in motion by an accident and resulted in damage or harm. Consequently, it was not possible to deal with them as part of reparation because while harm is a legal concept "it represents actual events."

The Special Rapporteur argued that in the context of the pollution of an international watercourse, measures which could be regarded as rehabilitative in the State of origin could be of a preventive nature in the context of transboundary harm. He referred to several international instruments dealing with prevention of environmental harm or with civil liability regimes where measures were identified as *preventive*. He therefore proposed the inclusion of the following definition of the term "response measures" in Article 2 of the draft articles:

> "Response measures means any reasonable measure taken by any person in relation to a particular incident to prevent or minimize transboundary harm".

Having thus dealt with the question of prevention both *ex ante* and *ex post* in Part III of his tenth report the Special Rapporteur dealt with the issue of State Liability. In his oral presentation he stated *inter alia* in this regard that the first question to be addressed was whether there was some form of strict State liability for transboundary harm or damage. He expressed the view that there could be such (State) liability for transboundary damage and that it could be incurred if all else failed. He pointed out in this regard that although the late Professor Quentin Baxter had also taken a similar view, State practice had not followed that trend but had opted for stipulating the civil liability of the operator. The only instrument, it was emphasized in this regard, that had provided for the "absolute" liability of the State was the Convention on International Liability for Damage caused by Space Objects mainly because at the time of its negotiation and adoption States had regarded space activities as their exclusive concern.

Emphasizing the advantages presented by the civil liability channel the Special Rapporteur stated that compensation of the victims of

transboundary harm was determined by a court, through due process of law so that victims did not have to rely on the discretion of the affected State which might not, for political reasons, take action. It was pointed out that the State of origin did not need to respond to the action of private persons before the municipal courts of another State. It may be mentioned that civil liability is always strict liability and it is in hazardous activities that the application of this form of no-fault liability has its origin. There are two legal principles which cannot be discarded merely because the operator is in one country and the victim in another. The person who created the risk and profited from the hazardous activity must be liable for its injurious consequences and it would be in-equitable to place the onus on the victim. The draft articles proposed to be elaborated could provide the instrument or device on which the strict (no-fault) liability of the operator could be based.

Addressing himself to the question whether the State under whose jurisdiction or control the activity which had caused harm, should share in the operator's liability, the Special Rapporteur stated that a survey of State practice revealed divergent possibilities. A State could have no liability for transboundary damage caused by accidents (*force majeure*); the operator would have strict liability for damage caused and the State would have to furnish the funds for that portion of the compensation which was or could not be satisfied by private operator or his insurance. A third possibility was where the operator would have the *primary strict liability* for the damage caused while the State would have secondary, or rather, residual responsibility for that portion of the compensation which was not satisfied by the operator, provided that the damage would not have occurred if the State had not failed to comply with one or more of its obligations. A fourth scenario was one where the State bore both strict liability and responsibility for a wrongful act depending on where the harm occurred as in the Convention on International Liability for Damage Caused by Space Objects. He pointed out in this regard that both the Commission and the Sixth Committee had in the past expressed their preference for a subsidiary liability of the State. He argued that it would be simplest not to impose any form of strict liability on the State and to draw the sharpest possible distinction between its liability for its failure to fulfil its obligations (liability for wrongful acts) and strict liability for harm caused by incidents resulting from the risk involved in the activity in question. Liability would be incurred in any case by the liable private party and possibly—by a group of liable parties. The advantage of this system would be to simplify the relationship between State liability and

the liability of private parties and perhaps, to make the draft more acceptable to States. It would also simplify the procedural aspects. Since only domestic courts would be competent and such thorny issues as that of a State appearing before a Court in a case involving a private party, particularly if it had to do so in the domestic courts of another State, would not arise. He submitted to the Commission an alternative formulation on State liability which is somewhere in between the two systems. The proposed draft article reads:

Alternative A :

"Residual liability for a breach by the State"

Harm which would not have occurred if the State of origin had fulfilled its obligations of prevention in respect of the activities referred to in article 1 shall entail the liability of the State of origin. Such liability shall be limited to that portion of the compensation which cannot be satisfied by applying the provisions on Civil liability set forth herein.''

Alternative B :

"The State of origin shall in no case be liable for compensation in respect of harm caused by incidents arising from the activities referred to in article 1".

Having thus explored the relationship between a State and the injured persons the Special Rapporteur now addressed himself to the issue of State liability for wrongful acts i.e. relationship between States *inter se* resulting from the failure of a State to comply with its own obligations. Referring to the draft articles on State Responsibility currently before the Commission, he stated that while failure on the part of a State to comply with its obligations gave rise to a number of obligations such as compensation, satisfaction, assurance and guarantees of non-repetition, the wrongful act in question must, however, be duly proved to be such and that an affected State could not therefore veto a lawful activity of the other State. The State thus remains obligated for only failure to take preventive measures. Where a State were to allow an activity within the scope of the present draft articles to be carried out without prior authorization or notification it would not be complying with its obligations of due diligence. In such a case were transboundary harm to occur, while the operator would be strictly liable, the State (of origin) would only be responsible for the wrongful acts viz. the other consequences of the breach of its due diligence obligations. The formulation on international State liability proposed by the Special Rapporteur read as under:

"The consequences of a breach by the State of origin of the obligations of prevention laid down in these articles shall be those consequences established by international law for the breach of international obligations".

Addressing the question of civil liability, the Special Rapporteur pointed out that international watercourses have in general stipulated strict liability primarily on the ground that the victim must be promptly compensated. He then enumerated the features common to the existing civil liability regimes viz:—

(i) The operator bearing liability must be clearly identified, liability being joint and several when several operators bore liability;

(ii) The operator was invariably obliged to take out insurance or to provide some other financial guarantee;

(iii) Where possible, compensation funds were to be established;

(iv) In order for the system to function, the principle of non-discrimination must be respected; in other words, the courts of the State of origin should accord the same protection to nationals and to non-nationals, to residents and to non-residents;

(v) In all matters not directly covered by the Convention, the law of the competent court applied, provided it was consistent with the Convention;

(vi) Except where otherwise provided, judgments enforceable in one court were to be equally enforceable in courts of all States Parties to the Convention; and

(vii) Monetary compensations awarded could be transferred without restriction in the currency desired by the beneficiary.

The clear identification of the party bearing liability for any harm had the advantage not only of putting the potentially liable parties on notice and making them do their best to avoid causing harm, but also of facilitating redress of the injured party in case of harm. A review of civil liability regimes reveals *inter alia* that liability was channelled through the operator, on the grounds that the operator: (a) was in control of the activity; (b) was in the best position to avoid causing harm; and (c) was the primary beneficiary of the operation and should therefore bear the cost of the operation to others. Relying on the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, as adopted by the Council of Euorpe, owing to its general character Mr. Barboza proposed provisions for defining the operator and his liability, stipulating insubstance that "operator' meant the person who exercised

the control of an activity and that the operator bore liability for any significant transboundary harm caused by that activity during the period in which he exercised control over the activity; and that, if several operators were involved in an incident, they were jointly and severally liable, unless an operator proved that he was liable only for part of the harm, in which case he would be liable only for that part of the harm. Based on these premises he proposed the following provision for the consideration by the Commission:

Liability of the Operator

The operator of an activity referred to in article 1 shall be liable for all significant transboundary harm caused by such activity during the periods in which he exercises control of such activity.

(a) In the case of continuous occurrances, or a series of occurrance having the same origin, operators liable under the paragraph above shall be held jointly and severally liable.

(b) Where the operator proves that during the period of the commission of the continuous occurrance in respect of which he is liable only a part of the damage was caused, he shall be liable for that part.

(c) Where the operator proves that the occurrance in a series of occurances having the same origin for which he is liable has caused only a part of the damage, he shall be held liable for that part.

Recourse against third parties

No provision of these articles shall restrict the right of recourse which the law of the competent jurisdiction grants to the operator against any third party.

Relying on the existing civil liability Conventions, Mr. Barboza took the view that the operator conducting activities under consideration had to provide a financial guarantee. To that end, it would be for the State to require the operator to take out insurance or to set up a financial security scheme in which operators would have to participate. Actions for compensation could be brought directly against the insurer or the financial guarantor. The proposed draft article on financial securities read:

Financial securities of insurance

In order to cover the liability provided for in these articles, States of origin shall, where appropriate, require operators engaged in dangerous activities in their territory or otherwise under their jurisdiction or control to participate in a financial security scheme or to provide other financial guarantees within such limits as shall be determined by the authorities of such States, in accordance with the assessment of the risk involved in the activity in question and the conditions established in their internal law.

Existing conventions had identified various courts as competent to hear claims. The list included courts having jurisdiction in the place: (a) where the harm had occurred; (b) where the operator resided; (c) where the injured party resided; or (d) where preventive measures were supposed to have been taken. Each of those courts offered advantages in terms of gathering evidence and by virtue of its link with the claimant or the defendant. He proposed that the first three possibilities should be adopted and suggested the following formulation on the competent court:—

Actions for compensation of damages attaching to the civil liability of the operator may be brought only in the competent courts of a State party that is either the affected State, the State of origin or the State where the liable operator has his domicile or residence or principal place of business.

For civil liability regimes to be effective, however, the competent courts must ensure equal treatment before the law for nationals and non-nationals, residents and non-residents. The draft articles should therefore include a provision to that effect. The Commission might decide that the principle set forth in article 10 on non-discrimination was sufficient; otherwise, a specific article with equivalent language should be included in the section under-consideration. The Rapporteur proposed the following provisions on Domestic remedies:—

The Parties shall provide in their domestic law for judicial remedies that allow for prompt and adequate compensation or other relief for the harm caused by the activities referred to in article 1.

In respect of casuality, the Special Rapporteur proposed, in keeping with a provision of the Council of Europe Convention, that in considering evidence of a casual link between acts and consequences, the court should take due account of the increased danger of damage inherent in the dangerous activities i.e. of the specific risks of certain dangerous activities

causing a given type of damage. The text of the proposed article did not, however, establish a presumptipn of casuality between incident and harm. The proposed text reads:

When considering evidence of the casual link between the incident and the harm, the court shall take due account of the increased danger of causing such harm inherent in the dangerous activity.

With regard to the enforceability of the judgment, it was noted that an effective civil liability regime must provide for the possibility of enforcing a judgment in the territory of a State other than the one where the judgment had been pronounced. Otherwise, any efforts made by a private party to seek redress before a domestic court might be in vain. It is for that reason that civil liability conventions usually not only contained provisions on the enforceability of judgments, but also provided for certain exceptions, such as fraud; non-respect for due process of the law; and cases where the judgment was contrary to the public policy of the State where enforcement was being sought or was irreconcilable with an earlier judgment. Consequently, the party seeking enforcement must comply with the procedural laws of the State where the judgment would be enforced. The Special Rapporteur proposed the following formulation for the consideration of the Commission:

Where the final judgments entered by the competent court are enforceable under the laws applied by such court, they shall be recognized in the territory of any other Contracting Party unless:

(a) The judgment was obtained by fraud;

(b) Reasonable advance notice of the claim to enable the defendant to present his case under appropriate conditions was not given;

(c) The judgement was contrary to the public policy of the State in which recognition is sought, or did not accord with the fundamental standards of justice;

(d) The judgement was irreconcilable with an earlier judgement given in the State in which recognition is sought on a claim on the same subject and between the same parties.

A judgement recognized under the paragraph above shall be enforced in any of the Member States as soon as the formalities required by the Member State in enforcement is being sought have been met. No further review of the merits of the case shall be permitted.

With regard to exceptions to liability, the grounds set forth in civil liability conventions included armed conflict; unforeseeable natural

phenomenon of an exceptional and irresistible character; wrongful intentional conduct of a third party; and gross negligence of the injured party. Those were reasonable grounds for exceptions to liability in respect of damages resulting from the activities considered in the report. With regard to State Responsibility for wrongful acts, such as failure to comply with preventive provisions, the grounds for exception were those provided for in Part One of that topic. The Special Rapporteur proposed the following articles on exemptions:

1. The operator shall not be liable:

(a) if the harm was directly attributable to an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or

(b) If the harm was wholly caused by an act or omission done with the intent to cause harm by a third party.

2. If the operator proves that the harm resulted wholly or partially either from an act or omission by the person who suffered the harm, or from the negligence of that person, the operator may be exonerated wholly or partially from his liability to such person.

Chapter V of the tenth report dealt with the statute of limitations in respect of liability. Under civil liability conventions, the time-limit varied from one year, as in the Convention on International Liability for Damage Caused by Space Objects, to 10 years, in the case of the 1963 Vienna Convention on Civil Liability for Nuclear Damage. Time-limits were determined on the basis of various considerations, such as the time within which harm might become visible and identifiable or the time that might be necessary to establish a casual relationship between harm and a particular activity. Since the activities covered in the report were similar to those dealt within the Council of Europe Convention, the three-year statute of limitations provided therein seemed appropriate for civil liability claims, on the understanding that no procedure could be instituted after 30 years from the date on which the incident resulting in harm had occurred. The proposed article on time limits reads :

Proceedings in respect of liability under these articles shall lapse after a period of three years from the date on which the claimant learned, or could reasonably have been expected to have learned, of the harm and of the identity of the operator or of the State of origin in the case of State liability. No proceedings may be instituted once thirty years have elapsed since the date of the incident which caused the harm. Where the incident consisted of a continuous

occurrance, the periods in question shall run from the date on which the incident began and where it consisted of a series of occurrances having the same origin. The periods in question shall run from the date of the last occurrance.

The last chapter of the report dealt with procedures to enforce civil liability. In the event that a State was objectively responsible for failing to comply with its obligations of prevention, the procedural channel available was State to State and, consequently, the normal diplomatic procedures and the usual methods of settling disputes were applicable. However, where a State had to face a private party or another State before a domestic court, the situation could become more complicated and some of the possibilities referred to in the report could consequently be set aside. Thus, where a State was subsidiarily responsible for a wrongful act for amounts not covered by the operator or his insurer, it might have to appear before a domestic court. That possibility alone was sufficient reason to discard that type of State responsibility. Other situations also gave rise to serious difficulties, for instance where an affected State suffered *immediate* damage, as in the case of damage to its environment. Under such circumstances, the affected State might have to bring an action before a national court, which could be the competent domestic court of that same State. That might pose problems for the defendants. That type of difficulty was one reason to consider solutions such as that proposed by the Netherlands in the IAEA Standing Committee for considering the amendment of the Paris and Vienna Conventions on Nuclear Damage, namely, the creation of a single forum such as a mixed claims commission, which would be competent to hear claims between States, between private parties and States, and between private parties.

In the course of the forty-sixth session the Commission *inter alia* considered and adopted twelve articles referred to it by the Drafting Committee at the Forty-fifth Session in 1993 and at the present session. The draft articles adopted at the current session are Article 1 (Scope of the present Articles); paragraphs (a), (b) and (c) of article 2 (Use of Terms); Article 11 (Prior Authorization); Article 12 (Risk Assessment); Article 13 (Unauthorized Activities); Article 14 (Measures to Prevent or Minimise the Risk); Article 14 *bis* (earlier 20 Bis) (Non-transference of Risk); Article 15 (Notification and information); Article 16 (Exchange of Information); Article 16 *bis* (Information to the Public); Article 17 (National Security and Industrial Secrets); Article 18 (Consultations on Preventive Measures); Article 19 (Rights of the State Likely to be Affected); and Article 20 (Factors Involved in an Equitable Balance of Interests). It may be recalled that of the aforementioned draft Articles 1, 2, 11, 12 and 14

were adopted by the Drafting Committee at the Forty-firth Session in 1993. Some notes and comments on these draft articles may be found hereunder.

Draft Article 1 *Scope of the present articles* defines the scope of the articles to activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State and which involve a risk of causing significant transboundary harm through their physical consequences. The definition of the scope of the proposed articles introduces four criteria viz: (i) that the articles apply to *activities not prohibited by international law*; (ii) that the activities to which preventive measures are applicable are carried out in the territory or otherwise under the jurisdiction or control of States; (iii) that the activities proposed to be covered by these articles must involve a risk of causing significant transboundary harm; and (iv) that the significant transboundary harm must have been caused by the physical consequenes of such activities.

The first criteria viz. "activities not prohibited by international law" has been incorporated because of its critical role in delimiting the parameters of the articles and because it is crucial in making the distinction between the scope of this topic and that of the topic of State Responsibility which deals with the wrongful acts.

The second criterion or element viz. "activities carried out in the territory or otherwise under the jurisdiction or control of a State" employs three concepts viz. "control", "jurisdiction" and "territory". Although the expression "jurisdiction or control of a State" is more commonly employed in many international instruments such as the United Nations Convention on the Law of the Sea, 1982; the Stockholm Declaration 1972; The Rio Declaration on Environment and Development, 1992; and the United Nations Convention on Biological Diversity 1992, the Commission deemed it useful to include the concept of territory so as to emphasize the significance of the territorial nexus between activities under these articles and a State. The commentaries clarify further that for the purpose of these articles the term "territory" refer to areas over which a State exercises its sovereign authority. The use of the term "territories" also stems from concerns about a possible uncertainty in contemporary international law as to the extent to which a State may exercise extra territorial jurisdiction in respect of certain activities. The Commission by its own admission, is also aware that the concept of "territory" for the purposes of this article is somewhat narrow and that there were situations where, under international law a State exercises jurisdiction and control over places over which it has no territorial rights.

The third criterion is that of a risk of causing significant transboundary harm. Although the phrase "risk of causing transboundary harm" is to be taken as a single phrase, its first component viz. risk is intended to limit the scope of the topic, for the present to activities with risk and their consequences to exclude activities which in fact cause transboundary harm in their normal operation. The words "transboundary harm" are intended to exclude activities which cause harm only in the territory of the State within which the activity is undertaken or those activities which harm the global commons but *without* any harm to any other State.

The fourth element is that the significant transboundary harm must have been caused by the "physical consequences" of such activities. The Commission had agreed in the interest of maintaining this topic within a manageable scope to exclude monetary, socio-economic or similar fields. The most effective way of limiting the scope of the articles, it was felt by requiring that the activities in question should have transboundary physical consequences which result in significant harm.

Draft Article 2 aims to incorporate the definitions of terms for the purpose of the proposed draft articles. As indicated earlier the Commission at its forty-fifth session adopted the definitions of three terms viz. (a) risk of causing significant transboundary harm; (b) transboundary harm; and (c) State of origin.

Paragraph (a) of draft article 2 defines *risk of causing significant transboundary harm* as encompassing a low probability of causing disastrous harm and a high probability of causing other significant harm. It alludes to the combined effect of the probability of occurrance of an accident and the magnitude of its injurious impact. It is the combined effect of risk and harm which sets the threshold. In the view of the Commission a definition based on the continued effect of risk and harm appropriate for the proposed article and that combined effect should reach a level that is deemed significant. The view prevalent in the Commission is that the obligations of prevention imposed on States should not only be reasonable but also sufficiently limited so as not to impose such obligations in respect of virtually all activities because the activities under consideration are not prohibited by international law.

The definition allows for a spectrum of relationship between risk and harm all of which would reach the level of significant harm. It identifies two poles within which the activities proposed to be regulated, will fall. One pole is where there is a *low probability* of causing disastrous harm—the characteristic of ultra hazardous activities. The other pole is a high probability of causing harm which while not disastrous is still significant.

It is to be understood that significant is sometimes more than detectable but less than serious or substantial. The harm must lead to a real deterimental effect on such matters as human health, industry, property, environment or agriculture in other States and such detrimental effects must be susceptible of being measured by factual and objective standards.

Paragraph (b) defines transboundary harm as meaning a harm caused in the territory of or in places under the jurisdiction or control of a State other than the State of orign whether not the States share a common border. This definition includes activities conducted under the jurisdiction or control of a State for example on the High Seas or within the Exclusive Economic Zone of a coastal State with effects on the territory of another State or in places under the other State's jurisdiction or control. The intention is to be able to clearly distinguish between a State to which an activity within the ambit and scope of the proposed articles is attributable from a State which has suffered the injurious impact. The separating boundaries are the territorial boundaries, jurisdictional boundaries and control boundaries and therefore the term "transboundary harm" is to be understood in the context of the expression within its territory or otherwise under its jurisdiction or control as employed in draft article 1.

Paragraph (c) of draft article 2 defines the State of origin as the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out. The definition is self-explanatory and when there is more than one State of origin they shall individually and jointly as appropriate comply with the provisions of the proposed article.

Draft article 11 entitled "*Prior authorization*" sets out the first supervisory function and responsibility of a State in respect of activities involving a risk of causing significant transboundary 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 planned and which may transform an activity into one involving a risk of causing significant transboundary harm.

This formulation is in effect a modified version of the opening sentence of the measures on preventive measures that the Special Rapporteur had proposed in his eighth report. It would have been observed 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 Risk Assessment stipulates that a State shall ensure that an assessment is undertaken of the risk of the activity causing significant transboundary harm before taking a decision to authorize an activity which though not prohibited by international law creates a risk of causing transboundary harm. It is further provided such an assessment should include an evaluation of the possible impact of that activity on persons or property as well as on the environment of other States.

It may be recalled that the Special Rapporteur had last year 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 Commission, however, feels that as these articles are designed to have global application, they cannot be too detailed and that they should contain only what is necessary for clarity.

The subject matter of this draft 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 its own territory to prevent or minimize the transboundary impact.

The requirement of environmental impact assessment plays an important role, and is compatible with Principle of the Rio Declaration on Environment and Development which like-wise provides for impact assessment of activities that are likely to have a significant adverse impact on the environment. The draft article leaves open the question of who should conduct the assessment to the States. Neither does the draft article specify what should be the content of the risk assessment. In sum the specific of the authority (governmental, non-governmental or operator) who shall evaluate the risk assessment and accept responsibility therefore—as well as what ought to be the content of assessment is left to the domestic law of the State in which such assessment is conducted.

Draft article 13 on "*Pre-existing Activities*" provides that where a State having assumed its obligations under these articles, ascertain that

an activity with a risk of causing a transboundary harm is being conducted in its territory or otherwise under its jurisdiction or control without the required prior authorization it shall direct those responsible for carrying out the activity that they obtain the necessary authorization. Pending authorization the State may permit the continuation of the activity in question at its own risk.

It was pointed out during the discussions in the Commission that draft 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 undertaking or as a modification.

Draft Article 14 entitled "*Measures to Prevent or Minimize the Risk*" requires States Parties to take all legislative, administrative or other actions to ensure that all necessary measures are adopted to prevent or minimize the risk of transboundary harm of activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State which create a risk of causing significant transboundary harm through their physical consequences. It needs to be stated that the Drafting Committee had proposed that the expression "prevent and minimize the risk" of transboundary harm in the present and other draft articles is to be reconsidered in the light of the decision of Commission as to whether the concept or prevention includes, in addition to measures aimed at preventing or minimizing the occurrance of an accident, measures taken after the occurrance of an accident to prevent or minimize the harm caused.

Draft Article 14 *bis* (formerly 20 *bis*) on "*Non-transference of Risk*" stipulates that in taking measures to prevent, control or reduce the transboundary effects of dangerous activities States shall ensure that risk is not simply transferred directly or indirectly, from one area to another or that one risk is not transformed from one type into another. It reiterates a general principle of non-transference of risk and is inspired, *inter alia* by the provisions of Article 195 of the Convention on the Law of the Sea, 1982 and Principle 14 of the Rio Declaration on Environment and Development, 1992. It may be recalled that during the debate at the forty-fifth Session whilst some members of the Commission had deemed this provision logical to be included in the draft articles, others had taken the view that the proposed article only complicated the proposed provisions.

Draft Article 15 addressed to "*Notification and Information*" provides that should the risk assessment of an activity, undertaken in accordance with draft Article 12, reveal the possibility of significant transboundary harm, the State of origin should inform the State or States likely to be affected and shall transmit to them the available technical and other relevant information on which the assessment is based and an indication of a reasonable time within which a response is required. Paragraph 2 further stipulates that where it subsequently comes to the knowledge of the State of origin that there are other States which are likley to be affected, it should notify them accordingly. The ninth report of the Special Rapporteur had, in this regard, referred to three recent 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.

Draft article 16 addresses itself to facilitating preventive measures, and provides for timely *Exchange of Information* between the States concerned, relevant to preventing or minimizing the risk causing significant transboundary harm and deals with steps to be taken after an activity has been undertaken. It is aimed at preventing or minimizing the risk of causing harm.

Draft article 16 *bis* on *Information to the Public* is inspired by new trends in international law, in general, and environmental law in particular, of seeking to involve in the decision making processes, individuals whose lives, health, property and environment might be affected by providing them with a chance to present their views and be heard. It requires that States provide their own public with information, whenever possible, relating to the risk and harm that may result from an activity subject to authorization and to ascertain their views thereon. The twofold requirements of this provision are: (i) that States provide information to their public regarding the activity and the risk and the harm it involves; and (ii) that States ascertain the view of the public. The purpose of providing information to the public is to ascertain their views. Without the latter i.e. the ascertainment of the views of the public the purpose of the provision would be defeated. As to the content of the information to be furnished to the public it is understood that such information includes basic information about the activity and the nature and scope of the risk and harm it may entail.

The Special Rapporteur explained the need for an article on "*National Security and Industrial Secrets*" 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 interest 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 attempted to maintain a reasonable balance between the interests of the States involved by requiring the State of origin that refuses to provide information on the basis of national security and industrial secrets, 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.

Draft article 17 purports to introduce an exception to the obligation of States to furnish information in accordance with the provisions of draft articles 15, 16 and 16 *bis*. It recognizes the need for striking a balance between the interests of the State of origin and the State that are likely to be affected. Therefore it requires the State of origin that is withholding information on the grounds of national security or industrial secrecy to cooperate in good faith with other State in providing as much information as can, under the circumstances be furnished.

Draft article 18 provides for *Consultations on Preventive Measures* between the States concerned, that is the State of origin and the States that are likely to be affected. 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, it may be recalled, this article was criticized particularly because of the use of the phrase "mutually acceptable solutions" which it was said might have harmful consequences. The Secretariat of the AALCC had concurred with that view since while it is desirable that State should be obliged to consult, it is far-fetched to require them to reach an agreement.

Draft article 19 on "*Rights of the State likely 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 requiring consultations may claim an equitable share of the cost of the assignment from the State of origin. This provision is aimed at protecting the rights and the legitimate interests of States that have reason to believe that they are likely to be adversely affected by an activity and enable them to request consultations. It also imposes a coordinate obligation on the State of origin to accede to that request.

It will be recalled that while introducing his ninth report at the Forty-fifth Session, the Special Rapporteur had 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 interests. In addition to procedures which allow States to negotiate and arrive at such a balance of interests, there are principles of extent to such an exercise. He had then proposed a set of factors involved in an equitable balance of interests.

The proposed formulation had referred both to equitable principles and to scientific data and most of the members had found it useful particularly as the articles were to become a framework convention whose provisions were meant not to be binding but to act as guidelines for States.

Draft article 20 provides that in order to achieve an equitable balance of interests the States concerned shall take into account all relevant factors and circumstances and goes on to furnish a non-exhaustive list of such factors and circumstances. The wide range of diversity of the types of activities which is proposed to be covered by these articles, coupled with the different situations and circumstances in which they will be conducted make it impossible to compile an exhaustive list of factors relevant to all individual cases.

STATE RESPONSIBILITY

At its forty-sixth session, the International Law Commission had before it the second chapter of the Fifth Report of the Special Rapporteur, Mr. Gaetano Arangio-Ruiz, addressed to the consequences of the acts characterized as international crimes under Article 19 of Part One of the draft articles[1] which although presented at the previous session, the

1. See A/CN.4/453 Add 2 and 3. Also see *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 p.59 at pp.73-90.

Commission had, owing to lack of time, been unable to consider last year. The Commission also had before it the Sixth Report of the Special Rapporteur.[2] The Sixth Report of the Special Rapporteur, Mr. Gaetano Arangio-Ruiz, was of the nature of an appraisal or overview of the pre-counter measures settlement provisions envisaged thus far for the draft articles. The third chapter of the Sixth Report had presented to the Commission, in the form of an questionnaire, the different issues raised by the distinction between crimes and delicts.

In the course of consideration of these issues the Members of the Commission emphasized the complexity of the problems which called for a reflection on the delicate and crucial notions of "international community, inter-State systems, fault and criminal responsibility of States, as well as the functions and powers of the United Nations organs. The debate in the Commission was on two main issues, viz. (i) the distinction between crimes and delicts as embodied in Article 19 of Part One of the draft articles;[3] and (ii) the issues considered by the Special Rapporteur as relevant to the elaboration of a regime of State responsibility for crimes.

In considering the distinction between crimes and delicts as embodied in Article 19, members of the Commission expressed divergent views with regards to such issues as (i) the concept of crime; (ii) the question of the legal and political basis of the concept of crime; (iii) the type of responsibility entailed by breaches characterized as crimes in Article 19;

2. See A/CN.4/461 and Add 1 and 2.

3. Article 19 of the Part One of the draft articles as adopted in 1980 reads:

International crimes and international delicts

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from:

(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

(iv) the need for the concept of crime; and (v) the definition contained in Article 19. As regards the first issue, viz. the concept of a crime, some members of the Commission expressed the view that the concept of crime posed to conceptual difficulties as the distinction between crimes and delicts reflected a qualitative difference between basic infringements of the international public order and ordinary delicts which did not threaten the fundamental premise upon which the international society was based viz. the co-existence of sovereign States. Other members, however, questioned the tenability of a concept of State crimes. It was argued in this regard that the many internationally wrongful acts which could be attributed to a State varied in magnitude depending on the subject-matter of the obligation breached, the significance the international community attached to the obligation, the scope of the obligation in question and the circumstances under which the breach of the obligation occurred.

As to the question of the legal and political basis of the concept of crime, while some members held the view that the concept of crime was rooted in positive law and described as falling within *lex lata* in as much as such acts as aggression, apartheid and genocide were regarded by the international community as a whole as violating its human rights and were characterized as criminal acts in international conventions. In addition, it was argued, the components of an international crime emerged from jurisprudence, State practice and the judgments of international tribunals established at Nurembourg and Tokyo as well as the judgement of the International Court of Justice in the *Barcelona Traction, Light and Power Company case*.[4] In this regard attention was drawn to the differences between a crime and a violation of an obligation *erga omnes* and that the ICJ had not confined itself to speaking of obligations *erga omnes* but had emphasized the significance of the rights involved thereby signifying that it (the court) had in mind particularly serious violations and not ordinary delicts. However, other members argued that the concept of crimes was not *lex lata* because there was no instrument making it an obligation for States to accept it. Some members while sharing the view that the concept of State crimes did not exist in *lex lata* expressed their willingness with certain reservations, to acknowledge that certain acts which could be committed only by States should be characterized as crimes.

The question whether a State could incur criminal responsibility or the type of responsibility entailed by breaches characterized as crime in Article 19 of Part One of the draft articles also brought forth divergent

4. ICJ Reports 1970, p.32.

opinions. For some members the notion of State responsibility for crimes posed no conceptual difficulties as it was feasible to envisage a concept equivalent to *mens rea* in the case of acts imputable to States. It was argued in this regard that while criminal responsibility was primarily individual, however, it could be collective and that the *recognition of the criminal responsibility of a legal person* in certain conditions and circumstances is a step forward in the development and codification of law. It was also argued that since a State could cause such a damage to the international community as a whole, a society should not be allowed to shift the responsibility for crimes committed in its name on to mere individuals and that the concept of a State crime should therefore be accepted even if the collective sanctions against the State in question may well be prejudicial to its entire population and not only to its leaders. History, it was pointed out, was replete with examples of criminal States. On the other hand, it was argued that criminalization of States should be abandoned since a State could not be placed on the same footing as its Government or a handful of persons who might be in charge of its affairs. The proponents of this view emphasized that crimes were committed by individuals who used the territory of the State and its resources to commit international delinquencies for their own criminal purposes. With regard to the element of *mens rea*, it was pointed out that it was not feasible to attribute the mens rea of one individual to a legal entity such as a State. Reference was also made to the *maxim societas delinquere non potest* (a State including its people as a whole cannot be subject of criminal law) and the view expressed that it was a moot point whether an administrative organ, as a legal person, could be regarded as a subject of criminal law. Those speaking against the concept of State responsibility also relied on such maxims as *nullum crimen nulla peone sine lege and inter alia* argued that in the absence of a legal organ to try and punish States, the attribution of a criminal responsibility to a State is inconceivable.

It may be stated that the Commission had in 1976 not sought to establish the criminal responsibility of the State and therefore the use of the term "crime" should not in any way prejudge the question of the content of the responsibility for an international crime. State responsibility in international law, it may be recalled, is neither criminal nor civil and it is very simply international, specific and different. The specificity of State responsibility is clear *inter alia* in that some internationally wrongful acts apart from entailing the responsibility of the State concerned entail also the individual responsibility of the perpetrators of the internationally wrongful acts and the perpetrators could not hide behind their functional immunities.

Apropos the incorporation of the need for the concept of crime in the proposed draft articles it was *inter alia* argued that the concept of crime served a fundamental purpose i.e. of freeing the rules relating to State responsibility from the strait jacket of bilateralism and, in the event of particularly serious wrongful acts, enabling the international community acting within the framework of international institutions or through individual States to intervene in order to defend the rights and interests of victim States. It was pointed out that the comity of States as a distinct legal person was the victim of an international crime and that therefore the concept of an international crime would assist in the promotion in the international community to the status of a quasi public legal authority. On the other hand, however, it was argued that the delict-crime distinction was neither appropriate nor necessary in the proposed draft articles on State Responsibility the main objective of which was to require States to pay compensation for the damage that they may cause and not to punish them. It was emphasized that the concept of an international crime was neither necessary nor sufficient to free the international community from the yoke of bilateralism. It was unnecessary because there was little or no justification for going so far as the punitive measures that were inevitably linked with the notion of a crime. Nor was it deemed sufficient since it failed to settle the issue of the category of *erga omnes* violations as a whole. Consideration, in the opinion of the secretariat of the Asian-African Legal Consultative Committee, would require next to be given to the question whether the concept of State crimes have not lost much of their relevance in the face of the retreat of apartheid and colonialism in the post-cold war scenario. The universally shared concern of environment and sustainable development, climate change and the principle of common heritage of mankind all have contributed to the adding a new dimension not only to inter-State relations but also to the question of State responsibility.

It will be recalled that during the Forty-fifth Session of the Commission the Special Rapporteur, Mr. Gaetano Arangio-Ruiz had pointed out that the list of internationally wrongful acts constituting international crimes incorporated in Article 19 dated back to 1946 and had asked the Commission 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. He had also pointed out then that the formulation of the general notion of international crime in Article 19 with wordings characterized by certain elements rendered it rather difficult to classify a breach as a crime or a delict and hence to ascertain which unlawful acts now came or should come under a regime of "aggravated" responsibility.

When the definition embodied in Article 19 was considered at the Forty-sixth Session, some members of the Commission expressed the view that the said provision was unsatisfactory in that it was too general and did not really propose a definition of crimes but rather stressed the degree of gravity of the act which was characterized as a crime without defining the threshold of gravity at which a delict became a crime. It was pointed out that the definition took no account of the wilful intent or of the concept of fault even though that element was inseparable from the concept of crime. Some members expressed concern that in view of its legislative history Article 19 as it stood now implied that a State had to continue to suffer the legal consequences of an international crime committed earlier even if the political, social or human circumstances in which that crime had been committed had long ceased to exist. On the other hand, it was pointed out that Article 19 adequately expressed the underlying intention and made it clear that while most breaches could be dealt with bilaterally there were other breaches of such a gravity that affected the entire international community. Some members expressed the view in this regard that the article had rightly been drafted in general terms in view of the fact that the concept of international crime was evolutive in nature and a flexible formulation adaptable to possible enlargement of the category of crimes was desirable.

Apropos the issues deemed by the Special Rapporteur Mr. Ruiz, as relevant to the elaboration of a regime of State responsibility the consideration in main was on the following aspects viz. (a) the mechanism for determining that a crime has been committed; (b) the possible consequences of a determination of a crime; (c) the punitive implications of the concept of crime; (d) the role of the United Nations in determining the existence and the consequences of a crime; (e) the possible exclusion of crimes from the scope of application of the provisions in circumstances precluding wrongfulness; (f) the general obligation of non-recognition of the consequences of a crime; (g) the general obligation not to aid a criminal State. Divergent views were expressed on these issues and the debate on the subject may be deemed to have been inconclusive owing largely due to lack of time.

It may however be recalled that in his fifth report the Special Rapporteur had *inter alia* considered the extent to which the functions and competence of the United Nations organs were or should be made legally suitable for the implementation of the consequences of an international crime. The three specific questions dealt with in this regard were: (i) whether the existing powers of General Assembly, the Security Council and the International Court of Justice included the determination of the existence,

attribution and the consequences of wrongful acts contemplated in draft Article 19 of part one of the draft articles; (ii) *de lege ferenda* whether and in what sense the existing powers of those organs should be legally adapted to the specific tasks; and (iii) to what extent the powers of the UN organs affected or should affect the faculte right or obligation of States to react to the internationally wrongful acts either in the sense of substituting for individual reaction or in the sense of legitimizing coordination, informing or otherwise conditioning such individual reaction.

It may be recalled that at the Commission's Forty-fifth Session the Drafting Committee had adopted the text of draft Articles 11, 12, 13 and 14 which had been presented to the Commission but the latter had not acted on them pending the submission of the commentaries to the draft articles. In his sixth report, the Special Rapporteur Mr. Gaetano Arangio Ruiz, presented at the current session of the Commission had proposed reformulation of draft Article 11 (countermeasures by an injured State) and draft Article 12 (conditions relating to resort to counter-measures) and the Commission had agreed to refer to his proposals to the Drafting Committee. The Commission at its forty-sixth session *inter alia* provisionally adopted the text of draft Article 11 (counter-measures by an injured State); draft Article 13 (proportionality) and draft Article 14 (prohibited counter-measures) for inclusion in Part Two of the proposed draft Aticles. The Commission deferred taking action on draft Article 12. It may be mentioned that the Commission agreed that draft Article 11 may require to be reviewed in the light of the text that may eventually be adopted for draft Article 12. The complete set of the draft articles on counter-measures will be formally submitted to the General Assembly next year.

In his Sixth Report the Special Rapporteur had among other things observed that the concept of adequate response must find a place in the proposed formulation relating to counter-measures by an injured State in order to strike a proper balance between the injured State and the wrong-doing State. The Special Rapporteur was of the view that the effect of omission of the notion of adequate response would be to allow the injured State a lot of scope to use counter-measures in order to compel both cessation and reparation. In the case of cessation, the injured State would be allowed to apply counter-measures without affording the alleged wrong doing State any opportunity to explain that the wrongful act was not attributable to it or that there was no wrongful act. In the case of reparation on the other hand, the State may well continue to be the target of counter-measures even after it had admitted its responsibility and even though it was in the process of providing reparation and/or satisfaction.

The Chairman of the Drafting Committee pointed out in this regard that the text of draft Article 11 adopted by the Commission in 1993, had by making the right of the injured State to resort to counter-measures subject to the conditions and restrictions set forth in subsequent articles, provided a safeguard against abuse. It was pointed out that the requirement of proportionality met in part the concerns of the Special Rapporteur. It was also emphasized that the phrase "as necessary to induce (the wrongdoing State) to comply with its obligations under Articles 6 to 19 *bis*" implied that there were cases where resort or continued resort or counter-measures might not be necessary. Further, it was pointed out that the phrase "as necessary" made it clear that counter-measures might be applied only as a last resort where other means available to an injured State such as negotiation, diplomatic protests or measures of retortion might be ineffective in inducing the wrongdoing State to comply with its obligations. It also indicated that the decision of the injured Sate to resort to counter-measures was to be made reasonably and in good faith and its own risk.

For easy reference, the texts of draft Articles 11, 13 and 14 as adopted are reproduced herewith.

Counter-measures by an Injured State

1. As long as the State which has committed an internationally wrongful act has not complied with its obligations under Articles 6 to 10 *bis*, the injured State is entitled, subject to the conditions and restrictions set forth in Articles..., not to comply with one or more of its obligations towards the State which has committed the internationally wrongful act, as necessary to induce it to comply with its obligations under Articles 6 to 10 bis.
2. Where a counter-measure against a State which has committed an internationally wrongful act involves a breach of an obligation towards a third State, such a breach cannot be justified as against the third State by reason of paragraph 1.

Article 13

Proportionality

Any counter-measure taken by an inuured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State.

Article 14

Prohibited countermeasures

An injured State shall not resort, by way of counter-measures, to:

threat or use of force as prohibited by the Charter of the United Nations;

(b) extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed an internationally wrongful act;

(c) any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents;

(d) any conduct which derogates from basic human rights; or

(e) any other conduct in contravention of a peremptory norm of general international law.

B. INTERNATIONAL CRIMINAL COURT: AN UPDATE

I. Background

The Draft Statute of the International Criminal Court was adopted by the International Law Commission (ILC) during the course of its forty-sixth session held from May to July 1994. The ILC adopted the draft statute consisting of 60 articles with commentaries. This topic was also discussed at the AALCC's Legal Advisers' Meeting held in New York in October 1994. The AALCC Secretariat had prepared a summary of the discussions together with brief commentaries which took place at the ILC and in its Working Group to facilitate substantive discussion in the Sixth Committee. These Secretariat commentaries have been reproduced in the Secretariat study relating to the "International Law Commission prepared for Doha Session in this Chapter. The Sixth Committee considered this topic in the background of the recommendation made by the ILC that the General Assembly convene an international conference to study the draft statute and conclude a convention on the establishment of an international criminal court.

Accordingly, the Sixth Committee noting this recommendation decided to establish an *ad hoc* Committee open to all States Members of the United Nations or its Specialized Agencies to review the major substantive and administrative issues arising out of the draft statute.

II. Views from the Sixth Committee (General Assembly, U.N.)

The Chairman of the International Law Commission Mr. Vladlen Vereshchetin, while introducing the Report of the Commission on the Work of its forty-sixth session, noted the substantive aspects of the intensive work carried out by the Commission. While concluding his summary presentation, he pointed out that the establishment of an international

criminal court would be a major contribution to the rule of law in international affairs and would crown efforts initiated by the United Nations almost half a century ago. In his summary presentation he outlined the scheme of the draft statute as adopted by the ILC.

The Chairman made a particular reference to the inter-relationship between the draft Code and the statute of an international Criminal Court. While noting the emphasis laid by a large number of members on the need to ensure the necessary coordination between the provisions of the two instruments, he pointed out that there was a widespread feeling in the Commission that, although the two exercises should not be rigidly linked and while the adoption of one of the instruments should not be contingent on the adoption of the others. According to him there were inevitable provisions and problems common to the two drafts and care should be taken to avoid contradictions between them.

A. Relationship with the United Nations:

The views expressed in the Sixth Committee did not differ substantially on the question of establishment of the Court. There were also issues concerning the mode of establishment such as—whether it should be through a treaty or by way of a resolution of the General Assembly; and what should be the relationship of the Court with the UN. The delegate of Japan, for example, said that the consent of States was indispensable if an international criminal court was to be effective. He also pointed out that the present draft statute made it clear that a court would complement national criminal justice systems and that it would be established by a treaty and not by a UN resolution. The view that the Court should be established through a treaty received wider acceptance. The delegate of the Republic of Korea did not favour the creation of the Court as a UN organ as it would cause a number of difficult legal problems. He, however, did not elaborate these probable legal problems. On the other hand, he favoured the creation of the Court by a multilateral treaty and linking it with the UN by an agreement.

According to the delegate of Egypt the ideal form of relationship between the Court and the UN would be through a convention; one similar to that between the Tribunal on the Law of the Sea and the UN. The delegate of Algeria did not favour treaty as the most appropriate mode for the Court's creation. In his view, it could be set up as an organ of the UN. That, according to him, would give it the moral authority and universal character of the UN without affecting its independence and autonomy.

The issue of jurisdiction was the most debated clause in the draft statute. States however have widely differed in their perception of the extent and scope of the jurisdiction of the Court. One view was that the Court should have jurisdiction over a very limited number of very serious crimes, as only in exceptional cases where states prepared to waive sovereignty in the criminal law field to international supervisory mechanisms. Based on certain criteria, the only crimes, according to some States, which should fall within the Court's jurisdiction were genocide, aggression, serious war crimes and systematic and large-scale violations of human rights. According to the delegate of China, although there was no doubt that genocide was a serious international offence which should be presented and punished, should that necessarily give the court jurisdiction over that category of crimes.

While referring to the jurisdictional aspects, the delegate of India noted that the statute incorporated a balanced approach and conformed to the principles "of making haste slowly" towards the establishment of an international criminal justice system and a permanent international criminal court. He also noted that by focussing on the national criminal jurisdiction and by requiring the consent of States concerned, priority had been given to the establishment of international criminal jurisdiction only in principle, and the matter of prosecution of the case was subject to States' consent.

According to the delegate of the Republic of Korea the jurisdiction of the court was the core of the draft statute. In his view it was still open to dispute that the crimes provided for in article 20 were well-defined enough to meet the standard of *nullum crimen sine lege*. However, considering that the draft statute was a procedural instrument, and did not intend to define or codify crimes, the present formulation was a basis for further discussion. As to the modalities in which States might accept the Court's jurisdiction over crimes in question, his Government was pleased that the draft adopted the so-called "opting-in" system as a general rule. However, he noted, the rigid consensual basis of jurisdiction as implied in that system should not frustrate the objective of establishing the Court. Further, according to him it was appropriate to qualify the requirement of the acceptance of the Court's jurisdiction by the custodial and territorial state with two important objections, namely, the concept of inherent jurisdiction over the crime of genocide and the waiver of requirement in the case of a recourse to the Court initiated by the Security Council.

The delegate of the Islamic Republic of Iran noted that the jurisdiction

of the Court should be limited to most serious crimes and should not call into question the jurisdiction of national criminal court. Expressing his views, the delegate of Egypt stated that the court must exercise its jurisdiction free of political pressure in order not to lose credibility. In the view of the delegate of Pakistan, the jurisdiction of the court should be confined to individuals and should not involve states as it would be contrary to the principle of sovereignty and the sovereign equality of states. The delegate of Sri Lanka also called for a thorough review of the jurisdictional aspects.

C. Security Council and the Court

The relationship between the Court and the Security Council was another crucial aspect which was outlined by many delegates. The delegate from China addressed this issue. He had questions on the soundness of paragraph 1 of article 23—on action by the Council—and whether it was a correct interpretation of the Charter. According to him some States had reservations about whether the Security Council was authorized under Chapter VII of the Charter to set up compulsory juridical jurisdiction. He was not against the Council making use of the Court to investigate and prosecute serious international crime, but it should do so only in ways which were incompatible with the character and status of the court and with the principle of voluntary acceptance of states. The delegate from India referred to the special power conferred on the Security Council to refer crimes to the Court under Chapter VII of the charter as a novel one.

One view was that the Security Council should have the sole authority to submit complaints to the court. On the other hand, it was also noted by some states that since the Security Council was a political body and not a judicial organ, its involvement in the prosecution of individuals should not be considered. According to the delegate of Iran only the Security Council could decide when an act of aggression had occurred; to prohibit prosecution before the court because the Security Council was considering threats to international peace and security would compromise the authority of the court. According to him the Council had, in recent years, been using a sweeping definition of threats to peace and security.

D. Procedural Issues and Future Course:

The debate in the Sixth Committee addressed issues which were essentially procedural in nature. There was a widespread support among members to establish a permanent international criminal court. While outlining the need for an accurate procedural law for investigation and public trials, the delegate of Japan expressed concern that since crimes in many cases may be committed in the context of political turmoil,

judicial proceedings might be abused for political ends particularly through perjury. Accordingly, he laid emphasis on the need for adequate safeguards. So, he also proposed further examination in informal consultations in the Sixth Committee.

There were views in the Sixth Committee supporting the convening of a preparatory conference before the statute entered into force. Such a conference, it was pointed out, should finalize the text of the statute. In one view the draft statute was silent on the restitution of property illegally acquired. The Indian delegate stated that his government was not in favour of rushing adoption of the statute, considering that the court could by itself not be effective in deferring serious crimes being committed in the context of threats to or breaches of international peace and security. Its various provisions, he noted, deserved careful study. Further, he preferred a general debate without reopening the delicate balance contained in the proposed statute, within and outside the UN, before formal decisions to hold a diplomatic conference to adopt the statute could be taken.

On behalf of the AALCC the Secretary-General delivered a brief statement reviewing the AALCC's work programme in relation to the ILC. In view of the importance of the topic relating to the Draft Statute of the International Criminal Court, the AALCC Secretariat held a Seminar in New Delhi to facilitate further discussion. The report of the Seminar is annexed to this chapter as Annex B.

ANNEX-A

ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT

Report A/49/738
A/RES/49/53
9.12.94

The General Assembly

Recalling its resolution 47/33 of 25 November 1992, in which it requested the International Law Commission to undertake the elaboration of a draft statute for an international criminal court,

Recalling also its resolution 48/31 of 9 December 1993, in which it requested the International Law Commission to continue its work on the question of the draft statute for an international criminal court, with a view to elaborating a draft statute for such a court, if possible at the Commission's forty-sixth session in 1994,

Noting that the International Law Commission adopted a draft statute for an international criminal court at its forty-sixth session and decided to recommend that an international conference of plenipotentiaries be convened to study the draft statute and to conclude a convention on the establishment of an international criminal court,

Expressing deep appreciation for the offer of the Government of Italy to host a conference on the establishment of an international criminal court,

1. *Welcomes* the report of the International Law Commission on the work of its forty-sixth session, including the recommendations contained therein;

2. *Decides* to establish an *ad hoc* committee open to all States Members of the United Nations or members of specialized agencies to review the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, in the light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries;

3. *Also decides* that the *ad hoc* committee will meet from 3 to 13 April 1995 and, if it so decides, from 14 to 25 August, and submit its report to the General Assembly at the beginning of its fiftieth session, and requests the Secretary-General to provide the *ad hoc* committee with the necessary facilities for the performance of its work;

4. *Invites* States to submit to the Secretary-General, before 15 March 1995, written comments on the draft statute for an international criminal court, and requests the Secretary-General to invite such comments from relevant international organs;

5. *Requests* the Secretary-General to submit to the *ad hoc* committee a preliminary report with provisional estimates of the staffing, structure and costs of the establishment and operation of an international criminal court;

6. *Decides* to include in the provisional agenda of its fiftieth session an item entitled "Establishment of an International Criminal Court", in order to study the report of the *ad hoc* committee and the written comments submitted by States and to decide on the convening of an international conference of plenipotentiaries to conclude a convention on the establishment of an international criminal court, including on the timing and duration of the conference.

REPORT ON THE SEMINAR ON "INTERNATIONAL CRIMINAL COURT" ORGANIZED BY THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE IN COLLABORATION WITH THE INDIAN SOCIETY OF INTERNATIONAL LAW ON 12TH JANUARY 1995.

The Secretariat of the Asian-African Legal Consultative Committee in collaboration with the Indian Society of International Law (ISIL) organized a Seminar on the proposed "International Criminal Court", in New Delhi on 12 January 1995. The one day Seminar had for its objective the consideration of the draft statute of the International Criminal Court as adopted by the International Law Commission during the course of its forty-sixth Session held during May to July 1994. The Seminar was informal in nature wherein all the participants spoke in their individual capacities and no formal conclusions were drawn or resolution adopted.

The morning session of the Seminar was chaired by Mr. Chusei Yamada, the President of the AALCC and the afternoon session by Dr. Najeeb Al-Nauimi the Vice President of the AALCC. The Seminar was attended by participants from 16 member-States of the AALCC viz. Bangladesh, the People's Republic of China, Cyprus, Ghana, India, Iraq, Japan, Kenya, Mongolia, Myanmar, Nigeria, Oman, Palestine, Philippines, Qatar, Sri Lanka, Thailand, Uganda, and Republic of Yeman. The representatives of two non-member states of the AALCC viz. Angola and Ethiopia and the former Secretary-General of the AALCC, Mr. B. Sen, the officials of the International Committee of the Red Cross; the Members of the Executive Council of the Indian Society of International Law; academics from the Jawaharlal Nehru University and several eminent members of the Supreme Court Bar of India also participated in the Seminar.

Professor R.P. Anand, Secretary-General of the Indian Society of International Law (ISIL) while welcoming the participants on behalf of the Executive Council of the ISIL highlighted the significance and topicality of the subject of the Seminar. Mr. Tang Chengyuan, the Secretary-General of the AALCC in his introductory remarks *inter alia*, welcomed the participants on behalf of the AALCC. Emphasizing the importance of the subject he stated that the matter had been the subject of intense debate both within the Sixth Committee of the United Nations as well as the meeting of the Legal Advisors of Member-States of the Asian-African

Legal Consultative Committee held at the UN Headquarters in New York in October 1994.

The discussions in the Seminar were based mainly on the papers presented by panelist which included Mr. S.T.A. Epaminondas, the Cyprus High Commissioner; Mr. M. Tom George, Minister, Nigerian High Commission; Dr. P.S. Rao, Joint Secretary and Legal Advisor, Ministry of External Affairs, Government of India; and Dr. V.S. Mani, Professor of International Space Law, Jawaharlal Nehru University. Valuable comments and observations were made by several participants notable among whom were Ambassador Chusei Yamada, the President of the AALCC; Dr. Najeeb Al-Nauimi, the Vice President of the Committee; Mr. Anthony Forsow, Ghana High Commissioner, and Professor Rahamatullah Khan, Jawaharlal Nehru University.

The debate on the subject covered almost all fundamental aspects of the proposed International Criminal Court viz. the mode of its establishment; the relationship of the court with the United Nations in particular the Security Council; the question of jurisdiction of the proposed court; the law applicable etc. Several auxiliary questions arising out of these issues were also debated.

Dr. Najeeb Al-Nauimi, Minister Legal Advisor, Government of the State of Qatar and the Vice-President of the AALCC in his address referred to the various aspects of draft statute. Although in his view, the International Law Commission's (ILC) work on the draft was good, the draft Statute presented was far from perfect as it had many gaps which required to be considered. In his view the questions of sovereignty needed further examination. He also noted that the provisions relating to collection of evidence and application of procedural aspects called for thorough examination. One of the areas which required review was concerning the "relationship between the Security Council and the International Criminal Court". In conclusion, he hoped that the discussion in the Seminar would go beyond the traditional areas and would lead to few possible new dimensions.

Dr. P.S. Rao, Joint Secretary and Legal Advisor, Ministery of External Affairs, India and the Member of the ILC gave an account of the evolution of the substantive aspects concerning the establishment of an International Criminal Court. In his assessment of the various factors which were crucial in the evolution of the Court, he made particular references to the Paris Peace Conference, Genocide Convention and several other unofficial proposals. In the post-second World War era, his reference was to Nuremberg and Tokyo Tribunals. He also traced evolutionary process within the ILC

itself in the early 1950s and its renewed importance in the recent times. According to Dr. Rao, the revival of the idea at the ILC was due to the increasing dissolutions in the international society itself. To substantiate these views, Dr. P.S. Rao referred to the increasing degree of terrorist activities, violation of human rights, crimes relating to illicit traffic in narcotics. He also noted the increasing inability of the Security Council to deal effectively with these crimes.

In his address Dr. Rao referred to the primary work of the ILC i.e., the Code of Crimes. He made a particular reference to the definitional problems in the Code. He noted that these difficulties in defining accurately some of the categories of crimes such as aggression, terrorism, apartheid, intervention etc. arose due to political and other reasons involved. He pointed out that in these circumstances it would be difficult for the ILC to find a common factor to establish a consensus. In this regard, he also noted the conflicting views prevalent as regards the question of linking the Code and the Court.

In the last part of his address Dr. Rao outlined the specific aspects of the draft statute. He referred to the issues concerning 'applicable law'. He also referred to the implications of having an *ad hoc* tribunal. The complicated question in his view, was primarily concerning, the compatibility of the national criminal jurisdictions with the trial procedures. "Jurisdiction', he noted, was accordingly another issue which eluded consensus. Financial constraints at various stages of operation, in his view needed greater consideration.

Mr. Chusei Yamada, the Chairman drew the attention of the participants to the background study prepared by the AALCC Secretariat. He hoped that it would be of help in outlining the major provisions of the draft statute. He clarified that the ILC members attended the deliberations in their individual capacities. He also expressed the view that as a member of the ILC, he did not necessarily endorse all the commentaries provided in the ILC draft. He also drew the attention of the participants to the establishment of an *ad hoc* committee by the Sixth Committee (Legal) of the General Assembly to thoroughly discuss these aspects. He hoped that these aspects would be taken note of by the participants.

In the discussion that followed, Dr. Najeeb Al-Nauimi felt that the political consensus was the main issue. Mr. Tom George, Minister, Nigerian High Commission, agreed that these issues were complex and eluded consensus. He felt that there should be ways to overcome the problems and complexities. In this regard, he referred to the successful functioning

of the International Court of Justice (ICJ). Dr. P.S. Rao while distinguishing the civil and criminal jurisdictions and the possible implications, expressed the view that there should be a non-discriminatory comprehensive criminal jurisdiction. Mr. Anthony Forsow, the High Commissioner of Ghana expressed the view that a permanent court be established by overcoming all the hurdles. There was also a view expressed by one of the participants (Capt. J.S. Gill) that the implications relating to maritime crimes, such as piracy should be given due consideration. Mr. Chusei Yamada, the Chairman drew the attention of the participants that it was left finally to the States to decide the modalities of submitting an accused to the ICC. He also noted that the consent of the individual was not required. He also drew a distinction between the application of substantive and procedural law. He noted that at the stage of trial, the procedural aspect of the law would be decided by the Court itself.

The Second session of the Seminar was chaired by Dr. Najeeb Al-Nauimi, Minister Legal Advisor, Government of the State of Qatar. Prof. Rahamatullah Khan of the Jawaharlal Nehru University, New Delhi and a member of the Executive Council of the ISIL, initiated the discussion. He mainly dealt with the question of the desirability of the establishment of permanent International Criminal Court and its repercussions in the post-cold war scenario wherein a new world order as envisaged and designed by few powerful states; and the conflicting interpretation concerning peace enforcement provisions of the UN Charter and the views given by the Security Council in this regard; and observed that the ICC considering this is a judicial solution to a political problem.

Mr. M.M. Tom George Minister, Nigerian High Commission, in his paper referred to the historical reasons which necessitated the establishment of the ICC. He also referred to the jurisdictional issues of the ICC in relation to other international tribunals. While referring to the scope of the applicable law, he expressed the view that the regional treaties should be considered along with the multilateral universal treaties. He also noted the problems prevalent in the enforcement procedures. He suggested that the proposed ICC should be delinked from the Security Council. He also expressed the view that the proposed Court should be situated in one of the countries of the South and he offered his country's cooperation in this regard. With a view to make the Court more accessible, he suggested that the Court's *locus standi* principle should not only be limited to States. He proposed that the UN Human Rights Commission, National and International Bar Associations could be allowed to bring the cases before the Court.

In his address Mr. Stavros A. Epaminondas the High Commissioner of Cyprus, expressed the view that the ICC should be created by a treaty. He also proposed that it should be closely linked to the United Nations. He also referred to the complexities involved in Article 20 while listing the crimes. He would prefer the formulation as it appears in Articles 21 and 22 of the Draft Code of Crimes against the Peace and Security of Mankind and adopted on first reading rather the formulation listed in the Commentary to Article 20 of the Draft Statute. Thus the exceptionally serious war crimes of "The establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory" and the "deportation or possible transfer of population", should be included in the list of crimes. He also noted that the system of declarations of acceptance of the jurisdiction that is envisaged by the International Law Commission could lead to a situation where, although a sufficient number of states are prepared to establish such a Court, a lack of declarations of acceptance of the Court's jurisdiction will mean that it can exercise no or only very few practical functions.

Professor V.S. Mani, Jawaharlal Nehru University, New Delhi. primarily addressed the jurisdictional issues of the Court. He also referred to the ILC's initial work and the views expressed by few individual members regarding the establishment and viability of the ICC. He referred to various authorities in this regard. Prof. Mani specifically addressed some of the important provisions of the Draft Statute, such as (a) The Preamble, (b) Jurisdiction; (c) The issues concerning the access to the Court; (d) The action by the Security Council; (e) Challenges to jurisdiction and admissibility and (f) Conflicting-overlapping of jurisdictions. Mr. Anthony Forsow, the High Commissioner of Ghana expressed his views on the issues concerning jurisdiction. Dr. Najeeb, the Chairman pointed out the limited mandate of the ILC as given by UN. He also pointed out that the political constraints were not in its purview.

While responding to the comments made, Dr. P.S. Rao addressed some of the specific issues, such as list of crimes, knowledge, state responsibility and crimes. There was a brief discussion on the issue of enforcement. During this discussion a reference was made to the possible conflict between the final resolution of the dispute by the ICJ and the enforceability of the same by the Security Council. Dr. Najeeb clarified the exact operation of these provisions and pointed out that there were no conflict situations in its actual operation.

In his concluding remarks, Dr. Najeeb thanked the participants for making the Seminar a fruitful one. Prof. R.P. Anand, on behalf of ISIL

also thanked the participants. He felt that the purpose of the Seminar was to raise questions and understand their implications that, he noted, was achieved. Mr. Tang Chengyuan, the Secretary-General, AALCC, while thanking the participants, noted that the Seminar served its purpose by generating a lively and purposeful discussion.

IX. International Trade Law

(i) Introduction

The AALCC Secretariat prepares a report on the recent legislative developments in the field of international trade law every year. 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. Also under the article 4D of the Committee's statutes: the functions and purposes of the committee shall be:

"to exchange views and information on matters of comman concern having legal implications and to make recommendations thereto, if deemed necessary". The AALCC Secretariat undertook a study on "The New GATT Accord". This study has also been reproduced in this chapter.

Thirty-fourth session: Discussions

The *Deputy Secretary-General* (Mr. Essam Abdel Rehman Mohammed introduced two Secretariat documents viz. (1) Report on the Legislative Activities of the United Nations and other International Organizations concerned with International Trade Law (No. AALCC/XXXIV/Doha/95/10) and the Report on the International Seminar on Globalization and Harmonization of Commercial and Arbitration Laws, held in New Delhi on 31 March—1 April 1995. (Doc. No. AALCC/XXXIV/Doha/95/10-A). This Seminar* had been organized by the AALCC with the technical support of UNCITRAL, UNIDO, World Bank and WIPO and hosted by the Indian Council of Arbitration.

* The Report of the Seminar has been annexed at the end of this Chapter at Page 337.

The Report focussed on the legislative activities of UNCITRAL, UNCTAD, UNIDO and UNIDROIT. In addressing the work of UNCITRAL, the report has dealt primarily with the UNCITRAL Model Law on Procurement of Goods, Construction and Services, the text of which had been adopted by UNCITRAL at its 1994 Session. As for UNCTAD, the Report gives an account of the functional reorientation and institutional restructuring which the UNCTAD had undergone since UNCTAD VIII. The report provided an overview of the work of UNCTAD in such areas as International Trade, Trade Efficiency, Transnational corporations and Investment, Privatization and Enterprise Development, Commodities, Services, Poverty Alleviation etc.

On UNIDO, the Report gives a brief account of projects nearing completion: (i) Principles for International Commercial Contracts; (ii) International Protection of Cultural Property; (iii) International aspects of Security Interests in Mobile Equipment; (iv) Franchising; (v) Inspection Agency Contract; and (vi) Civil Liability connected with the carrying out of dangerous activities.

The *Representative of UNCITRAL* commended the Secretariat for providing a succinct account of the work of UNCITRAL, and observed that since there was a general acceptance that creation of a conducive legal infrastructure was a *sine qua non* to the growth of international commercial transaction, the role of UNCITRAL was tailored to the achievement of that objective. The UNCITRAL texts were developed by legal experts representing the main legal systems and as such were internationally accepted. He then provided the context in which UNCITRAL had undertaken the work leading to the adoption of UNCITRAL Model Law or Procurement of Goods Construction and Services. It had been noted that procurement legislation in many countries were deficient, and lacked transparency and clarity which often resulted in misuse of public funds and corrupt practices. This prompted UNCITRAL to develop this Model Law which is intended to assist States in updating and modernizing their existing procurement laws or favour the enactment of new legislation where none existed. He urged the Member States in the AALCC to consider the Model Law while revising the existing procurement legislation or enacting a new one. He pointed out that there was already a fair amount of interest in the Model Law and that UNCITRAL was ready to provide technical assistance to States enacting or revising the procurement legislation. He also referred to the work UNCITRAL was undertaking in relation to BOT contracts by which developing countries lacking finance can promote infrastructure development.

The Delegate of the Republic of Korea noting that the BOT mechanism

had emerged as a preferred contractual modality for promoting infrastructure development, wished to know the recent successful BOT projects.

The *Representative of UNCITRAL* pointed out that the BOT mechanism for infrastructure development was a fairly new concept, and therefore there were no examples of completed projects yet. He stated that BOT was a method of project financing wherein government gave concession to build, operate and transfer the project at the final stage. This process took a considerably long time. He drew the attention of the Committee to some of the projects in South East Asia which were either at discussion stage or at the stage of execution. He made a particular reference to a hydel project being undertaken in Pakistan. He also informed the Plenary about the widespread application of this mechanism in Latin America. He was of the view that the BOT mechanism of project finance was sure to emerge as a major factor in the coming decade.

The *Deputy Secretary-General* (Mr. Essam Abdel Rehman Mohammed) also introduced the study on the New GATT agreement contained in document AALCC/XXXIV/Doha/95/11. He pointed out that the main focus of the study was to highlight some of the features of this Agreement in three crucial areas, namely (a) The World Trade Organization (b) Trade-related Investment Measure and (c) Trade-related Aspects of Intellectual Property Rights. He also noted that the implications flowing from these Agreements had both positive and negative aspects for the Member States of the AALCC. He pointed out that the study before the Committee outlined the major policy initiatives which actually shaped the Final Agreement. In his view the approach adopted by the study was to see how best the Agreement could be utilized to serve the interest of countries belonging to different categories.

The WTO, he noted was to facilitate the implementation, administration and operation of the Uruguay Round Agreements and also provided a forum for negotiations among its members concerning their multilateral trade relations. As regards the Agreement on trade-related investment measures, he pointed out that the study outlined the divergences existing in the negotiation of investment measures between the developed and developing countries. On the other hand, intellectual property rights presented an entirely new transwork. Accordingly, he pointed out, the scope and intensity of the obligations contained in the Agreement on TRIPs, went far beyond what had been envisaged at the beginning of the negotiations. The primary focus of the study, he noted, was on the need to consider the requirements of developing countries.

(ii) Decision on the "Progress Report in the field of International Trade Law".

(Adopted on 22nd April 1995)

The Asian-African Legal Consultative Committee at Its Thirty-fourth Session:

Having taken note of the Report concerning the "Legislative Activities of the United Nations and other International Organizations concerned with International Trade Law" contained in Doc. No. AALCC/XXXIV/Doha/95/10 and the Secretariat study on "The New GATT Accord: its implications for the Asian-African Countries" contained in Doc. No. AALCC/XXXIV/Doha/95/11;

1. *Expresses* its appreciation for the brief of documents prepared by the Secretariat on the recent developments in the field of International Trade Law;

2. *Also expresses* its appreciation for the continued co-operation with the various international organizations competent in the field of international trade law and hopes that this cooperation will be intensified in the future;

3. *Urges* the Members States of the AALCC to consider the UNCITRAL Model Law on Procurement of Goods, Construction and Services as they reform or enact their legislation on procurement and also

to consider adopting, ratifying or acceding to the other texts prepared by the United Nations Commission on International Trade Law (UNCITRAL);

4. *Requests* the Secretary-General to continue to monitor the developments in the area of international trade law and present a report thereon to the Asian-African Legal Consultative Committee at its Thirty-fifth Session.

(iii) Secretariat Brief

A. Legislative Activities of United Nations and other Organizations Concerned with International Trade Law

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

The twenty-seventh session of the United Nations Commission on International Trade Law (UNCITRAL) was held at the UN Headquarters in New York, from 31 May to 17 July 1994. The substantive topics before this session were: (i) New International Economic Order—Draft Amendments to the UNCITRAL Model Law on Procurement of Goods and Construction to incorporate procurement of services; (ii) International Commercial Arbitration—preparation of Draft Guidelines for Preparatory Conferences in Arbitral Proceedings; (iii) Legal Issues in Electronic Data Interchange (EDI)—Preparation of Model Statutory Provisions on EDI; and International Contract Practices; Draft Convention on Independent Guarantees and Stand-by Letters of Credit. The Commission also considered possible future work to be undertaken in relation to assignment of claims and related matters; cross-border insolvency and Build, Operate and Transfer (BOT) arrangements.

The main focus of discussion at this session was, however, a set of draft amendments aimed at incorporating the procurement of services into the UNCITRAL Model Law on Procurement of Goods and Construction, adopted at its last session in 1993 and consequent draft amendments to the Guide on Enactment of the Model Law on Procurement of Goods and Construction aimed at extending the scope of the Guide to procurement of services. The Commission adopted these amendments resulting in the

establishment of a more comprehensive Model Law on Procurement entitled "UNCITRAL Model Law on Procurement of Goods, Construction and Services".

On the topic of International Commercial Arbitration, the Commission examined the draft of the guidelines on Preparatory Conferences in Arbitral Proceedings prepared by the Secretariat. It is often considered useful to hold, particularly in international cases, a preparatory conference at an early stage of the arbitral proceedings amongst the participants to an arbitration. At such a conference, appropriate procedural decisions are taken and details of procedure settled so as to make the subsequent arbitral proceedings more predictable as well as more efficient and cost-effective. The preparation of the proposed Guidelines is motivated by the consideration that in appropriate circumstances, a preparatory conference is a useful exercise and internationally harmonized guidelines would assist practitioners in deciding whether to hold a preparatory conference, and if one is to be held, to help them prepare it and carry it out. The Draft Guidelines is made up of three chapters: Chapter I sets out general considerations; Chapter II sets out the guidelines on convening and conducting of preparatory conferences. Chapter III sets out guidelines on a checklist of possible topics which might be addressed in the preparatory conference. These issues could be divided into two parts: Issues required to be addressed at an early stage of the arbitral proceedings. These would include rules governing arbitral procedure, language of the arbitral proceedings and the place of arbitration. Issues which could be taken up at a later stage of the arbitral proceedings would include: definition of issues and the order of deciding them; undisputed facts or issues, matters relating to taking of evidence etc. Further issues suggested during the course of this Session for coverage in the proposed guidelines included: designation of an appointing authority if such an authority had not been designated; confidentiality of information disclosed during the arbitral proceedings; the use of EDI in the conduct of arbitral proceedings; and establishment of ground rules for communications between the parties and the arbitral tribunal.

After examination of the proposed Draft Guidelines, the Commission requested the Secretariat to revise them in the light of the suggestions made at the present session and to submit revised draft Guidelines with a view to finalization of the text at its next session.

On the topic of Legal Issues in Electronic Data Interchange (EDI), the Commission had before it two reports of its Working Group on EDI (A/CN.9/373 and A/CN.9/390) and noted with satisfaction that the Working

Group had begun the preparation of model statutory provisions for uniform rules on the legal aspects of EDI and related means of trade data communication. For expediting the work, the Commission requested the Working Group on EDI to at least complete a set of basic "core provisions" for consideration at the next session of the Commission in 1995, in particular since it had already been decided that the relationship between EDI users and public authorities as well as consumer transactions would not be the focus of model statutory provisions.

On the topic of International Contract Practices, the Commission noted the progress made by its Working Group on International Contract Practices as set out in the reports of the Working Group (A/CN.9/388 and A/CN.9/391) towards developing the draft of a Convention on Independent Guarantees and Stand-by Letters of Credit. The Working Group had revised 17 of the 27 articles of the Draft Convention. The Commission asked the Working Group to expedite its work so as to present the Draft Convention at its next session in 1995.

Finally, the Commission addressed itself to the scope of the work to be undertaken in regard to the three new topics before it: namely, assignment of claims and related matters; cross-border insolvency; and BOT arrangements. As regards the first topic, the Commission decided to limit itself to assignment of international commercial receivables, i.e. claims for payment of sums of money that arise from international commercial transactions, including assignment by way of sale or by way of security, non-notification assignment (a type of assignment in which the debtor is not notified of the assignment) and factoring (sale of receivables for financing and other purposes) to the extent not covered in the UNIDROIT Convention on International Factoring of 1988. This Convention covers assignments both by way of sale and by way of security. The Commission requested the Secretariat to prepare a detailed study on the issues that had been identified, possibly accompanied by a first draft of the uniform rules in cooperation with UNIDROIT and other international organizations active in this area such as the World Bank, the European Bank for Reconstruction and Development and the Inter-American Development Bank.

On the topic of cross-border insolvency, in which the problems are compounded by a wide disparity of national laws and conflicting jurisdictions, the Commission decided to concentrate on three sub-areas, namely, judicial cooperation, "access and recognition" and formulation of a set of model legislative provisions on insolvency aimed at achieving substantive unification of the insolvency law. In regard to judicial cooperation, the questions needed to be resolved included the extent of

judicial cooperation possible under the current law, for example by the application of the notion of comity and framing of necessary rules by which through judicial cooperation the problems arising as a result of parallel proceedings and conflicting legal regimes and jurisdictions could be addressed. "Access and recognition" concerned the granting of access to courts to representatives of foreign insolvency proceedings or creditors and to giving recognition to orders issued by foreign courts administering insolvency proceedings. The Commission, however, decided to ask the Secretariat to undertake at the present stage work on the twin issues of judicial cooperation and access and recognition.

On BOT arrangements, the Commission decided to study the desirability and feasibility of undertaking work on some of the legal problems that arise in BOT projects, including the creation of an enabling framework for such projects, after the UNIDO had finalized its "Guidelines for the Development, Negotiation and Contracting of BOT Projects" in September 1994. Typically, a BOT project is one in which a Government grants a concession for a period of time to a private consortium for the development of a project, the consortium then builds, operates and manages the project for a number of years after its completion and recoups its construction costs and makes a profit out of the proceeds coming from the operation and commercial exploitation of the project. At the end of the concession period, the project is transferred to the Government. Although BOT projects have already been used in the development of large infrastructural projects such as telecommunications networks, highways and other public transportation projects, port facilities and in energy supply, increasingly it is also being utilized for medium and small scale projects. BOT projects are particularly attractive for developing countries faced with decreasing borrowing capacity and declining budgetary resources. It yields them an opportunity to finance projects without involving public funds and without guaranteeing the repayments on any loans or returns on the investments made on the project.

Since a major achievement of the twenty-seventh session of the Commission has been the adoption of a consolidated text of the Model Law encompassing procurement of goods, construction and services this note focusses only on this important legislative work.

UNCITRAL Model Law on Procurement of Goods Construction and Services

Background

The work on the subject of procurement was first undertaken by UNCITRAL in 1986 and had been entrusted to its Working group on

NIEO. Since different considerations were involved in the procurement of goods and construction and in the procurement of services, it was decided at that time to first take up the preparation of a Model Law devoted to the procurement of goods and construction. Consequently 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 of Goods and Construction. The Working Group completed its mandate at the close of its fifteenth session by adopting the draft text. The draft of the Model Law as finalized by the Working Group was then circulated to Governments and interested international organizations for comment. At the twenty-sixth session of the Commission in 1993, the draft of the Model Law on Procurement of Goods and Construction 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 a Guide to Enactment of the Model Law on Procurement of Goods and Construction prepared by the Secretariat.

The Model Law on Procurement of Goods and Construction consisted of a Preamble and 47 articles arranged under five chapters. Chapter I set forth general provisions in Articles 1 to 15. Chapter II listed out the various methods of procurement and conditions for their use in Articles 16 to 20. Chapter III dealt with Tendering Proceedings in Articles 21 to 35. Chapter IV set out the provisions relative to procurement methods other than tendering in Articles 36 to 41. Finally, Chapter V set forth provisions establishing a right of review of acts and decisions of the procuring entity and governing its exercise in Articles 42-47.[1]

At its twenty-sixth Session (1993), after adopting the Model Law on Procurement of Goods and Construction, the Commission asked the Working Group on NIEO to proceed with the preparation of model statutory provisions on procurement of services. The Working Group devoted its sixteenth (Vienna, 6 to 17 December 1993) and seventeenth (New York, 14 to 25 March 1994) sessions for the purpose of discharging this mandate.

The Working Group began its task by considering the two approaches mooted before it in implementing its mandate. The first one consisted of the formulation of a free standing model law dealing exclusively with the procurement of services. This approach was stated to have the advantage of underscoring a distinct and specialized treatment for the procurement

1. For detailed analysis of the Model Law on the Procurement of Goods and Construction, see Notes and Comments of the AALCC Secretariat prepared for the 48th Session of the General Assembly.

of services because unlike in the case of procurement of goods and construction, it was mostly governed by non-price considerations. Moreover, the existing Model was premised on the tendering method which in most cases would be unsuitable for the procurement of services. The second approach advocated consisted of making suitable amendments and additions to the existing Model Law with a view to the elucidation of a consolidated text dealing with the procurement of goods and construction as well as of services. This approach was considered preferable for a number of reasons: (i) Most provisions of the existing Model Law were in substance also applicable to the procurement of services: (ii) At the national level, States traditionally dealt with procurement of goods, construction and services in a consolidated text; and (iii) it was true that procurement of services required a specialized treatment in most cases, but it was thought to be inadvisable to preclude the use of other methods of procurement in the case of procurement of services in the circumstances when it would be advisable to have recourse to those methods. In the light of the aforementioned discussion, the Working Group eventually decided to follow a mixed approach, consisting of a consolidated model statute dealing with the procurement of goods, construction and services with a more distinct treatment for the procurement of services. Having decided this course of action, the Working Group proceeded to undertake a review of the provisions of the existing Model Law article by article so as to ascertain what drafting or substantive changes would be required to be effected therein to ensure that they are applicable to the procurement of goods and construction as well as to the procurement of services and to provide for a preferred method for procurement of services in a separate chapter, except in cases falling within the conditions of use of tendering in the cases of services or in cases subject to procurement by other methods (restricted tendering, two-stage tendering, competitive negotiation, single-source procurement, and request for quotations).

Having decided on the structure of the Model Law applicable to the procurement of goods and construction as well as of services, the Working Group effected the necessary drafting and/or substantive changes in the provisions of the Model Law on Procurement of Goods and Construction which are as follows:

Title : It was decided to entitle the revised text as "UNCITRAL Model Law on Procurement of Goods, Construction and Services".

Preamble : Both in the *chapeau* and sub-paragraph (c) a reference to "services" was included.

Article 2
Definitions

The definitions of 'procurement', 'goods' and 'construction' were revised to accommodate the new context. Further, a definition of 'services' was added in sub-paragraph (d) *Bis.*[2]

Article 6
Qualifications of suppliers and contractors

The qualifications of suppliers and contractors were improved in view of the extension of the text to cover procurement of services. Further, a proviso was added to the end of paragraph (5) so as to prohibit discrimination amongst suppliers and contractors based on criteria that were not objectively justifiable.

Article 7
Prequalification proceedings

Paragraph (3) was amended to make the prequalification proceedings applicable to all methods of procurement including the principal method for the procurement of services as provided for in Chapter IV *Bis.*[3]

Article 9
Form of communications

Drafting changes were inserted to adjust this provision to the procurement of services.

Article 11
Record of procurement proceedings

Drafting changes were made in paragraphs (1)(d), (e) and (f) and a new provision was added as (i) *Bis.*[4] Paragraph (1)(d) was amended to ensure that in the circumstances where a tender, proposal or offer did not involve a price or price-determining mechanism and if other terms were not known to the procuring entity, there was no obligation on the procuring entity to record them. Paragraph (1)(e) was modified to permit a margin of preference in the case of procurement of services. Drafting change in sub-paragraph (f) became necessary in view of the relocation of Article 33 on Rejection of All Tenders as Article 11 *Bis.*[5]

A new sub-paragraph (i) *Bis*[6] was inserted to require the procuring entity to record the grounds and circumstances on which it relied to justify the selection procedure in the case of procurement of services.

---

2. This is now sub-paragraph (e) of the final text.
3. This is now Chapter V of the finally adopted text.
4. Paragraph (j) of Article 11 of the finally adopted text.
5. This is renumbered as Article 12 in the final text.
6. Sub-paragraph (j) of Article 11 in the finally adopted text.

Article 11 *Bis*[7]

Rejection of tenders, offers, proposals and quotations

Article 33 of the previous Model Law was limited to the tendering method. The present article extends the scope to rejection of tenders, proposals, offers or quotations because of the incorporation of the procurement of services in the revised text.

Article 14[8]

Rules concerning description of goods, construction or services

Drafting changes were inserted in paragraphs (1), (2) and (3) in view of the inclusion of procurement of services in the revised Model Law.

Article 15

Language[9]

Addition of the wording 'or services' in sub-paragraph (b).

Article 16

Methods of Procurement[10]

Article 16 has been substantially modified. It lays down the ground rules as to the type of the procurement method to be used irrespective of whether the procurement is of goods, construction or services. Article 16 establishes the rule that for the procurement of goods or construction, tendering is the method of procurement to be used normally, while request for proposals for services, as set out in Chapter IV *Bis*,[11] is the method to be used normally for procurement of services. For those exceptional cases of procurement of goods or construction in which tendering, even if feasible, is not judged by the procuring entity to be the method most apt to provide the best value, Article 16 provides a number of other methods of procurement. In the case of services, the procuring entity may use tendering when it is feasible to formulate detailed specifications and the nature of services allow for tendering; otherwise it may use of the other methods of procurement available under the Model Law if the conditions for its use are met.

Paragraph (4) sets forth the requirement that a decision to use a method of procurement other than tendering in the case of goods or construction, or, in the case of services, a method of procurement other than request for proposals for services, should be supported in the record by a statement of the grounds and circumstances underlying the decision.

7. Renumbered as Article 12 in the final text.
8. Renumbered as Article 16 in the final text.
9. Renumbered as Article 17 in the final text.
10. Renumbered as Article 18 in the final text.
11. Renumbered as Chapter IV in the final text.

Article 17

Conditions for use of two-stage tendering; Article 19 : Conditions for use of request for quotations; and Article 20 : Conditions for use of single-source procurement.[12]

Wordings were adjusted to reflect their application to services.

Article 23

Contents of invitation to tender and invitation to prequalify :[13]

In order to adjust this provision to the procurement of services, the wordings "or the nature of services and the location where they are to be provided" were inserted in paragraph 1(b) and "or the timetable for the provision of services" in paragraph (1)(c).

Article 25

Contents of solicitation documents[14]

Drafting changes were incorporated in paragraphs (d), (g), (h), (i) and (x) to adjust their application to the procurement of services.

Article 32

Examination, evaluation and comparison of tenders[15]

Drafting changes were made in paragraph (4)(c)(ii) and (iii) and (d) to adjust their application to procurement of services.

Article 36

Two-stage tendering[16]

Paragraph (2) was amended to provide that if relevant, the solicitation documents should seek the professional qualifications of the service providers. Paragraph (3) was amended to clarify that the negotiations referred to therein were part of the first stage of the two-stage tendering.

Article 38

Request for proposals[17]

Drafting change was made in paragraph (4)(b) to adjust its application to the procurement of services.

12. Renumbered as Articles 19, 21 and 22 respectively in the final text.
13. Renumbered as Article 25 in the final text.
14. Renumbered as Article 27 in the final text.
15. Renumbered as Article 34 in the final text.
16. Renumbered as Article 46 in the final text.
17. Renumbered as Article 43 in the final text.

Article 40
Request for quotations and

Article 41
Single-source procurement[18]

Drafting changes were made in these provisions so as to adjust their application to procurement of services.

CHAPTER IV BIS : REQUEST FOR PROPOSALS FOR SERVICES[19]

This chapter, which is made up of six articles, namely Article 41 bis,[20] 41 ter,[21] 41 quater,[22] 41 quinnies,[23] 41 sexies[24] and 41 septies,[25] has been added to the Model Law and is entirely a new set of provisions. It sets forth a set of procedures especially designed for the procurement of services. The main differences between the procurement of goods or construction and procurement of services are as follows: (i) Unlike the procurement of goods or construction, procurement of services typically involves the supply of an intangible commodity whose quality and enact content are often difficulty to quantify. The quality of services is largely dependent on the skill and expertise of the supplier or contractor, (ii) while in the case of procurement of goods and construction, price is often the main criterion in the selection process, it is not considered as important a criterion in the evaluation process as the qualifications and competence of the supplier or contractor. Chapter IV *Bis* has been structured to reflect these differences.

In the normal circumstances, the Model Law mandates the use of tendering in the procurement of goods or construction, while in the procurement of services, it prescribes the use of request for proposals for services so as to give due weight in the evaluation process to the qualifications and expertise of the service provider. For the exceptional circumstances in which tendering is not found to be appropriate for procurement goods or construction, the Model Law offers other methods of procurement. It also does so for the circumstances in which the special

18. Renumbered as Articles 50 and 51 respectively in the final text.
19. Renumbered as Chapter IV entitled, "Principal method for procurement of Services".
20. Renumbered as Article 37 in the final text.
21. Renumbered as Article 38 in the final text.
22. Renumbered as Article 39 in the final text.
23. Renumbered as Article 40 in the final text.
24. It has been restructured into four articles, namely articles 41, 42, 43 and 44.
25. Renumbered as Article 45 in the final text.

procedure laid down in chapter IV *Bis* is not found appropriate or feasible for the procurement of services.

The main features of this specialized method for the procurement of services include unrestricted solicitation of suppliers and contractors as a general rule and predisclosure in the solicitation of proposals of the criteria for evaluation of the proposals, and use of one of the three optional selection methods as provided for in Article 41 *sexies*.[26] These optional selection methods are set out in paragraphs (2), (3) and (4) of Article 41 *sexies*.[27] In the first method, which is similar to tendering, there is no negotiation and the procuring entity subjects all the proposals that have obtained a technical rating above a set threshold, to a straightforward competition. Under this method, the successful proposal will be the one with the lowest price or one with the best combined evaluation in terms of both non-price criteria and the price. The second optional method is one in which the procured entity negotiates with the suppliers and contractors, after which they submit their best and final offers. In the third method, the procuring entity holds negotiations solely on price with the supplier or contractor who has obtained the highest technical rating.

Chapter IV *Bis* (Chaper IV in the final Text) sets out the procedural modalities for the exercise of the request for proposal for services, the principal method designated by the Model Law for procurement of services. Article 41 *Bis* on *Solicitation of proposals*[28] aims at ensuring the widest possible participation by suppliers and contractors in the procurement proceedings. However, in cases where resort to open solicitation would appear to be unwarranted or defeat the objectives of economy and efficiency, paragraph (3) permits the procuring entity not to engage in open solicitations.

Article 41 *ter*[29] contains a list of the minimum information that should be contained in the request for proposals in order to assist the suppliers and contractors in preparing their proposals and to enable the procuring entity to compare those proposals on an equal basis. Paragraphs (h) and (i) reflect the fact that, in many instances of procurement of services, the full nature and characteristics of the services to be procured might not be known to the procuring entity. Since price might not always be a relevant criterion in the procurement of services, paragraphs (k) and (l) are only applicable if price is a relevant criterion in the selection process.

Article 41 quater on Criteria for the evaluation of proposals[30] sets

26. Restructured into Articles 41, 42, 43 and 44.
27. These are now contained in Articles 42, 43 and 44.
28. Renumbered as Article 37.
29. Renumbered as Article 38.
30. Renumbered as Article 39.

out the permissible range of criteria that the procuring entity may apply in evaluating the proposals. The procuring entity is not, however, required to apply each of these criteria in every instance of procurement. In the interests of transparency, however, it is required to apply the same criteria to all proposals. It is precluded from applying criteria that have not been predisclosed to the suppliers and contractors in the request for proposals.

Paragraph (1)(a) lists as one of the criteria the qualifications and abilities of the personnel who will be involved in providing the services. This criterion would be particularly relevant in the procurement of those services that require a high degree of skill and knowledge on the part of service providers. By establishing the effectiveness of the proposal in meeting the needs of the procuring entity as one of the possible criteria, paragraph (1)(b) enables the procuring entity to disregard a proposal that has been inflated with regard to technical and quality aspects beyond what is required by the procuring entity in an attempt to obtain a high ranking in the selection process, thereby artificially attempting to put the procuring entity in the position of having to negotiate with the proponent of the inflated proposal. Paragraphs (1)(d) and (e) and paragraph (2) are similar to provisions applicable to tendering by way of Article 32(4)(c)(iii), (iv) and (d).[31] (Impact on local economy; national defence and security considerations; margin of preference for domestic suppliers).

Article 41 quinnies : Clarification and modifications of request for proposals[32] reproduces the provisions of Article 26[33] on corresponding matter in the context of tendering.

Article 41 sexies on Selection procedures[34] provides for three optional procedures for the selection and evaluation of the proposals in the case of procurement of services. The first method provided for in (Article 42) is more price-oriented and does not involve any negotiations. This is particularly suitable for cases where services to be procured are of fairly standard nature where no great personal skill or expertise is required. However, to ensure that the suppliers or contractors possess sufficient experience and expertise, the procuring entity is required to establish a threshold level by which to measure the non-price factors of the proposals. If this threshold is set at a sufficient high level, then all the suppliers or contractors whose proposals attain a ranking at or above the set threshold level would qualify as potential suppliers or contractors. From amongst

31. Renumbered as Article 34.
32. Renumbered as Article 40.
33. Renumbered as Article 28.
34. Restructured into Articles 41, 42, 43 and 44.

these, the procuring entity will select the supplier or contractor whose proposal is of the lowest value or is deemed best based on a combined evaluation of price and non-price factors.

Articles 43 and 44 provide for methods in which personal skill and expertise of the supplier or contractor will be of critical consideration. Greater emphasis to be placed on those criteria and provide for negotiation. Article 43 sets forth a method of selection that corresponds to the request for proposals method under Article 39.[35] It is, therefore, best suited in those circumstances where the procuring entity seeks various proposals on how best to meet its procurement needs. By allowing for early negotiations with all suppliers and contractors, the procuring entity is able to determine its actual needs which then can be taken into account by suppliers and contractors when preparing their best and final offers. Paragraph (3) has been included in order to ensure that the price of the proposal is not given undue weight in the evaluation process to the detriment of the evaluation of the technical and other aspects of the proposal including the evaluation of the competence of those who will be involved in providing the services.

In the third method set forth in Article 44 the procuring entity sets a threshold on the basis of the quality and technical aspects of the proposals, and then ranks those proposals that are rated above the threshold, ensuring that the suppliers and contractors with whom it will negotiate are capable of providing the services required. The procuring entity then holds negotiations with those suppliers or contractors, one at a time, starting with the supplier or contractor that was ranked highest in the procurement proceedings on the basis of their ranking until it concludes a procurement contract with one of them. The negotiations are aimed at ensuring that the procuring entity obtains a fair and reasonable price for the services to be provided. This is particularly useful for the procurement of intellectual services.

It should, however, be noted that in this procedure the procuring entity is not allowed to reopen negotiations with suppliers and contractors with whom it has already negotiated and terminated negotiations even if at a later stage it becomes apparent that dealing with them would have been more profitable. This has been provided to obviate open-ended negotiations and their possible abuse and resultant unnecessary delays.

Article 41(3) permits the use of an impartial panel of experts in the selection procedure by a procuring entity. Whether such a panel would

35. Renumbered as Article 48.

have the power to bind the procuring entity or have only advisory jurisdiction has been left to the States enacting the Model Law.

Article 41 septies on Confidentiality[36] has been included in order to prevent abuse of the selection procedures and to promote confidence in the procurement process. It requires all parties in the procurement proceedings to maintain confidentiality especially where negotiations are involved.

Article 42
Right to Review[37]

Sub-paragraph (a) *Bis* was added in paragraph (2) of this article to make it clear that in the procurement of services, the choice of any one of the three procedures provided for in (Article 42, 43 and 44) would not be the subject-matter of review. Also, in sub paragraphs (c) and (e) the language was modified to preclude from review a decision by the procuring entity to reject all tenders, offers or quotations under Article 11 *Bis*[38] and an omission on the part of the procuring entity to make a reference as envisaged in paragraph(s) of Article 41 *ter*.[39]

All the aforesaid amendments, revisions and additions made by the Working Group were approved by the Commission and the revised text was formally adopted as the "UNCITRAL Model Law on Procurement of Goods, Construction and Services".[40] The Commission also approved the draft amendments proposed by the Secretariat to the *Guide to Enactment of UNCITRAL Model Law on Procurement of Goods and Construction* so as to render it a Guide on the UNCITRAL Model Law on Procurement of Goods, Construction and Services. The Commission, in a resolution adopted by it, has requested the Secretary-General of the United Nations

36. Renumbered as Article 45.
37. Renumbered as Article 52.
38. Renumbered as Article 12.
39. Renumbered as Article 38.
40. The Model Law on Procurement of Goods, Construction and Services has 57 articles divided into six Chapters. Chapter I, consisting of Articles 1 to 17, sets forth the general provisions which are equally applicable to the procurement of goods and constructions as well as the procurement of services. Chapter II, consisting of Articles 18 to 22, lists out the various methods of procurement and the conditions for their use. Chapter III consisting of Articles 23 to 36 focusses on tendering proceedings. Chapter IV, made up of Articles 37 to 45, deals with the principal method for the procurement of services. Chapter V, consisting of Articles 46 to 51, sets out the procedural modalities for the use of methods of procurement other than tendering and the principal method for the procurement of services, namely, two-stage tendering, restricted tendering, requests for proposals, competitive negotiation, request for quotations and single-source procurement. The final chapter, Chapter VI, sets forth provisions establishing a right of review of acts and decisions of the procuring entity and governs its exercise.

to transmit the text of the UNCITRAL Model Law on Procurement Goods, Construction and Services together with its companion Guide 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.

General Observations

Procurement expenditure represents a significant portion of the overall development expenditure in the developing and other countries 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, not only from one State to another, but also from one government agency to another in the same State. 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 biassed against their foreign counterparts. Since procurement of goods and services should be quality-oriented and cost-effective and procurement procedures fair and transparent, sound laws and practices for public procurement are *sine qua non* for all countries.

In 1993, the Commission had adopted a Model Law on Procurement of Goods and Construction along with a companion Guide, intended to assist States in updating and modernizing their existing laws or for the enactment of new legislation where none existed in the area of the procurement of goods and construction.

While the procurement of goods and construction constitutes a bulk of the procurement budgets of most public entities, services has also acquired a significant component of the total Government procurement in most countries. Moreover, the procurement of services has already become an area of rapid development and increasing importance in view of the current trends towards liberalization and globalization of national economies. Furthermore, the recent trend towards privatization worldwide is also bound to lead to the transfer to the private sector of services previously performed exclusively by Governments. However, many of these countries lack a well regulated system for the procurement of services.

At present, national laws on the procurement of services are widely divergent. While the laws of some States do contain provisions on the procurement of services, the laws in some other States do not clearly distinguish between the procurement of goods or construction and the procurement of services, and therefore, fail to take account of the specific

circumstances relevant to procurement of services. The laws in yet other States do not deal with the procurement of services at all. It would, therefore, be fair to conclude that the procurement of services is, in many instances, not subject to procedures that are sufficiently open, fair and competitive to ensure adequate quality and a fair price for the public purchaser. In this context, the Model Law on Procurement of Goods, Construction and Services, consolidated in one text by the Commission at its twenty-seventh Session (1994) is bound to serve as a handy tool for States to assess the adequacy of their existing legislation and as a readily available text for new legislation where none presently exists.

It should, however, be noted that both the Model Laws, i.e. the UNCITRAL Model Law on Procurement of Goods and Construction and the UNCITRAL Model on Procurement of Goods, Construction and Services, are framework legislation which do not set forth all the rules and regulations that may be necessary to implement the procurement procedures in an enacting State. Accordingly, both the Model Laws envisage issuance of procurement regulations by an enacting State to fill in the procedural details for the procedures authorized by these models and also to take account of the local conditions obtaining therein. In this regard; assistance could be taken from the companion Guides to these Models in identifying the areas in which the national law would need to be supplemented by procurement regulations.

In the view of the Secretariat, both the Model Laws represent 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. At the same time, special Measures should be worked out to guarantee the realization of the transparency and the accountability in the procurement proceedings.

II. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD)

The United Nations Conference on Trade and Development (UNCTAD) was established in 1964 to promote international cooperation in trade and development and the economic development of developing countries. It is composed of 187 member States. Its institutional set-up comprises the Conference, the Trade and Development Board (TDB) and a number of subsidiary bodies serviced by a permanent Secretariat.

Held every four years, the Conference is the organisation's highest

policy-making body. It formulates policy guidelines and decides on the programme of work. Eight Conferences have been held so far: Geneva (1964), New Delhi (1968), Santiago (1972), Nairobi (1976), Manila (1979), Belgrade (1983), Geneva (1987) and Cartagena de Indias, Colombia (1992).

UNCTAD's early years were marked by high rates of economic growth particularly in developed countries, worsening terms of trade for developing country commodity exports and widening income disparity between them and the developed countries. Recognition of these factors led to consensus on the need to increase financial flows to developing countries, strengthen and stabilise commodity markets and support developing country participation in world trade.

The 1970s witnessed a roll-back of the multilateral trading system and a slowdown in world economic rates with adverse consequences for the trade and economic development of developing countries. Significant decisions were taken as a result of negotiations under UNCTAD auspices on commodity market stabilisation and preferential treatment for the exports of developing countries. The Group of 77 also put forward the call for a New International Economic Order (NIEO) leading to tensions among the North and South countries.

The situation deteriorated in the 1980s which came to be known as "the lost decade for development". In mid-1980s dialogue and negotiations became deadlocked in most forums. However, the momentous changes that took place in the world the late 1980s forced a reassessment of international economic cooperation. A fresh consensus emerged in the early 1990s on the need for new actions to support the international trade and economic development of developing countries. This consensus took shape at UNCTAD VIII held at Cartagena in February 1992. UNCTAD VIII took a giant step towards laying to rest the reciprocal misgivings between the North and South countries which had caused deadlock in the economic cooperation dialogue during the 1980s. In the *Cartagena Commitment* adopted at UNCTAD VIII all participants pledged a *New Partnership for Development* expressing their political will to translate words into reality. The Conference endorsed UNCTAD'S functions of:

- Policy analysis;
- Intergovernmental discussion, negotiation and consensus building;
- Monitoring, implementation and follow-up of agreements; and
- Technical cooperation.

The Conference redefined UNCTAD's activities until 1996 on four broad themes:

- A New international partnership for development;

— Global interdependence

— Paths to development

— Sustainable development.

In an overhaul of UNCTAD machinery, the Conference re-focussed the Trade and Development Board (TDB) on policy issues and reorganised its work while completely restructuring the intergovernmental machinery. While retaining the Special Committee on Preferences and the Inter-governmental Group on Restructurings Business Practices, the Conference established four Standing Committee for a duration of four years. These were the Committee on Commodities, on Poverty Alleviation, on Economic Cooperation among Developing Countries and on Developing Services Sectors. In addition thereto, five *Ad Hoc* Working Groups were established for a duration of two years; on Investment and Financial Flows; Trade Efficiency; Comparative Experiences with Privatization; Expansion of Trading Opportunities for Developing Countries; Inter-relationships between Investment and Technology Transfer.

A Mid-term Review, which took place in May 1994, decided to wind up the five *Ad Hoc* Working Groups and created three new ones. These are on Trade, Environment and Development; the Role of Enterprises in Development; and Trading Opportunities in the New International Trading Context. The U.N. General Assembly assigned to the UNCTAD Secretariat responsibility for the substantive service of two subsidiary bodies of ECOSOC, namely, the Commission on International Investment and Transnational Corporations, and Commission on Science and Technology.

An Overview of the Work of UNCTAD

International Trade

In the early years, efforts were concentrated on securing preferential treatment for developing country exports, which led in 1971 to the establishment of the Generalized System of Preferences (GSP). Work on eliminating restrictive business practices and reducing non-tariff barriers to trade had also begun. Since UNCTAD-VIII, the scope has been expanded to include trade in services, intellectual property and environment-related issues, trade policy reforms, improving competiton, facilitating structural adjustment and optimizing the relationships between investment and technology.

Generalized System of Preferences (GSP) : The GSP is a preferential tariff system under which very low or zero tariffs are placed by developed

countries on many developing country exports without seeking trade concessions in return. Currently, there are 166 beneficiary countries, including 27 Central and Eastern European economies in transition. In May 1994, UNCTAD's Special Committee on Preferences agreed that a policy review of the GSP scheduled for 1995 should discuss all critical issues and seek to revitalise the GSP.

Restrictive Business Practices : UNCTAD's initiatives to improve competition in world trade led to the adoption by the UN General Assembly in 1980 of a Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (RBPs). The Set was the first unanimously adopted multilateral instrument relating to the control of restrictive business or anti-competitive practices. The Intergovernmental Group of Experts on RBPs, established in 1981, monitors the Set's implementation and meets annually to discuss relevant issues. A third Review Conference of the Set is scheduled for 1995.

Trading Opportunities : Since UNCTAD VIII, expanding trading opportunities for developing countries is one of the its main tasks. The Working Group on the Expansion of Trading Opportunities for Developing Countries held four sessions from 1992 to 1994 to identify national measures to enhance the competitiveness of industries with export potential and to find ways of improving opportunities for developing country exports. The Group adopted its final report in July 1994, containing its findings and recommendations for actions at the national, regional and international levels, including technical cooperation activities. This Working Group has been replaced by the *Ad Hoc* Working Group on Trading Opportunities in the New International Trading Context.

Economies in Transition : UNCTAD is entrused with the task of enhancing technical cooperation for the development of trade between economies in transition and developing countries. It is also involved in projects for computerizing customs procedures and the establishment of Trade Points in the economies in transition.

Trade and Environment : UNCTAD VIII and Agenda 21 gave UNCTAD a broad mandate in the areas of trade, environment and development. The TDB has defined that role as lying in "policy analysis and debate, a conceptual work, the building of consensus among member States on the interaction between environmental and trade policies, the dissemination of information of policy-makers and the encouragement and provision of assistance in capacity building with emphasis on problems of the developing countries and the least developed among them as well as countries in transition." The *Ad Hoc* Working Group on Trade,

Environment and Development is entrusted with the examination of the effects of environmental policies, standards and regulations on market access and competitiveness; market opportunities arising from the demand for environment-friendly products and eco-labelling schemes.

Trade Efficiency

UNCTAD VIII decided to make trade efficiency a new priority task. The initiative's aims are to lower the cost of international trade transactions, enhance participation in international trade especially by small and medium-sized enterprises and promote efficient trade practices. The first United Nations International Symposium on Trade Efficiency held at the ministerial level in Columbus (Ohio) on 17-21 October 1994 considered concrete actions to enhance trade efficiency at the national and international levels. The Symposium adopted a Ministerial Declaration and trade efficiency guidelines and recommendations.

Resources for Development

Since UNCTAD VIII, there is fresh emphasis on investment and financial flows, acquiring finance without creating foreign debt, and setting up new mechanisms to increase foreign direct investment. The report of the *Ad Hoc* Working Group on Investment and Financial Flows which concluded in March 1994 made recommendations on foreign direct investment (FDI), foreign portfolio equity investment (FPEI) and build-operate-transfer (BOT) arrangements.

Transnational Corporations and Investment

The UN Programme on Transnational Corporation (TNCs) has been transferred to UNCTAD. At its 20th Annual session in May 1994, the Commission on Transnational Corporations, which reports to the ECOSOC, recommended that it should be renamed the UNCTAD Commission on International Investment and Transnational Corporations and be made a subsidiary body of the TDB.

Privatization and Enterprise Development

With both developed and developing countries turning increasingly to privatization, UNCTAD VIII established a new programme on privatization and enterprise development and set up an *Ad Hoc* Working Group on Comparative Experiences with Privatization. That provided governments with the opportunity to exchange privatization experiences and to formulate guiding principles for the design and implementation of privatization programmes. At its fourth and final session in April 1994, the *Ad Hoc* Working Group adopted a set of "Indicative Elements for

Consideration in Formulating Privatization Programmes" which includes guidelines and options for the formulation of privatization policies.

Commodities

UNCTAD IV in 1976 adopted an Integrated Programme for Commodities (IPC) which became an umbrella for specific International Commodities (ICAs) and the Common Fund, designed to underpin the ICAs with financial backing. The Common Fund, an autonomous institution, is widely recognized as a significant instrument of international commodity policy. Its first account, designed to finance the creation and operation of buffer stocks to help stablise prices is not currently used, but its Second Account which finances commodity development projects is operating successfully. UNCTAD has played a central role in assisting the negotiation or renegotiation of ICAs which have been established for several commodities, including cocoa, jute and jute products, natural rubber, olive oil, sugar, tin, tropical timber and wheat. It also promotes regular consultations among commodity market and industry operators. It has also set up Expert Groups for Iron Ore and Tungsten and autonomous intergovernmental bodies for minerals and metals, including the International Nickel Study Group and the International Copper Study Group.

The Standing Committee on Commodities, set up by UNCTAD VIII, conducted a review at its January 1994 Session of market-based management instruments and associated risks, national experiences of diversification, and the needs for financial and technical assistance to developing countries. The Committee is also assisting the TDB on the question of convening a World Conference on Commodities under UNCTAD auspices.

A new International Cocoa Agreement was negotiated in 1993 under UNCTAD auspices and entered into force in February 1994. Its production policy mechanism represents a new contribution to commodity policy.

At its fourth session in January 1994, the United Nations Conference on Tropical Timber adopted the International Tropical Timber Agreement 1994 which brings together an economic and ecological partnership.

The second session of the UN Conference on Natural Rubber was held in October 1994 to negotiate a successor agreement to the International Natural Rubber Agreement of 1987.

Services Sectors

UNCTAD has been involved since its inception in such specific sectors as transport, insurance, tourism and trade financing. This work has led to

the negotiation of various instruments, particularly concerning maritime transport, as well as resolutions and guidelines. The current focus is on enabling developing countries to benefit from liberalisation of trade in services. The chief change in orientation after UNCTAD VIII is the emphasis on matters of national concern rather than global issues.

Shipping : UNCTAD has played a leading role in the area of international shipping legislation. A Committee on Shipping set up in 1965 focussed on international shipping legislation and such developmental issues as the establishment and expansion of national merchant marines. It was later expanded to include multimodal transport, bulk cargo markets and registration of ships. The international conventions adopted as on date include the UN Convention on a Code of Conduct for Liner Conferences (1974), the UN Convention on International Multimodal Transport of Goods (1980); the UN Convention on Conditions for Registration of Ships (1986); and the UN Convention on Maritime Liens and Mortgages (1993).

In 1993, the TDB approved the terms of reference of an Intergovernmental Group of Experts on Ports with the following mandates:

(i) Port organisation, including issues relating to privatization, commercialization, deregulation and legislation;

(ii) Port management, including issues relating to human resources development, strategic planning, marketing, sustainable development and investment.

Insurance : UNCTAD's insurance programme provides support to the developing countries in their efforts to build a viable domestic insurance industry and establish an appropriate regulatory and supervisory framework.

Prior to UNCTAD VIII, the work on each of the service sectors was entrusted to separate governing bodies. Since UNCTAD-VIII, a single body, the Committee on Developing Services Sectors has been charged with services in general, insurance and shipping.

Economic Cooperation Among Developing Countries (ECDC)

UNCTAD has been the first UN agency to make ECDC a part of its regular programme since 1968 aiming at promoting regional economic integration in developing countries and South-South trade. It has helped to establish ECDC programmes and institutions and implement cooperation activities in Africa, Asia, Latin America and the Caribbean. At the inter-regional level, it was instrumental in promoting the agreement on the Global System of Trade Preferences among Developing Countries (GSTP)

which entered into force in 1989 in about 40 countries. A second round of GSTP negotiations was launched in 1991.

UNCTAD has also contributed to strengthening monetary and financial cooperation among developing countries by supporting such multilateral clearing and payments arrangements as the Asian Clearing Union, and such trade financing institutions as the Arab Trade Financing Programme. The feasibility of establishing an inter-regional trade financing facility has also been under the consideration of UNCTAD since 1991.

UNCTAD also promotes South-South trade by encouraging and facilitating cooperation among developing country enterprises, including joint ventures, the setting up of enterprise associations and promotion of joint meetings of chambers of commerce and industry. Both the Association of Latin American Trading Enterprises (ALAT) and the Association of African Trading Enterprises (ASATRADE) were set up under UNCTAD auspices.

Poverty Alleviation

Since UNCTAD-VIII, poverty alleviation has become a central issue within UNCTAD and its Standing Committee on Poverty Alleviation. The main issues studied by the Standing Committee so far include social funds and safety nets, mobilization of domestic and external resources for poverty alleviation, effects of structural adjustment programmes on poverty, job-creation policies, means for the participation of small-scale and micro-enterprises in international trade and social mobilization and organisation of the poor.

At its second session in July 1994, the Standing Committee adopted a set of recommendations for the World Summit on Social Development (Copenhagen, March 1995). The recommendations covered international trade, debt relief, Official Development Assistance (ODA), and structural adjustment programmes in terms of their relationship to poverty.

Least Developed Countries (LDCs)

LDCs have been a focal point of UNCTAD's work since its inception. A list of LDCs and criteria prepared by the UNCTAD Secretariat to define LDC status were approved by the UN General Assembly in 1971.

UNCTAD has played a leading role in mobilizing support for LDCs by providing the organizational framework and substantive support for two UN Conferences on LDCs held in Paris in 1981 and 1990. The first adopted a Substantial New Programme of Action (SNPS) for LDCs for the 1980s while the second reviewed the SNPS and adopted a strengthened

Programme of Action for LDCs for the 1990s. A High-Level Intergovernmental Meeting on the mid-term Global Review of the Action Programme is expected to be held in autumn 1995.

III. UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANISATION (UNIDO)

The major work programme of UNIDO in the area of international trade law appears to be focussed on the preparation of guidelines and manuals so as to assist developing countries in their industrial development. For the last few years, UNIDO is engaged in the preparation of Guidelines for Development, Negotiation and Contracting of Build-Operate-Transfer (BOT) Projects and a Manual on Technology Transfer Negotiations.

Guidelines for Development, Negotiation and Contracting of BOT Projects

Under a BOT scheme, private investors, both local and foreign are invited to build an infrastructure facility, operate the same on a commercial basis for a certain period of time, during which fees may be charged to cover the project and operating costs, to achieve a return on equity investments and to repay the financing. Since the early 1980s, the BOT strategy is being employed in a number of developing countries as an alternative way to implement and finance large infrastructure and industrial projects. The scheme is particularly useful for developing countries which lack development finance for infrastructure projects.

The main objectives of the UNIDO Guidelines, which are due to be published during the course of this year, are:

(i) To give developing countries basic and strategic orientation so as to strengthen their capabilities in introducing, promoting and implementing BOT strategy and projects;

(ii) To provide practical information on the structure, procedures and basic issues of BOT arrangements;

(iii) To support dissemination and the learning process of BOT strategy; and

(iv) To contribute towards reducing the time and expenses of BOT bidding, negotiation and contracting through the preparation of standard procedures and model documentation.

The *Guidelines* will be structured into the following chapters:

1) Introduction to the BOT concept and strategy;

2) Development phases of BOT arrangements;

3) Major issues on designing, implementing and executing BOT strategies and projects:

   3.1 Economic viability;

   3.2 Financial aspects and engineering;

   3.3 Risk allocation;

   3.4 Governmental role and support—legal and political environment;

   3.5 Selection of sponsors and procurement issues;

   3.6 Transfer of Technology and capability building;

   3.7 Operation, maintenance and transfer of ownership;

   3.8 Structuring and drafting of the contract package;

Standard Project Agreement and standard provisions for BOT Contracts.

The scope of the proposed Guidelines, it is stated, will not be limited to large infrastructure projects, but will address the widest possible range of suitable projects for promotion on the BOT basis. It is also intended to cover small-scale social infrastructure, such as water treatment, facilities, hospitals, etc. and takeover of inefficient projects by the private sectors. Other areas to be addressed include : infrastructure (water, electricity, communications, transport etc.), industrial estates and complexes, commercial and trade centres, storage and distributions centres.

The Guidelines are intended to be addressed to decision-makers at high government and political levels in the developing countries. They will be balanced and acceptable to banks and financial institutions, as well as investors and contractors. They will also be directed towards the planning and operational professionals engaged in BOT arrangements and projects, especially in the areas of finance, insurance and engineering and related legal aspects.

Manual on Technology Transfer Negotiations

This *Manual*, expected to be published during the course of this year, is intended to serve the purpose of a teaching tool for technology transfer negotiation courses, for developing the skills of trainers of negotiators

and as a working tool for negotiators. The *Manual* will cover, in a comprehensive manner, the range of subjects that entrepreneurs, decision-makers and government officials dealing with technology acquisition are likely to be confronted within the various phases of the technology transfer process. The contents of the *Manual* include subjects 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.

IV INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT)

The 73rd session of the Governing Council of UNIDROIT was held in Rome from 9 to 13 May 1994. At that session, the Governing Council considered the state of implementation of the work programme for the triennial 1993-95 which included the following substantive items:

1) Principles for international commercial contracts;
2) International protection of cultural property;
3) International aspects of security interests in mobile equipment;
4) Franchising;
5) Inspection agency contracts;
6) Civil liability connected with the carrying out of dangerous activities;
7) Legal issues connected with software.

Principles of International Commercial Contracts

1994 saw the culmination of the work on this project with the adoption of the final text of the Unidroit Principles of International Commercial Contracts. The Principles consist of a preamble and 119 articles divided into seven chapters (General provisions; Formation; Validity; Interpretation; Content; Performance; and Non-Performance). The chapter on performance contains a special section on hardship, while the chapter on non-performance deals with such questions as the right to performance, termination and damages. Each article is accompanied by a commentary, including illustrations, which form an integral part of the Principles. As such, the Principles constitute a system of rules of contract law specifically adapted to the special requirements of modern commercial practice and which may in a number of important ways be of service to the international

community. They may in particular be chosen by the parties as the law governing their contract or referred to by arbitrators in the settlement of disputes, be used as a means of interpreting or supplementing existing international uniform law instruments and also serve as a model for international legislators when drafting new legal instruments or for national law-makers when adapting domestic law to meet modern requirements.

The English version of the Principles was published in June 1994 and the French version in July 1994. Spanish and Italian versions are scheduled to be published early in 1995 while German, Arabic, Chinese, Russian, Dutch and Hungarian versions are in the course of preparation.

International protection of cultural property

The committee of governmental experts on the international protection of cultural property approved, at its fourth session held in Rome from 29 September to 8 October 1993, the text of the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects. This would be the subject-matter of a diplomatic conference being convened by the Italian Government in Rome from 7 to 24 June 1995.

International aspects of security interests in mobile equipment

This item is under consideration of a study group designated by the Governing Council. The first session of the sub-committee of the study-group, set up pursuant to a decision taken by the Governing Council at its 72nd session, to prepare a first draft of the proposed Convention in this area was held in Rome from 14 to 16 February 1994. The sub-committee was able to reach a number of conclusions, which, while provisional insofar as they might need to be revised in the light of the sub-committee's consideration of the issues of enforcement and priorities, were nevertheless seen as providing a basis for the preparation of a first draft. The areas encompassed by these conclusions were the sphere of application of the proposed Convention, the setting up of an international registry and the conditions that should govern the recognition by the courts of Contracting States of international interests in mobile equipment created in accordance with the proposed Convention. The sub-committee recognized that henceforth it would be better to refer to the subject-matter of the proposed Convention in terms of international interests in mobile equipment rather than, as hitherto, in terms of certain international aspects of security interests in mobile equipment. This change of direction was felt necessary in view of the sub-committee's desire to embrace in the same instrument both interests arising under security agreements and those arising under either a retention of title agreement or a leasing

agreement with or without an option to purchase, for a term, say, three years.

Subsequently, a small drafting group, made up of one representative each of the English and French-speaking members of the sub-committee, met in Paris on 11 July 1994 in order to prepare a first set of draft articles designed to reflect the provisional conclusions reached by the sub-committee at its first session. The drafting group's efforts resulted in proposals for a first set of draft articles of a future Unidroit Convention on International Interests in Mobile Equipment. These were subsequently circulated for comment *inter alia* among all members of both the Study Group and the Sub-committee.

The second session of the sub-committee was held in Rome from 29 November to 1 December 1994. It has before it the proposals for a first set of draft articles prepared by the drafting group as also the comments made by members of the study group/sub-committee and concerned international organizations. After dealing with the issues raised by the comments, which concerned the first test of internationality to be employed in the proposed Convention, the effect of making registration a condition for the application of the proposed Convention, the definition of mobile equipment for the purposes of the proposed Convention and the question of whether the proposed Convention should apply not only to the recognition and enforcement of international interests in mobile equipment but also to their creation, the sub-committee considered those elements still missing from the broad framework which it had embarked upon at its previous session, namely the shape of the rules on enforcement and priorities to be included in the future Convention. It was agreed that the question of whether supplementary rules should be prepared specifically for aircraft, should be deferred pending the submission of a paper by the aircraft industry.

The drafting group is to reconvene, probably in May 1995 to endeavour to complete the framework begun in 1994 in the light of the provisional conclusions reached by the sub-committee at its second session and the report to be submitted by the aircraft industry.

Franchising

The Unidroit study group on franchising met in Rome from 16 to 18 May 1994. The terms of reference of the study group includes : to examine different aspects of franchising and in particular disclosure of information between parties before and after the conclusion of a franchise agreement and the effects of master franchise agreements on sub-franchise agreements,

to make proposals to the Council and to indicate the form of any instrument or instruments that might be envisaged.

With reference to international franchising, the study group focussed on master franchise agreements. It considered in particular the nature of the relationship between the master-franchise agreement and the sub-franchise agreements, applicable law and jurisdiction, the settlement of disputes, problems associated with the tripartite nature of the relationship between franchisor, sub-franchisor and sub-franchisees, particularly in relation to termination, and disclosure.

In relation to domestic franchising, the study group concentrated on disclosure and examined the experiences of countries which have attempted some form of regulation in this area, the role of franchise associations and the importance of the codes of ethics adopted by these associations.

The study group reached the conclusion that none of these areas would lend itself to being dealt with by means of an international convention. However, there emerged a general consensus on the desirability of preparing a legal guide to international franchising, and in particular to master-franchise agreements which are most commonly used in international franchising. The study group accordingly, decided to recommend to the Governing Council at its 74th session (scheduled for March 1995) that it agree to the preparation of a Legal Guide to Master-Franchise Agreements.

Inspection agency contracts

In pursuance of a decision by the Governing Council at its 72nd session, in June 1993, the secretariat of Unidroit had circulated a study on inspection agency contracts in the international sale of goods commissioned from Ms. Jelena Vilus. A paper analysing the comments and reactions received was drawn up by the secretariat for submission to the 73rd session of the Governing Council scheduled for March 1994. The Council requested the secretariat to engage in a further round of consultations with the interested circles to enable it to decide on the prospects of any useful working being carried out in connection with this topic.

Civil liability connected with the carrying out of dangerous activities

This topic was included in the programme of work of Unidroit following upon a reference from the Government of India in the wake of the Bhopal disaster. The Governing Council at its 73rd session (1994) asked the Secretariat to prepare a study designed to identify issues that might serve as a basis for possible measures designed to ensure compensation for personal injury to the victims of industrial accidents. The study was to

be conducted within the following parameters: (i) It should be confined to the question of liability for personal injury; (ii) It should cover neither nuclear accidents nor accidents occurring in the transport of goods (both areas amply regulated by international legislation) and (iii) Any action that might be authorized in the light of such study would be undertaken on a step-by-step basis.

Given the pressure on its own human and financial resources, the secretariat is currently engaged in exploring the possibility of obtaining special external financing for the carrying out of such a study.

Legal issues connected with software

A study by the secretariat had suggested Unidroit initiative in the area of specific commissioning of software programmes and the rights to use of the programme by the party commissioning the programme and the party developing it. Agreements concluded with a view to the preparation of such programmes are usually tailor-made from one agreement to another and their terms differ according to the experiences of the parties and their respective bargaining power. It was proposed by the secretariat that Unidroit might usefully consider the drawing up of guidelines regarding the negotiation of such agreements, their purpose being to make the parties more aware of the differing legal consequences flowing from their choice of contractual provisions.

The Governing Council at its 72nd session in June 1993 took note of the Secretariat study but in view of the doubts expressed by certain members as to the usefulness of carrying out work on the subject at the present, as well as of the number of topics on which Unidroit was already engaged, it was decided that further study should only be undertaken as and when the resources of the Institute would permit. The Governing Council, at its 74th session in March 1995, is to decide whether the item should be formally deleted from the programme.

B. The New GATT Accord: An Overview with Special Reference to World Trade Organization (WTO), Trade-Related Investment Measures (TRIMS) and Trade-Related Aspects of Intellectual Property Rights (TRIPS)

The conclusion of the Uruguay Round Negotiations and the signing of the Final Act Embodying the Results of Uruguay Round Multilateral Trade Negotiations (Final Act) by 111 countries on 15 April 1994, has brought about far-reaching changes in the structure of the international economic relations.[1] A new world trade body, the World Trade Organisation (WTO) has formally come into existence to oversee the effective implementation of the Final Act. The objective of the Final Act remains free trade. Nevertheless, keeping in view the recent developments and the emphasis on the environment the WTO seeks to allow "for the optimal use of the world's resources in accordance with the objective of sustainable development... to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."[2] It also recognises "the need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development."[3]

1. *The outcome of the Uruguay Round: An Initial Assessment, Supporting Papers to The Trade and Development Report, 1994* (UNCTAD, New York), p. 5.
2. *Preamble, Agreement Establishing the World Trade Organization*, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Marrakesh, 15 April 1994), p. 9.
3. *Ibid.*

Despite these peripheral references to the developing countries and the recognition of their problems in regard to economic development and growth, the actual outcome of the Final Act is surely to be decided by multifarious factors, such as trade, technology, flow of investments and the political decision-making processes. Even the whole process of the negotiation at the Uruguay Round had been determined by these factors in one way or the other. Developing countries faced other kinds of problems too. They lacked coherence in outlining their common outlook. The emergence of new technologies and the trade patterns were also not in their favour. In other words, they lacked both the resources and the expertise to meet the challenges posed by the new and emerging areas. Infrastructural deficiencies were also a major factor in the way of developing countries' inability to identify and articulate the possible hindrances inherent in the various provisions of the draft negotiating text.[4]

Be that as it may, the Final Act has been adopted and now the task is to see how best it could be utilized to serve the interests of countries belonging to different categories. The WTO will provide the common institutional framework for the conduct of trade relations among its members in matters related to the agreements and associated legal instruments.[5] Accordingly, the endeavour in this study will be to examine the implications of the Final Act on the Asian-African countries, *vis-a-vis* the new and emerging areas of technology.

Background and Negotiating Approaches

The Uruguay Round of Multilateral Trade Negotiations was launched in September 1986.[6] According to one view the new round was "the most challenging undertaking in the GATT history not only because it was launched against the background of an unprecedented worsening of the world trading conditions with a view, *inter alia*, to developing a more open, viable and durable multilateral trading system but also because of the scope and complexity of its agenda"[7]. This round addressed traditional market access issues also the longstanding ones, such as agriculture, tropical products or safeguards. As regards the institutional framework of GATT, it dealt with dispute settlement procedures, the implementation of certain articles or the functioning of the GATT system as a whole. Another feature of the Uruguay Round was the inclusion for the first time of such issues as trade-related aspects of intellectual property rights (TRIPS), trade-related investment measures (TRIMS) and trade in services.

It should be noted that the principles and rules that governed international trade since the Second World War were generally embodied in the General Agreement on Tariffs and Trade (GATT). The operating mechanism of the GATT system has been summed in the following way: "Such basic premises of GATT as the principles of most-favoured nation and non-discriminatory treatment, as well as differential and more favourable treatment for developing countries, have over-time brought under its auspices nearly 100 trading nations, both developed and developing. Through a series of rounds of trade negotiations, within this multilateral framework of contractual rights and obligations, the GATT Contracting Parties have succeeded in reducing significantly the general levels of tariff protection and in introducing more discipline into the use of a number of non-tariff measures which have become important trade policy instruments."[8]

There were, however, important shifts in the emphasis accorded to various topics. The new "themes", as they were called, were also introduced. The reasons which necessitated the introduction of new themes were stated to be a complex set of factors within the structure of the international trading system itself. According to one view, "the inclusion in the Uruguay Round of the issues of services, trade-related investment measures, and trade-related aspects of intellectual property rights reflects the structural changes which have taken place in the world economy and the evolution of the role of technology and technological progress in world production and trade."[9] The rapid changes in the technological innovations opened up new possibilities such as informatics, telecommunications, biotechnologies and new material applications. These new areas brought in elements in the usage of scientific knowledge and its collection, storage, processing and transfer for practical applications.

4. Supporting Papers, n. 1. p. 202. The UNCTAD Study briefly examines the "Cost of adapting national intellectual property laws and institutional arrangements to TRIPS provisions".
5. For the List of Agreements concluded at the Uruguay Round and of related decisions and declarations see Annex A of the Secretariat Brief No. AALCC/XXXIV/Doha/95/11.
6. The Uruguay Round was officially launched on 20 September 1986 with the adoption of the Ministerial Declaration on the Uruguay Round (generally referred to as the Punta del Este Declaration), but the negotiating process can be considered to have begun as far as back as in early 1982 in the preparatory work for the GATT Ministerial Session of November of that year, which established the work programme that provided the elements for the Uruguay Round Negotiating agenda. See: *Trade and Development Report, 1994* (UNCTAD: New York) p. 119.
7. *Uruguay Round Papers on Selected Issues* (UNCTAD, New York, 1989).
8. *Ibid.*
9. Paolo Bifoani, "Intellectual Property Rights and International Trade" in *Uruguay Round Papers*, n. 7, p. 129.

The negotiating approaches on all these issues were formulated on one basic criterion, namely, the prevalence of economic inequality and dependency existing between developed and developing countries in their relations. In other words, it should be noted as a prelude to the determination of these approaches that the international flow of technology has been regulated by prevailing market conditions and the economic power of the actors involved. Due to these differences, after more than four years of negotiations the Uruguay Round could not be concluded within the agreed timeframe at the Ministerial Meeting of the Trade Negotiations Committee (TNC), held at Brussels from 3 to 7 Decemer, 1990.[10] The UNCTAD's Trade and Development Report 1991 noted: "The negotiations had to be suspended because of a number of political deadlocks, first of all in the area of agriculture, where participants could not agree over "specific binding commitments" in the three related areas of domestic support market access and export competition. There were also wide divergencies in the positions of participants in some other key areas, such as anti-dumping and trade-related investment measures, on which draft texts were submitted to the Brussels Meeting. Moreover, practically all parts of the draft Final Act submitted to in Brussels' Meeting contained fundamental, political or technical points of disagreement, on which difficult compromises still had to be negotiated."[11]

The complex and difficult nature of the negotiations could be seen in the decision of the Brussels Ministerial Meeting (December 1990). This meeting concluded with a request to the Director-General of GATT to pursue intensive consultations in the early months of 1991 with the specific objective of achieving agreement in all the areas of the negotiating programme in which there were still differences outstanding, taking into acount the considerable amount of work carried out by Ministers at the Brussels Meeting, although it did not commit any participant.

It took nearly two years to finally formulate a final document embodying the conclusions of the negotiations. These negotiations, although open to all the Member States, were at times conducted with too many constraints. Some of the leading developing countries could not consistently maintain their negotiating approaches and strategies. The process of negotiations leading to the final outcome was summed up as "a matter of compromise between the divergent positions of the major trading nations"[12] Further,

10. Prior to its final meeting in Marrakesh, Morocco, the TNC, set up at Punta del Este, has met twice at Ministerial level, at the Mid-term Review of Montreal in December 1988, and at Brussels in December 1990. See *Trade and Development Report, 1994*, n. 6, p. 119.
11. *Trade and Development Report*, 1991 (UNCTAD: New York), p. 141.
12. *Ibid.*

"in order to achieve their objectives more effectively, certain developing countries aligned themselves with groups of developed countries where their interests coincided, as on agricultural reform and improved market access. In other areas, however, particularly that of the "new issues", where developed and developing countries found themselves in radically different situations, developing countries had effectively coordinated their positions and submitted their proposals."[13]

The Trade Negotiations Committee concluded the Uruguay Round in Marrakesh, on April 15, 1994, with the signing of the Final Act and opening for signature of the Agreement Establishing the World Trade Organisation. Of the 125 countries which formally participated in the Round, 111 signed the Final Act and 104 signed the WTO Agreement, in many cases with the indication that their acceptance was subject to ratification. Seven countries were unable to sign the WTO Agreement because of domestic legislative impediments.[14] In addition to twenty-eight agreements, a number of Decisions and Declarations were adopted., including[15] (i) the Marrakesh Declaration containing schedules of concessions on goods; (ii) Decision on the Establishment of the Preparatory Committee for the WTO; (iii) Decision on Acceptance of and Accession to the Agreement Establishing WTO; (iv) Decision on Trade and Environment; (v) Decision on Trade in Services and the Environment; (vi) Declaration on the Relationship of the WTO with the International Monetary Fund; (vii) Decision on Organizational and Financial Consequences Flowing from Implementation of the Agreement Establishing the WTO.

III. Final Act Embodying the Results of the Uruguay Round Negotiations: An Overview

The implementation of the Final Act, it is estimated, should result in the increase of the World trade by more than 200 billion dollars.[16] According to an UNCTAD study, the successful conclusion of the Uruguay Round should also result in a substantial strengthening of the multilateral trading system essentially by: (i) providing much more detailed rules to govern the application of a variety of trade policy measures, particularly those where weak or unclear disciplines had consistently been a source of trade

13. *Ibid.*, p. 142.
14. Australia, Botswana, Burundi, India, Japan, Republic of Korea and United States, See: *Trade and Development Report, 1994*, n. 6, p. 119.
15. See Annex. A Doc. AALCC/XXXIV/Doha/95/11.
16. The current approximate World Trade is estimated $1,000 billion. *The Economic Times, 16 December*, 1994.

tensions and the subject of trade disputes; (ii) devising new multilateral trade rules to cover intellectual property and trade in services; (iii) achieving a substantial degree of tariff liberalization as to maintain the momentum towards ever freer multilateral trade; (iv) reducing the discriminatory aspects of regional trade agreements; (v) effectively raising the multilateral obligations of all countries to broadly comparable levels, with differential and more favourable treatment for developing countries being delineated in a more specific, contractual manner; and (vi) linking together the various agreements concluded within a formal institutional framework (i.e. WTO), subject to an integrated-dispute settlement mechanism. An aspect which probably may need greater consideration at a later date would be the inclusion in the Final Act range of measures previously viewed as falling within the scope of domestic policy.[17]

The present study seeks to concentrate on three major areas concerning the institutional framework i.e. (a) WTO, (b) trade-related aspects of intellectual property rights, and (c) investment measures. These areas are of distinct importance to the developing countries of Asia and Africa. The main functions of WTO, for instance, are to facilitate the implementation, administration and operation of the Uruguay Round Agreements, and to provide a forum for negotiations among members concerning their multilateral trade relations.[18] The provisions relating to investment measures need careful and selective consideration. It should be noted that during the initial stages of the negotiations some developed countries attempted to negotiate multilateral obligations with respect to the treatment of investment *per-se*, in pursuit of their longstanding objective of obtaining the multilateral acceptance of such principles as a "right of establishment" and "national treatment" for transnational enterprises and to link such principles to the multilateral trading system. Due to the strong responses of a group of developing countries, the UNCTAD study notes, negotiations finally concentrated on compatibility within the GATT or measures which linked investment to trade in goods.[19]

The importance of intellectual property rights in the overall context of emerging new technological innovations has already been emphasized. Accordingly, the scope and intensity of the obligations contained in the Agreement on TRIPS go far beyond what had been envisaged at the beginning of the negotiations. There are no specific provisions to facilitate tecnology transfer to developing countries. The norms and standards

17. UNCTAD, *Trade and Development Report*, n. 6, p. 119.
18. Article III, *The Agreement Establishing the World Trade Organization*.
19. UNCTAD, *Trade and Development Report, 1994*, n. 6, p. 136.

envisaged in the Agreement on TRIPS do not take into account the specific problems which may have to be faced by the developing countries. In the following analysis an attempt has been made to address briefly some of these issues which are critical to the Member States of the AALCC.

A. World Trade Organisation (WTO)

The World Trade Organisation (WTO) provides the institutional framework to the Final Act.[20] The role which is likely to be played by the WTO in the "new world order" has been described in different ways. Some view it as finally taking the place of the still-born International Trade Organization (ITO) of the Havana Charter and constituting the "missing pillar" of the post-war world economic system—the third "Bretton Woods" institution.[21] On the other hand, views have also been expressed that the WTO "would not be different in character from the existing GATT Secretariat... nor is it expected to be a larger, more costly organization.[22] Some view its role cautiously by noting, "the WTO has no more real power than that which existed for the GATT under the previous agreements."[23]

(i) Organizational Structure

The Organizational Structure, which is open to all WTO Members, consists of a Ministerial Conference, meeting at least once every two years, and a General Council, meeting as appropriate. The General Council will also carry out the functions of a Dispute Settlement Body and a Trade Policy Review Body. Other bodies include a Council for Trade in Goods, a Council for Trade in Service, and a Council for TRIPS. A Committee on Budget, Finance and Administration, a Committee on Trade and Development, and a Committee on Balance-of-Payments Restrictions will be established by the Ministerial Conference. The Council for Trade in Goods, the Council for Trade in Services, and the Council for TRIPS will establish their respective rules of procedure subject to the approval of the General Council, and any subsidiary bodies they may set up will establish their own rules of procedure subject to the approval of their respective Councils. The Council for Trade in Goods will oversee the functioning of the Multilateral Trade Agreements as set out in Annex 1A, while the Council for Trade in Services will oversee the functioning of the General Agreement on Trade in Service as set out in Annex 1B, and

20. *Ibid.*
21. *Ibid.*
22. *Ibid.*
23. *Ibid.*

the Council for TRIPS will oversee the functioning of the Agreement on TRIPS, including Trade in Counterfeit Goods, as set out in Annex 1C.[24]

The Agreement establishing the WTO provides that the General Council will make arrangements with other intergovernmental organizations that have related responsibilities to provide for effective cooperation as well as with non-governmental organizations for consultation and cooperation on matters related to those of the WTO. There will be a Secretariat of the WTO headed by a Director-General. The financial regulations of the WTO will be based, as far as practicable, on the regulations and practices of the GATT 1947. The WTO has a legal personality and will be accorded by its members such legal capacity as may be necessary for the exercise of its functions.[25]

The WTO Agreement stipulates that the Contracting Parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept the Agreement and the Multilateral Trade Agreements, and which have submitted their schedules of concessions on goods (annexed to GATT 1994) and services are eligible to become original members of the WTO. There is an exemption from that basic requirement related to the least developed countries which will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.[26]

(ii) Functional Aspects

Although the WTO Agreement consists of a Preamble, sixteen Articles and four Annexes, it does not incorporate any substantive multilateral rules and disciplines (concerning for example, MFN treatment, non-discrimination, national treatment etc). It has been noted that the preamble, a redraft of the GATT 1947 preamble, is the only place in the Agreement where substantive matters are touched upon. Apart from referring to the "optimal use of the world's resources in accordance with the objective of sustainable development", the preamble recognizes the "need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development". It, in general terms, seeks to develop "an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs

24. *Ibid.*
25. UNCTAD, *Trade and Development Report* (Supplement, n. 1, p. 11).
26. *Ibid.*, p 13.

and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations."

The decision-making procedures constitute an important component of the WTO Agreement. According to the UNCTAD Study, the Agreement foresees that the WTO will continue the GATT practice of decision-making by consensus. A decision by consensus, it is noted, is deemed to have been taken if no member present at the meeting when the decision was taken, formally objected to the proposed decision. However, when a decision cannot be arrived at by consensus, the matter will be decided by voting. In this respect, different procedures have been established depending on the issue involved.

The WTO Agreement creates an obligation on its Member States which needs consideration. It says, "each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." This provision does not outline the extent of conformity. Accordingly, it has been noted, "Bearing in mind the complexities of the legal relationship between the GATT and national law in some major trading countries—this provision could be open to different interpretations". It is also a matter of interpretation as to whether this provision and the conformity envisaged could be taken to the dispute settlement mechanism.

B. Trade-related Investment Measures (TRIMS)

The inter-relationship between the investment and the trading system has a long history. The last two hundred years have seen various measures adopted for the purposes of regulating and protecting the flow of international investment. These developments have been summed up in the following words: "In the late eighteenth and nineteenth centuries, the European powers and the United Statesd set minimum standards for the protection of foreign investment based on treatment superior to national treatment, according to which the host countries were not permitted to interfere with foreign assets and seizure and expropriations were prohibited. The standards of treatment were established in a number of commercial treaties, and were often enforced through political pressure or military intervention."[27]

These kinds of enforcement measures had no basis whatsoever in the international legal system. The UNCTAD Report points out that these measures adopted by a number of States "diverged from the general principles of international law, under which foreigners were subject to

27. *Ibid.*

local laws and not entitled to a higher standard of justice than nationals"'[28] Furthermore, interference with the property of foreigners was permissible subject to independent judicial review and full compensation.

With the increase of the movement of capital across the boundaries, particularly after the Second World War, the issue of investment formed a part of the negotiations at the United Nations system. It has, however, been noted that the negotiations which led up to the Havana Charter, and eventually to GATT demonstrated that governments were not prepared to subject their investment policies to international rules and disciplines.[29] Developed countries sought to pursue the investment policies bilaterally through the conclusion of Friendship, Commerce and Navigation (FCN) Treaties and Investment Promotion and Protection Agreements. The purpose of these treaties was to ensure that the property of investors would not be expropriated without prompt, adequate and effective compensation, non-discriminatory treatment, transfer of funds and dispute settlement procedures.

(1) Investment Norms and GATT

There were a number of factors which actually facilitated the linking of investment legislation and the GATT. After the conclusion of the Tokyo Round of Multilateral Trade Negotiations in 1979, the UNCTAD Study notes, there were attempts to bring under the purview of the General Agreement a more focussed consideration of a limited number of performance requirements introduced by host countries with regard to foreign investors, particularly in relation to the use of local content and to export performance.[30] However, several developing countries while opposing these attempts maintained that the issue of foreign direct investment was beyond the jurisdictional competence of GATT. Developed countries continued to argue that such requirements had effects clearly related to trade and should be addressed by the Contracting Parties through a detailed examination of the GATT articles.

Meanwhile, a dispute brought by the United States against Canada on the Administration of the Foreign Investment Review Act (FIRA) in 1982 to GATT was considered to be a significant step in defining the extent to which investment measures were covered by multilateral trade obligations. The United States had claimed that the requirements imposed on the foreign investor by FIRA to purchase goods of Canadian origin in preference

28. *Ibid.*
29. *Ibid.*
30. *Ibid.*

to imported goods, to manufacture goods in Canada which would otherwise have to be imported and to export specified quantities of production were inconsistent with GATT Article III: 4, III: 5, XI and XVI: 3 (c). On the other hand, a large number of delegations had expressed doubts as to whether the dispute between the United States and Canada was one for which GATT had competence since it involved investment legislation, a subject not covered by GATT. Nevertheless, the GATT Council decided to allow the Panel to pursue the matter, limiting its activities and findings within the boundaries of GATT and the legislation as such would not be called into question. Finally, the FIRA Panel found that Canada's practice of allowing certain foreign direct investments were inconsistent with some of the GATT provisions.

Considering some of the issues raised by the above dispute, the United States at the preparatory stages of the Uruguay Round proposed that the negotiations should (i) seek to increase discipline over government investment measures which divert trade and investment flows at the expense of other Contracting Parties; (ii) explore a broad range of investment issues in the negotiations, including national/MFN treatment for new and established direct investment and the right to establish an investment; and (iii) examine various types of trade-related investment measures such as local content requirements, export performance requirements, incentives and product mandating, which should be controlled and reduced in the light of specific articles of GATT as well as its overall objectives. Accordingly, the Punta del Este Ministerial Declaration on TRIMS stated: "Following an examination of the operation of GATT Articles related to the trade restrictive and distorting effects of investment measures, negotiations should elaborate, as appropriate, further provisions that may be necessary to avoid such adverse effects on trade."[32]

(ii) The Agreement of TRIMS

The negotiating approaches at the GATT had two distinct parts: first, whether the disciplines evolved in this area should be limited by existing GATT Articles or expanded to develop an investment regime; second, whether some or all actionable TRIMS should be prohibited or should be dealt with on a case-by-case basis demonstration of direct and significant restrictions and adverse effects on trade. The United States and Japan were in favour of an international investment regime that would establish rights for foreign investors and reduce constraints on transnational corporations. The EC and the Nordic countries focussed on measures

32. *Ibid.*, p. 138.

that had a direct and significant restrictive impact on trade and a direct link to existing GATT rules. Developing countries, on the other hand, called for strict adherence to the mandate and for limiting the negotiating exercise to the effects of investment measures or regulations that had a direct and significant negative effect on trade.

The Agreement on TRIMS does not introduce any new obligations, but merely prohibits those TRIMS that have been judged inconsistent with GATT obligations regarding National Treatment on Internal Taxation and Regulation (Article III) and the General Elimination of Quantitative Restrictions (Article XI). These include, it is noted, (a) local content requirements (inconsistent with national treatment obligation), such as those which require the purchase or use by an enterprise of products of domestic origin in terms of the volume or value of products or in terms of proportion of their domestic production, or that require an enterprise's purchases or use of imported products to be limited to an amount related to the volume or value of the local products that it exports; and (b) trade balancing requirements (inconsistent with the obligation to eliminate quantitative restrictions), such as those which restrict the importation by an enterprise of products used in or related to its local production generally or to an amount linked to its exports or to the foreign exchange inflows attributable to the enterprise, or that restrict exports in terms of volume or value of products or as a proportion of local production. These measures are included in an illustrative List annexed to the Agreement. It has, however, been pointed out that "there would seem to be a "grey area" subject to interpretation, and a variety of investment measures may be challenged after the entry into force of the WTO Agreement."[33]

C. Trade-Related Aspects of Intellectual Property Rights (TRIPS)

Technological advancement and innovation has brought about tremendous changes in the production process itself. Information technologies, in particular, have radically altered the nature of competition due to the inherent vulnerability of such technologies to rapid appropriation.[34] According to a UNCTAD study, "the international convergence of technological capabilities among developed and a limited number of developing countries and the gradual erosion of competitiveness in the traditional areas of production of a number of developed countries have made intellectual property a new basis of comparative advantage."[35]

33. UNCTAD, *Trade and Development Report*, n. 6, p. 136.
34. UNCTAD, *Trade and Development Report* (Supplement). n. 4, p. 185.
35. *Ibid.*

The Punta del Este Ministerial Declaration on the Uruguay Round set the objectives of the negotiation as: "In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines."

(i) GATT and TRIPS: Compatibility

The discussion on intellectual property in GATT was initiated in an altogether different form. It was first introduced into the GATT negotiations during the Tokyo Round in 1978 on the basis of a draft proposal put forward by the United States and the European Communities (EC), with specific regard to anti-counterfeiting measures. As no agreement was reached at that time, the United States circulated a new draft in 1982, and a GATT Group of Experts held several meetings on the matter in 1985.

The issues concerning counterfeiting were acceptable to developing countries and its further negotiation in the GATT forum was agreed. The reasons for this acceptance were: (i) the issue of counterfeiting did not normally involve technological undertaking, the developing countries found it easier to address the latter issues than those concerning substantive standards of protection dealt with in existing international treaties and administered by specialised agencies in the field; and (ii) it was realized that the practice of countrfeiting did not confer advantage in terms of national policy aimed at building up industrial and technological capabilities. It has been, however, noted that "owing to the insistence of the developed countries, the discussions at the TRIPS negotiations centred more on the establishment of substantive and uniform standards involving a higher level of protection for intellectual property rights."[36]

Two distinct views emerged in the process of TRIPS negotiations. The developing countries were initially prepared to discuss only the clarification of existing GATT rules and provisions dealing with intellectual property, such as Articles IX and XX (d) and measures to restrict trade in counterfeit goods that could be understood as clarifying Article 9 of the Paris Convention, which deals with the seizure, on importation, of goods unlawfully bearing a mark or trade name. They regarded any discussion of substantive intellectual property norms as beyond the competence of GATT and within the exclusive jurisdiction of the World

36. UNCTAD, *Trade and Development Report*, n. 6, p. 185.

Intellectual Property Organization (WIPQ). Developed countries, on the other hand, interpreted the Punta del Este Declaration as allowing for the elaboration of new substantive rules of international intellectual property law.

(ii) The Agreement on TRIPS

The Agreement on TRIPS recognizes that, in order to reduce distortions and impediments to international trade, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to international trade, new rules and disciplines are needed. To this end, the Agreement addresses the applicability of the basic principles of GATT and those relevant to intellectual property rights, the provision of effective enforcement measures for those rights, multilateral disputes settlement, and transitional arrangements.

The Agreement establishes minimum universal standards on patents, copyrights, trademarks, industrial designs, geographycal indications, integrated circuits and undisclosed information. The Agreement introduces, in addition to the well-established principle of national treatment, that of "most favoured-nation" treatment, a novelty in international IPR regimes, whereby any advantage a member grants to the nationals of any other country must be extended immediately and unconditionally to the nationals of all other members. The basic principles, it is noted, refer to criteria and objectives of special interest to developing countries, namely the contribution that the protection and enforcement of intellectual property rights should make to the promotion of technological innovation and to the transfer and dissemination of technology, and the measures that countries may adopt to protect public health and nutrition and to promote public interest in sectors of vital importance to their socio-economic and technological development.

Patents protection, as provided in Article 27:1 of the Agreement, will be available for any inventions, whether products or processes, in all fields of technology without discrimination as to the place or invention, the field of technology and whether products are imported or locally produced. The Agreement allows for exclusion from patentability for diagnostic, therapeutic and surgical methods for the treatment of humans or animals, and for plants and animals (other than micro-organisms), as well as for essentially biological processes for the production of plants or animals (other than micro-biological) or non-biological processes). Plant varieties, however, must be protectable either by patents, or *sui generis* (a class by itself) system or by any combination of the two.

These formulations of the extent of patent protection in the Agreement have given rise to a number of possible implications. Firstly, the impact of this change on the various sectors of the economies, particularly pharmaceutical, of the developing countries needs to be accurately addressed. Problems have been envisaged in the area of patenting life-forms. These formulations, it is argued, merely outline the provisions as embodied in the legislations of developed countries. Similar problems have also been raised in the case of issuance of compulsory licences. The compulsory licencing procedures are invoked only when the patents are not adequately worked. In the Agreement the provision relating to compulsory licensing has been completely diluted. It is referred to as "Other uses without the Authorization of the Right Holder". In the final analysis, the provisions relating to patents have not only been diluted, they have also taken one-sided view of the operation of the patent system.

IV. Conclusion

This study briefly outlines the three major areas of the Final Act embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, namely, the World Trade Orgazination, Trade-related Investment Measures and the Trade-related Intellectual Property Rights. The implications arising out of these agreements need closer scrutiny in the light of the practices they may establish. For developing countries two issues may become important. One, the possibilities of changing their legal and policy options while pursuing the multilateral trade negotiations. It has far-reaching implications on the structure of their priorities as regards development and growth. The second problem relates to the building of infrastructural and operative mechanisms. In material terms, these aspects will be cost-intensive Till today many developing countries are not prepared for such a quick turnaround, notwithstanding the transitional arrangements provided for in the Agreement. In the AALCC Secretariat's view some of these issues will definitely need further substantive and specific elaboration so as to facilitate effective gains from the emerging new trade regimes.

Report of the International Seminar on Globalization and Harmonization of Commercial and Arbitration Laws, New Delhi, 31 March—1 April, 1995

An International Seminar on "Globalization and Harmonization of Commercial and Arbitration Laws" was held in New Delhi, on 31 March and 1 April, 1995. The seminar was organized by the Asian-African Legal Consultative Committee with the technical support provided by UNIDO, UNCITRAL, WIPO, World Bank and UNIDROIT and hosted by the Indian Council of Arbitration. The main objective of the Seminar was to promote standardization and harmonization of commercial laws and practices on uniformly agreed and acceptable basis in the Afro-Asian region in the wake of the ongoing phenomenon of liberalization and globalization of national economies.

In addition to representation from co-sponsoring and collaborating institutions and the Regional Centre for Arbitration, Kuala Lumpur, the Seminar was attended by delegations from: China, Ghana, Indonesia, Jordan, Kenya, Kuwait, Libyan Arab Jamahiriya, Malaysia, Mauritius, Mongolia, Namibia, Nepal, Nigeria, Oman, Palestine, the Philippines, Sri Lanka, Thailand, United Arab Emirates, Republic of Yemen and Zambia. Senior officers from the Ministries of Law, Justice and Company Affairs, Commerce and External Affairs, Government of India and a large number of participants from public and private sector undertakings in India, also participated.

The Seminar addressed itself to the following topics:

(i) Unification of the law and procedures for international commercial arbitration—UNCITRAL Model Law on International Commercial Arbitration;

(ii) Promoting unification of laws related to procurement of goods, construction and services; UNCITRAL Model Law on Procurement of Goods, Construction and Services;

(iii) Promoting unification of laws related to international sale of goods;

(iv) Unification of laws related to international transport of goods (Hamburg Rules, Multimodal Convention and the Convention on the Liability of Transport Terminal Operators in International Trade);

(v) Arbitration of intellectual property disputes;

(vi) New contractual modalities for infrastructure development—BOT/ BOO, International Franchising and joint ventures;

(vii) International Arbitration Services—Role of ICCA; ICC, AALCC Regional Centres and the Indian Council of Arbitration.

The proceedings of the Seminar were organized into nine working sessions. Four working sessions were held on the first day and five working sessions on the second day.

The first working session devoted to the topic "Unification of the Law and Procedure for International Commercial Arbitration"—was chaired by Dr. P.C. Rao, Secretary, Ministry of Law, Justice and Company Affairs, Government of India. The main speakers during this session were Mr. Robert Hunja, Legal Officer, UNCITRAL; Mr. Ram T. Madan, Advocate, Jenner & Block, Chicago; and Mr. D.C. Singhania, Solicitor and Senior Advocate, Supreme Court of India. Mr. Hunja's presentation was on UNCITRAL Model Law on International Commercial Arbitration. He related the background to the preparation of the Model Law and presented an overview of some of its salient features. He stated that the main objective of the Model Law was to contribute to the establishment of a unified legal framework for the settlement of international business disputes through arbitration. As such, the Model Law was intended to assist countries that do not have an arbitral legislation to adopt a modern arbitral legislation. It also provided a sound basis to orient the existing national arbitral legislation to the needs of modern international arbitration practice. While urging the implementation of the Model Law in the national domain for achieving a worldwide uniformity of the arbitration law and procedures, he laid special emphasis on the training of the arbitrators. Mr. Madaan's presentation was devoted to the 'Adoption of the UNCITRAL Model Law in the USA'. He pointed out that in USA, three approaches were being followed in regard to the implementation of the UNCITRAL Model Law: (i) amending the existing Federal Law in the light of the Model Law; (ii) adopting the Model Law in its entirety at the State-level; and adopting the Model Law partially at the State-level. Mr. Singhania referred to the salient features of the Model Law and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Dr. Rao while summing up the discussions emphasized that an essential ingredient of the economic reform programme should be a modern law for the settlement of international commercial disputes. Such a law should be supported by necessary infrastructure facilities including a Centre for ADR and providing training facilities for arbitrators.

The second session was devoted to 'UNCITRAL Model Law on Procurement of Goods, Construction and Services". The main speakers on this topic were Mr. Robert Hunja (UNCITRAL), Dr. Syed Ahmed (World Bank) and Mr. M.P. Gupta (India) Mr. Hunja in his presentation stated that while procurement expenditures represented a significant portion of the overall development expenditure in the developing countries, few of those countries had adequate legal framework for procurement. Since procurement of goods and services should be quality-oriented, and cost-effective, and procurement procedures fair and transparent, the UNCITRAL's Model Law on Procurement was intended to assist States in updating and modernising their existing laws or for the enactment of new legislation where none existed in the area of procurement of goods and services. Dr. Syed Ahmed (World Bank) spelt out the procurement guidelines prepared by the World Bank which were required to be followed by borrowers for the World Bank financed projects. Mr. M.P. Gupta referred to the international competitive bidding procedures in India and urged the Government of India to exclude World Bank aided works contracts from the operation of amendments effected by some of the States in India to the Indian Arbitration Act 1940. His suggestion was that pending the enactment of the proposed comprehensive legislation on arbitration by the Government of India it would be necessary and useful to execute World Bank contracts in any place outside the jurisdiction of the aforementioned State Governments to save such contracts from the mischief of the State amendments.

The third session was devoted to the "United Nations Convention on Contracts for the International Sale of Goods 1980". The leading speakers were Mr. Robert Hunja (UNCITRAL) and Mr. P.M. Bakshi, a former Member of the Law Commission of India. Mr. Hunja recounted the background leading to the adoption of the UN Convention on Contracts for the International Sale of Goods in 1980 and described its salient features. He stated that the Convention was basically restricted to the formation of the contract for international sale of goods and the rights and duties of the buyer and seller arising from such contracts. As such an important principle enshrined in the Convention was that there was utmost emphasis on the preservation of the contract and it was relatively difficult under the Convention to reject the goods and to say that there was no contract. Another principle embodied in the Convention was that of contractual freedom. As such, the Convention permitted the parties to exclude the application of the Convention or to derogate from or vary the effect of any of its provisions. The Convention thus gave primacy to the terms of the contract and its provisions were in the nature of being

suppletive rules to the international sale contract. He stated that although the Convention had been ratified by more than forty States, other States should soon adhere to it so that all international sales are governed by the Convention. Mr. P.M. Bakshi in his presentation set forth a comparative analysis of some of the important provisions of the UN Sales Convention and the Indian law applicable to the sale of goods.

The fourth session was devoted to the UN Convention on the Carriage of Goods by Sea 1978 (The Hamburg Rules) and the UN Convention on International Multimodal Transport of Goods, 1980. The leading speakers on this topic were Mr. R.S. Saran (India) and Mr. Robert Hunja (UNCITRAL). Mr. Saran first addressed himself to the UN Convention on the Carriage of Goods by Sea 1978, popularly known as the Hamburg Rules, and subsequently to the UN Convention on International Multimodal Transport of Goods, 1980. He observed that although the Hamburg rules represented a fair balance between the interests of the carrier and the cargo-owner unlike the Hague or Hague-Visby Rules which were tilted in favour of the carrier, the shipowning interests had not been happy with the Hamburg Rules with the result that almost all maritime States had not as yet ratified the Hamburg Rules. Despite this negative trend, in his view, indications were that the Hamburg Rules would catch on, although it might take some time. The factors, according to him, favouring the spread of the Hamburg Rules included trade compulsions and the very nature of the rules, e.g. mandatory application to both outward and inward bills of lading, requirement of bills of lading to including a paramount clause for incorporation of the Rules, wide options of forum for litigation and arbitration and mandatory nature of the Rules not permitting any worthwhile exclusion cases.

As regards the United Nations Convention on International Transport of Goods, 1980, it was stated that the striking feature of the Multimodal Transport System was not the actual merger or physical combination of various modes of transport, but the principle whereby the operator accepted liability, as a principal and not as an agent, for the cargo from the time he took over the charge of the cargo from the consignor until delivery to the consignee. In the multimodal regime, there was one document of transport, one rate and through liability. The Multimodal Convention subscribed to these principles. As for the implementation of the Multimodal Convention in India, the pointed out that although India had not ratified the Convention, it had enacted a legislation called "The Multimodal Transport of Goods Act 1993" to "provide for the regulation of the multimodal transportation of goods from any place in India to a place outside India on the basis of a multimodal contract and for matters connected therewith

or incidental thereto". The Act laid down the responsibilities and liabilities of multimodal transport operators and included other relevant provisions concerning lien, general average, jurisdiction for instituting action, arbitration etc.

Mr. Hunja (UNCITRAL) traced the evolution of the legal regime concerning the maritime transport of goods and described the salient features of the Hamburg Rules pinpointing at the same time the many improvements which these Rules had made over the Hague or Hague-Visby rules. According to him, these improvements were: (i) The scope of application of the Hamburg Rules was substantially wider than that of the Hague Rules; (ii) The duration of liability of the carrier was wider in the case of the Hamburg Rules as compared to that in the hague Rules; (iii) While both the Hamburg and Hague Rules based the liability on presumed fault of the carrier, in the case of the latter such liability could be disclaimed by a series of exemptions; (iv) The financial limits of liability of the carrier were 25% higher in the Hamburg Rules than those established under the 1979 Additional Protocol to the Hague Rules; (v) Unlike the Hamburg Rules, the Hague Rules did not provide for the liability of the carrier for delay in delivery; (vi) In the Hamburg Rules, limitation period for bringing suits was two years while in the Hague Rules, it was one year. Finally, Mr. Hunja stated that since the Hamburg Rules were elaborated on the initiative of the developing countries and were in their own interest, they must, in particular, India should expedite their adherence to the Rules so that the outmoded Hague Rules could be displaced and the prevailing uncertainty arising on account of a multiplicity of regimes applicable to the carriage of goods by sea could be ended.

The first session on the second day was devoted to the "United Nations Convention on the Liability of Transport Terminal Operators in International Trade, 1993". In his introductory remarks, the Chairman Mr. Anthony Forsow, High Commissioner for Ghana in India referred to the evolving legal regime concerning the maritime transport of goods and stated that this Convention covered the last link in the chain of liability concerning the transport of goods. He pointed out that while the carrier's liability through various transport conventions was governed by harmonized and mandatory rules, there existed periods during which the goods in transit were not subject to a mandatory regime. The negative consequences of these gaps in the liability regime were serious as in most cases goods lost or damaged occurred not during the actual carriage, but when they were in the care of custody of the terminal operator. The 1993 Convention therefore sought to establish a uniform legal regime governing the liability of transport terminal operators.

Mr. Robert Hunja referred to the policies underlying the Convention, the gaps covered by the Convention in liability regimes left by other international conventions, and the need for harmonization and modernization in the area and the benefits that would accrue from the adoption of the legal regime instituted by the Convention.

The second session was devoted to "Arbitration of Intellectual Property Disputes". The leading speakers on this topic were Dr. Francis Gurry, Director of the WIPO Arbitration Centre and Dr. K.V. Swaminathan, Chairman, Waterfalls Institute of Technology Transfer.

Dr. Gurry in the course of his presentation identified the following factors which motivated the establishment of WIPO Arbitration Centre to cater to the arbitration of intellecutal property disputes: (i) the central position which intellectual property had come to assume in the contemporary economy; (ii) increasing international character of the exploitation of intellectual property as a consequence of internationalization of markets; (iii) increasing resort to, and increasing interest, in alternative dispute resolution (ADR) techniques; and (iv) specific characteristics of intellectual property disputes. He then outlined the services provided by the WIPO Arbitration Centre for the resolution of intellectual property disputes through good offices, mediation, arbitration and expedited arbitration.

Dr. Swaminathan, in the course of his presentation demonstrated with the help of transparencies, problems and issues that would need to be addressed by the emerging legal regime in the area of intellectual property following upon the adoption of the new GATT Accord and in particular, the companion Agreement on Intellectual Property Rights. He emphasized the need for coining a definition of an intellectual property dispute, evolution of suitable criteria for the selection of arbitrators for tackling such disputes and possibility of inclusion of Indian arbitrators in the WIPO Arbitration Centre's panel of arbitrators.

The third session was devoted to the topic "New Contractual Modalities for Infrastructure Development—BOT/BOO, Franchising and Joint Ventures". The main speakers were Mr. Jose M.De. Lima-Caldas, Chief, Technology Division, UNIDO, Mr. Robert Hunja (UNCITRAL), Dr. Syed Ahmed (World Bank), Mr. Asghar Dastmalchi, Assistant Secretary-General, AALCC and Mr. D.S. Mohil (AALCC).

Mr. Lima-Caldas (UNIDO) in his presentation referred to the UNIDO Programme on BOT Strategy which was composed of the following elements: (a) the establishment of guidelines and standard procedures for the negotiation and implementation and standard procedures for the negotiation

and implementation of BOT arrangements; (b) the availability of an advisory taskforce that can provide assistance in connection with specific BOT projects; and (c) technical assistance at the enterprise, national or regional levels for capacity building and policy advice related to the implementation of the BOT scheme. He pointed out that in pursuance of this programme, UNIDO was currently engaged in the formulation of Guidelines for Development, Negotiation and Contracting of BOT Projects. The main objectives of these Guidelines would be: (i) To give developing countries basic and strategic orientation so as to strengthen their capabilities in promoting and implementing BOT projects; (ii) to provide practical information on the structures, procedures and basic issues of BOT arrangements; (iii) To support dissemination and the learning process of BOT strategy; and (iv) To contribute towards reducing the time and expenses of BOT bidding, negotiation and contracting through the preparation of procedures and model documentation.

Mr. Hunja also identified the possible areas which UNCITRAL was likely to take up in the near future in regard to the BOT contracts. He also touched upon the legal problems that could arise in the implementation of such projects because of inadequacy of legal framework, procurement aspects and complexity in contracting.

Dr. Ahmed (World Bank) introduced his paper entitled "The BOT Model of Financing Infrastructure Projects in Developing Countries". The paper outlined the basic concept of a BOT project; the requirements for a conducive legal environment for successfully structuring and implementing a BOT project; and carried an analysis of different contractual arrangements that could form part of a BOT project.

Mr. Asghar Dastmalchi, Assistant Secretary-General, AALCC, introduced the paper on "International Franchising" contributed by UNIDROIT at the request of the AALCC. The paper discussed different ways of franchising internationally and concluded that it was the master franchise agreement which was most commonly used for international franchising. It also focussed on the nature of the relationship between the master franchise agreement and sub-franchise agreements, applicable law and jurisdiction, the settlement of disputes, and problems associated with the tripartite nature of the relationship between franchisor, sub-franchiser and sub-franchisees, particularly in relation to termination and disclosure.

The paper entitled "Legal Aspects of Joint Ventures in Asia and Africa" was introduced by Mr. Mohil (AALCC). The paper traced the evolution of joint ventures, dealt with the relative merits and demerits of contractual and equity joint venture, outlined the legal framework in

Asian and African countries applicable to joint venture operations and provided guidelines for the setting up a joint venture and the prototype of a joint venture contract.

The fourth session was devoted to the "Role of ICCA, ICC, AALCC Regional Centres and Indian Council of Arbitration". Mr. F.S. Nariman, President of the ICCA, at the outset, gave a brief account of the role played by and activities of the ICCA and ICC in the area of international commercial arbitration. He stressed the need for intensifying interaction between the arbitral institutions worldwide so that rules and practices were standardized.

Mr. Essam Abdul Rehman Mohamed, Deputy Secretary-General, AALCC, introduced the paper contributed by Dr. Mohamed Aboul-Enein, Director of the Regional Centre for International Commercial Arbitration, Cairo, on the role of the Cairo Centre in the resolution of commercial and investment disputes. The paper gave an outline of the services provided by the Centre for the resolution of international commercial and investment disputes through arbitration, conciliation, mediation, claims review board, mini-trials etc.

Ms. P.G. Lim, Director of the Regional Centre for Arbitration, Kuala Lumpur, in her address gave an account of the services provided by the Kuala Lumpur Centre, a non-profit making institution, for the resolution of international commercial disputes and the training programmes and conferences organized by it to populrize the institution of arbitration and alternative dispute resolution (ADR) techniques. She pointed out that the Centre had a global network of cooperation agreements with the arbitral institutions in different parts of the world and was thus able to provide administrative services and facilities for the conduct of arbitral proceedings under the rules or auspices of the other arbitral institutions.

Mr. S.C. Nirwani, Executive Director of ICCA, cautioned the parties concluding business contracts not to forget making provisions for the settlement of possible disputes by a proper recourse to arbitration. According to him the clauses that the parties should insert in the contracts included a valid arbitration clause; reference of the dispute to institutional arbitration; selection of procedural rules (UNCITRAL or ICC); the law applicable to the contract; and the venue of arbitration.

The fifth and final working session devoted to "Practical, Legal and Arbitration Problems" provided an opportunity for interaction between the speakers of the previous sessions and the participants. It was agreed to make the following recommendation:

"The Seminar recommended taking the benefit of the arbitration facilities and the Alternative Dispute Resolution (ADR) mechanisms and called upon the Asian-African countries to pattern their laws on the United Nations Conventions related to the International Sale of Goods; Carriage of Goods by sea; Liability of Transport Terminal Operators in International Trade; Multimodal Transport of Goods, and the Model Laws on International Commercial Arbitration and International Procurement".