

## Complementarity

Majority of the delegations favoured a consensual approach towards the application of principle of complementarity but sought a clear definition of the principle of complementarity. Mere reference to the principle in the preambular paragraphs was not considered sufficient.

## Issues Pertaining to Jurisdiction and Applicable Law

It was generally agreed that the jurisdiction of the ICC needed to be very clearly defined for the effective operation of the Court as well as for upholding the principle *nullum crimen sine lege*. It was pointed out that the role of the statute was not to deal with the substantive definitions of the crimes but was to set out the judicial mechanism for the prosecution of the crimes. It was accordingly suggested that the definitions of crimes under the purview of the Court could properly be made in the statute or in the multilateral treaties creating or embodying those crimes. Majority of delegations however agreed that the jurisdiction of the Court be limited only to the most serious crimes of international concern. Some of the delegations felt that the crimes of drug trafficking, terrorism and piracy could be properly brought under the purview of the Court.

## International Criminal Court and the Security Council

Divergent views were expressed on the question of the relationship between the Court and the Security Council. Several delegations pointed out that the inherent jurisdictions envisaged by the statute upon referral by the Security Council (article 23) could the objectivity and independence of the ICC and, hence, it would not prove to be in the interest of developing a uniform nondiscriminatory, impartial international criminal justice system. The Security Council it was argued, could be assigned only a limited role. Some others felt that the ICC should be independent from the influence of the Security Council.

## Procedural Issues

There was general agreement that the procedural issues were fundamental to ensuring the fairness of the Court's proceedings and that

adequate protection should be accorded to the rights of the accused. Some delegations felt that extensive pre-trial investigations were better left to the Courts of the complainant State. Some delegations sought to know what factors could be taken into account to decide the 'gravity of the crime' and the 'individual circumstances of the convicted person, as for instance, (a) the aggravating as well as mitigating factor (b) the extent and severity of the damage or the injury caused by the commission of the offence; and (c) the antecedents of the convicted persons.

## Consent And Accountability

Several delegations favoured the exercise of jurisdiction by the ICC through consensus, i.e. jurisdiction to be conditional upon the acceptance by concerned States in a given case. It was also pointed out that while the consent of the State nationality of the accused and that of the victim were equally important. Some delegations therefore favoured 'opting-in procedures.'

On the question of the principle of accountability, it was pointed out that both the ICC and the sovereign States needed to be held accountable for actions taken or for refusal to act.

At the end of the deliberations the AALCC at its 35th Session, among other things, expressed its appreciation to the Government of the Philippines for hosting the Special Meeting on the establishment of an ICC with excellent arrangements. The Committee also expressed its appreciation to the Japanese Government for taking the initiatives to convene such a Meeting and for providing the necessary additional documentation.

The Committee at its 35th Session, urged its Member States to take part actively in the forthcoming Preparatory Committee Meetings on the establishment of an ICC; and directed the AALCC Secretariat to monitor the outcome of the Preparatory Committee Meetings to be held in New York and to report to its Thirty-Sixth Session. The present brief of documents, has accordingly made a modest endeavor to reflect the progress of work in the PREPCOM since the 35th Session of the AALCC.

While the AALCC Secretariat fully supports the establishment of an International Criminal Court on a permanent footing<sup>42</sup>, it also believes that an indepth consideration should be given to the various contentious issues in the Preparatory Committee. In particular, the AALCC Secretariat feels that some issues need consideration by the members of the AALCC in their participation in the future negotiations within the Preparatory Committee. The issues which require consideration include:

- (a) complementarity between ICC and national jurisdictions;
- (b) the extent and scope of crimes which may be considered by the ICC and the extent of applicability of the provisions relating to the Draft Code of Crimes in determining the jurisdiction of the ICC;
- (c) the scope of inherent jurisdiction as enunciated in Article 20 of the ICC Statute;
- (d) exercise of jurisdiction and the State consent; consideration to be accorded to 'trigger mechanism';
- (e) the role of the Security Council vis-a-vis the ICC;
- (f) procedural issues and the uniform application of international standards relating to these procedures;
- (g) composition and administration of the ICC, and
- (h) budget.

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<sup>42</sup> See in this context The ICC: An Update (AALCC Doc. NO.XXXIV/Doha/95/1A); Report of the ILC on the work of its Forty-Fifth Session (Doc.No.AALCC XXXIII/Tokyo/94/1); Note on AALCC's Views Relating to ICC submitted to Ad Hoc Committee's Meeting (Sixth Committee) held from 14 to 25 August, 1995.

The AALCC Secretariat believes that the establishment of an independent judicial body at the international level to try well-defined international crimes is very crucial for the members of the Afro-Asian community. Considering the crucial stage of debates concerning the establishment of an ICC, the Secretariat proposes to explore the possibilities of convening an Expert Group Meeting in 1997.

### **Assessment and Conclusions**

In the view of the AALCC Secretariat the following points need to be highlighted:

1. It is of paramount importance for the developing countries to attend the remaining Preparatory Committee Meetings scheduled to be held in New York in August 1997 and March 1998. The presence of Asian and African countries especially, and the coordination of their positions will counter balance the position taken by some of the developed countries which are led by the permanent members of the Security Council.
2. This counter balancing of positions will help the eventually established ICC to have a much more independence in its work and in fulfilling its goals, immune from the influence of the Security Council and the United Nations, which can otherwise bind her arms.
3. After the February Meeting the positions between these two trends is quite far from each other and the pending issues are very important for the future work on the ICC. Some of them are (i) relationship of the ICC with the Security Council; (ii) the jurisdiction of the Court; (iii) definition of aggression; (iv) the relative independence of the Court concerning its ability to deal with the crime of aggression, without any influence from the Security Council which can block its effectiveness.
4. It is important for the Asian African countries to work together to see that the ICC is not transformed into a

judicial institution without any independence. This can be done bilateral or within their regional institutions and movements.

5. In the recently concluded Ministerial Session of the Organization of African Unity held in Tripoli in February 1997, the Deputy Secretary General highlighted that the major current activities of the AALCC Secretariat in regard to the work of the Prepcom on Establishment of an ICC consisting both attending and monitoring the Meetings of the Preparatory Committee. In this context the AALCC:
  - (a) urges African States to participate in the deliberations of the Preparatory Committee meetings in order to be aware of the most crucial issues of their interest i.e. (Jurisdiction Role of Security Council);
  - (b) believes that the ICC should be an independent body and should not be manipulated in order to prevent and defend us from crimes perpetrated against humanity.

#### **Areas which need to be focussed at the proposed Special Meeting on inter-related aspects of the International Criminal Court and International Humanitarian Law**

The present brief of documents has been prepared with a view to preparing and helping member States to attend the three forthcoming PrepCom meetings on a common platform on the question of the finalization and adoption of a convention on the establishment of an ICC.

The excerpts from the report of the Deputy Secretary General Ambassador Dr. Wafik Zaher Kamil, have been given in extenso to highlight the areas of consensus and those requiring harmonization which require to be considered at the proposed Special Meeting on the inter-related aspects of the international Criminal Court and International Humanitarian Law.

The problem of implementation of international humanitarian law was reiterated by the former Solicitor General of Philippine, H.E. Mr. Raul I Goco, in his statement made on behalf of the President of the AALCC, at the meeting of the Legal Advisers of the AALCC held in New York in October 1996.

In recent years, several resolutions adopted by the General Assembly on the United Nations Decade of International Law have underscored the significance of promoting respect for the principles of international law. It may be recalled in this regard that the 26th International Red Cross and Red Crescent Conference held in Geneva in December 1995 identified implementation as one of the key challenges facing international humanitarian law and underlined the need for measures to be taken at the national and international level.

The Special Meeting on the Inter-related Aspects Between the International Criminal Court and International Humanitarian Law will be a culmination of a series of meetings on the implementation of humanitarian law organized by ICRC around the world, as also of the consistent efforts made by the Deputy Secretary General, Ambassador Dr Wafik Zaher Kamil and Legal Adviser of ICRC, Dr. Tony Pfanner in this regard. This Special Meeting assumes far greater importance in the light of the fact that at this meeting the following major areas of concern of the member States will be highlighted: These areas are :

- (a) Recent and ongoing developments in international humanitarian law, including a discussion concerning the applicable to situations not formally covered by humanitarian law, amendment to the 1980 conventional weapons treaty and the study on the status of customary international humanitarian law. Reference will also be made on the importance of national implementation of international humanitarian law.
- (b) Examination of the role of international tribunals and the ICC, with particular emphasis on the examination of the role of the tribunals for former Yugoslavia and Rwanda and the draft Statute for an ICC. A consideration of the

impact of the establishment of these international tribunals in developing and promoting respect for international humanitarian law, including an analysis of the material, personal and temporal application of their Statutes.

- (c) Examination of efforts to promote adherence to the principal humanitarian law instruments, particularly the Additional Protocols of 1977 and the relevance of these instruments to Asian and African states.
- (d) Examination of the competence of the national tribunals and of the International Criminal Court facing the repression of violations of international humanitarian law, and, in that context, the study of the obligation of 'aut judicare aut dedere' as incorporated in humanitarian law treaties.

## V. Report of The International Law Commission on The Work of Its Forty-Eighth Session

### (i) Introduction

1. The International Law Commission ILC held its forty-eighth session in Geneva from May 6 to July 26, 1996. There were as many as five substantive topics on the agenda of this session. These included:-

- (I) State Responsibility;
- (II) The Draft Code of Crimes Against the Peace and Security of Mankind;
- (III) International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law;
- (IV) The Law and Practice Relating to Reservations to Treaties; and
- (V) State Succession and its Impact on the Nationality of Natural and Legal Persons.

It may be recalled that the General Assembly had by operative paragraph 3 of its resolution 50\45 of December 11, 1995 urged the Commission to resume at its 48th Session (a) the work on the draft Code of Crimes against the Peace and Security of Mankind in such a manner that the second reading of the draft code may be completed at that session; (b) the work on the draft articles on State Responsibility in such a manner that the first reading of that draft may be completed, taking into account the divergent views at that session, expressed during the Sixth Committee's debate on the topic so that alternative approaches may be developed when necessary; (c) At its 50th session the General Assembly had also urged the Commission to resume the work on "International Liability for Injurious Consequences Arising out of Acts not