

It may be stated in this regard that at the Forty fourth session of the International Law Commission, the Planning Group of the Enlarged Bureau of the Commission had established a Working Group⁵¹ on the long-term programme to consider topics to be recommended to the General Assembly for inclusion in the programme of work of the Commission. One of the topics included in the pre-selected list was the "Extra-territorial Application of National Legislation". An outline prepared on the topic by one Member of the Commission had, *inter alia*, suggested that :

"It appears quite clear that a study of the subject of the extra-territorial application of national laws by the International Law Commission would be important and timely. There is an ample body of State practice, case law, national statutes and international treaties and a variety of critical scholarly studies and suggestions. Such a study could be free of any ideological overtones and may be welcomed by States of all persuasions... Such a study further could complement the efforts of the Commission in the codification and progressive development of law in other areas like responsibility of States liability for transnational injury draft code of crimes and establishment of an international criminal jurisdiction."⁵²

In determining the scope of the future work on the subject the Committee may, recall that the request of the Government of Islamic Republic of Iran is to carry out a comprehensive study concerning the legality of such unilateral measures (i.e. sanction imposed against third parties) "taking into consideration the positions and reactions of various governments including the position of its Member States." In considering the future work of the Secretariat on this item Member States may wish to consider sharing their experiences, with the Secretariat, on this matter.

⁵¹ *Outlines Prepared by Members of the Commission on Selected Topics of International Law, International Law Commission, Forty-fifth session, Document No. A/CN.4/454, p 71.*

⁵² Dr. P. Sreenivasa Rao; "Extraterritorial Application of National Legislation" Ibid p 85

IV. Inter-Related Aspects Between International Criminal Court And International Humanitarian Law

(i) Introduction

Pursuant to the mandate under Article 4 (a) of the Statutes, the AALCC Secretariat has for the past many years been in the practice of monitoring and reporting to the Member States of the AALCC on the work and outcome of the annual sessions of the International Law Commission (ILC). Among other topics, a prominent item which featured in the work of the ILC and as reported by the Secretariat was that of 'Draft Code of Crimes Against the Peace and Security of Mankind'. With the General Assembly requesting the ILC to begin its work on a draft Statute for the establishing of an International Criminal Court to study and report on the ILC proceedings, during the years 1991 to 1994, which culminated in the adoption by the Commission of a draft Statute on the Establishment of an International Criminal Court.

Following the adoption of the draft Statute by ILC, the item was included as a subject matter of common interest to AALCC Member States, under Article 4(e) of the Statutes. At the thirty fourth Session of the Committee, held at Doha (1995), the Committee took note of the adoption by the ILC of the draft Statute on ICC and directed the Secretariat to monitor further developments in the Ad hoc Committee, in this regard. The Secretariat actively participated at the deliberations of the Ad Hoc Committee and the Preparatory Committee to establish the International Criminal Court (PREPCOM) and continued reporting on these developments to the Member States.

In acknowledgement of the growing importance of the subject, a one day Special Meeting on the Establishment of the ICC was convened within the administrative framework of the thirty-fifth session of the AALCC at Manila in March 1996. The Special Meeting was addressed by Mr. Adriaan Bos, Chairman of the Ad Hoc Committee on ICC and Prof Gerhard Hafner, Stanford University. The deliberations, though

agreed on the need for the establishment of an ICC was divided on the mode of its establishment and a host of such other issues. The deliberations on the definition and the scope of the 'core crimes' as included in the draft statute of ICC, more particularly 'war crimes' and 'crimes against humanity', revealed a keen interest to study the implementation of international humanitarian law (IHL) within the context of the proposed ICC. In this backdrop, the representative of ICRC approached the Deputy Secretary General, Ambassador Dr. Wafik Zaher Kamil and discussed the prospects of holding a meeting on International Humanitarian Law, on the same lines as the Special Meeting. Accordingly, when the Work Programme of the AALCC Secretariat was drawn up for the year 1996, the topic of IHL was included in the agenda.

Later when the Legal Advisers of the Member States of AALCC met at New York in October 1996, IHL was one of the three topics under consideration. The representative of ICRC, mooted the proposal to examine the humanitarian law aspects, in the context of the ILC's work on ICC and Draft Code of Crimes. She also noted that the guidelines on the applicability of humanitarian law for UN peace-keeping forces could be an area of study. The Meeting, broadly agreed for the need to further study the issues concerning the establishment of ICC and to harmonize views relating to criminal law.

In the light of the General Assembly resolution, drawing the attention of the PREPCOM to the humanitarian law provisions as incorporated in the ILC work on Draft Code of Crimes and the interlinkages and impact it may have on the working of an ICC, the Committee decided to convene a Special Meeting on the Inter-related Aspects of ICC and IHL under the framework of its thirty sixth session, to be held in Tehran. (May 1997)

Consequently the special meeting on Inter-related Aspects of ICC and IHL was held during the Thirty sixth Session of the AALCC at Tehran in May 1997, a detailed Report of which has been reproduced in this chapter.

A Summary of the Rapporteur's Report on the Special Meeting between Inter-related Aspects of the ICC and the IHL

The Special Meeting was convened by the AALCC with co-operation and support of ICRC parallel to the 36th Session. The meeting was chaired by the President Hon'ble Dr. M Javad Zarif. The meeting elected Hon'ble A.R.M.A. Peeroo, as the Vice President and the Representative of Egypt Mr. M. Allam as Rapporteur.

At the outset of the first substantive session, the Secretary General of the AALCC in his welcome address underscored the significance of the subject for the developing countries in general and AALCC Member States in particular.

The Secretary General recounted the association of the AALCC and the work of the ILC on the drawing up of the Statute of the ICC. Striking a personal note he recounted that during his first visit to New York in his capacity as the Secretary General of the AALCC in September - October 1994 the matter had been briefly discussed at the meeting of legal Advisers of Member States. He pointed out that in contrast the establishment of an ICC was one of the three items considered by the legal advisors in October 1996. He recalled also that the Secretariat had held a Seminar on the ICC in New Delhi in early 1995.

The basic objective of the present meeting, the Secretary General said, was to promote consensus on issues relating to the ICC and to provide inputs into the deliberations of the PREPCOM. The Secretariat was willing to make such further studies as may be called upon to make.

He concluded by pointing out, that in the course of the last session held in Manila, a Special Meeting on the Establishment of ICC had been held and the report thereof had been forwarded to the PREPCOM for consideration of its meeting held in March 1996. He thanked the ICRC for its support and the Government of the Islamic Republic of Iran for hosting the meeting.

The Deputy Secretary General Ambassador Dr. Kamil in his address laid emphasis on the need for an independent and permanent

ICC and established the link between the institutions governing International Humanitarian Law and the Statute of the proposed ICC. He also invited attention to the matter of extradition of fugitive offenders.

Ambassador Kamil urged Member States to forge closer links of mutual co-operation in the common cause of establishing an International Criminal jurisdiction and observed that adoption of a common stance in particular by the Member States of AALCC could not be over emphasised. He also urged representatives of Member States to give due consideration to attending the remaining three sessions of the PREPCOM to ensure universal acceptance of the proposed criminal jurisdiction. Referring to the resolution of the General Assembly he said that it was imperative that the close connection between work of the PREPCOM and the Draft Code of Crimes against the Peace and Security of Mankind adopted by ILC at its 48th Session in 1996, be borne in mind.

Two panelists namely Mr. Yves Sandoz, Director of International Law and Policy, ICRC, Geneva and Prof. Georges Abi-Saab, Member, ICRC Expert Group for Humanitarian Law, Geneva made presentations on "International Humanitarian Law: Current Developments" and "The International Tribunals and the International Criminal Court" respectively.

Following presentations by these two panelists, intervention were made by representatives of several Member and Observer States.

The general consensus was for the establishment of an independent and permanent International Criminal Court, with a material jurisdiction broader in scope than what had hitherto been envisaged by the Statute and in the course of the deliberations in the PREPCOM thus far.

In the course of the second session Prof. Djamchid Momtaz and Prof N. L. Mitra made their presentations on "Universal Adherence of International Humanitarian Law and Importance of its Implementation at

the National level" and "The competence of the National Tribunals of the International Criminal Court facing repression of violations of International Humanitarian Law", respectively.

The Secretariat had prepared summary records of the deliberations during the two sessions, which, among other things, reflected that:

- (i) There was absolutely no divergence of views on the need to establish independent and permanent International Criminal Court nor did there appear to be any difference of opinion as to the mode of establishment.
- (ii) There was a fair amount of divergence of views on the material jurisdiction of the proposed ICC. Doubt, for instance was raised for the inclusion of an exercise of jurisdiction by the Court on crimes committed against UN and associated personal while excluding other more serious offences. It was in this regard also that questions were raised as to the pragmatism of inherent jurisdiction of the proposed Court and more specifically identified crimes included within the provisions of the Statute of the Court.
- (iii) A related question which perplexed some participants was the implementation in practice of the principle of complementarity. Corollaries to the principle of complementarity were the principles of the trigger mechanism and exclusivity. There was a strong feeling that a clear line of demarcation between the jurisdiction of the municipal Courts and ICC be clearly drawn.
- (iv) The role of the Security Council or as some of the representatives phrased it, the relationship between the Security Council and the ICC was yet another issue on which representatives expressed reservations. An undercurrent of the frequent references to the relationship between ICC and Security Council was the implicit question "would a strong relationship between the Security

Council and ICC tantamount to politicizing the proposed international criminal jurisdiction?" Reference was in this regard made by some to the right of veto of the five permanent members of the Security Council, and the fear that the Court becomes an instrument manipulated by some countries. In this regard, the composition or rather the need to enlarge the membership of the Security Council was also touched upon.

- (v) On the procedural aspects, doubts were raised as to the exemption of certain officials being exempted from having to depose or give evidence before the court. The question of the role of the Procuracy though mentioned was not debated.
- (vi) Mention was made of the final clauses of the Statute and the question of the number of ratifications which may be required for the Statute to enter into force were raised. The general opinion appeared to be that a number of ratifications required should not be very high. The point thus made was based on the experience of the Law of the Sea Convention which took 12 years to enter into force because it was imperative that 60 States should ratify it.
- (vii) Regarding International Humanitarian Law the first issue identified in this regard was the need for the wider dissemination and appreciation of International Humanitarian Law. The interventions and observations related to the implementation of International Humanitarian Law reflected a twofold concern (i) the incorporation of the principle and norms of International Humanitarian Law in the Municipal Legislation of States and the enforcement of principles of International Humanitarian Law before national tribunals. Another major aspect of implementation of International Humanitarian Law was the jurisdiction of the ICC over the violations of the Geneva Conventions and their two Protocols.

Views were expressed on the necessity to see the institutions of International Humanitarian Law independent, neutral and apolitical and to urge them to watch NGO's trying to use their umbrella for other proposes than humanitarian assistance.

Attention was drawn to the proposal advanced by the representative of a Member State that the Secretariat consider convening an Inter Sessional Meeting of a Group of Experts to debate the issues relating to the establishment of an independent ICC as a part of its Work Programme of promoting a common stand towards a consensus. The Committee may wish to consider this proposal and reflect it in the resolution that it may adopt. The Committee may also wish to consider continuing to monitor the progress of working of the PREPCOM for the ICC and to be represented at the meetings thereof.

The pace of work in the PREPCOM and the debates in the present meeting are convincing indications that the international community is well on its way towards establishing an international Criminal Court which would also have competence over violations of the principles of the International Humanitarian Law.

Thirty Sixth Session: Discussions

A one day Special Meeting on the interrelated Aspects of ICC and IHL was held on 5th May 1997, within the administrative framework of the thirty sixth session of the Committee at Tehran. The meeting was attended by representatives from 35 Member States including Bahrain, Bangladesh, People's Republic of China, Cyprus, Arab Republic of Egypt, India, Indonesia, Islamic Republic of Iran, Iraq, Japan, Jordan, Kenya, Republic of Korea, Kuwait, Malaysia, Mauritius, Mongolia, Myanmar, Nepal, Nigeria, Sultanate of Oman, Palestine, Philippines, State of Qatar, Senegal, Singapore, Sri Lanka, Sudan, Syrian Arab Republic, Tanzania, Thailand, United Arab Emirates, Uganda and Yemen. Also 11 other non-Member States viz. Australia, Colombia, Croatia, Cuba, France, Holy See, Hungary, Italy, Morocco, Norway and Russian Federation were represented in their capacity as Observers. Besides the ICRC, 3 other international organisations including the UN, UNHCR and UNIDROIT were also represented.

The Special Meeting, elected its own Bureau comprising:-

President	...	H.E. Dr. M. Javad Zarif
Vice-President	...	Hon'ble A.R.M.A. Peeroo
Rapporteur	...	Mr. Mahmoud M. Allam

The proceedings of the meeting, conducted in two sessions included presentations by the following panelists:

- 1 Mr Yves Sandoz, Director for International Law and Policy, ICRC
- 2 Prof Georges Abi-Saab, Member of ICRC Expert Group
- 3 Prof. Djamchid Momtaz, Tehran University
- 4 Prof. Nripendra Lal Mitra, National Law School of India University, Bangalore

The Secretary General of AALCC, H.E. Mr. Tang Chengyuan, welcomed the gathering. He reiterated the significance of the subject and stated that the Special Meeting was aimed at receiving inputs that would feed upon and influence the future studies of the AALCC, on this subject.

The Deputy Secretary General, Ambassador Dr. Wafik Zaher Kamil introducing the Secretariat brief on this subject stated that the objective of the Special Meeting was to take note of the recent developments concerning the establishment of an ICC and to study the difficulties of implementation of IHL, within the framework of ICC. Briefly tracing the developments since the adoption of the Draft Statute by the ILC in 1994, he highlighted the trends emerging from the deliberations as witnessed in the Ad hoc Committee and the PREPCOM on contentious issues like: scope of jurisdiction of the court, definition of crimes, organization of the Court, procedural aspects of criminal justice system, the role of the Security Council in the proposed ICC framework and provisions relating to international cooperation and judicial assistance between States and ICC.

Speaking on the implementation of IHL, he observed that international tribunals cannot be effective substitutes for national courts, and hence the importance of national legislations to suppress violations of IHL.

Recalling that the AALCC has been actively involved in the deliberations at the PREPCOM, he urged Member States to fully participate in the forthcoming meetings of the PREPCOM, so as to influence developments leading to the Diplomatic Conference sought to be convened in May 1998.

Following this, the four panelists deputed by the ICRC made their presentations. Speaking on, "Current Developments in International Humanitarian Law," Mr. Yves Sandoz identified the major challenges in the implementation of IHL as: the difficulty in distinguishing combatants and non-combatants; the ever-increasing number of populations requiring assistance measures; the growing trend wherein the disappearance of lack of political and administrative structures in the areas of conflict, rendering it difficult to have minimum Guarantees for security to civilians.

To effectively counter these challenges, he proposed a three pronged strategy, including: (a) identification and elaboration of norms; (b) formulating suitable implementation mechanisms, and (c) streamlining the method of operation of humanitarian actors, be adopted.

As regards, the identification and elaboration of norms, he called for a universal acceptance of the four Geneva Conventions of 1949 and the two Additional Protocols of 1977. Among the emerging areas, the need for more normative responses were required, vis-a-vis:

- (a) the obligation of UN peace keeping, forces towards IHL,
- (b) the protection and assistance needs of internally displaced persons in armed conflicts,
- (c) the status of 'emblems' and ensuing their universal acceptability; and

(d) legality of manufacture and possession of nuclear weapons and other arms of mass destruction.

In this connection, he recalled the efforts being made by the ICRC in constituting an Expert Group to identify principles of IHL which may have attained the status of customary international law.

Secondly, while talking on the implementation mechanism, he laid stress on adopting a preventive approach to violations of IHL. Besides he called for a wider dissemination of IHL among the members of armed forces. Stress was also laid on imparting such education to children wherein IHL was adopted to suit local values to ensure better understanding.

Commenting on the proliferation of humanitarian actors in recent times, he advocated restraint and the need to maintain a low profile, lest their enthusiasm to provide assistance be perceived as amounting to interference. Stating that the strength of humanitarian agencies lay in their image of being neutral and their capacity to inspire confidence among the warring factions he advocated a policy of dialogue and persuasion, rather than denunciation. He also recalled the work currently being undertaken by ICRC on framing a code of Conduct for regulation of the activities of humanitarian workers, aimed at respecting local values.

Prof. Georges Abi-Saab, in his presentation on "The International Tribunals and ICC" focussed on three main themes, viz (i) issues of jurisdiction; (ii) relative merits of permanent and adhoc criminal tribunals and (iii) applicability of IHL to violations in non-international armed conflicts.

Outlining the evolution of the practice of establishing adhoc tribunals for prosecution of offenders for violation of humanitarian norms, he identified the various phases of development. In the late 1940s in the context of the Nuremberg and Tokyo tribunals significant breakthroughs were achieved in articulating the normative basis of (a) personal responsibility of criminal acts of individuals (b) attribution of criminal responsibility to military superiors for acts of subordinates, and (c) the bar on the plea of "superior orders" for acts of subordinates. Besides,

the 1948 Genocide Convention had the effect of detaching the crime of genocide from the context of war time activities, thus enlarging its scope to include acts committed in normal times of peace. The four Geneva Conventions adopted in 1949 expanded the norm of "grave breaches" which aids in the fixation of individual criminal responsibility. The second phase, starting in the 1980s, witnessed active cooperation of States in facilitating inter-state prosecution exemplified by the rule "extradite or prosecute"

The initiative of the international community in establishing the Yugoslavian and Rwandan adhoc tribunals, he observed, was a quantum leap in the sense, that it manifested the resolve of the international community to engage in tangible and action-oriented moves, towards prosecution of war criminals. Expanding on the merits of the adhoc tribunals for Yugoslavia and Rwanda and also the proposed ICC, he was of the view that they are not seen as a forum for victor's justice, but a manifestation of the unified will of the international community. Secondly, the fact that the investigation and prosecution of the offenders under these forums is accomplished during the time of war and is not postponed until the completion of the conflict (as in the Nuremberg and Tokyo trials), could have a deterrent effect on further attempts of committing atrocities.

Speaking of the subject of the jurisdiction, *ratione materiae* of the proposed ICC, he was of the view that, apart from the traditional crimes of piracy and slavery, universality of jurisdiction was acceptable to States only on crimes against humanity and the crime of genocide. On the crime of aggression, he was of the view that the prosecution of decision makers who were responsible for perpetuation of atrocities, could in practice be not a simple proposition.

On the issue of the relationship between the proposed ICC and national judicial systems, he was of the view that the application of provisions relating to the primacy of ICC - in terms of the State's obligation to closely co-operate with the Court in transfer of accused, collection of evidence and such other matters, and the interpretation of the provisions relating to transfer of cases from the national domain to the ICC, were points on which States may widely disagree. Highlighting

the general reluctance of States to waive their jurisdiction over their own nationals, he pointed out that the immediate perceptible benefit arising from the constitution of adhoc tribunals has been the spurt in national legislation, wherein 17 States have enacted law punishing violations of IHL.

As to the status of violations of IHL in instances of non-international armed conflicts, he acknowledged that though the Additional Protocol II of 1977 doesnot contain the equivalent of 'grave-breaches' component of the other humanitarian conventions (applicable in international armed conflicts), he expressed optimism that the jurisdiction '*ratione materiae*' as articulated in the Security Council resolution establishing the Rwanda tribunal and the pronouncement of the Appellate Chamber of the Yugoslavian Tribunal on 2nd October 1995, pointed to an emerging trend, whereby 'serious violations of the laws and customs of armed conflicts' are made applicable even to non-international armed conflict.

In conclusion, he underlined the urgency of establishing the proposed ICC and called for a pragmatic approach on the need to evolve a minimal consensus towards the end. It was preferable, he opined, to have atleast an institutional structure for the administration of criminal justice. Such an institution, even if it fell short of the idealistic standards, could be improvised upon in the future as was the case with the International Court of Justice.

Prof Djamchid Momtaz in his submission on "National Measures to Implement International Humanitarian Law" specifically highlighted issues concerning, (i) Preventive Measures and (ii) Repressive measures aimed at ensuring the implementation of IHL.

On the implementation of Humanitarian Law he said that the Four Geneva Conventions and the two Additional Protocols, were the most important instruments of the International Humanitarian Law, which *inter alia* upheld the fundamental maxim of the Law of Treaties: *pacta sunt servanda*. Article 26 of the Vienna Convention on the Law of Treaties which expounds on this maxim stipulates clearly "each treaty in force

binds the parties and has to be executed in good faith". The Four Geneva Conventions and Additional Protocol underlined with authority its obligation.

International Humanitarian Law ran the risk of remaining a dead letter if it was not backed up in the internal legislation of States by legal and practical measures aimed at ensuring its application. Recalling the efforts of ICRC in 1965 and 1969 to compile national legislation on IHL from 49 countries he drew attention to the XXVth International Conference of the Red Cross held in Geneva in 1986 which by consensus adopted a resolution on "National Measures to Implement International Humanitarian Law". The utility of the Proposals submitted by the Intergovernmental Expert Group, of the ICRC in January 1995 on practical ways to promote full respect for IHL, was also highlighted.

Emphasizing the need for preventive measures, he quoted the provisions of the IHL instruments obligating States to enact national legislation and imparting knowledge of these to both civil and military authorities. In this regard, the establishment of National Commissions charged with the task of rendering advice and assistance to Governments on these matters. The National Societies of ICRC could also be co-opted in this effort. He also suggested that States could adopt legislation stipulating sanctions in case of improper use of emblems of the Red Cross and the Red Crescent, in order to safeguard their protective value during conflicts.

Speaking on repressive measures aimed at ensuring respect for IHL, he clarified the distinction between grave breaches and other violations of IHL. Designating that the 'grave breaches' were of an *erga omnes* character and are subject to universal jurisdiction, he sought to clarify that each Contracting Party was liable to make a search for persons suspected of such grave breaches and to try them in the national courts, or alternatively to extradite them for trial to any other requesting State.

In conclusion he stated that inspite of the laudable efforts of States to ensure implementation of International Humanitarian Law at national levels, it had not been fully implemented, and States could take