

Prohibited by International law" in order to complete the first reading of the draft articles relating to the activities that risk causing transboundary harm."

It may also be recalled that the General Assembly had at its 50th session taken note of the beginning of the work on the topics of the "The Law and practice Relating to Reservations to Treaties" and "State Succession and its Impact on the Nationality of Natural and legal Persons" and invited the Commission to continue its work on those topics along the lines indicated in its report to the General Assembly.

The Commission at its 48th session considered all the above mentioned items and some notes and comments on these topics may be found in the latter part of this chapter.

As regards "State Responsibility" the Commission completed its reading of a set of 20 draft articles and 2 Annexes, on State Responsibility. It decided to transmit the draft articles and the relevant commentaries thereto to the Governments of Member States for comments to be submitted to the Secretary General by 1.1.1998.

The Commission at its 48th Session adopted a set of 20 articles constituting the Draft Code of Crimes Against the Peace and Security of Mankind and commentaries thereto. The Draft Code was adopted with the understanding that with a view to reaching agreement the Commission had considerably reduced the scope of the Code. On first reading in 1991 the draft Code comprised a list of 12 categories of crimes. Some members expressed their regrets at the reduced scope of the coverage of the Code. The Commission acted in response to the interest of adoption of the Code and of obtaining support by Governments. It is understood that the inclusion of certain crimes in the Code does not affect the status of other crimes under international law and that the adoption of the code does not in any way preclude the further development of this important area of law.

It may be recalled that the Assembly had also urged the Commission to resume the work on "International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law" in order to complete the first reading of the draft articles relating to the activities that risk causing transboundary harm. The Commission at its 48th Session decided to transmit

the report of the Working Group consisting of 23 draft articles and commentaries thereto to the General Assembly and to Governments of Member States for comments.

On the question of the Law and practice Relating to Reservations to Treaties, the Commission decided to defer the consideration of the second report of the Special Rapporteur, Mr. Alain Pellet, until its next session.

As regards the subject of State Succession and its Impact on the Nationality of Natural and Legal Persons, the Commission at its 48th session, after considering the Second report of the Special Rapporteur, Mr. Vaclav Mikulka, reconvened the Working Group entrusted with the mandate of identifying issues arising out of the topic, categorizing those issues which are closely related thereto and to direct, to the Commission, those issues which could be profitably pursued given contemporary concerns. The Commission set out its recommendations to the General Assembly regarding its plan and approach to be followed on the work on the topic at its future sessions.

#### **Long-term programme of Work of the Commission**

The Commission, at its 48th session, re-established the Working Group on the Long Term Programme of Work<sup>1</sup> to consider the programme of work for the next five-year term of office. The Working Group on the long term programme of work was composed of Mr. D.W. Bowett (Chairman); Mr. J. Crawford; Mr. Qizhi He; Mr. M. Kusuma-Atmadja; Mr. I. V. Lakashuk; Mr. P. Pellet; Mr. R. Rosenstock and Mr. Chusei Yamada. Working Group reviewed a number of topics and recommended that the following three topics viz. (i) Diplomatic Protection; (ii) Ownership

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and Protection of Wrecks Beyond the Limits of National Maritime Jurisdiction; and (iii) Unilateral Acts of States, be taken up by the Commission.

**(i) Diplomatic Protection.**

With regard to the question of Diplomatic Protection it has been suggested that work on this topic would complement the Commission's work on State Responsibility and would be of interest to all the Member States.

It has been suggested that the study could take the traditional pattern of articles and commentaries but leave for future decision the question of its final form. The consideration of the subject of persons claiming protection would *inter alia* involve the inquiry of matters relating to (a) the basis of and rationale for diplomatic protection; (b) Persons claiming diplomatic protection; (c) Protection of certain forms of State property and individuals only incidentally; (d) the preconditions for protection; (e) the mechanisms for diplomatic protection in the absence of diplomatic relations; (f) the formal requirement of a claim to protection; and (g) the conclusiveness of claims settlement.

**(ii) Ownership and Protection of Wrecks beyond the limits of National Maritime Jurisdiction:**

The Working Group expressed the view that while the topic is of special interest owing to its practical value and well delimited it has however never been studied before. The Working Group felt that the study of this topic could be concluded in a short time.

The provisional outline advanced envisages that the study would involve the consideration of the following: (a) Definition of a Wreck; (b) Coastal State Jurisdiction; (c) The issues of ownership or title; and (a) Disposal of recovered vessels or objects therein.

**Unilateral Acts of States:**

The Working Group considered the subject appropriate for immediate consideration as it is a well delimited topic which has been the subject of several doctrinal works but has not yet been studied by an international body. Although it has been touched by several judgments of the ICJ, especially the Nuclear Test Cases, the celebrated dicta leave room for questions and uncertainties. Another reason is that States have abundant recourse to unilateral acts and their practice can be studied with a view to drawing general legal principles. Finally it was felt that although the law of treaties and the law applicable to unilateral acts of States differ in many respects, the existing law of treaties offers a helpful point of departure and a scheme by reference to which the rules relating to unilateral acts could be approached.

The proposed outline of the Study is: (a) Definition and topology; (b) Legal effects and application; (c) Conditions of validity; and (d) Duration, Amendment and Termination.

**Thirty - sixth Session - Discussions**

Introducing the item the Secretary General invited attention to Article 4 of the Statutes of the Committee and said that the functions of the Committee include the examination of questions that are under consideration by the International Law Commission and to arrange for the views of the Committee to be placed before the Commission. The functions of the Committee include also the consideration of the Reports of the Commission and to make recommendations thereon to the Governments of Member States. He stated that in conformity with its statutory requirements the Secretariat had prepared a brief of documents on the report of the ILC on the work of its 48th Session held in Geneva from May 6 to July 26th, 1996.

Recounting that there were as many as five substantive topics on the agenda of the 48th Session of the ILC which 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, the Secretary General stated that the ILC at its last Session considered all the items and notes and comments prepared by the Secretariat.

He further stated that the ILC at its 48th Session and also completed its second reading of a set of draft articles on the Draft Code of Crimes Against Peace and Security of Mankind. It also completed the first reading of draft articles relating to the activities that risk causing transboundary harm.

On the question of the Law and Practice relating to Reservation to Treaties the ILC decided to defer the consideration of the report of the Special Rapporteur on the item until its 49th Session and made recommendations to the General Assembly regarding its plan and approach on the work of State Succession and its impact on the Nationality of Natural and Legal Persons, the Secretary General stated.

He pointed out that the ILC at its 48th Session also recommended that three topics namely (i) Diplomatic protection; (ii) Ownership and Protection of Wrecks beyond the limits of National Maritime Jurisdiction, and (iii) Unilateral Acts of States, be taken up by the Commission in its future programme of work. Recalling that the AALCC at its 35th Session had called upon him to convey to the ILC the interest of the Committee that the Commission include the topic Diplomatic Protection in its agenda. He stated that it was a matter of satisfaction that the General Assembly at its recently concluded 51st Session had invited the Commission to examine the topics "Diplomatic Protection" and "Unilateral Act of States".

The Delegate of Japan, at the outset offered his felicitations to the President and Vice-President of the Thirty-sixth Session of the AALCC on their election.

Referring to the Draft Code of Crime against the Peace and Security of Mankind, he recalled that forty years after receiving its mandate, the Commission had at its forty-eighth session completed its second reading on the item and had forwarded it to the General Assembly for consideration. Recalling the adoption of the Draft Statute on the Establishment of an International Criminal Court by the ILC in 1994, he clarified the functional

linkages between the Draft Codes of Crimes which expounded the substantive criminal law and the Statute on the ICC, that provides for the procedural and organizational element in the administration of criminal justice.

As regards the progress on the work on the topic of "State Responsibility" he stated that the first reading was completed during the current Session and the Secretary General of the United Nations had requested all States to communicate their comments by early 1998. He was of the view that the Commission's formulation involved certain controversial aspects like 'civil liability' and 'international crimes' which needs to be sorted out in the future.

Expressing the view that the Commission is yet to find proper direction in furthering its work on the topic of International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law, he said that a Working Group had been established to chart out the future course of action. On the topic "Law and Practice Relating to Reservation to Treaties", he emphasized that the efforts of the Commission were not aimed at altering the basic framework of the regime on 'treaties', but to study state practice in the area of reservations to multilateral treaties, and provide some guidelines for States on this subject. He also invited the attention of the gathering to the mandate of the ILC on two topics, viz. (i) Diplomatic Protection and (ii) Unilateral Acts of States, which had been referred to it by the General Assembly.

Stressing the importance of the comments and factual inputs from States for effective functioning of the ILC, he urged all Member States of the AALCC to provide a more detailed feed-back to the ILC. This, he stated, would ensure that the interests of the Asian-African community were given due consideration in the codification and progressive development of international law. In this context, he was of the view that this purpose was admirably served by the presence and reports of the Secretary General of AALCC in the proceedings of the Commission. He also suggested, the Secretary General of AALCC may consider seeking comments or circulating questionnaires among Member States, for elucidating their views on matters being discussed in ILC, which may serve the purpose of informing the Commission, as to the views of the Asian-African States.

The Delegate of India speaking on the Draft Code of Crime Against the Peace and Security of Mankind adopted by the ILC, highlighted the changes effected between the first reading and its final adoption. He pointed out that initially the Code had twelve crimes which now stands reduced to five viz., crimes of aggression, genocide, crimes against humanity, crimes against UN and associated personnel and war crimes. On the inclusion of the crimes against UN and associated personnel, though he considered it very important but felt that no in-depth analysis of the legal criteria for personnel in crisis situation has been undertaken. In this context, he pointed out instances wherein certain crimes have been excluded due to difficulties experienced in identifying the constitutive elements of a crime. In such situations, he felt, that the role of States in providing detailed comments and observation to the General Assembly and the ILC would be helpful to analyze any given issue in a comprehensive and holistic manner. He expressed his concerns over the lukewarm attitude of Asian and African States in articulating their views at international legal fora. Towards this end, he suggested convening of expert group meetings involving academicians, lawyers and diplomats, under the auspices of AALCC.

Citing the example of ILC work on 'State Responsibility' and 'International Crimes', he observed that any endeavour to expand existing concept must be attempted only if it was in the larger interests of all the States.

The Delegate of China expressed his appreciation for the Report on the Work of the International Law Commission introduced by the Secretary General of the AALCC. He further stated that China has always supported the work done by the ILC towards the progressive development and codification of International law.

He said that the Draft Code of Crime Against the Peace and Security of Mankind is a significant step towards the formulation of an international code. However, there were certain lacunae in the draft code, wherein, an International Criminal Court (ICC) can exercise Jurisdiction over a judgment delivered by a national court. He felt this would essentially run contrary to the principle of complementarity provided in the draft Statute of the ICC. Another issue was the exclusion of certain important crimes such as those of apartheid, colonialism, and international terrorism and introduction

of a new crime against UN and its associated personnel, in the draft code. With regard to the topic of State Responsibility that the ILC had completed its first reading of the provisional draft articles on the same. The delegate while making a reference to Part Three of the Draft Articles, felt that it was not necessary to include principles and methods of peaceful settlement of disputes as an essential part of State Responsibility. The delegate also expressed reservation as regards the compulsory arbitral procedures contained in Article 58 and Article 60, as these run counter to the principle that arbitration requires consent of all parties concerned. Beside Article 60, the delegate felt, was contrary to the provisions of the Statute of ICJ which provides that agreement between States constitutes the basis of Jurisdiction.

Apropos the new topics included in the agenda of the ILC viz. "Diplomatic Protection" and "Unilateral Acts of States" the delegate felt that the latter required detailed consideration and study. Bearing in mind the fact that the ILC is now undergoing a difficult phase in choice of new topics, the delegate expressed hope that the AALCC as the only inter governmental legal body, could play an important role in this regard.

Expressing his appreciation for the work accomplished by the ILC at its previous Session the Delegate of the Islamic Republic of Iran pointed out that it was during the 48th session that the ILC had completed its second reading of the articles of the Draft Code on Crimes Against the Peace and Security of Mankind and the first reading of draft articles on 'State Responsibility'.

With regard to the Code of Crime he stated that in reducing the number of offenses from twelve to five during its second reading, the Commission had sacrificed judicial idealism to political expediency. Referring to the principle of 'non-intervention' as a well established principle of international law, he cited the judgment of the ICJ in the Case Concerning Military and Paramilitary Activities in and against Nicaragua which had held that in view of the generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in internal affairs of other States. Further elaborating on this point, he felt intervention without being coercive could in a milder, but effective way, take the form of unilateral sanctions. However, he expressed the hope that, the declaration of the ILC while concluding its work on the code that "the inclusion of certain crimes in

the Code does not affect the status of other crimes under international law", would provide leeway for inclusion of the crime of intervention in internal affairs of a State, as a crime in the Code. Noting with appreciation the work of the ILC, he expressed the view to include a definition of crimes against the peace and security of mankind. He felt a definition could be availed from the work of the ILC draft articles on State Responsibility, which stated that the "breach of an international obligation... essential for the protection of fundamental interests of international community". A definition of a state crime, he felt, could be deduced from this.

Welcoming the work of ILC on the draft code which prohibits use of weapons not justified by military necessity and which cause long term damage to the environment, he was of the view, that the ILC had nuclear weapons in mind which alone would entail such a consequence.

Referring to 'armed conflicts not of international character', he felt, the acts listed in Article 201 paragraph (f) are, with the exception of acts of terrorism, covered by the common Article 3 of the four Geneva Conventions of 1949. He further added that though one may not question the respect for these laws but, the question that remains is, whether the incrimination by the draft Code of acts listed in Article 3, present in all the four Geneva Conventions are based on customary law? In this regard, he made a reference to the Statute of the International Tribunal for Rwanda, wherein the Security Council had widened the ambit of characterization of a crime by including acts committed during the period of internal conflicts.

On the topic of State Responsibility, the delegate supported Special Rapporteur Mr. Robert Ago's suggestion in 1976 that, there must be a distinction drawn up between a 'delict' and a 'crime'. Though the delegate agreed with the ILC's approach on defactorization of a crime by the Security Council or the General Assembly, he expressed anguish that these bodies are often 'complacent' towards wrongful acts. Elaborating further on this issue, he felt, these bodies have limited competence and the ICJ alone remained the timely competent organ. Agreeing with the Commission's argument that characterization could be brought about under Part III of the draft articles on State Responsibility, he further added that, the ICJ is capable of performing a similar role.

In the opinion of the delegate, especially with reference to Article 52 of the draft articles, an international crime must not jeopardize the political independence or territorial integrity of a State, as this would lead to an issue of international peace and security.

He also observed that Commission's work on draft articles on 'countermeasures', the circumstances precluding wrongfulness generates a number of apprehensions. Citing an international law in this field would go towards legitimizing counter measures as a tool of action by some powers. He also pointed out that in the application of such counter measures it would be the weaker states who would have to bear the brunt of such measures.

Dwelling on the notion of 'effective victim', he mentioned the Nicaragua case, where the Court rejected claims of "actio popularis" on behalf of the international community, He furthermore agreed with the consistent approach of the draft articles on counter measures based on the unequal capacity of States. While agreeing to Article 34 of the draft articles dealing with self defense, he again referred to the Nicaragua case which held that the "lawfulness of a reaction to aggression depends on respect for the criteria of necessity and proportionality."

Concluding his presentation, the delegate reiterated his appreciation for the excellent work done by the ILC, for furthering the cause of the codification and progressive development of International Law.

**(ii) Decision on the "Work of International Law Commission."**

**Adopted on 7.5.1997.**

*The Asian-African Legal Consultative Committee At Its Thirty-Sixth Session*

*Mindful* of the role of the International Law Commission in the fulfilment of the objectives of the United Nations Decade of International Law:

*Having* taken note with appreciation of the report of the Secretary-General on the Work of the International Law Commission at its Forty-eighth Session (Doc. No. AALCC/XXXVI/Tehran/97/S.1) as supplemented by his oral statement:

1. *Expresses* its felicitations to the International Law Commission on the achievements of its Forty-eighth Session;
2. *Affirms* the significance of the progressive development of international law and its codification;
3. *Requests* the Secretary-General to bring to the attention of the International Law Commission at its 49th Session the views expressed on different items in its agenda during the Thirty sixth Session of the AALCC;
4. *Further requests* the Secretary General to convey to the International Law Commission its earnest appreciation on the completion of the formulation of the draft articles of the "Code of Crimes Against the Peace and Security of Mankind" at its Session in 1996.
5. *Decides* to inscribe on the agenda of its Thirty-seventh session an item entitled "The Report on the Work of the International Law Commission at its Forty-ninth Session"