ASIAN AFRICAN LEGAL CONSULTATIVE COMMITTEE

REPORT
AND
SELECTED DOCUMENTS
OF THE
THIRTY-EIGHTH SESSION
HELD IN ACCRA, GHANA
(19 April-23 April, 1999)

THE AALCC SECRETARIAT

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PREFACE

It is with pleasure that the Asian African Legal Consultative Committee presents this volume of "Report and Selected Documents' for the thirty-eighth Session held in Accra, Ghana from 19 to 23 April 1999. This Report is another contribution of the AALCC towards achieving greater dissemination of its work and promoting wider knowledge of international legal matters of common concern amongst the Member States of the two continents of Asia and Africa.

The AALCC's main achievement has been in generating positive consensus within the Member States over matters and issues that are of prime importance to them and are on the agenda of the United Nations. Member States increasingly work in consultation with this organization and have often sought creative solutions to various legal problems. That way, the AALCC has gained a great deal of institutional as well as functional progress. The AALCC Secretariat has plans to improve the speed and access of its publications by initiating a web-based service with e-mail facility to keep the Member States informed about the research work emanating from the Secretariat.

This is a regional organization having a global vision and this has enabled it to play a vital role in formulating views and opinions especially during the UN Decade of International Law. This report is a landscape of international legal issues that have greatly influenced the world over these years. Economic and other constraints have seldom impeded the full realization of the potential of the AALCC.

Another publication 'AALCC Bulletin' published bi-annually, apart from covering AALCC's activities and the latest legal developments has a section for Articles/Write-ups on subjects of international law. Students/teachers/diplomats and other experts in the field of international law are welcome to send in their contributions towards the same.

This Report contains detailed background information, Decisions adopted and the discussions held during the Accra Session for handy reference purposes. Since this volume covers almost all the items under the AALCC's Agenda, the wide readership all around is expected to benefit from it.

Before, concluding, I would like to express my appreciation for my colleagues Mr. M. Reza Dabiri the Deputy Secretary General for his valuable editorial skills shown in the preparation of this massive volume, and Mrs. Neelam V.Mathur for her efficient handling of the compilation and proof reading jobs of this text.

New Delhi
1st February 2000

Tang Chengyuan
Secretary General

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(i) Introduction

The Asian Legal Consultative Committee was constituted on 15 November 1956 by seven Asian States. i.e. Burma, Japan, India, Indonesia, Iraq, Sri Lanka and the United States Arab Republic. The Committee was founded to facilitate the exchange of views and information on legal matters of common concern to the Member States. The Committee was accorded in 1980 the Permanent Observer Status in the United Nations and in 1981, the status of an inter-Governmental Organisation on the 25th Anniversary of the Constitution of the Committee. The Committee by now, with much wider participation of States, had been able to forge very close links with the International Court of Justice over the years and some of the judges of the ICJ had themselves participated in the work of the Committee and had contributed to a large measure in building up the image and the high reputation which it has been able to earn in the United Nations and international legal circles. The administration of justice, the adjudication of claims, the resolution of legal issues and the pacific settlement of disputes which remain the raison d'etre of the United Nations and its principal judicial organ, the ICJ, are very much dependent on the progressive development to meet the changing needs of an expanding international community. It is this vital function, namely the progressive development of law which the AALCC has been performing since its inception that has earned to it the gratitude and admiration of the ICJ and the comity of nations. The Committee has since been examining matters which are before the United Nations and specifically the International Law Commission and the Sixth Committee of the General Assembly. It has made substantial progress in achieving its aims and objectives as a regional inter-governmental organisation, with forty-four nations* in its

* These are: Arab Republic of Egypt, Bahrain, Bangladesh, China, Cyprus, Gambia, Ghana, India, Indonesia, Iran (Islamic Republic of) Iraq, Japan, Jordan, Kenya, DPR Korea, Republic of Korea, Kuwait, Libya, Malaysia, Mauritius, Mongolia, Myanmar, Nepal,

fold. The Committee continues to promote common awareness of the merit of peaceful resolution of disputes as well as development of consensus on regional and global issues among its members. The annual Sessions of the Committee are held each year in different member countries upon invitation and rotation.

The latest thirty-eighth annual Session was held in Accra, Ghana from 19 to 23 April 1999. The Session was inaugurated by H.E. Flt. Lt. Rawlings, the President of Ghana. Dr. Martin A.B.K. Amidu, the Deputy Minister of Justice and Deputy Attorney General of the Government of Ghana was elected as the President of the Committee and Mr. Abdulla Ahmed Ghanim, Minister of Legal Affairs, Government of the Republic of Yemen was elected the Vice President of the 38th Session. The Committee was honoured by the presence of two distinguished members of the International Law Commission, Ambassador Mr. Chusei Yamada and Ambassador Mr. E.A. Addo, the Solicitor General of Ghana.

Detailed deliberations were held on each of the listed topics and a special Meeting on Environment was held.

The Agenda items of the Accra Session are as follows:

I. Organizational Matters

1. Consideration and adoption of Agenda
2. Election of the President and the Vice President.
3. Admission of observers
4. Report of the Secretary General on Organizational; Administrative and Financial matters.

Nigeria, Oman, Pakistan, Palestine, Philippines, Qatar, Saudi Arabia, Senegal, Sierra Leone, Singapore, Somalia, Sri Lanka, Sudan, Syria, Tanzania, Thailand, Turkey, Uganda, United Arab Emirates and Yemen. Botswana is an associate member.

5. Report on Matters concerning the Headquarters Issue
6. Repot on the Regional Centres of Arbitration
7. Report on the Financial Matters of the Arabic Division.
8. Venue of the Thirty-ninth Session.

II. Matters under Article 4 (a) of the Statues: Matter Relating to the International Law Commission.

Report on the work of the International Law Commission on its Fiftieth Session.

III. Matters under Article 4 (c) of the Statutes: Matters Referred to the Committee by Member States

1. Status and Treatments of Refugees.
2. Deportation of Palestinians and other Israeli practices among them the Massive Immigration and Settlement of Jews in occupied Territories in Violation of International Law particularly the fourth Geneva Convention of 1949.
3. Legal Protection of Migrant Workers.
4. Law of the Sea.
5. Extraterritorial Application of National Legislation: Sanction Imposed against Third Parties.

IV. Matters under Article 4 (d) of the Statues: Matters of Common Concern having Legal Implications.

1. The United Nations Decade of International Law: Report of the Experts Group Meeting, New Delhi 11th and 12th February 1999.
2. The Report of the UN Conference of Plenipotentiaries on the Establishment an International Criminal Court.

3. The United Nations Conference on Environment and Development: Follow-up

V. Trade Law Matters

1. Progress Report concerning the Legislative Activities of the United Nations and other International Organizations in the Field of International Trade Law.

2. Report of the WTO Seminar held in New Delhi on 17th and 18th November 1998.

VI. Special Meeting on Environmental Law

VII. Any other Matter.

(ii) Progress of Work since the Thirty-seventh (New Delhi) Session, 1998

Subsequent to the Thirty-seventh Session held in New Delhi, in April 1998 the Secretariat followed the work programme as approved at that Session. This included the work supportive of the United Nations and other inter-governmental organizations; Organization of meetings and seminars under the auspices of the AALCC; representation at international conferences; preparation of briefs for consideration at Accra Session and other promotional activities. A brief reflection on these activities is as follows:

(a) Co-operation and Consultation with the United Nations and AALCC's work Supportive of the United Nations, Its Specialized Agencies and other Inter-Governmental Organizations

(i) *Secretary General's Meeting with the Legal Counsel of the United Nations*

The Secretary General visited New York from 26 October to 3rd November, 1998. During his week long stay in New York the Secretary General held consultations with Mr. Hans Corell,

the United Nations Legal Counsel and other United Nations Officials. In his meting with the Legal Counsel, the Secretary General expressed his gratitude and appreciation to the United Nations for its continued support to the AALCC's work.

(ii) *Representation at the fifty-third Session of the General Assembly of the United Nations*

The Secretary General and the AALCC's Permanent Observer in New York, Mr. Bhagwat Singh represented the AALCC at the 53rd Session of the General Assembly.

Pursuant to General Assembly Resolution adopted at its Fifty-first Session (GA Res. A/51/11) an item on "Co-operation between" the United Nations and the Asian-African Legal Consultative Committee was placed on the agenda of the 53rd Session of the General Assembly. The item came up for consideration at the 48th Plenary Meeting held on 29th October, 1998. The Secretary General addressed the meeting on behalf of the AALCC. The debate on the item was based on the Report of the Secretary General prepared by the Secretariat of the United Nations. The General Assembly, after the conclusion of the debate adopted a resolution which noted with satisfaction the commendable progress achieved in promoting co-operation between the United Nations and the AALCC.

(iii) *Secretary General's Participation at the Sixth Committee Meeting*

The Secretary General had the opportunity to address the meeting of the Sixth Committee (Legal) of the UN General Assembly on 29th October, 1999 in which he mentioned about the work programme of the Committee and the deliberations held at the AALCC's 37th Session in New Delhi.

(iv) *Informal Consultation of Legal Advisers*

The Secretary-General was invited to attend the Informal Consultation of the Legal Advisers held during the 53rd Session of the General Assembly. The consultation focussed its discussion on the work of the International Law Commission. Establishment of the International Criminal Court and issues concerning International Terrorism.

(b) Meetings Organised under the Auspices of the AALCC

(i) AALCC Meetings Organised during the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy – 15 June to 17 July, 1998

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court was held in Rome, Italy, from 15 June to 17 July, 1998. The Deputy Secretary General, Ambassador Dr.Wafik Zaher Kamil, convened two AALCC meetings during the Conference which were chaired by the President of AALCC. Dr. P.S. Rao. The Meetings were attended by the representatives of Members States of the AALCC as well as non-member States. Prior to the meeting an overview of the Draft Statute, prepared by the Secretariat was circulated among the Member States and this document was very much appreciated by them.

The AALCC meeting evoked great interest. Mr. Philippe Kirsch Chairman of the Committee of the Whole was very appreciative of this initiative and the feed back given to him by the President.

(ii) *Meeting of Legal Advisers of Member States of the AALCC held at the United Nations Office, New York, 30th October, 1998*

A meeting of the Legal Advisers of Members States of the AALCC was held at the United Nations Office in New York on 30th October 1998. It was chaired by the President of the AALCC Dr. P.S. Rao, Joint Secretary, Legal Adviser Ministry of External Affairs, Government of India and a member of the International Law Commission. Apart from the Legal Advisers of 22 AALCC Member States[1] and 14 observer delegations,[2] the

[1] Bahrain, Bangladesh, Botswana, China, Cyprus, D.P.R. Korea, Egypt, Ghana, India, Indonesia, Islamic Republic of Iran, Japan, Libyan Arab Jamahiriya, Malaysia, Mongolia, Myanmar, Saudi Arabia, Singapore, Sri Lanka, Thailand, Uganda and Yemen.

[2] Angola, Australia, Canada, Cote d'Ivorte. Finland, France, Germany, Mexico, Netherlands, New Zealand, Russian Federation, South Africa, United Kingdom and the United States.

meeting was attended by the President of the International Court of Justice Judge Stephen Schwebel; Vice President, Judge Weeramantry and Registrar of the ICJ; Mr. E. Ospina Valencia; the Chairman of the Sixth Committee Mr. Jargalsaikhan Enkhsaikhan; the Chairman of the International Law Commission, Mr. Joao Clemente Baena Soares; the Chairman of the Committee of the Whole of the United Nations Conference on the Establishment of an ICC, Mr.Philippe Kirsch: Chairman of the Preparatory Committee on the Establishment of an International Criminal Court (ICC), Mr. Adrian Bos; Chairperson of the Working Group on the UN Decade of International Law, Dr.Flores; Ambassador C. Pinto and Mr. C. Greenwood (experts); Mr.Pace from the Hague Appeal for Peace Initiative; the Under Secretary General and the Legal Counsel of the United Nations Mr. Hans Corell. the Secretary General Mr. Tang Chengyuan and the Permanent Observer of the AALCC in New York represented the AALCC.

A Background Note prepared by the Secretariat identified three issues for discussion namely: (i) the United Nations Decade of International Law including the Third International Peace Conference; (ii) AALCC's Proposed Seminar on the World Trade Organisation: Dispute Settlement Mechanism and (iii) Environmental Law.

(iii) *AALCC Seminar on Certain Aspects on the Functioning of the WTO Dispute Settlement Mechanism and Other Allied Matters held in New Delhi on 17th and 18th November 1998.*

Pursuant to a decision taken at the AALCC's 37th Session, the Secretariat, in collaboration with the Ministries of Commerce and External Affairs of the Government of India, convened a two-day Seminar in New Delhi on 17-18 November, 1998.

Senior Government officials, eminent experts and distinguished lawyers and Representatives of 28 Member States, 14 Observer States, three international organizations viz; The European Commission, the UNCTAD, WTO and the Director of the Kuala Lumpur Regional Centre for Arbitration attended the Seminar.

The Discussion during the six substantive sessions of the Seminar revolved largely around the presentations made by a group of experts on the issues concerning the dispute settlement mechanism within the framework of the World Trade Organisation.

The Secretary General would like to place on record his gratitude to the Government of India for the assistance and the financial contribution for organizing this meeting.

(iv) *AALCC Seminar on Human Rights in the United Nations System, New Delhi, 14 January, 1999.*

A 'Seminar on Human Rights in the United Nations System' was Organised by the AALCC on 14 January 1999. It was presided by the President of the Committee Dr. P.S. Rao and attended by officials of the diplomatic missions in New Delhi and the Secretariat. The Chief Guest was Ambassador Omran Shafei, who was until December 1998, a Member of the United Nations Human Rights Committee.

The Secretary General, in his welcome statement recalled that the AALCC at its Kampala Session in 1993 had adopted Kampala Declaration on Human Rights. The Declaration *inter alia* recognized the right to development as an inalienable right. He observed that sustainable development and environment were intrinsically linked and the human rights to a clean and healthy environment needed to be progressively developed and codified.

Ambassador Shafei comprehensively dealt with the ongoing work on human rights in the UN System. Elaborating the need for international cooperation in the field, he felt that States should endeavour to voluntarily adhere to UN instruments on human rights. The President recognized a third generation of human rights, especially the right to development. He drew attention to the matters concerning the competence of human rights treaty bodies and questions concerning reservations appended to the instrument of ratification or accession. The discussion that followed touched

upon issues relating to cultural values and human rights, human rights education, human rights and international humanitarian laws and the right to a clean environment.

(v) *Meeting to consider the Themes of the First International Peace Conference held in New Delhi on 11 and 12 February 1999*

A two-day meeting to consider the three preliminary reports on the themes of the First International Peace Conference was held in New Delhi on 11th and 12th February 1999. The meeting was one of the six regional meetings dedicated to commemoration of the 1999 Centennial of the first International Peace Conference. Among the subjects identified for the Meeting were: (i) Peaceful Settlement of Disputes: Prospects for the twenty-first century (ii) International Humanitarian Law and Laws of War; (iii) Development of International Law relating to Disarmament and Arms Control since the first Hague Peace Conference in 1899. The Meeting was attended by representatives and experts from several Member States and non-member States. Mr. Hans Corell, Under Secretary General and Legal Counsel of the United Nations, Executive Sectary of the Organizing Committee for the Centennial Conference, representatives of ICRC, the League of Arab States and officials of the AALCC Secretariat also participated in this meeting.

(c) Preparation of Studies on Matters before the United Nations and other International Organizations

In pursuance of the Committee's programme for rendering assistance to Member Governments for their active participation in the work of the Sixth Committee, the Secretariat prepared Notes and Comments on selected items on the agenda of the 53rd Session of the General Assembly. These studies were submitted for consideration at the AALCC's Legal Advisers Meeting held in New York on 30th October 1998.

Notes and Comments were prepared on the report on the work of the International Law Commission during its 50th

Session held in May-July 1998. Document No. AALCC/UNGA/LII/98/2 submitted to that Meeting contained notes and comments on substantive items considered by the International Law Commission at its 50th Session. These were: State Responsibility; The Law and Practice Relating to Reservations to Treaties; International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law; and State Succession and its Impact on the Nationality of Natural Persons; Diplomatic Protection; and the Unilateral Acts of State. Comments prepared included: United Nations Decade of International Law; Work of the United Nations Commission on International Trade Law at its 31st Session, International Cooperation in Criminal Matters; Oceans and the Law of the Sea; the Establishment of an International Criminal Court, Protection of Global Climate for Present and Future Generations of Mankind; and on Implementation of the Provisions of the Charter of the United Nations related to assistance to the thirst states affected by applications of sanctions.

(d) Publications

The AALCC Secretariat has been bringing out a Bulletin regularly for more than the last twenty years. However, since 1998, it is being published bi-annually. The bulletin has served as a tool for wider dissemination of information about the activities of the AALCC and providing an up-date as to the developments in the field of international law. In order to enhance its legal character so as to render better service in legal mattes to the Member States, the Bulletin now includes one or two research articles and papers contributed by the staff Members of AALCC and the scholars from the Asian and African region. The Secretary General hopes that the Member Governments would encourage scholars in their respective Universities and academic institutions to contribute articles for the Bulletin. A Board of Editors, headed by the Secretary General and comprising senior officials in the Secretariat has been constituted to advise on the matters.

The Secretariat has published the Report of the AALCC's Seminar on Extraterritorial Application of National Legislation: Sanctions Imposed Against Third Parties which was held in Tehran in January, 1998.

Another publication which has been undertaken in cooperation with the UNEP is the "Asian-African Hand Book on Environmental Law". The Secretariat has been able to bring out this publication before Accra Session.

Each year the AALCC publishes its annual Report entitled Report and Selected Documents. The latest in this series is the Report and Selected Documents of the Thirty-eighth Session held on 19-23 April, 1999. This publication contains background information, decisions adopted and the research studies prepared for the Accra Session.

(iii) AALCC's Regional Centres for Arbitration

The question of organization of a dispute settlement scheme in relation to economic and commercial transactions with and within the countries of the Afro-Asian region was first discussed at AALCC's Tokyo Session, held in 1974. At that Session, the AALCC endorsed the recommendation of its Trade Law Sub-Committee, that efforts should be made to develop institutions and facilities for the conduct of international arbitrations in the Afro-Asian region so that the flow of arbitrations to arbitral institutions outside the region could be minimized. After subsequent discussions on this matter at its Kuala Lumpur (1976) and Baghdad (1977) Sessions, and consultations with the Member Governments and concerned international institutions, the AALCC decided at its Doha Session held in January 1978 upon the establishment of a Regional Centre for Arbitration in Kuala Lumpur, second Centre in Cairo and a third one to be located in an African country in consultation with the Member Governments concerned. It was also envisaged that additional Centres might be set up progressively in the light of experience gained from the activities of these centres.

In April 1978 an Agreement was concluded through an exchange of letter between the government of Malaysia and AALCC for the establishment of a Regional Centre for Arbitration in Kuala Lumpur. The Kuala Lumpur Centre was formally inaugurated by the Prime Minister of Malaysia on 16 October 1978. A Similar agreement was concluded with the Government of the Arab Republic of Egypt in January 1979 for establishing a second Centre in Cairo. The Cairo Centre was formally inaugurated on 5 February 1979 by Mr. Ahmed Aly Moussa, the then Minister of Justice of Egypt.

An Agreement had also been concluded with the Federal Government of Nigeria in 1980 for the location of a third Centre in Lagos and the same was formally inaugurated in March 1989. On 26 April 1999 Mr. Alhaji Abdullahi Ibrahim OFR (SAN), Attorney General and Minister of Justice, on behalf of Nigeria and Mr. Tang Chengyuan, Sectary General of the AALCC, signed the Headquarters Agreement. The Agreement formalizes the continued functioning of the Centre for a period of five years with effect from January 1999 to December 2004.

An Agreement has also been concluded between the Government of the Islamic Republic of Iran and the AALCC on 3 May 1997, for the establishment of a Regional Centre for Arbitration in Tehran. The Agreement, among other things, provides that the Centre would function under the auspices of the AALCC. The Government of Islamic Republic of Iran would respect the independent functioning of the Centre, and have conferred certain privileges and immunities to the Centre, as may be necessary for the purpose of executing its functions. The Centre would be administered by Director who shall be national of the Islamic Republic of Iran and would be appointed by the Government in consultation with the Secretary General of the AALCC. Until such time that the Centre becomes financially independent, the Government could make available premises and make an annual grant for the purposes of the functioning of the Centre. Among the various initiatives taken by the interim Secretariat, the important ones include the preparation of the promotional material of the Centre; and drafting the rules of Arbitration for conducting arbitration

under the auspices of the Tehran Centre. The Agreement has already been confirmed by the Cabinet and also approved by the Commission of Foreign Policy of Iranian Parliament (Majlis). It is awaiting final ratification by the Parliament. The Iranian Parliament has also approved the Arbitration Legislation, based on UNCITRAL Model Law, which has become effective from September 1997.

Activities of the AALCC's Regional Centres for Arbitration

The tasks entrusted to the AALCC's Centres in the light of the overall objectives of the ALLCC's dispute settlement scheme include:

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

(ii) Assistance and Facilities for holding ad hoc arbitral proceedings under UNCITRAL Arbitration Rules 1976;

(iii) Assistance in the enforcement of awards;

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

(v) Promotional work in association with the AALCC Secretariat.

Although in the beginning the promotional activities of the Regional Centres for Arbitration were primarily carried out by the AALCC in view of its established contacts with Governments, governmental agencies and international institutions, over the past few years, such activities have been mainly carried out by the Centres themselves. However, the AALCC Secretariat too periodically organizes international conferences and seminar aimed at promoting awareness about the role and functions of the Regional Centre for Arbitration.

(iv) AALCC's Data Collection Unit to be Re-Activated

A resolution on re-activation of the AALCC's Data Collection Unit was adopted at the Accra Session, (1999). The resolution stressed the need for and significance of exchange of information between the Committee, the United Nations, its agencies and other international bodies. It also referred to the effective role of research and study in the fulfillment of the objectives of the Committee. It is important to note that the resolution does not confine itself to the work of Data Collection only in respect of international economic and trade law matters but covers the entire gamut of the substantive activities of the Secretariat, including research and dissemination of information.

In order to promote wider dissemination of the AALCC's Work through the Unit, the Secretariat has to incur operational expenses towards the functioning of the Unit. For pursuance of the Accra mandate the Secretariat has to set up a web site and the acquisition of this facility would be possible from the unspent amount available to the Secretariat from the earlier grants provided by the Government of the Republic of Korea for the Establishment of the Unit and the Government of the Republic of Korea for the establishment of the Unit and the Government of Japan for the purchase of computers and other necessary accessories.

The e-mail linkage, and the establishment of a web-site would generally facilitate communication with international organizations, and specifically with Member States. This mode of communication would be of immense help for re-activating of the Data Collection Unit. The Secretariat would urge all Member States to avail of this facility and promptly furnish information and materials in English, the official language of the Committee.

The Data Collection Unit functions under the overall supervision of the Deputy Secretary General, Mr.M. Reza Dabiri.

The text of the Resolution adopted at Accra is as follows:

(Adopted on 23rd April, 1999)

The Asian-African Legal Consultative Committee at its Thirty-eight Session

Stressing the need and significance of exchange of information between the Committee, the United Nations, its related Agencies and other international bodies.

Having in mind the effective role of research and study in Committee's objectives:

Appreciating the financial assistance given by the Government of Republic of Korea for the establishment of the Data Collection Unit and by the Government of Japan for the purchase of computers and the internet facilities:

1. *Requests* the Secretary General to continue to update and improve technical efficiency of the Unit including establishment of a web-site and homepage in the year 1999-2000 to facilitate the communication between the Secretariat, Member States and other international organizations;

2. *Urges* Member Governments to furnish information and other relevant material in order to enrich Data Collection Unit; and

3. *Requests* the Secretary General to report on the establishment of a web-site and homepage to the Thirty-ninth Session.

II. THE LAW OF THE SEA

(i) Introduction

The item Law of the Sea was taken up by the Committee at the initiative of the Government of Indonesia in 1970 and has thereafter remained a priority item at successive Sessions of the AALCC. 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 (hereinafter called UNCLOS-III) through preparation of background papers and provision of opportunities for in-depth discussions, the AALCC gradually emerged as a useful forum for a continuing dialogue on some of the major issues on this subject. The subject matter is one in which all the Member States of the AALCC are deeply interested and has been the subject of discussion at inter-sessional and Working Group Meetings.

Following the adoption of the United Nations Convention on the Law of the Sea, 1982 (hereinafter referred to as the Law of the Sea Convention, 1982 or simply the Convention) the AALCC at its 23rd Session (Tokyo, 1983) approved the future work programme on this subject, which included a comprehensive set of issues among which were: (i) the encouragement of taking steps towards ratification of the Convention (ii) 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 (iii) assistance to Governments in regard to the work of the Preparatory commission; and (iv) the examination of the question of promoting regional or subregional co-operation taking into account the interests of landlocked and geographically disadvantaged States.

The item was considered at the 37th Session of the AALCC (New Delhi, 1998). The brief of documents prepared by

the Secretariat for that session, *inter alia*, furnished an overview of developments since the entry into force of the Law of the Sea Convention including the Meeting of the States Parties to the Convention; the work of the International Seabed Authority (hereinafter referred to as ISBA); and the establishment of the International Tribunal for the Law of the Sea. It had also contained an overview of the 1996 Global Programme of Action for the Protection of the Marine Environment from Land Based Activities.

At the 37th Session the AALCC, *inter alia*, urged its Member States, who had not already done so,[1] to consider ratifying the Convention on the Law of the Sea. The AALCC also urged the full and effective participation of the Member States in the International Seabed Authority (ISBA) so as to ensure and safeguard the Legitimate interests of the developing countries and for the progressive development of the principle of the Common Heritage of Mankind.

The AALCC at its 37th session reiterated its call to the Member States to give 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. To this end, the AALCC urged Member States to adopt 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 the developing countries during this initial period.

It directed the Secretariat to continue to co-operate with such international organizations as are competent in the field of ocean and marine affairs and to consider assisting Member States in their representation at the ISBA. The AALCC at that Session *inter alia* decided to inscribe on the agenda of its 38th

[1] 11 Member States of the AALCC viz. Bangladesh; Islamic Republic of Iran: Democratic People's Republic of Korea; Libya; Nepal; State of Palestine; State of Qatar; Syria; Thailand; Turkey; and the United Arab Emirates have not ratified or acceded to the Convention,

Session an item entitled "Implementation of the Law of the Sea Convention, 1982".

The brief of documents prepared for the Accra Session accordingly furnishes an overview of the developments, relating to the implementation of the Law of the Sea Convention, since the 37th Session of the Committee (New Delhi, 1998).

Thirty - eighth Session : Discussion

Introducing the item the *Deputy Secretary General* Mr.Mohammad Reza Dabiri stated that the item Law of the Sea had initially been taken up at the initiative of the Government of Indonesia and had thereafter remained a priority item at successive regular sessions of the committee. The subject had in the past also been the subject of discussion at inter-sessional and working group meetings. The item was last considered at the 37th Session of the Committee whereat the Committee had considered a brief of documents prepared by the Secretariat which furnished an overview of developments since the entry into force of the Law of the Sea Convention. At its 37th Session the Committee had urged its Member States, who had not already done so, to consider ratifying the Convention on the Law of the Sea. The Committee had also urged 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 progressive development of the principle of the Common Heritage of Mankind. The AALCC at its 37th Session had called upon Member States to give 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.

He further stated that the brief of documents prepared by the Secretariat sought to furnish an overview of developments in the matters relating to the Law of the Sea, in particular in respect of (i) the consideration, by the General Assembly, of the item relating to the Oceans and the Law of the

Sea including the 1995 Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks; (ii) Meeting of the States Parties to the UN Convention on the Law of the Sea; (iii) the work of the International Seabed Authority, including the work of its organs like the Council, the Legal and Technical Commission and the Finance Committee; (iv) the Commission on the Limits of the continental Shelf; and (v) the International Tribunal for the Law of the Sea. This brief of documents also listed the progress in respect of the Registered Pioneer Investors.

The Deputy Secretary General stated that the 53rd Session of the General Assembly had expressed its satisfaction at the increase in number of States Parties to the Convention and the Agreement relating to the implementation of Part XI of Law of the Sea Convention and in order to achieve the goal of universal participation had renewed its call to 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. The General Assembly at its 53rd session also reaffirmed its decision to undertake an annual consideration and review of the overall developments pertaining to the implementation of the Convention and other developments relating to the Law of the Sea.

Recalling that the General Assembly at its 52nd Session had expressed its satisfaction at the progress being made by the Legal and Technical Commission towards the formulation of a draft Mining Code, the Deputy Secretary General stated that the study prepared by the Secretariat provided an overview of the draft Mining Code. The Committee at its Session may, he suggested, consider mandating the Secretariat to make a concerted study of the Mining Code and to this end approve of the representation of the AALCC Secretariat at the meeting of the International Seabed Authority. He recalled in this regard, that the Secretariat had in the past been represented at the Sessions of the Preparatory Commission on the International Seabed Authority and the International Tribunal for the Law of the Sea and, that during the earlier phase of the work of the PREPCOM, co-operation between the

AALCC and the PREPCOM had, indeed, been seen as a forerunner to the co-operation between the Seabed Authority and the AALCC.

Pointing out that the General Assembly had proclaimed the year 1998 as the Year of the Oceans and that the General Assembly at its 53rd session had welcomed the issuance of the Report, of the Independent World Commission on the Oceans, entitled "The Ocean: Our Future" in the context of the International Year of the Oceans, he said that Report was likely to be considered at the Seventh Session of the Commission on Sustainable Development in 1999 whereat the Commission would in accordance with decision of the Nineteenth Special Session of the General Assembly address the sectoral theme "Oceans and Seas".

Mr. Dabiri stated that the new treaty system of ocean institutions was now in place and had begun its work. The General Assembly of the United Nations had expressed its concern on the financial situation of both the International Seabed Authority and the International Tribunal for the Law of the Sea. In its resolution 43/32 the General Assembly had, among other things, appealed to all members of the Authority and all States Parties to the Convention to defray their assessed contributions to the International Sea bed Authority and to the International Tribunal for the Law of the Sea in order to ensure that they are able to carry out their functions.

He pointed out further that 1999 marked the fifth anniversary of the entry into force of the United Nations Convention on the Law of the Sea. This is the year in which ocean affairs and the Law of the Sea are on the agenda for critical analysis and decisions about "institutional and managerial arrangements for the future". Emphasizing the coincidence between the programme of the Commission for Sustainable Development, and the five-year experience with the Law of the Sea Convention he stressed that the year 1999 must be used to put into place a number of pieces of the design for ocean governance in the next century.

The establishment of an institution of "ocean governance" by a Committee with universal membership which must respond to the General Assembly directly, and not to the ECOSOC which is a more specialized body with less than universal membership.

The *Delegate of Japan* while extending her appreciation to the Secretariat for the background reports, asked for the floor to lay out some important developments that had occurred during the course of the past one year. She was of the opinion that several states had renewed their commitments by ratifying the Convention and the Development Agreement. She added that 130 State Parties to UNCLOS 82 in itself, was a strong manifestation of the universality of the Convention. The second instance was the importance accorded to the International Tribunal on the Law of the Sea, wherein the *M/V Saiga Case* had reached the Merits stage. This according to the delegate was an act of faith placed in the UNCLOS regime for dispute resolution. She expressed the hope that her own country person Judge Yamamoto would gain legal expertise in this field. Lastly she commended the work of the International Sea Bed Authority (ISBA) for its work during the last year. The efforts included the approval of the plans of work for exploration submitted by Registered Pioneer Investors and the Mining Code. Reiterating Japan's commitment for establishment of a stable order of the Law of the Sea, the delegate concluded her presentation by expressing the hope that Member States of the AALCC, who have not yet become Parties, would do so.

The *Delegate of the Arab Republic of Egypt* recalling the pioneering work of the AALCC, during the Third UNCLOS in general and EEZ in particular, felt that a certain laxity had befallen the Asian African states. But the Implementation Agreement relating to Part XI of the Convention, had once again reactivated the work related to the subject. He was of the view that the institution of the Council, the Technical and the Financial Committee was a welcome move. The Mining Code submitted to the Council, he felt would be soon finalized. He also expressed happiness that the *Saiga Case* had moved on to

the Merit Stage. He expressed an opinion that the topic on the "Law of the Sea" could be taken by the Committee biennially rather than annually. This suggestion he felt, could be discussed at the stage of adopting of resolutions on the topic.

The *Delegate of India* stated that her country with a coast line exceeding 4000 miles and 1300 islands had always attached special importance to the study of ocean affairs. Recalling her country's contribution and active participation in the third UN Conference on the Law of the Sea, she said that her country had invested heavily and had major interests in the exploration and exploration of petroleum and hydrocarbon carbon resources, present in the territorial waters and the EEZ. Speaking on maritime safety and marine pollution, she was of the view that though state jurisdiction was primarily in vogue, regional co-operation in the field could prove better for ensuring compliance. Buttressing this position, she recalled that her country and 14 other States had signed a Memorandum of Understanding on Port State Control for the Indian Ocean region, which provided that the maritime authority of each state must inspect at least 10 per cent of the foreign merchant ships entering their ports every year.

The *Delegate of the People's Republic of China* pointed out that the designation of the year 1998 as the International Year of the Ocean, was very important for human society. He said his country has shown great concern over and placed great importance on maintaining peace, tranquillity, stability of the ocean and the effective sustainable utilization of marine resources, development of marine scientific research and protection of marine environment. He felt that these concerns had been sufficiently addressed by UNCLOS, the Agreement Relating to Implementation of Part XI of UNCLOS and other relevant rules, regulations and procedures. As regards the plan for the exploration of the seabed by pioneer investors, he felt that the Council should look into, very carefully, the Draft Mining Code. The delegate further stated that the Council must bear in mind the principle of common heritage of mankind while finalizing this Code. While agreeing to the guarantee of the legitimate rights of investors, he felt, it was

necessary to safeguard the just rights and interests of the developing countries. The principle of common heritage, in his view, would go a long way in preserving and protecting the marine environment.

With regard to his country's efforts towards developing guidelines for marine environment preservation and mining of poly-metallic nodules, he recalled that recently a workshop was held in China which brought out an assessment of possible environmental impacts arising from exploitation of deep seabed poly-metallic nodules. Furthermore, he appreciated the work of ITLOS, which has started its deliberations on the merit stage of the *M/V Saiga Case*. He called upon Asian and African States to work towards establishing a healthy, stable and just legal order of the oceans.

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

(Adopted on 23.04.1999)

The Asian African Legal Consultative Committee at its Thirty-eighth Session

Having considered the Secretariat Brief of Documents on "The Law of the Sea", as set out in Document AALCC/XXVIII/ACCRA/99/S.5, and having heard the statement of the Deputy Secretary General;

1. *Notes* with satisfaction that the United Nations Convention on the Law of the Sea entered into force on 16 November 1994;

2. *Notes also* the work of the International Seabed Authority on the formulation of the Regulations on Prospecting and Exploration of Polymetallic Nodules in the Area;

3. *Notes with Satisfaction* the reference of a dispute to the International Tribunal for the Law of the Sea;

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

5. *Reminds* Member States to give timely consideration to the need for adopting a common policy and strategy for the interim period before the commercial exploitation of the deep seabed minerals becomes feasible, and for this purpose urges Member States to take an evolutionary approach especially to the "initial function" of the International Seabed Authority so as to make the ISBA useful to the international community in general and developing countries in particular.

6. *Urges Member States to consider* the full and effective participation (of Member States) in the ISBA 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. *Urges Member States* to consider making written declarations choosing from among the means concerning the settlement of disputes listed in Article 287 of the United Nations Convention on the Law of the Sea;

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

9. *Directs the Secretariat* to consider technical assisting Member States in their representation at the ISBA and monitor the progress of work of the International Seabed Authority on the formulation of the regulations on Prospecting and Exploration of Poly-metallic Nodules in the Area and to report thereon;

10. *Also directs the Secretariat* to continue to cooperate with International organizations relating to the fields of ocean and marine affairs;

11. *Decides* to inscribe on the agenda of its thirty-ninth Session an entitled "Implementation of the Law of the Sea Convention, 1982".

(iii) Secretariat Study: Law of the Sea

The item "Law of the Sea" has been on the agenda of the United Nations General Assembly since its 37th session (1982) when the General Assembly, *inter alia* approved the assumption, by the Secretary General, of the responsibilities entrusted to him under the UN Convention on the Law of the Sea, 1982[2] and the related resolution adopted by UNCLOS III and has thereafter been considered at successive sessions.

The General Assembly had by its Resolution 52/26 of 26 November 1997 inscribed the item "Oceans and the Law of the

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[2] The Convention entered into force on November 16, 1994 and as of September 1998 126 States had ratified, acceded or succeeded to the Convention. These States are: Algeria. Angola, Antigua and Barbuda, Argentina, Australia, Austria, Bahamas, *Bahrain*, Barbados, Belize, Benin, Bolivia, Bosnia and Herzegovina, *Botswana*, Brazil, Brunei Darussalam, Bulgaria, Cameroon, Cape Verde, Chile, *China*, Comoros, Cook Islands, Costa Rica, Cote d'Ivoire, Croatia, Cuba, *Cyprus*, Czech Republic, Democratic Republic of the Congo, Djibouti, Dominica, *Egypt*. Equatorial Guinea, Fiji, Finland; France, Gabon, *Gambia*, Georgia, Germany, *Ghana*, Greece, Grenada, Guatemala. Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Iceland, *India, Indonesia, Iraq* Ireland, Italy, Jamaica, *Japan Jordan, Kenya, Kuwait Korea Republic of, Kuwait*. Lao People's Democratic Republic, Lebanon, Macedonia (former Yugoslav Republic of), *Malaysia*, Mali, Malta, Marshall Islands, Mauritania, *Mauritius*, Mexico, Micronesia (Federated States of), Monaco, *Mongolia*, Mozambique, *Myanmar*, Namibia, Nauru, Netherlands, New Zealand, *Nigeria*, Norway, *Oman*, *Pakistan*, Palau, Panama, Papua New Guinea, Paraguay, *Philippines*, Portugal, Romania. Russian Federation, Saint Kitts and Nevis. Saint Lucia, Saint Vincent and the Grenadines, Samoa, Sao Tome and Principle, *Saudi Arabia, Senegal*, Seychelles, *Sierra Leone, Singapore*, Slovakia, Slovenia, Solomon Islands *Somalia*, South Africa. Spain, *Sri Lanka, Sudan*, Suriname, Sweden, Togo, Tonga; Trinidad and Tobago, Tunisia, *Uganda*. United Kingdom of Great Britain and Northern Island, United Republic of *Tanzania*, Uruguay, Viet Nam, *Yemen*, Yugoslavia, Zambia and Zimbabwe. See *Oceans and the Law of the Sea: Report of the Secretary General UN* Doc. A/53/456 of 5 October 1998.

Sea" on the provisional agenda of its 53rd session. At its 53rd Session the General Assembly *inter alia* considered the Report of the Secretary General on the item.[3] After consideration of the item at its 53rd Session the General Assembly, among other things, reaffirmed the universal character of the United Nations Convention on the Law of the Sea 1982 and called upon States, that had not already done so, to become parties to the Convention.

In his report to the General Assembly at its 53rd Session the Secretary General had pointed out that at least 14 of the 46 declarations made upon ratification or accession do not seem to be in conformity with the provisions of Article 310 and are neither supported by any other provision of the Convention nor by any rule of general international law. One half of these declarations (7) have been made after the entry into force of the Convention. The General Assembly has, at its 53rd session, called upon States to ensure that any declarations or statements that they had made or make when signing, ratifying or acceding are in conformity with the Convention and to withdraw any of their declarations or statements that are not in conformity with the Convention.[4] It also reaffirmed its decision to continue to undertake an annual consideration and review and evaluation of the developments pertaining to the implementation of the Convention and other developments relating to the Law of the Sea and Ocean Affairs.

The General Assembly at its 53rd session took note of the work of the Independent World Commission on the Oceans, and of its report "The Ocean... Our Future", and welcomed its issuance in the context of the International Year of the Ocean. It reaffirmed its decision to undertake an annual review and evaluation of the implementation of the Convention and other developments relating to ocean affairs and the law of the sea

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[3] A/53/456.

[4] See operative paragraph 3 of General Assembly Resolution on the Oceans and the Law of the Sea. 53/32 of 6 January 1999. For the full text of the resolution see ANNEX.

and to consider the results of the review by the Commission on Sustainable Development of the sectoral theme of "Oceans and seas" in 1999 under the agenda item "Oceans and the law of the sea".

The provisions of the Convention have, since its adoption, been developed in two implementing agreements viz.

(a) The Agreement Relating to the Implementation of Part XI of the Convention adopted in 1994; and

(b) The Agreement for the Implementation of the Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, adopted in 1995.

(a) The Agreement Relating to the Implementation of Part XI of the Convention, 1994

The Agreement Relating to the Implementation of Part XI of the Convention was adopted by General Assembly Resolution 48/263 on July 28, 1994 (hereinafter called the 1994 Agreement) and entered into force on 28 July 1996. It has since been ratified or acceded to by 90 States and one intergovernmental organization.[5] It may be stated that 12

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[5] As of April 1, 1998 the 88 States that had consented to be bound by the Agreement are Algeria, Argentina, Australia, Austria, Bahamas, Barbados, Belize, Benin, Bolivia, Brunei Darussalam, Bulgaria, Chile, *China*. Cook Islands, Cote d'Ivoire, Croatia, *Cyprus*, Czech Republic, Equatorial Guinea, Fiji, Finland, France, Gabon, Georgia, Germany, Greece, Grenada, Guatemala, Guinea. Haiti. Iceland, *India*, Ireland, Italy, Jamaica, *Japan, Jordan, Kenya*, Lebanon, Macedonia (the former Yugoslav Republic of). *Malaysia*, Malta, Mauritania, *Mauritius*, Micronesia (Federated States of), Monaco, *Mongolia*, Mozambique, *Myanmar*, Namibia, Nauru, Netherlands, New Zealand, *Nigeria*, Norway, *Oman, Pakistan*, Palau, Panama, Papua New Guinea, Paraguay, Philippines. Portugal, *Republic of Korea*, Romania, Russian Federation. Samoa. *Saudi Arabia, Senegal*. Seychelles. *Sierra Leone, Singapore*. Slovakia, Slovenia, Solomon Islands, South Africa Spain. *Sri Lanka*, Sweden, Togo, Tonga,

States have continued to be members of the International Seabed Authority on a provisional basis. The provisional membership of all these States was to have terminated on 16th November 1998.[6]

The 1994 Agreement is to be interpreted and applied together with the Convention as a single instrument and in the event of any inconsistency between the provisions of Part XI of the Convention and the 1994 Agreement the provisions of the latter are to prevail. Any ratification or accession to the Convention, after the adoption of the Agreement, represents also consent to be bound by the Agreement, and no State or entity can establish its consent to be bound by the Agreement unless it has previously established or establishes, at the same time, its consent to be bound by that Convention. States that were parties to the Convention prior to the adoption of the Agreement are now required to establish their consent to be bound by the Agreement, separately, by depositing an instrument of ratification or accession.[7]

The Secretary General of the United Nations, Mr. Kofi Annan, has said that "the entry into force of the United Nations Convention on the Law of the Sea and the Agreement relating to the Implementation of Part XI of the Convention has led the United Nations to redesign its programme of information, advice and assistance in the field.[8] By its resolution 53/32 the

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Trinidad and Tobago, *Uganda*, United Kingdom, Yugoslavia, Zambia, Zimbabwe and the European Union.

6 The States are *Bangladesh*, Belarus, Belgium, Canada, *Nepal*, Poland, *Qatar*, Switzerland, Ukraine, *United Arab Emirates*, and the United States of America.

7 For a detailed account of the 1994 Agreement See. AALCC/XXXIV/Doha/95/5. Reprinted in the *Asian African Legal Consultative Committee Report and Selected Documents of the Thirty Fourth Session, Doha, Qatar.*

8 Kofi A. Annan: *Renewal and Transition: Annual Report on the Work of the Organization 1997* (United Nations, New York 1997) para 146 page 59.

General Assembly called upon States that had not already done so to become parties to the Agreement.

(b) The Agreement for the Implementation of the Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995.

The Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995 (hereinafter referred to as the 1995 Fish Stock Agreement) has since its adoption been signed by 58 States including 11 Member States of the AALCC and one international organization[9] and is to enter into force 30 days after it has been ratified by 30 signatory States. It had until September 1998 been ratified by only 18 States[10] including 4 Member States of the AALCC.

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9 The Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea, 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Species was adopted on August 4, 1995 by the United Nations Conference on Straddling Fish Stocks and Highly Migratory fish Stocks. As of April 1, 1998 the 58 States signatory to the UN Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks are: Argentina, Australia, Austria, *Bangladesh*, Belgium, Belize, Brazil, Burkina Faso, Canada, *China*, Cote d'Ivoire, Denmark. *Egypt*, Fiji, Finland, France, Gabon, Germany, Greece, Guinea Bissau, Iceland, *Indonesia*, Ireland, Israel, Italy, Jamaica, *Japan*, Luxembourg, Maldives, Marshall Islands, Mauritania, Micronesia (Federated States of): Morocco, Namibia, Netherlands, New Zealand, Niue, Norway, *Pakistan* Papua New Guinea, *Philippines* Portugal, *Republic of Korea*. Russian Federation, Saint Lucia, Samoa, *Senegal*, Seychelles, Spain, *Sri Lanka* Sweden. Tonga. *Uganda*, Ukraine, United Kingdom. United States of America, Uruguay and Vanuatu. In addition it has been signed by the European Community. See *Law of the Sea Bulletin No. 36.*

10 Bahamas, Fiji, Iceland, *Iran, Mauritius*, Micronesia, Namibia, Nauru, Norway, Russian Federation Saint Lucia, Samoa, *Senegal*, Seychelles, Solomon Islands, *Sri Lanka*. Tonga and the United States of America.

Although the 1995 Fish Stock Agreement stipulates for the possibility of its provisional application and many States were expected to apply the 1995 Fish Stock Agreement provisionally in tune with Resolution I on the "Early and Effective Implementation of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea, 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks as adopted by the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks", no party to that Agreement is known to have notified its wish to do so.

The 1995 Fish Stock Agreement is a separate instrument and greatly elaborates upon the general provisions of the Convention on the Law of the Sea, relating to the conservation and management of straddling fish stocks and highly migratory specifies. It is to be interpreted and applied in a manner consistent with that Convention. There is no link or nexus between this Agreement and the Convention in establishing a consent to be bound by these two instruments.

The General Assembly in its Resolution 52/26 had *inter alia*, emphasized the importance of the early entry into force[11] and effective implementation of the 1995 Agreement and called upon all States and other entities referred to in article 1 paragraph 2(b) of the Agreement to sign and ratify or accede to it and to consider applying it provisionally. It also decided to include under the item "Oceans and Law of the Sea" a sub-item entitled "Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory

[11] See *Oceans and The Law Of The Sea: Agreement For The Implementation Of The Provisions Of The United Nations Convention On The Law Of The Sea Of 10 December 1982 Relating To The Conservation And Management Of Straddling Fish Stocks And Highly Migratory Fish Stocks.* A/52/555.

Fish Stocks".[12] The *Agenda For Development*, adopted by the General Assembly had encouraged countries "to become parties to the Agreement for the Implementation of the Provisions of The United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and to implement this Agreement".[13]

Meeting of States Parties to the Convention

Since the coming into force of the Law of the Sea Convention a number of Meetings of States Parties to the Convention have been held. Paragraph 4 of General Assembly Resolution 52/28 had requested the Secretary General to convene a Meeting of State Parties to the Convention in May 1998. The eighth Meeting of the State Parties convened by the Secretary General in May 1998 dealt primarily with the budget of the International Tribunal for the Law of the Sea (ITLOS) for 1999, the rules of procedure of the Meeting of State Parties and the role of the Meeting of the State Parties in reviewing ocean and law of the sea issues. The Secretariat of the AALCC was not represented at these and other meetings of the Law of the Sea Institutions. At its 53rd Session the General Assembly *inter alia requested* the Secretary-General to convene the Meeting of States Parties to the Convention in New York from 19 to 28 May 1999, during which, on 24 May, the election of seven judges of the International Tribunal for the Law of the Sea ("the Tribunal") took place.

[12] See *Law of the Sea: Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migration Fish Stocks.* A/51/L.28.

[13] *Agenda for Development*, (United Nations, New York, 1997) para 151 at pp.58-59.

The International Seabed Authority (Isba)

The International Seabed Authority (hereinafter refer red to as the Authority or ISBA) established by the Convention, with its seat at Kingston, Jamaica, is an autonomous international organization through which the States Parties to the Convention organize and control activities in the Area. It comprises all the States Parties to the Convention as well as those States which have agreed to the provisional application of the 1994 Agreement on the Law of the Sea. As of September 1998 there were 138 members of the Authority, including the 11 members on provisional basis. It may be stated that Ambassadors of 13 States Parties including 2 member States of the AALCC have already presented their credentials to the Secretary General of the Authority as Permanent Representatives to the Authority.[14]

At its third resumed session in August 1997 the ISBA granted observer status to Greenpeace International, a non-governmental organization. Thereafter, in March 1998 in the course of its fourth session the Authority accorded observer status to the Permanent Commission of the South Pacific, a sub-regional organization.[15]

The General Assembly at its 51st Session had by its resolution 51/6 invited "the Seabed Authority to participate in the deliberations of the General Assembly in the capacity of observer. At its 52nd Session the General Assembly approved the Agreement Concerning the Relationship between the United Nations and the International Seabed Authority of

[14] The States that have hitherto established Permanent Missions to the Authority are Argentina. Brazil, Chile, *China*, Costa Rica, Cuba, Fiji, Germany, Haiti, Italy, Jamaica, Mexico, the Netherlands, and the *Republic of Korea*.

[15] See the *Report of the Secretary-General of the International Seabed Authority under Article 166, paragraph 4, of the United Nations Convention on the Law of the Sea*, Doc. No. ISBA/4/A/11 of 20th July 1998.

March 14, 1997.[16] The Agreement defines the terms of relationship of the United Nations and the Authority.[17] It stipulates that the United Nations recognizes that the Authority is the organization for organizing and controlling activities in the seabed and ocean floor and subsoil thereof in the Area and that the Authority shall function as an autonomous international organization. The Authority on its part is to promote peace and international co-operation and the provisions of Article 4 of the Agreement requires the Authority to provide the Security Council with Information and assistance needed to maintain or restore international peace and security. Article 5 stipulates that the "Authority agrees, subject to the provisions of this Agreement relating to the safeguarding of confidential material, to provide any information that may be requested by the International Court of Justice in accordance with the Statute of the court". At its 53rd Session the General Assembly noted with satisfaction the adoption of the Agreement concerning the Relationship between the United Nations and the Authority.

At its fifth Session, scheduled to be held In Jamaica in 1999, the Authority will, among other things, consider the draft Agreement concerning the relationship between the Authority and the International Tribunal for the Law of the Sea; the draft Agreement between the Authority and the Government of Jamaica and the draft financial regulations.

(i) Council of the International Sea-bed Authority

The Council of the International Seabed Authority (hereinafter called the Council) consists of 36 members representing five groups of States reflecting 4 main elements

[16] See General Assembly Resolution 52/27 of 26 November 1997.

[17] See Article 1 entitled "Purpose of the Agreement" of the Agreement Concerning the Relationship between the United Nations and the International Seabed Authority. For the text of the Agreement see General Assembly Resolution 52/27 of 26 November 1997. The text of the Agreement has been reproduced in 36 *I.L.M.* 1492 (1997).

viz. (i) States with a special interest in deep seabed mining such as the largest consumers or largest producers of the categories of minerals to be mined from the seabed (ii) States that have pioneered large investments and activity in the international seabed area; (iii) developing States with special interests such as land locked or populous States; and (iv) an equitable geographical representation as well as a balance between developed and developing States.

The Council of the Authority was first elected in March 1996. The 36 members of the Council for the year 1999, including 13 member States of the AALCC, are Argentina, Austria, Belgium, Brazil, Cameroon, Canada, Chile, *China*, Costa Rica, *Egypt*, Fiji, France, Gabon, Germany, *Indonesia*, Jamaica, *Japan*, *Kenya*, Namibia, the Netherlands, *Nigeria*, *Oman*, *Pakistan*, Paraguay, *Philippines*, Poland, *Republic of Korea*, the Russian Federation, *Saudi Arabia*, *Senegal*, *Sudan*, Trinidad and Tobago, Tunisia, Ukraine, the United Kingdom of Great Britain ad Northern Ireland and the United States of America.

(ii) Legal and Technical Commission

Paragraph 1 (b) of Article 163 of the Convention on the Law of the Sea envisaged the establishment of a Legal and Technical Commission. The States Parties to the Convention have accordingly established a 22 member Legal and Technical Commission.[18]

(a) Draft Regulations on Prospecting Exploration of Polymetallic Nodules in the Area

The functions of the Legal and Technical Commission as enumerated in Article 165 of the Convention on the Law of the

[18] Bahamas, Cameroon, *China*, Cote d'Ivoire, Costa Rica, Cuba, *Egypt*, Fiji, Finland, France, Germany, Gabon, *India*, Italy), *Japan*, Norway, Poland, *Republic of Korea*, Russian Federation, Ukraine and United States of America.

Sea *inter alia include* (i) making recommendations, upon the request of the council, with regard to the exercise of the Authority's functions; (ii) review formal plans of work for activities in the Area and to submit appropriate recommendations to the Council. The Legal and Technical Commission of the ISBA took a step towards the fulfillment of its functions by preparing a set of Draft Regulations on Prospecting and Exploration of Polymetallic Nodules in the Area (hereinafter referred to as the Draft Regulations). The Draft Regulations prepared by the Legal and Technical Commission and submitted to the Council for adoption, in March 1998, comprises 32 regulations arranged in seven (VII) Parts and 4 Annexes. The text of the Draft Regulations deals only with prospecting and exploration for Polymetallic nodules and consists of regulations governing applications for the approval of plans of work for exploration together with a standard contract and standard clauses of contracts.

Part I of the Draft Regulations entitled "Introduction" comprises of Regulation 1 on the use of terms and its first paragraph sets out no less than 20 definitions.[19] The definitions included in this Part of the Draft Regulations include (i) Activities in the Area; (ii) Agreement; (iii) Area; (iv) Authority; (v) Coordinates; (vi) Contractor; (vii) Convention; (viii) Enterprise; (ix) Entity; (x) Exploration; (xi) Marine Environment; (xii) Poly-metallic Nodules; (xiii) Prospecting; (xiv) Provisional Member; (xv) Registered Pioneer Investor; (xvi) Reserved Area; (xvii) Resources; (xviii) Secretary-General; (xix) Serious Harm to the marine Environment; and (xx) State.

Part II of the Draft Regulations on the "Notification of Prospecting" comprises the texts of Regulations 2-5, addressed to Prospecting (Regulation 2) ; Notification of Prospecting (Regulation 3); Consideration of Notification (Regulation 4) and; Annual Report (Regulation 5) respectively.

[19] See Regulation I in *The Draft Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area prepared by the Legal and Technical Commission* Doc. ISBA/3LTC/WP.1/Rev.3.

Part III of the Draft Regulations on the Applications For Approval of Plans of Work for Exploration to Obtain a Contract (Regulations 6-19) comprises of three sections. Section 1 of this part of the Draft Regulations sets out the General Provisions and comprises the texts of Regulations 6 and 7. While the first of these is a provision of a general nature, Regulation 7 addresses the question of Application for Approval of Plans of Work With Respect to a Reserved Area.

Section 2 of the Part III of the Draft Regulations consisting of the texts of Regulations 8 to 15 is entitled "Content of Applications". This Section of the Regulations stipulates provisions relating to (i) Form of Applications (Regulation 8); (ii) Certificate of Sponsorship (Regulation 9); (iii) Financial and Technical Capabilities; (Regulation 10); (iv) Previous Contracts with the Authority (Regulation 11); (v) Undertakings (Regulation 1 2); (vi) Total Area covered by the Applications (Regulation 13); (vii) Data and Information to be submitted before the designation of a reserved area (Regulation 14); and (viii) Data and information to be submitted for approval of plans of work (Regulation 15).

Section 3 of Part III of the Draft Regulations deals with "Fees" and draft regulation 16 makes provision for Fee for Application. Finally, Section 4 of Part II provides for "Processing Of Applications" (Regulation 17-19).

Part IV of the Draft Regulations entitled "Contracts for Exploration" incorporates the text of Regulations 20-27 covering such issues as (i) The Contract; (ii) Size of Area and Relinquishment; (iii) Duration of Contracts; (iv) Training; (v) Periodic Review of the Programme of Work; (vi) Termination of Sponsorship; (vii) Sponsorship by Provisional Members; and (viii) Responsibility and Liability. It may be mentioned that paragraph 1 of Regulation 27 on Responsibility and Liability is largely based on Article 22 of Annex III of the United Nations Convention on the Law of the Sea, 1982 but seeks to enlarge the scope of the provisions by referring to Liability in the title of the Regulation.

Part V of the Draft Regulations is addressed to the "Protection and Preservation of the Marine Environment" and consists of the text of Regulations 28-30. Whilst the first of these (Regulation 28) reflects the general principle of the "Protection and Preservation of the Marine Environment" the second provides for the Rights and Legitimate Interests of Coastal States. Finally, draft Regulation provides for Emergency Orders in respect of incidents causing serious harm to the marine environment.

Part VI of the draft Regulations is addressed to "Confidentiality of Data and Information" (Regulation 31). Finally part VII of the draft Regulations set out the provision relating to the Settlement of Disputes (Regulation 32).[20]

Appended to the draft Regulations on Prospecting and Exploration of Polymetallic Nodules in the Area are four annexes relating to (i) Notification of Intention to Engage in Prospecting; (ii) Application for Approval of a Plan of work for Exploration To Obtain a Contract; (iii) Contract for Exploration; and (iv) Standard Clauses for Exploration Contract. Annex I on the Notification of Intention to engage in Prospecting must be read together with Regulation 3 on the Notification of Prospecting, paragraph 2 of which requires every notification to be in the form prescribed in Annex I and to conform to the Regulations.

Annex II addressed to the "Application for Approval of a Plan of work for Exploration To Obtain a Contract" should be read together with Regulation 8 on "Form of Applications" and Regulation 14 addressed to "Data and Information to be Submitted before the Designation of a Reserved Area" set out in Part III of the Regulations.

It would have been observed that Part III (Applications For Approval Of Plans of Work for Exploration to Obtain a

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[20] See *The Provisional Text of the Draft Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area* prepared by the Legal and Technical Commission Doc. ISBA/3LTC/WP.1/Rev.3.

Contract, Regulations 6-19) and Part (Contracts for Exploration, Regulations 20-27) of the draft regulations read together with Annexes 2,3 and 4 thereof are the very core of the proposed contract regime for the exploration of Polymetallic nodules in the Area. The work of the Commission reflects the "extensive consideration it gives to 3 key areas that it had identified" viz. (i) the protection and preservation of the marine environment; (ii) annual reporting and the transfer of data by contractors to the Authority; and (iii) Confidentiality of the information submitted.[21]

The Legal and Technical Commission submitted the text of the draft mining code to the Council for adoption on 23rd March 1998. Thereafter, the Council at its fourth Session reviewed the draft mining code and will continue its work on the review of the draft code, on a priority basis, at the fifth Session of the Authority scheduled to be held in August 1999.

At its 53rd Session the General Assembly noted with satisfaction the progress in the work of the International Seabed Authority and emphasized the importance of continued progress towards the adoption of the regulations on prospecting and exploration for Polymetallic nodules.

(iii) The Finance Committee

The 1994 Agreement *inter alia* stipulates that the Assembly shall elect 15 Members of the Finance Committee from candidates nominated by States Parties, taking into account equitable geographical representation and special interests. The 5 categories of Council members are to be represented on the Finance Committee by at least one member and until the Authority remains dependent on assessed contributions, the 5 largest contributors to the budget of the United Nations will also be represented on the Committee. The remaining 5 members are to be elected from among the other

[21] *Oceans and the Law of the Sea, General Assembly Resolution 53/32.*

States Parties. The ISBA had in August 1996, *inter alia*, elected its Finance Committee.[22]

The Finance Committee has been considering the draft financial regulations and they are expected to be adopted during the fourth resumed Session of the Authority in August 1999.

(iv) Status of the Registered Pioneer Investors

A registered pioneer investor was entitled, in accordance with paragraph 6(1) (ii) of section 1 of the annex to the 1994 Agreement, to request approval of the plan of work for exploration within 36 months of the entry into force of the Convention. On August 1997 all 7 registered pioneer investors[23] submitted requests for approval of their plans of work for exploration to the Secretary-General of the Authority. Thereafter the requests for approval of plans of work were considered by the Legal and Technical Commission which body ascertained that the requirements of the Agreement had been met.

[22] A Members of the Finance Committee are *China*; France; Germany; India; Italy; Jamaica; *Japan*; Mexico; Russian Federation; South Africa; Tunisia; *Uganda*; United Kingdom; United States of America; and Uruguay. The final agreement on the composition of the Committee was reached after the various regional and interest groups arrived at an understanding on the allocation of seats and the duration of terms. 7 Members of the Finance Committee are nominees of developed countries and 8 those of the developing countries.

[23] The 7 registered Pioneer investors are the China (the China Ocean Mineral Resources Research and Development Company), France (Institut Francias de recherché pour l'exploitation de la mer/l'Association francais pour l'etude et la recherché des nodules - IFREMAR/AFERNOD), India, Japan (the Deep Ocean resources Development Company), the Republic of Korea, the Russian Federation (Yuzhmorgeologiya), and Bulgaria, Cuba the Czech and Slovak Federal Republic (Interoceanmetal Joint Organization).

Thereafter, the Council acting on the recommendation of the Legal and Technical Commission noted that the plans of work for exploration submitted by the 7 registered pioneer investors were considered to be approved and requested the Secretary General of the Authority to take the necessary steps to issue the plans of work in the form of contracts incorporating the applicable obligations under the provisions of the Convention, the agreement and in accordance with the regulations for prospecting and exploration for Polymetallic nodules in the Area and a standard form of contract to be approved by the Council. Once the seabed mining code is approved by the Council and the Authority, the 7 pioneer investors would be granted exploration contracts.

Commission on the Limits of the Continental Shelf

Article 76 of the Convention envisages the establishment of the Commission on the Limits of the Continental Shelf (hereinafter referred to as the Continental Shelf Commission). The Continental Shelf Commission established in 1997 consists of 21 members, serving in their personal capacity as experts in the field of geology, geophysics or hydrography, elected by States Parties to the Convention from among their nationals, having due regard to the need of ensuring equitable geographical representation. The members of the Continental Shelf Commission are to be "considered to be experts on mission covered by article VI of the General Convention".[24]

The members of the Continental Shelf Commission were elected at the sixth meeting of the State Parties held in March 1997. The 21 States, including 8 member

[24] See the *Legal opinion on the applicability of the Convention on the Privileges and Immunities of the United Nations to the members of the Commission on the Continental Shelf* Commission on the Continental Shelf Doc. No. CLCS/5 of 11 March 1998.

States of the AALCC, represented on the Continental shelf Commission are Argentina; Brazil; Cameroon; *China*; Croatia; *Egypt*; Germany;[25] *India*; Ireland; Jamaica; *Japan*;[26] *Republic of Korea; Malaysia; Mauritius*; New Zealand; *Nigeria*; Norway; Russian Federation; and Zambia.

The functions of the Commission include (i) the consideration of the data submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with Article 76 of the Convention and the Statement of Understanding adopted by UNCLOS III on 29 August 1980; and (ii) providing scientific and technical advice if requested by the coastal State concerned during the preparation of such data.

At its 53rd Session the General Assembly by its resolution 53/32 noted with satisfaction the progress in the work of the Commission on the Limits of the Continental Shelf during its third and fourth sessions, held in New York from 4

[25] Professor Dr. Hans Amann, who had been elected a member of the Legal and Technical Commission on 15th August, 1996 for a term of five years resigned from the Commission on 5th May 1998, due to his professional commitment in Germany. By a letter dated 18th June 1998 the Head of the German Delegation to the Authority the Government of Germany informed the Secretary General of the Authority of the nomination of Professor Dr. Helmut Beiersdorf, as a candidate for the election to fill the vacant seat on the Commission. The outcome of the election at the resumed fourth session of the Authority in August 1998 is not known.

[26] Mr. Toshio Sakasegawa, who had been elected a member of the Legal and Technical Commission on 15th August, 1996 for a term of five years resigned from the Commission on 21st July 1998, for family reasons. By a note verbale dated 23rd July 1998 the Embassy of Japan in Jamaica, the Government of Japan informed the Secretary General of the Authority of the nomination of Mr. Yuji Kajitani, Geologist, of the Metal Mining Agency of Japan as candidate for the election to fill the vacant seat on the Commission. The outcome of the election at the resumed fourth session of the Authority in August 1998 is not known.

to 15 May and from 31 August to 4 September 1998, respectively, in adopting provisionally its rules of 'procedure and in adopting provisionally its scientific and technical guidelines aimed at assisting States to prepare their submissions regarding the outer limits of their continental shelf. It also approved the convening by the Secretary-General of the fifth and sixth Sessions of the Commission in New York from 3 to 14 May and from 30 August to 3 September 1999, respectively.

International Tribunal for the Law of the Sea

The States Parties to the Convention at their fifth meeting held in New York from 24 July to 2 August 1996 elected 21 Judges of the International Tribunal for the Law of the Sea.[27] In accordance with the understanding that no regional group would have less than three seats the geographical representation of the elected members of the Tribunal is as follows: African Group 5,[28] Asian Group 5,[29] Latin American and Caribbean Group, 5[30] Eastern European Group, 4[31] and Western European and other States Group, 4.[32]

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[27] The Judges elected are: - D.H. Anderson, Hugo Caminos, Gudmundur Eiriksson, Paul Bamela Engo, A Joseph, Anatoly Lazarevich Kolodkin, Edward A. Laing, Rangel Vicente Marotta, Mohammed Mouldi Marxist, Thomas A Mensah, Tafsir Malick Ndiaye, L. Dolliver Nelson, Choon-Ho Park. P.C. Rao, Tullio Treves, Budislav Vukas, Joseph Sinde Warioba, Rudiger Wolfrum, Soji Yamamoto, Alexander Yankov, and Lihai Zhao.

[28] Cameroon; *Ghana; Senegal; Tanzania;* and Tunisia.

[29] *China: India; Japan Republic of Korea;* and Lebanon.

[30] Argentina; Belize; Brazil; and Grenada.

[31] Bulgaria; Crotia and Russian Federation.

[32] Germany; Iceland; Italy; and United Kingdom of Great Britain and Northern Ireland.

It may be mentioned that one third or 7 members of the Tribunal had been elected for 3 year terms[33] and their term of office will expire in 1999. New elections are scheduled to be held, in accordance with General Assembly Resolution 53/32, on the 24th May 1999 during the ninth Meeting of States Parties to the Convention to be held in New York.

The Tribunal has established three standing chambers in addition to the Seabed Disputes Chamber. The three chambers established are the (i) Chamber of Summary Procedure; (ii) Chamber for Fisheries Disputes[34] and (iii) Chamber for Marine Environment Disputes.[35]

The International Tribunal for the Law of the Sea delivered its first judgment in *"The M/V "Saiga" Case (Saint Vincent and the Grenadines vs. Guinea)* on 4 December 1997. In its first case the Tribunal unanimously found that it had jurisdiction under Article 292 of the Convention on the Law of the Sea to entertain the Application filed by Saint Vincent and the Grenadines on 13 November 1997. It pronounced that the Application was admissible and ordered that Guinea release the *M/V Saiga* and its crew from detention and decided that the release shall be upon the posting of a reasonable bond or security. It further decided in this regard that the security shall consist of (i) gas oil discharged from the *M/V Saiga*; and (ii) the amount of US $ 400,000, to be posted in the form of a letter of credit or bank guarantee or, if agreed by the parties, in any other form.

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[33] The Judges elected for three year terms are: Paul B. Engo (Cameroon); A. Joseph (Lebanon); A.L. Kolodkin (Russian Federation); V.Marotta Rangel (Brazil); P.C. Rao (*India*); J.S. Warioba (Tanzania) and R. Wolfrum (Germany).

[34] The Members of the Tribunal selected to serve on the Chamber for Fisheries Disputes are D.H. Anderson; H. Caminos; G.Eiriksson; P.B. Engo; E.A. Laing; P.C. Rao; and S.Yamamoto.

[35] The Members of the Tribunal selected to serve on the Chamber for Marine Environment Disputes are Judge R. Wolfrum: A.L. Kolodkin; M.M. Marxist; Choon-Ho Park; J.S. Warioba: S. Yamamoto: and A. Yankov.

In January 1998 Saint Vincent and the Grenadines filed with the Tribunal a request for the prescription of provisional measures, pending the constitution of an arbitral tribunal. Thereafter, both Saint Vincent and the Grenadines agreed, by an exchange of letters, to submit to the Tribunal both the merits and the request for the prescription of the provisional measures with regard to the arrest and detention of the *M/V Saiga* by the Authorities of Guinea in October 1997.

The General Assembly at its 53rd Session *inter alia* noted that the Tribunal, established in accordance with annex VI to the Convention as a new means for the settlement of disputes concerning the interpretation or application of the Convention and the Agreement, had delivered its first judgment on 4 December 1997 and encouraged States parties to the Convention to consider making a written declaration choosing from the means set out in article 287 for the settlement of disputes concerning the interpretation and application of the Convention and the Agreement, and invites States to note the provisions of annexes VI, VII and VIII to the Convention concerning, respectively, conciliation, the Tribunal, arbitration and special arbitration.

Comments and Observations

The international community has, since the entry into force of the Law of the Sea Convention in November 1994 devoted its attention to the establishment of the institutions that instrument had envisaged. The establishment of the new treaty system of ocean institutions is now almost complete and, what is more, it has begun functioning. The conclusion of an Agreement concerning the Relationship between the United Nations and the International Seabed Authority, the Agreement on cooperation and Relationship between the United Nations and the Tribunal, the work of the Legal and Technical Commission on the draft regulations governing the exploration of Polymetallic nodules in the Area and the first judgment of

the Tribunal for the Law of the Sea in *The M/V "Saiga"* are all pointers to that end.

Both the General Assembly and the AALCC have at their successive Sessions called upon States, who have not already done so, to ratify or accede to the Convention and the 1994 Agreement thereto. A total of 67 States, including 11 member States of the AALCC, are yet to ratify or accede to the Law of the Sea regime. 49 Asian and African States and 28 States in the Latin American and Caribbean States and States of the European and North American region are yet to ratify or accede to the Convention.[36]

The General Assembly has since the adoption of the Convention repeatedly called on States to harmonize their national legislation with its provisions and ensure their consistent application. Compliance of States with the provisions of the Convention regarding the establishment of the outer limits of maritime areas is now high. While 133 coastal States now claim a territorial sea of 12 nautical miles or less, inconsistent with the Convention, however, are the claims of 11 States for a territorial sea extending beyond 12 miles and the claim of one coastal State for a contiguous zone exceeding 24 nautical miles. Of these 8 States claims a single 200 nautical miles area referred to as the "maritime domain".

The practice of coastal States with regard to the Exclusive Economic Zones (EEZ) and the Fishery Zones reveals a compliance with the provisions of the Convention. Some States combine EEZ with FZ while others have one or more depending on the circumstances. Many states continue to maintain their old legislation on the continental shelf which includes the definition contained in the Geneva Convention on the Continental Shelf, 1958. The position of only two of the coastal States which do not define the outer limits of their

[36] 16 African States; 23 Asian States; 7 Latin American and Caribbean Group of States and 21 States in Europe and North America have not to date ratified or acceded to the Convention.

continental shelf, in accordance with the criteria set out either in the 1958 Convention or the 1982 Convention, are inconsistent with the provisions of article 76 of the 1982 Convention.

With its entry into force and with new prospects for its universal acceptance the Convention on the Law of the Sea is attracting renewed ad widespread interest among governments and intergovernmental and non-governmental organizations. The Convention is being increasingly recognized as providing the mechanism for addressing all ocean related issues, and by clearly defining the terms of international co-operation serves to enhance co-ordination and promote coherence of action. In the words of the Secretary-General of the United Nations "the Convention provides a universal legal framework for rationally managing marine resources and an agreed set of principles to guide consideration of the numerous issues and challenges that will continue to arise from navigation and over flight to resource exploration and exploitation conservation and pollution and fishing and shipping, the Convention provides a focal point for international deliberation and for action".

It may be stated in this regard that the General Assembly at its 53rd Session taking into account of the importance of reliable hydrographic and nautical information to enhance the safety of navigation, *inter alia* encouraged States parties to the Convention to deposit with the Secretary-General charts and geographical coordinates, as provided for in the Convention.

The entry into force of the Convention has brought new attention to all areas affected, or potentially affected, by the Law of the Sea. Attention is now focused by the world Trade Organization (WTO) and the World Customs Organization on the possible need to formulate special provisions as to "rules of origin" to deal with products (both living and non-living) originating or derived from the various maritime zones. In addition to clarifying the concepts and the jurisdictional aspects of the territorial sea, the high seas, the Continental Shelf, the Exclusive Economic Zone and the International

Seabed Area, the Division for Ocean Affairs and the Law of the Sea has brought a broad range of issues to the attention of the Technical Committee of the World Customs Organization and the WTO Committee on Rules of Origin, which are charged with further legal developments under the Agreement on Rules of Origin.

In recent times there has been an increasing threat to shipping from piracy and armed robbery at sea. According to the Report of the Secretary-General there had been 252 incidents of piracy and armed robbery against ships during 1997. The gravity of the problem has been brought to the attention of a number of fora including the Meeting of States Parties to the Convention, the International Maritime Organization (IMO), and the General Assembly of the United Nations. The General Assembly at its 53rd Session expressed its appreciation and support for the ongoing work of the IMO and urged all States, in particular the Coastal States in the affected regions[37] to take all necessary and appropriate measures to prevent and combat incidents of piracy and armed robbery at sea and to investigate or cooperate in the investigation of such incidents wherever they occur and bring the alleged perpetrators to justice in accordance with international law. The Assembly also called upon States to cooperate fully with the IMO to combat piracy and armed robbery against ships, by submitting reports on such incidents.

[37] The areas most affected by pirates and armed robbers are the South China Sea: the Strait of Malacca; Indian Ocean; East and West Africa; and South America.

ANNEX

GENERAL ASSEMBLY 6 January 1999
Fifty-third Session
Item 38 (a)

RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY
(without reference to a Main Committee (A/53/L.35 and Addl.)

53/32. Oceans and the Law of the Sea

The General Assembly,

Recalling its resolutions 49/28 of 6 December 1994. 50/23 of 5 December 1995, 51/34 of 9 December 1996 52/26 of 26 November 1997 adopted subsequent to the entry into force of the Law of the Sea[38] ("the Convention") on 16 November 1994.

Recalling also its resolution 2749 (XXV) of 17 December 1970, and considering that the Convention, together with the Agreement relating to the implementation of part XI of the United nations Convention on the Law of the Sea of 10 December 1982[39] ("the Agreement"), provides the regime to be applied to the Area and its resources as defined in the Convention.

Emphasizing the universal of the Convention and its fundamental importance for the maintenance and strengthening of international peace and security, as well as for the sustainable use and development of the seas and oceans and their resources.

Conscious that the problems of ocean space are closely interrelated and need to be considered as a whole,

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[38] Official Records of *the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations Publication, Sales No. E, 84. V.3.), document A/CONF.62/122.

[39] Resolution 48/263. Annex.

Noting with satisfaction that "Oceans and seas" will be the sectoral theme discussed by the Commission on Sustainable Development at its seventh session in 1999,

Reaffirming the strategic importance of the Convention as a framework for national, regional and global action in the marine sector, as recognized also by the United Nations Conference on Environment and Development in chapter 17 of Agenda 21,[40] as well as in the Programme for the Further Implementation of Agenda 21, in particular paragraph 36 thereof dealing with oceans and seas,[41]

Recalling that, by its resolution 49/131 of 19 December 1994, it proclaimed 1998 the International Year of the Ocean,

Noting with satisfaction the increase in the number of States parties to the Convention and the Agreement,

Recognizing the impact on States of the entry into force of the Convention and the Agreement and the increasing need, particularly of developing States, for advice and assistance in their implementation in order to benefit thereunder,

Taking note with concern of the financial situation of the International Seabed Authority and 'the International Tribunal for the Law of the Sea,

Conscious of the need to promote and facilitate international cooperation, especially at the subregional and regional levels, in order to ensure the orderly and sustainable development of the uses and resources of the seas and oceans,

Conscious also of the importance of education and training in the field of ocean affairs and the law of the sea.

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[40] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1991.* (United Nations publication, Sales No.E.93.I.8 and Corrigenda) vol.1.

[41] Resolution S-19/2, annex.

Taking account of the importance of reliable hydrographic and nautical information to enhance the safety of navigation,

Expressing its concern at the increasing threat to shipping from piracy and armed robbery at sea and its appreciation and support for the ongoing work of the International Maritime Organization in this area,

Expressing its appreciation once again to the Secretary-General for his efforts in support of the Convention and in its effective implementation, including providing assistance in the functioning of the institutions created by the Convention,

Noting the responsibilities of the Secretary-General under the Convention and related resolutions of the General Assembly, in particular resolutions 49/28 and 52/26, and emphasizing the importance of the performance of such responsibilities for the effective and consistent implementation of the Convention,

Taking note of the Report of the Secretary-General,[42] and reaffirming the importance of the annual consideration and review by the General Assembly of the overall developments pertaining to the implementation of the Convention, as well as of other developments relating to the law of the sea ocean affairs,

1. *Call upon* all States that have not done so, in order to achieve the goal of universal participation, to become parties to the Convention and the Agreement;

2. *Reaffirms* the unified character of the Convention;

3. *Calls upon* States to harmonize as a matter of priority their national legislation with the provisions of the Convention, to ensure the consistent application of those provisions and to ensure that any declarations or statements that they have

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[42] A/53/456.

made or make when signing, ratifying or acceding are in conformity with the Convention and to withdraw any of their declarations or statements that are not in conformity;

4. *Encourages* States parties to the Convention to deposit with the Secretary-General charts and geographical coordinates, as provided for in the Convention;

5. *Requests* the Secretary - General to convene the Meeting of States Parties to the Convention in New York from 19 to 28 May 1999, during which, on 24 May, the election of seven Judges of the International Tribunal for the Law of the Sea ("the Tribunal") will take place,

6. *Notes with satisfaction* that the Tribunal established in accordance with annex VI to the Convention as a new means for the settlement of disputes concerning the interpretation or application of the Convention and the Agreement, delivered its first judgment on 4 December 1997-,

7. *Encourages* States parties to the Convention to consider making a written declaration choosing from the means set out in article 287 for the settlement of disputes concerning the interpretation and application of the Convention and the Agreement, and invites States to note the provisions of annexes VI, VII and VIII to the Convention concerning, respectively, the Tribunal, arbitration and special arbitration;

8. *Requests* the Secretary-General to circulate lists of conciliators and arbitrators drawn up and maintained in accordance with annexes V and VII to the Convention and to update these lists accordingly,

9. *Notes with satisfaction* the progress in the work of the International Seabed Authority and emphasizes the importance of continued progress towards the adoption of the regulations on prospecting and exploration for poly metallic nodules;

10. *Notes* with appreciation the adoption of the Agreement concerning the Relationship between the United Nations and

the Authority and the Agreement on Cooperation and Relationship between the United Nations and the Tribunal,

11. *Appeal* to all members of the Authority and all States parties to the Convention to pay their assessed contributions to the Authority and to the Tribunal, respectively, in full and on time in ensure that they are able to carry out their functions as provided for in the Convention;

12. *Notes with satisfaction* the progress in the work of the Commission on the limits of the Continental Shelf ("the Commission") during its third and fourth sessions, held in New York from 4 to 15 May and from 31 August to 4 September 1998, respectively, in adopting provisionally its rules of procedure and it adopting provisionally its scientific and technical guidelines aimed at assisting States to prepare their submissions regarding the outer limits of their continental shelf;

13. *Approves* the convening by the Secretary-General of the fifth and sixth sessions of the Commission in New York from 3 to 14 May and from 30 August to 3 September 1999, respectively;

14. *Express its appreciation* to the Secretary - General for the annual comprehensive report on oceans and the law of the sea[43] and for the activities of the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs of the Secretariat, in accordance with the provisions of the Convention and the mandate set forth in resolutions 49/28 and 52/26;

15. *Requests* the Secretary-General to ensure that the institutional capacity of the Organization adequately responds to the needs of States, the newly established institutions under the Convention and other competent international organizations by providing advice and assistance taking into account needs of developing countries;

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[43] A/53/456.

16. *Also requests* the Secretary - General to continue to carry out the responsibilities entrusted to him in the Convention and related resolutions of the General Assembly, including those mentioned in paragraph 11 of resolution 52/26, and to ensure that the performance of such activities is not adversely affected by savings as may be realized under the approved budget for the Organization;

17. *Notes with appreciation* the continued efforts of the Division of Ocean Affairs and the Law of the Sea to provide timely information on the oceans, marine affairs and the law of the sea through its Web site, site on the Internet;[44]

18. *Reaffirms* the importance of ensuring the uniform and consistent application of the Convention and a coordinated approach to its overall implementation, and of strengthening technical cooperation and financial assistance for this purpose, stresses once again the continuing importance of the efforts of the Secretary General to these ends, and reiterates its invitation to the competent international organizations and other international bodies to support these objectives;

19. *Invites* Member States and others in a position to do so to contribute to the further development of the Hamilton Shirley Amerasinghe Memorial Fellowship Programme on the law of the Sea established by the General Assembly in resolution 35/116 of 10 December 1980, and to support the training activities under TRAIN-SEA-COAST programme of the Division for-Ocean Affairs and the Law of the Sea;

20. *Notes with interest* the ongoing work of the United Nations Educational, Scientific and Cultural Organization (UNESCO) towards a convention for the implementation of the provisions of the Convention, relating to the protection of the underwater cultural heritage, and stresses the importance of ensuring that the instrument to be elaborated is in full conformity with the relevant provisions of the Convention;

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[44] www.un.org/Depts.los.

21. *Invites* States to cooperate in carrying out hydrographic surveys and nautical services for the purpose of ensuring safe navigation as well as to ensure the greatest uniformity in charts and nautical publications and to coordinate their activities so that hydrographic and nautical information is made available on a worldwide scale;

22. *Urges* all States, in particular coastal Stages in affected regions, to take all necessary and appropriate measures to present and combat incidents of piracy and armed robbery at sea and to investigate or cooperate in the investigation of such incidents wherever they occur and bring the alleged perpetrators to justice in accordance with international law;

23. *Calls upon* States to cooperate fully with the International Maritime Organization to combat piracy and armed robbery against ships, including by submitting reports on incidents to that organization;

24. *Takes note* of the work of the Independent World Commission on the Oceans, and of its report "The Ocean..Our Future", and welcomes its issuance in the context of the International Year of the Ocean;

25. *Reaffirms* its decision to undertake an annual review and evaluation of the implementation of the Convention and other developments relating to ocean affairs and the law of the sea;

26. *Reaffirms* also its decision, in resolution S-19/2 of 28 June 1997, to consider the results of the review by the Commission Sustainable Development of the sectoral theme of "Oceans and seas" in 1999 under the agenda item "Oceans and the law of the sea";

27. *Requests* the Secretary - General to report to the General Assembly at its fifty-fourth session on the implementation of the present resolution, including other developments and issues relating to ocean affairs and the law of the sea, in connection with his annual comprehensive report

on oceans and the law of the sea, and to circulate the report sufficiently in advance of consideration by the General Assembly of the item concerning oceans and the law of the sea;

28. *Decides* to include in the provisional agenda of its fifty-fourth session the item entitled "Oceans and the law of the sea".

III. UNITED NATIONS DECADE OF INTERNATIONAL LAW: REPORT OF THE SECRETARY GENERAL ON THE AALCC MEETING ON THE THREE PRELIMINARY REPORTS ON THE THEMES OF THE FIRST INTERNATIONAL PEACE CONFERENCE HELD IN NEW DELHI, ON 11TH AND 12TH FEBRUARY, 1999

(i) Introduction

The General Assembly of the United Nations had by its Resolution 44/23 declared the Decade of the Nineties as the United Nations Decade of International Law. Four 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.

Following upon the adoption of General Assembly Resolution 44/23 an item entitled 'The United Nations Decade of International Law" was placed on the agenda of the 29th Session of the AALCC (Beijing, 1990). The item has thereafter been considered at each successive Session of the General Assembly of the United Nations as well as the AALCC. The matter has also been discussed at the meetings of the Legal Advisers of the Member States of the AALCC.

The item was also considered at the 37th Session of the AALCC (New Delhi, 1998). At that session the AALCC, *inter alia*, reaffirmed 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. Reiterating the significance of strict adherence to the principles of law as enshrined in the Charter of the United Nations the AALCC at its 37th Session requested its Member States to give serious attention to the observance and implementation of the Decade. It requested the Secretary General to urge the Member States to ratify the relevant international Conventions and apprise the Secretary General of the United Nations of the initiative taken by the AALCC Secretariat in that regard. It also directed the Secretariat of the AALCC to continue its efforts towards the realization of the objectives of the United Nations Decade of International Law.

At the 37th Session of the AALCC, held in New Delhi in April 1998 note was taken of the proposal advanced by the Russian Federation, at the 51st session of the General Assembly, for a third international peace conference with a view to considering international law and order in the post cold-war world at the threshold of the twenty first century. Recalling General Assembly Resolution 52/159 on "1999 Action Dedicated to the Centennial of the First Peace Conference and to the Closing of the United Nations Decade of International Law" the delegations of several Member States whilst supporting the convening of a Peace Conference in 1999 emphasized the active participation by the Member States and the Secretariat of the AALCC in preparing for the proposed conference in 1999. The view was expressed that the commemoration of the first Peace Conference, together with the adoption of a Declaration and a Plan of Action would assist in furthering the avowed objectives of the Decade even during the next millennium. The Secretariat of the AALCC was requested to monitor developments in this regard and to study the means to appropriately mark the closure of the United Nations Decade of International Law.

Meeting of the Legal Advisers of Member States of the AALCC

The Committee at its 37th Session (New Delhi, 1998) had *inter alia* directed the Secretariat to convene a meeting of the Legal Advisers of Member States at the United Nations

Headquarters in New York.

Pursuant to that mandate a meeting of the Legal Advisers of Member States of the AALCC was convened at the UN Office in New York in October 1998.

The basic objective of the meeting was to seek the opinion and policy guidance of Legal Advisers of Member States on three items namely (i) United Nations Decade of International law including the Third International Peace Conference; (ii) the World Trade Organization; and (iii) Environmental Law. The consideration of these items had been based on a background note prepared by the Secretariat.

The Background Note prepared by the Secretariat had recalled that at its 51st Session the Sixth Committee of the General Assembly considered a proposal related to the 1999 Action dedicated to the centennial of the First International Peace Conference and to the closing of the United Nations Decade of International Law" submitted by the Governments of the Netherlands and the Russian Federation. It had recommended that the General Assembly invite the Governments of the Russian Federation and the Netherlands to arrange a preliminarily discussion with other interested Member States on the substantive content of 1999 action and to seek in this respect the co-operation of the International Court of justice, the Permanent Court of Arbitration, relevant intergovernmental organizations, as well as other relevant organizations. The Sixth Committee had also recommended that the General Assembly call upon the competent United Nations organs, programmes and specialized agencies to study the possibilities of providing assistance to that end. Finally, the Sixth Committee recommended that the Assembly include in the provisional agenda of its 52nd Session, under the item "United Nations Decade of International Law" a sub-item entitled" 1999 Action dedicated to the Centennial of the first International Peace Conference and to closing of the United Nations Decade of International Law".

It was against this backdrop that the Sixth Committee

had considered the Programme of Action for the Celebration of the Centennial of the First International Peace Conference proposed by the Russian Federation and the Netherlands. The proposal envisaged that the three main themes viz. (i) the armament question; (ii) humanitarian law and the laws and customs of war; and (iii) the peaceful settlement of disputes, on the agenda of the First Peace Conference would feature on the agenda of the 1999 celebration of the Centennial of the first Hague Peace Conference.

The General Assembly at its 52nd Session had welcomed the Programme of Action dedicated to the Centennial of the first International Peace Conference, presented by the Governments of the Kingdom of the Netherlands and of the Russian Federation aiming to contribute to the further development of the themes of the first and the second International Peace Conference and which could be regarded as a third International Peace Conference. The Assembly invited (i) the Governments of the Kingdom of the Netherlands and of the Russian Federation to proceed with the implementation of the Programme of Action; (ii) all States to participate in the activities set out in the Programme of Action, as well as to initiate such activities and to co-ordinate their efforts in this respect at the global level, as well as at the regional and national levels; and (iii) All States to take appropriate measures to ensure universal participation in the activities pursuant to the Programme of Action, with special consideration for he participation of representatives of the least developed countries.

Further it may be recalled in this regard that an item entitled "Co-operation Between the United Nations and the Asian African Legal Consultative Committee" was placed on the provisional agenda of the 53rd Session of the General Assembly and that in its resolution on the "Co-operation Between the United Nations and the Asian African Legal Consultative Committee" adopted on 4 November 1996 the General Assembly had *inter alia* noted with appreciation the decisions of the AALCC to "participate actively in the programmes of the United Nations Decade of International Law.

Within the framework of the United Nations Decade of

International Law, the Governments of the Kingdom of Netherlands and the Russian Federation had been called upon to organize and co-ordinate the Centennial of the First International Peace Conference. Thereafter the co-organizers of the 1999 Centennial celebrations transmitted the first preliminary report on the peaceful settlement of disputes with the request that the report be considered by Asian African Legal Consultative Committee. It was requested also that a report on the Committee's consideration of the preliminary report on the Peaceful Settlement of Disputes be made available to the Executive Secretariat of the Centennial of the First International Peace Conference with a view to its inclusion in the revision of the reports for final discussions at the expert meetings at the Hague in May 1999 and St. Petersburg in June 1999.

Similar requests had also been made in respect of the Preliminary Reports on International Humanitarian Law and the Laws of War; and development of international law relating to disarmament and arms control since the first Hague Peace Conference, 1899.

In the "Progress Report on the action dedicated to the 1999 centennial of the first International Peace Conference and to the closing of the United Nations Decade of International Law" submitted by the delegations of the Kingdom of the Netherlands and the Russian Federation at the 53rd Session of the General Assembly, the co-organizers proposed the convening of six regional meetings to discuss the preliminary reports on the themes of the first International Peace Conference. The AALCC was identified as one of the regional intergovernmental organizations which could convene such a meeting and thus provide an opportunity for the representative of AALCC Member States to exchange views on the Three Reports for final discussion at the Expert Meetings scheduled to be held at the Hague in May 1999 and St. Petersburg in June 1999. The Legal Advisers of Member States of the AALCC at their meeting in New York in October 1998 directed the Secretariat to convene a meeting envisaged in that Report and endorsed by the General Assembly resolution on the subject of Action to be taken dedicated to the 1999 centennial of the first International Peace Conference and to the closing of the United Nations Decade of International Law.

the reports for final discussions at the expert meetings at the Hague in May 1999 and St. Petersburg in June 1999. Similar requests had also been made in respect of the Preliminary Reports on International Humanitarian law and the laws of War; and Development of International Law relating to disarmament and Arms Control since the first Hague Peace Conference, 1899.

In the "Progress Report on the action dedicated to the 1999 Centennial of the first International Peace Conference and to the closing of the Decade the delegations of the Kingdom of the Netherlands and the Russian Federation had proposed the convening of six regional meetings to discuss the preliminary reports on the themes of the first International Peace Conference. The AALCC had been identified as one of the regional intergovernmental organizations which could convene such a meeting.

Pursuant to that mandate the Secretariat of the AALCC in collaboration with the Ministry of External Affairs, Government of India, convened a two day meeting to consider the Preliminary Reports on the themes of the three First International Peace Conference. The objective of the Meeting was to promote a free and frank exchange of views on the three preliminary Reports on the themes of the First International Peace Conference.

The Deputy Secretary General Mr. Dabiri, who was also the Officer in-Charge of this meeting stated that the basic working document of the session on the Peaceful Settlement of Disputes was a Report on "The Peaceful Settlement of Disputes: Prospects for the Twenty-first century" jointly prepared for the 1999 Centennial Commemoration of the First Hague Peace Conference by Professor Franciso O. Vicuna and Professor Christopher Pinto. This Report had been circulated by the Secretariat. The full text of the report of the Rapporteur on the Peaceful Settlement of Disputes: Prospects for the 21st Century is annexed to this chapter.

The basic working document of the Session on the question of the "International Humanitarian Law and the Laws of War" was a preliminary Report on "International Humanitarian Law and the Laws of War" prepared for the 1999 Centennial Commemoration of the First Hague Peace

Conference by Professor Christopher Greenwood. The full text of the report of the Rapporteur on the International Humanitarian Law and the Laws of War has been annexed to this chapter.

He stated further that the Session on the question of "Disarmament and Arms Control since the First Peace Conference" of the AALCC Meeting to consider the three Preliminary Reports on the Themes of the First International Peace Conference had considered a Preliminary Report on "Development of International Law Relating to Disarmament and Arms Control since the First Hague Peace Conference" prepared for the 1999 Centennial Commemoration of the First Hague Peace Conference by Mr. Hans Blix. The full text of the report of the Rapporteur on the Development of International Law Relating to Disarmament and Arms Control has been reproduced in this Chapter.

At the end of the Meeting the President of the 37th Session had requested the Secretary General to prepare a Report of the Meeting and to include therein all written comments that may have been or were received within a fortnight of the closure of the meeting. The Report he had announced would be submitted to the 38th Session of the Committee scheduled to be held at Accra, Ghana, and given due consideration. In fulfillment of that mandate the Secretariat had prepared this Report. The Deputy Secretary General stated that Committee may wish to consider mandating the Secretariat to forward this report to the Secretariat of the Centennial Conference for its inclusion in the working papers for the forthcoming meetings at the Hague in May 1999 and St. Petersburg in June 1999. It may also wish to consider mandating the AALCC Secretariat to be represented at those meetings, should funds so permit.

The *Observer for the Netherlands* said that his Government deemed it a great honour to be invited to the Annual Session of the Committee and it offered him an opportunity to thank the AALCC for its response to the Netherlands' proposal of organizing the centennial of the First Hague Peace Conference. He said that the AALCC had convened

an extraordinary meeting to discuss the preliminary drafts of the reports on the three themes of the First Hague Peace Conference. The AALCC meeting which had discussed the issues of humanitarian law, the peaceful settlement of disputes and disarmament questions had contributed to a large extent to the success of the forthcoming discussions at the Peace Palace, the Hague on the 18th and 18th of May, 1999. The AALCC had contributed to the success of the discussion by its willingness to participate in the preparatory work of the centennial as well as by the content of the discussion in New Delhi.

The AALCC together with other regional organizations had elevated the centennial conference and the discussions under its umbrella to a global level. In this, it had contributed to the realization/fulfillment of the intention of the organizers of the centennial conference.

The *Observer for Netherlands* further stated that the comments and observations of the participants of the AALCC meeting were being incorporated, to the extent, feasible, in its final draft of the Report of the Rapporteurs on the themes of the First International Peace Conference. He said that the participants in the Centennial Conference would find on their desks a number of thoroughly re searched papers intended to serve as a basis for the formulation of view and conclusions on the further development of International Law to reflect the themes of the First International Peace Conference. The views and conclusions adopted by the Centennial Conference would be presented to the General Assembly of the United Nations. He concluded by saying that he hoped to welcome all the legal advisers of the Member States of the AALCC to the Centennial Conference at the Hague May, 1999. He stated that her Majesty, Queen Beatrix, the Secretary General of the UN Mr. Kofi Annan and the Under Secretary for Legal Affairs, the Legal Counsel of the UN; Mr. Hans Corell would be present at the Conference.

The *Delegate of the Islamic Republic of Iran* commended the Secretary General for convening the meeting to consider the preliminary reports on the themes of the First International Peace Conference. The discussion at that meeting would be useful for a better understanding of the problems of the contemporary international community and the future task of

maintaining international peace and justice.

He observed that non-aligned countries in proposing that the decade of the 1990s be declared the Decade of International law had intended to promote the acceptance and respect for the principles of international law, the promotion of the means and methods of the peaceful settlement of disputes including the resort to and full respect for the international court of justice. The prevalence of the rule of law in international society would make a significance contribution to the establishment of a just and equitable society. The promising record of the Decade had been scarred by some negative discouraging practices, which had become the subject of some concern to some States. He recounted instances of the resort to unilateral measures in contravention of the principles and norms of international law; the resort to the use of force in the pretext of self-defence; imposition of economic sanctions or pressures to coerce others to comply with the political aims of powerful state and the selective invocation of human rights standards for political ends, in this regard.

He was of the view that the prevalence of the rule in international relations cannot be promoted by a half-hearted approach to the acceptance of and respect of international law. He called for the renunciation of the threat of use of force as the means of furthering national policy and strict adherence t the obligations of law.

He pointed out that the principle of peaceful settlement of dispute, a major theme of the 1899 Hague Peace Conference continued to be relevant at the threshold of the new millennium.

The *Delegate of the Arab Republic of Egypt* among other things stated that the views of his Government had been expressed at the meeting in New Delhi and that Egypt had been appointed one of the Rapporteurs at the meeting in New Delhi. He reiterated his delegations stand on the Reports on the 3 themes of the Conference.

The *Observer for Yugoslavia* referred to the recent events in Yugoslavia and pointed out that the NATO military action in Yugoslavia was violative of both Article 2 paragraph 4 and Article 53 paragraph 1 of the Charter of the United Nations. She

pointed out that earlier Rambouillet Agreement had contravened the provisions of the Vienna Convention on the Law of Treaties, 1969, and went against the grain of the principle on non-intervention as couched in Article 2 paragraph 7 of the Charter. She enumerated a whole host of action which in her opinion were violative of the 1949 Geneva Convention.

The *Delegate of the State of Qatar* was of the view that the statement of the observer for Yugoslavia departed from the main agenda item under consideration. He pointed out that AALCC was not a forum for political statements.

The *Delegate of Pakistan* recalled that the Statutes of the AALCC had envisaged that the function of the Committee was to be a forum for consideration of legal matters of common interest to its Member States. He was of the view that the views expressed by the Observer for Yugoslavia should not be a part of the official records of the Session of the Committee since they were outside the purview of the basic functions of the Committee.

The *President* stated that the views of an Observer are not binding on the delegates who adopt a decision by consensus. He recalled the past practice of the Committee in respect of hearing the views of an Observer.

The *Delegate of Ghana* stated that while the Observer for Yugoslavia is entitled to hold an opinion, the views are not binding on the delegates and the Committee cannot take a stand on them.

The *President* said that the Secretariat shall have the mandate to follow the outcome of the Centennial celebrations both at the Hague and St. Petersburg. The AALCC should subject to the availability of funds, be represented at both the Hague and St. Petersburg Meetings.

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

(Adopted on 23.04.1999)

The Asian African Legal Consultative Committee at its Thirty-eighth Session

Having taken note of the Report of the Secretariat on the Expert Group Meeting to consider the preliminary reports on the themes of the First International Peace Conference set out in Doc. No. AALCC/XXXVIII/Accra/99/S.7;

Having heard the statement of the Deputy Secretary General;

1. *Expresses* its appreciation to the Government of the Netherlands and the International Committee for the Red Cross for the financial grant to meet the costs of the meeting and the printing of papers and report of the seminar.
2. *Reaffirms* that many of the political, economic and social problems which riddle the Members States of the international society can be resolved on the basis of the rule of law;
3. *Reiterates* the importance of strict adherence to the Principles of International law as enshrined in the Charter of the United Nations;
4. *Requests* Member States to continue to give serious attention to the observance of the objective of the Decade;
5. *Also requests* the Secretary-General to apprise the Secretary-General of the United Nations of the initiatives taken by the Committee in this regard;
6. *Directs* the Secretariat to participate in the centenary meetings at the Hague in May 1999 and, subject to the availability of funds, at St. Petersburg in June 1999;

7. *Also Directs* the Secretariat to monitor the proceedings on this item at the 54th Session of the UN General Assembly; and

8. *Decides* to place the item "United Nations Decade of International Law" on the agenda of its Thirty-ninth Session for review of further work on the item.

(iii) Secretariat Study: United Nations Decade of International Law: Report of the Expert Group Meeting, New Delhi 11th and 12th February 1999

AALCC Meeting to Consider the Preliminary Reports on the Themes of the First International Peace Conference

Pursuant to the given mandate the Secretariat of the AALCC in collaboration with the Ministry of External Affairs, Government of India, convened a two day meeting to consider the three Preliminary Reports on the themes of the First International Peace Conference. The objective of the Seminar, chaired by Dr. P.S. Rao, Joint Secretary, Legal and Treaties Divisions, Legal Adviser, Ministry of External affairs (India) and the President of the AALCC, was to promote a free and frank exchange of views on the three preliminary Reports on the themes of the First International Peace Conference.

Senior Government officials, eminent experts, and distinguished international lawyers from 23 Member States of the AALCC;[1] 12 observer States,[2] and the representatives of 4 international organizations[3] participated in the Meeting which was inaugurated by Mr. Dilip Lahiri, Additional Secretary in the Ministry of External Affairs, Government of India. The Under Secretary General for Legal affairs and the Legal Counsel of the United Nations, Mr. Hans Corell and the Executive Secretary of

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1 These had included the Arab Republic of Egypt, People's Republic of China, Ghana, India, Indonesia, Islamic Republic of Iran, Japan, Kenya, Democratic People's Republic of Korea, Kuwait, Myanmar, Nepal, Oman, Philippines, Qatar, Somalia, Sri Lanka, Syria, Thailand, Turkey, the United Arab Emirates and the Republic of Yemen.

2 These had included Bulgaria, Burkina Faso, Chile, Colombia, Finland, France, Germany, Israel, Morocco, the Netherlands, United Kingdom, and Venezuela.

3 These had included the United Nations, the United Nations High Commissioner for Refugees (UNHCR) the League of Arab States and the International Committee for the Red Cross (ICRC).

the Organizing Committee of the Centennial Conference of the First Hague Peace Conference Mr. T. Buchli were among those who participated in the meeting.

Inaugural Session

The President of the Committee, Dr. P.S. Rao, in his opening statement *inter alia* observed that commemorating the centennial of the first Hague Peace Conference was an opportune time to reflect not only upon the progress made on the themes of that Conference but also on the course the rule of law had taken in establishing a just and equitable world order. The destructive capacity of the means and methods of armed conflicts had, in the intervening period, he emphasized, become more comprehensive and less discriminating of combatants and non-combatants. While the United Nations had succeeded in averting a third world war it had failed to prevent localized and regional armed conflicts where the effects on innocent civilians and combatants were equally devastating. He stated that as the international society approached the turn of a new millennium the failure in terms prohibiting certain means of warfare and regulating the methods of warfare itself was a cause for great concern. Emphasizing that international peace and security could not be attained by half hearted approaches and that there could be no partial solutions in matters of life and death he called for the renunciation of the use of force as a concept and as an idea to achieve ends of national policy. Members of the international community, he stated, needed to abide by that obligation and keep that in view even while planing military strategy or in conducting the "diplomacy of violence". States needed to abandon theories of deterrence and forsake their reliance upon doctrines like Mutually Assured Destruction (MAD) and instead adopt a policy of not merely non-proliferation of nuclear weapons but total elimination of nuclear weapons.

Turning to the question of peaceful settlement of disputes, Dr. Rao observed that the "peaceful settlement of disputes is not a synonym for compulsory settlement of disputes by a third party" and comprises various means and methods. Referring to the settlement of disputes by having recourse to the

jurisdiction of the International Court of Justice he stated that the jurisdiction of the court is based on the principles of consensus and agreement among the disputing parties. The need to obtain the consent of the contesting parties to a dispute is based on a realistic assessment of such factors as the level of integration that is still required to be achieved among the peoples of the world as members of one international legal community and the lack, perhaps, of a just, equitable and universally applicable international law on some of the fundamental aspects of access to and enjoyment of the resources of the world.

Dr. Rao further stated that efforts to achieve a legal community of mankind had fallen short of the legitimate expectations of the international community and this had to be urgently remedied and provided for. He asked for consideration to be given to the methods and procedures of codification conferences. Law making conferences, he stated, should afford ample opportunity at every stage of the decision making for interests of all States to be properly given a play, according to fair procedures Decisions should save in exceptional circumstances be arrived at by consensus.

In his welcome address the Secretary General, Mr. Tang Chengyuan emphasized that the meeting was one of the six regional meetings, as resolved by the General Assembly of the United Nations at its 53rd Session, which would discuss the preliminary reports on the themes of the First International Peace Conference and thus provide an opportunity for the representative of AALCC Member States and experts from the Afro-Asian region to exchange views on the Three Reports for final discussion at the Expert Meetings scheduled to be held at the Hague in May 1999 and St. Petersburg in June 1999. He stated in this regard that he "Progress Report on the action dedicated to the 1999 centennial of the first International Peace Conference and to the closing of the United Nations Decade of International Law" submitted by the delegations of the Kingdom of the Netherlands and the Russian Federation at the fifty third Session of the General Assembly has been made available to the participants. He said that the subjects identified by the co-

organizers of the 1999 Centennial Celebrations for discussion at the meeting are: (i) The Peaceful Settlement of Disputes: Prospects for the Twenty First Century (ii) International Humanitarian Law and the Laws of War; and (iii) Development of International Law relating to Disarmament and Arms Control since the First Hague Peace Conference in 1899.

The Secretary General stated that the debate on these items were to revolve around the three Reports prepared by eminent Rapporteurs, and that copies of these three reports have been reproduced by the Secretariat and circulated among the participants. The Meeting was intended to provide an opportunity for the representative of States in the region to exchange views on the Three Reports for final discussion at the Expert Meetings scheduled to be held at the Hague in May 1999 and St. Petersburg in June 1999.

The Under Secretary General for Legal Affairs and the Legal Counsel of the United Nations Mr. Hans Corell in his address to the Meeting *inter alia* said that the principle of the peaceful settlement of disputes had been vastly developed during the current century. He pointed out that while there was no lack of instruments and institutions for the pacific settlement of disputes, the political will to seek third party resolution or to submit a case to an institution was sometimes found wanting. He said that what was required was not the adoption of more international instruments or the establishment of institutions for the peaceful settlement of disputes but the dissemination and understanding of the existing instruments and institutions. There was also the need to strengthen the political will of states to employ the existing modes and means of settlement of disputes. Recalling that the International Court of Justice had more cases on its docket than ever before he said that the resources of the Court need to be augmented and increased. The Permanent Court of Arbitration, unfortunately, had never in its history been employed fully for the purpose for which it had been established.

Appropos international Humanitarian law and the Laws of War he was of the view that the existing norms and principles need to be observed and implemented. The General Assembly at

its 53rd session had noted with appreciation that the year 1999 would mark the 50th anniversary of the Four Geneva Conventions of 1949. He expressed the hope that more states would accept the provisions relating to fact finding missions. Turning to the International Criminal Court he called for greater support for the Statute of the ICC in the interest of implementation of international humanitarian law. Speaking of the significance of the work of the PREPCOM on the International Criminal Court, which was scheduled to hold its first session in the latter half of February, he urged that States actively participate in its work.

Referring to the question of disarmament and arms control he said that it is ironic that there had been an unprecedented increase in armament in the period since the first Peace Conference. He said that he Convention relating to anti Personnel Mines would contribute to the elimination of arms which cause suffering to non-combatants and civilians. He called for concerted action for disarmament and the abolition of weapons of mass destruction.

In his inaugural address, Mr. Dilip Lahiri, Additional Secretary, United Nations Division, Ministry of External Affairs (India) stated that he believed that the deliberations of the Asian and African Group of Experts will be an essential input into the Centennial Commemoration, bearing in mind, particularly the sweeping changes in the political geography of the Eurocentric world of 1899 when the Hague Conference took place. He commended for the Rapporteurs three excellent and incisive preliminary Reports before the meeting on the Hague themes and stated that the Reports bring out the tremendous but uneven progress made over the last 100 years in the three areas. The 20th Century had seen slaughter, destruction and suffering through war and armed conflict on a scale unprecedented in human history. It is therefore only appropriate that these bitter experiences should have provided the impetus for remarkable advances in the codification and progressive development of international humanitarian law.

He further stated that the post Cold War -world had seen a mushrooming of ethnic, religion-based conflicts within countries and had witnessed the phenomenon of cross border fomentation of such conflicts through support to terrorism and insurgency. Misguided external pressures had precipitated the disintegration of a number of multicultural and multiethnic states. He was of the view that while internationally accepted standards of conduct are an obligation on all sides of any conflict, international or internal, the problem arose with the desire for intrusive external monitoring. Outside parties, including NGOS, had not always provided a model of disinterested behaviour in such situations. If the desire for closer external scrutiny could sometimes result in worsening the situation of compliance he asked for consideration to be given to whether a more benign approach based on "soft law" might provide better results. Professor Greenwood, he observed, had also underlined the need to clarify the laws applicable to the conduct of military operations by the UN itself.

Recalling the fact that Professor Greenwood' report was written before the Statute of the International Criminal Court was adopted at Rome he observed that the views of countries which include two third of humanity were excluded in developing the international law on crimes against humanity. The role accorded to the UN Security Council raised troubling questions relating to the basic principles of equality among nationals and peoples and the five permanent members of the Council had been placed on a pedestal by the rest of the world accepting that their leaders, officials and soldiers cannot ever be accused before the ICC of committing grave crimes of International concerns. Since the Council has been provided the power even to capture non-Parties to the ICC within its purview, we may witness the legally absurd situation of non-Parties triggering ICC jurisdiction on other non-parties. The deliberate decision to exclude the use of weapons of mass destruction from the listing of war crimes, juxtaposed with the inclusion of relatively innocuous types of weapons in the list, sends a perplexing message to the international community.

He also stated that while the international community can take comfort at the conclusion of the chemical Weapons Convention which agreed to eliminate a whole class of weapons of mass destruction, the record of achievement in the area of disarmament since the Hague Peace Conference of 1899 and 1907 has not been very encouraging Mr. Lahiri pointed out that the right of first use of nuclear weapons continues to be asserted, together with new doctrines expanding the contingencies for such first use. Despite the important advisory opinion rendered by the International Court of Justice on the legality of the use of nuclear weapons, and the overwhelming international public opinion for eliminating nuclear weapons, there is stubborn refusal on the part of some States possessing nuclear weapons even to engage in multilateral discussions on the issue. The abolition of nuclear weapons must be the highest priority in the unfinished agenda of this Hague theme for the 21st Century.

Mr. Lahiri pointed out that the Report on the settlement of disputes brings out that despite the impressive institutional structure available, and the vast reservoir of theory and study built up over the years, for the peaceful settlement of international disputes through third party intervention, diplomacy and direct negotiations remains by far the preferred option. Attempts to lower the threshold for third party intervention, whether through increasing the availability of mechanisms, or a permissive culture could well have the paradoxical effect of mailing the party with a weaker case more recalcitrant in the hope of a Solomonic judgment from third parties. Preventive diplomacy is certainly preferential to a proliferation of disputes. But the preferred form of preventive diplomacy should be strengthening of multilateralism and international cooperation in the development both of hard and soft law. The classical dispute settlement mechanism provided for under the Charter should not be weakened and distorted. He said that as a "Friend of 1999", the Government of India was happy to be associated with the meeting.

The vote of thanks was delivered by Professor Salah Amer of the Arab Republic of Egypt. He thanked the Member Governments of the Committee for their interest in the functions and activities of the Committee and their co-operation and for the keen interest that they have evinced in the Meeting. The

unwavering faith of the Member States of the Committee in the utility of the work of the Committee had contributed in no small measure to the attainment of the world wide recognition that the Committee enjoyed. He also expressed appreciation for the non-Member States who supported the work of the Committee.

The discussion during the three substantive sessions of the two-day meeting revolved largely around the presentations made by a group of experts drawn from both member and non-member states of the AALCC. These had included Professor Franciso Oreggo Vicuna; Professor Christopher Pinto; Professor Rahmatullah Khan: Professor V.S. Mani; Professor B.S. Murthy; Dr. Raja Mohan; Professor B.S. Chimni; Mr. K. Subhramanyam and the representative of the International Committee for the Red Cross (ICRC) Dr. Umesh Kadam and Dr. (Ms) Z. Noparast. The meeting appointed three Moderators to facilitate discussion on the themes of the First International Peace Conference. Accordingly, the meeting also appointed three Rapporteurs to facilitate the task of rounding up the deliberations of the meeting. All in all, the debate in the course of the meeting was informal in nature wherein all the participants spoke in their individual capacities and, no formal conclusions or resolutions were adopted.

First Substantive Session

The first substantive session of the AALCC Meeting to consider the three Preliminary Reports on the Themes of the First International Peace Conference to consider the question of the "Peaceful Settlement of Disputes: Prospects in the 21st Century" was chaired by the President of the AALCC Dr. P.S. Rao. The basic working document of this session was a Report on "The Peaceful Settlement of Disputes: Prospects for the Twenty-first Century" jointly prepared for the 1999 Centennial Commemoration of the First Hague Peace Conference by Professor Francisco O. Vicuna and Professor Christopher Pinto.[4]

To facilitate the consideration of the aforementioned Report and to guide discussion on the issues raised therein Professor Quizhi He, Legal Adviser, Ministry of Foreign affairs of the People's Republic of China and a distinguished member of the International Law Commission was appointed Moderator. To

[4] This Report had been circulated by the Secretariat as Document No. AALCC/UNDIL/CFPC/1991/1.

facilitate the adoption of a Report Mr. S.M. Confiado (Philippines) was appointed Rapporteur for the Session. Following upon the introductory remarks of the Moderator the two Rapporteurs, Professor F.O. Vicuna and Professor Christopher Pinto made presentations by way of introducing their Report. Thereafter, Professor B.S. Murty and Professor Rahmatullah Khan, who had been specially commissioned by the Secretariat for that purpose, commented upon the Preliminary Report of the Special Rapporteurs. This was followed by interventions, comments and observations by the representatives of 5 Member States and the Under Secretary General in charge of Legal Affairs and the Legal Counsel of the United Nations. Interventions were made by the representatives of the Arab Republic of Egypt; China; India; Somalia and Turkey.

Second Substantive Session

The second substantive session of the Meeting considered the question of the "International Humanitarian Law and the Laws of War" was chaired by the President of the AALCC Dr. P.S. Rao. The basic working document of this session was a Preliminary Report on "International Humanitarian Law and the Laws of War" prepared for the 1999 Centennial Commemoration of the First Hague Peace Conference by Professor Christopher Greenwood.[5]

To facilitate the consideration of the aforementioned Report and to guide discussions on the issues raised therein Professor (Ms.) Gulnihal Bozkurt, Professor of International Law at the University of Ankara (Turkey) was appointed Moderator. To facilitate the preparation of a Report Mr. Kojo Y. Asuamah (Ghana) was appointed Rapporteur for the Session. Following the introductory remarks by the Moderator presentations were made by Professor B.S. Chimni; Dr. (Ms) Zahra Noparast and the representative of the International Committee for the Red Cross (ICRC), Dr. Umesh Kadam. The presentations related to Professor Christopher Greenwood's Report.

[5] This Report had been circulated by the Secretariat as Document No. AALCC/UNDIL/CFPC/1999/2.

Third Substantive Session

The third substantive session of the AALCC Meeting to consider the three Preliminary Reports on the Themes of the First International Peace Conference considered the question of "Disarmament and Arms Control since the First Peace Conference" and was chaired by the President of the AALCC Dr. P.S. Rao. The basic working document of this session was a Preliminary Report on "Development of International Law Relating to Disarmament and Arms Control since the First Hague Peace Conference" prepared for the 1999 Centennial Commemoration of the First Hague Peace Conference by Mr. Hans Blix.[6]

To facilitate the consideration of the aforementioned Report and to guide discussions on the issues raised therein Professor Frank Xavier Njenga, former Secretary General of the AALCC and currently Dean Faculty of Law Moi University (Kenya) was appointed Moderator and to facilitate the preparation of a Report Mr. Wael Aboulmagd (Arab Republic of Egypt) was appointed Rapporteur for the Session. Following the introductory remarks by the Moderator presentations were made by Professor V.S. Mani; Dr. Raja Mohan and Mr. K. Subhramanayam. The presentations related to Mr. Hans Blix's Report.

Fourth Session

The fourth session was chaired by the President of the Committee, Dr. P.S. Rao and presentations of reports were made by the three Rapporteurs on the proceedings of the three preceding session of the AALCC meeting.

(i) Peaceful Settlement of Disputes: Prospects in the 21st Century

The Rapporteur of the first substantive session on the question of the "Peaceful Settlement of Disputes; Prospects in

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6 This Report had been circulated by the Secretariat as Document No. AALCC/UNDIL/CFPC/1999/3.

the 21st Century", Mr. S.M. Confiado, said that reference had been made to the evolution of the principle of non-use of force in international law in international relations and to the emergence of the concept of the peaceful settlement of disputes. The adversarial character of the means of the peaceful settlement of disputes, save and except perhaps that of negotiations, was pointed out. The point was made in this regard that barring conciliation following mutual consultations all other means of resolution of disputes were non-zero sum games. One of the Special Rapporteurs, Professor Christopher Pinto, referred to some of the positive aspects of "trial by combat" adversarial procedures of the peaceful settlement of disputes.

The Rapporteur, Mr. S.M. Confiado observed that International law was sometimes authoritative not because it was the law and must prevail. It was stated in this regard that contemporary international law often reflected the will and power of larger States over smaller States. He stated that several specific issues of the settlement of disputes and the prospects of their use in the Twenty-first Century had been considered. The specific points raised in the preliminary report and considered had included Judicial Arbitration; Use of the International Court of Justice; and Alternative Dispute Resolution Mechanisms including the role of regional bodies. As regards the role of regional international organizations a view had been expressed that consideration needed to be given to strengthening the role of regional organizations in the peaceful settlement of disputes. This reference to the role of regional organizations was further elaborated by a proposal that regional courts should be considered to supplement the working and role of the ICJ in the settlement of disputes. This greater use of the regional courts would strengthen the mechanism of peaceful settlement of international disputes.

The Special Rapporteur recalled that questions relating to Alternative Dispute Resolution mechanism including the proposal relating to the establishment of a Permanent Conciliatory Committee (or alternately Permanent mediator Committee) were considered. A view was expressed in this regard that the choice of mode of peaceful settlement of disputes

would largely depend upon the nature of the dispute. It was stated in this regard that experience had shown that territorial disputes had often satisfactorily been resolved by negotiations. In the context of the consideration of establishment of a Permanent Conciliatory Committee, a view was expressed that conciliation was the most popular means of resolution of disputes.

A view was expressed that a dispute needed to be examined in its totality including its root causes. The examination of a dispute from the point of view of the Victim of the dispute was mooted and a view expressed that the resolution of disputes should aim at addressing the very roots of the disputes per se rather than simply seek to offer a theoretical solution. The issue of resolution of problems/disputes stemming from such political bodies as the Security Council needed to be addressed.

A number of specific issues relating to a wider or universal use of the ICJ were raised and a view was expressed that in the examination of this question of a wider use to the court emphasis requires to be shifted from the consideration of mere modification structural aspects of the Court to the modification, amendment and streamlining of the functions and practical aspects of the working of the Court. Consideration was given to the expansion of the competence of the Court and general issues including those relating to role of the Advisory Opinion of Court.

Apropos, the Advisory Opinion of the ICJ a view was expressed that the Court had a positive role to play in the progressive development and codification of international law. Consideration was given to expanding the competence of a large number of organs and specialized agencies of the UN to seek the Advisory Opinion of the Court. While the question of the authority of the Secretary General of the United Nations to seek advisory opinion of the Court appeared to find support, the competence of non-governmental organizations to seek advisory opinions or to appear before the Court in contentious cases was considered but not pressed and no clear affirmation of the

competence of the Non-Governmental Organizations emerged.

The issue of the acceptance of the jurisdiction of the court was debated and the majority opinion, the Special Rapporteur said, appeared to favour reference of a dispute to the court by mutual consent. The prohibitive financial aspects for the developing countries, or referring a dispute to the court were also considered.

The full text of the Report of the Special Rapporteur of the first session on the Peaceful Settlement of Disputes, Mr. S.M. Confiado, as adopted at the fourth session of the AALCC Meeting to consider the Preliminary Reports on the themes of the first International Peace Conference is annexed to this Chapter.

(ii) International Humanitarian Law and the Laws of War

Presenting the Report of the second session On "International Humanitarian Law And The Laws Of War, the Rapporteur, Mr. Kojo Y. Asuamah, stated that Professor Chimni in his presentation had observed that the key objective of the report of the special Rapporteur, Professor Greenwood, was to conduct a review of the achievements and failures of the 20th Century and to identify problems which remained unresolved and to suggest how such problems might be addressed. The Preliminary Report had concluded that no new laws were required but that existing laws should be made more effective.

Professor Chimni's evaluation of the report identified what he called "the conceptual weaknesses" of the report. In the main, he identified the complete absence of some reference to the application of the relevant norms of International Humanitarian Law and Laws of War to colonized peoples, the failure of the report to show the multicultural roots of the rules of the laws of war and stressed that the laws of war were never intended to legitimize violence but to restrict or regulate the use of violence in the course of war. The Laws of War had culminated in the development of even more destructive weapons in total disregard of humanitarian considerations. He

drew a distinction between the essentially humanitarian concerns which the ICRC promotes through the protection of the rights of individuals in times of war and the humanitarian which is invaded by its non-humanitarian character seeking to legitimize violence and a particular vision of world order.

The Special Rapporteur, Mr. Kojo Y. Asuamah, stated the concern was expressed about the North-South divide which has affected the application of the Laws of War and wonder why some powerful countries should ignore the laws of war as in Vietnam and champion the establishment of tribunals for war crimes in Rwanda and former Yugoslavia whilst opposing the establishment of an International Criminal Court in the interest of refusing the application of international laws of war against its own people.

Attention was drawn to the inadequate examination of the relationships between International Human Rights Law and International Humanitarian Law in the context of internal conflicts (conflicts within States).

Dr. (Ms) Zahra Noparast's presentation essentially dealt with the need for international law to clarify the notion of the right of self-defence which tends to encourage States to resort to the use of force. It was argued that a sanctions regime coupled with a compulsory jurisdiction for the International Court of Justice to enforce compliance would have a restraining influence to those States which wage illegal wars under the guise of the right of self-defence. In this connection, she expressed concern about the International customary definition of the right of self-defence, the vague manner in which the right of self-defence is defined in Article 51 of the Charter and the apparent changes which the concept has undergone. Referring to Prof. Greenwood's report which had stated that the conditions of "necessity" and "proportionality" were requirements for the invocation of the right of self-defence, she argued that it was necessary to have a time frame which would prevent arbitrary action in the use of the right of self-defence.

In his presentation, the Legal Officer of the ICRC Regional Delegation, Mr. Umesh Kadam, stated that the ICRC was in

agreement with the conclusions of the Greenwood Report that no new laws were required and that the effective implementation of existing laws remained the essential challenges today and tomorrow. The ICRC representative emphasized that the terms "International Humanitarian Law" and the "Laws of War" did not reflect different areas of the law but, in effect, referred to the same thing. He referred to Article 51 of the Additional Protocol I which codifies the principle of proportionality and lamented the absence of a reference in the report relating to indiscriminate attacks where inspite of clear identification of military targets, civilians tend to suffer the consequences of such attack.

The Representative of the ICRC also emphasized the importance of discrimination of international humanitarian law as espoused in the Geneva Conventions. The lack of implementation of existing international humanitarian law resulted from the lack of political will of States to fully apply the law and informed the meeting that the Advisory Service of the ICRC was addressing those concerns.

The President of the Committee, Dr. P.S. Rao, stated that he agreed with Prof. Greenwood's emphasis on the protection of human lives in armed conflict as well as the need to concentrate on new techniques for the effective compliance with existing laws.

Several participants suggested the conclusions of the Greenwood report to the effect that there was no need for new laws and stressed the need for the effective enforcement of existing International Humanitarian Law and Laws of War.

A suggestion was made by participants for the creation of an expert body to study the military manuals of armies throughout the world to facilitate the formulation of training programmes for military personnel which guaranteed adequate knowledge of International Humanitarian Law and the Laws of War for compliance in war situations. It was also suggested that dissemination of information on these laws should not be limited to military personnel but also to the general public, in the belief that an enlightened public opinion could positively

affect violations of IHL in times of war. It was recommended that co-operation with ICRC in this regard would promote the objectives of the 50th Anniversary of the Geneva Conventions.

Participants also welcomed the establishment of war crimes tribunals such as in Rwanda and former Yugoslavia and expressed concern about the delays between the apprehension of criminals, their trial and conviction. In this connection the UN Security Council's power to establish criminal courts as already demonstrated was highlighted.

Finally, the consensus emerged that whether it was International Humanitarian Law or Human Rights Law, the objective to protect human lives and the vulnerable such as women and children in war situations remained the same. Participants also agreed that States should honour their obligations in the implementation of IHL and human rights laws.

The full text of the Report of the Special Rapporteur of the second session on the International Humanitarian Law and Laws of War, Mr. Kojo Y. Asuamah, as adopted at the fourth session of the AALCC Meeting to consider the Preliminary Reports on the themes of the first International Peace Conference is annexed to this chapter.

(iii) Development Of International Law Relating To Disarmament And Arms Control Since The First Hague Peace Conference In 1999

Presenting his report on the consideration of the item Development of International Law relating to Disarmament and Arms Control since the first Hague Peace Conference in 1899, the Rapporteur, Mr. Wael Aboulmagd, stated that the Moderator had observed that the armaments race during the last hundred years had destabilized the world community and that the Report prepared by the Special Rapporteur, Mr. Hans Blix, was succinct and very clear in its historical disposition and its consideration an opportune development.

Professor V.S Mani in his paper entitled "The International Law of Disarmament: A Centennial Overview" had wondered why the international legal community had stayed away. The Blix Report chiefly focused on issues "concerning arms and disarmament". He however felt that the Report did not aim "to completely cover the issues or to examine all the Agreements". He felt the Blix Report could be divided into matters concerning (i) Aims of the First Hague Peace Conference; (ii) Focus on the time after the first Peace Conference; (iii) Realization of the aims of the first Hague Peace Conference regarding disarmament and arms control; and (iv) Common issues; seeking their solution.

The main thrust were on issues pertaining to compliance and verification of arms control and disarmament agreements. Certain deficiencies of the Report were highlighted and evaluated. It was pointed out that (i) most attempts at disarmaments have been tentative and partial with inadequate commitment on the part of States; (ii) the effort towards disarmament is underscored by mutuality of suspicion and distrust; (iii) the move towards disarmament has been a pragmatic step-by-step approach; (iv) efforts towards nuclear disarmament have been discriminatory, especially the NPT regime which focuses on the ban on horizontal proliferation of weapons; (v) a discussion of non-proliferation must encompass issue of oligopolistic regimes like the London Club, Australia Club and the MTCR regime; (vi) the Blix Report had left untouched issues concerning the international transfer of armaments and related materials; (vii) the Report was largely an analysis of the verification and compliance mechanisms prevalent in disarmament agreements; and (viii) the Blix Report did not make an attempt to look into the legality of weapons.

Professor V.S. Mani had concluded, the Special Rapporteur stated, suggesting some items for an agenda towards future disarmament efforts which would include: (i) Ban on nuclear testing coupled with an obligation to negotiate a treaty banning nuclear weapons; (ii) the creation of reciprocal no first use arrangements among nuclear weapon States; (iii) stable non-use guarantees by Nuclear Weapon States to non-nuclear

States; (iv) ending deployment of short range nuclear weapons; (v) taking nuclear forces off alert; (vi) the removal of nuclear warheads from delivery systems (removal of hair-trigger elements); (vii) control over fissionable material; (viii) ban/restrictions on development/production of new weapons; (ix) ban on first use of existing weapons of mass destruction; and (x) identification, and ban or restriction on the existing means and methods of warfare whose use violates Article 35 of Geneva Protocol I of 1977.

Mr. Subhramanyam felt that the title of the Blix Report "Development of International Law Relating to Disarmament and Arms Control since the First Hague Peace Conference" was misleading as it did not deal at all with the issue of legality of nuclear weapons, which had come up before the ICJ as an Advisory Opinion. In his view, the Blix Report also, did not speak about the 'legitimacy or the legality of the use of nuclear weapons'. A diabolical stand was adopted by the nuclear have, as there existed no obligation for regulation of nuclear weapons, when lesser weapons of mass destruction such as biological and chemical weapons were regulated upon. Furthermore, he felt that the Blix Report was silent on the important issue of nuclear weapon technology.

The most important event not considered by the Blix Report was the indefinite extension of the NPT after the 25 year review in 1995. This act, in his view, had one and for all legitimized nuclear weapons, in all its facets. The chief challenge before international lawyers, he felt, was to evolve ways and means to delegitimize this process.

Another issue, he touched upon related to the violation of a basic norm of the 1969 Vienna Convention relating to Law of Treaties, wherein obligations, arose when a State is a party to a treaty regime. In this regard, he felt the efforts of the Big Five nuclear powers to coerce India to adhere to the CTBT regime, violated the Law of Treaties.

Dr. Raja Mohan felt that although international law regulated the use of force in international relations security

experts often felt international law not germane to their discussions. The element of power prevalent in the international relations, he felt, often transcended the international legal processes. The challenge before international lawyers, he averred, was how to get around this dilemma. Considering the fact that, there was a discriminatory regime which created two sets of laws, one for the have and other for the have nots. The real challenge to international lawyers is to press for a "universal no first use treaty regime". He felt, that the non-State actors, new entrants in the process of disarmament who could play a damaging role, especially after the collapse of the Soviet Union, where one never felt the need for a verification regime.

The Rapporteur, Mr. Wael Aboulmagd, said that the discussions revealed the following strands of thought viz. (a) that there is an urgent need for a genuine universal disarmament regime; (b) that the Hans Blix Report does not cover important aspect - viz. Transfer and trade of nuclear technology; (c) that the strengthening of international law relating to disarmament, could be achieved only if international law is based on reciprocity as unilateralism has been the main stumbling block towards multilateral negotiations in addressing disarmament issues; (d) that given the existence of a treaty regime prohibiting production, use and stockpiling of chemical and biological weapons, speakers questioned the differential approach to nuclear weapons, as both categories were weapons of mass destruction (e) that States should endevour to have a "no first use treaty regime"; (f) that the extension of NPT regime essentially calls for a de-legitimization of the nuclear weapons proliferation regime; (g) that the Blix Report did not reflect on a number of relevant issues relating to the effects of indefinite extension of NPT, evaluation of NPT regime, relationship between legal instruments created and complete disarmament and lack of future perspectives and direction towards disarmament in the next century.

The full text of the Report of the Special Rapporteur of the third Session on Disarmament and Arms Control since the First Peace Conference, Mr. Wael Aboulmagd, as adopted at the fourth session of the AALCC Meeting to consider the Preliminary Reports on the themes of the first International Peace Conference is annexed to this chapter.

It needs to be stated that the President Dr. P.S. Rao, requested the representatives of States and other participants to file with the Secretariat of the Committee for written comments, observations, and proposals relating to the issues considered for the enrichment of both the report of the Secretariat and the Report of the special Rapporteurs on the subject.

Closing Session

The closing session, chaired by the President of the 37th Session of the Committee was largely ceremonial in nature to mark the end of the Meeting to consider the Preliminary Reports on the three themes of the first International Peace Conference. Statements were made by the President, Dr P.S. Rao; the Under Secretary General for Legal Affairs and the Legal Counsel of the United Nations, Mr. Hans Corell; the Secretary General, Mr. Tang Chengyuan; the representative of the Government of Netherlands, Mr L. Buchli; the representative of the Government of Finland; and the representative of the ICRC.

The President requested the Secretary General to prepare a Report of the Meeting and to include therein all written comments that may have been or are received within a forenight of the closure of the meeting. The Report he announced would be submitted to the 38th session of the Committee scheduled to be held at Accra, Ghana, and given due consideration. In fulfillment of that mandate the Secretariat had prepared this Report for consideration at the Committee's session in Accra, Ghana. The printed Report of the Seminar will shortly be brought out by the secretariat which would cover the detailed deliberations, comments, observations and the full texts of the statements made during the four sessions of the two day seminar.

Annex I

REPORT OF THE RAPPORTEUR, MR. S.M. CONFIADO, ON THE PROCEEDINGS OF THE FIRST SESSION OF THE AALCC MEETING TO CONSIDER THE PRELIMINARY REPORTS ON THE THEMES OF THE FIRST INTERNATIONAL PEACE CONFERENCE HELD IN NEW DELHI ON 11TH FEBAURY 1999

1. The first substantive session of the AALCC Meeting to consider the three Preliminary Reports on the Themes of the First International Peace Conference to consider the question of the "Peaceful Settlement of Disputes: Prospects in the 21st Century" was chaired by the President of the AALCC Fr. P.S.Rao. The basis working document of this session was a Report on "The Peaceful Settlement of Disputes: Prospects for the Twenty-first Century" jointly prepared for the 1999 Centennial Commemoration of the First Hague Peace Conference by Professor Franciso O. Vicuna and Professor Christopher Pinto. This report had been circulated by the Secretariat as Document No. AALCC/UNDIL/CFPC/1991/1.

2. To facilitate the consideration of the aforementioned Report and to guide discussions on the issues raised therein Professor Quizhi He, Legal Adviser, International Law Commission was appointed Moderator. Following the introduction of the Report by two Rapporteurs, Professor F.O. Vicuna and Professor Christopher Pinto, presentations were made by Professor B.S. Murty and Professor Rahmatullah Khan who had been specially commissioned by the Secretariat for that purpose. This was followed by interventions, comments and observations by the representatives of 5 Member States and the Under Secretary General in charge of Legal Affairs and the Legal Counsel of the United Nations. Interventions were made by the representatives of the Arab Republic of Egypt: China: India; Somalia and Turkey.

3. Reference was made to the evolution of the principle of non-use of force in international law in international relations and to the emergence of the concept of the peaceful settlement of disputes. The adversarial character of the means of the peaceful settlement of disputes, save and except perhaps that of negotiations, was pointed out. The point was made in this regard that barring conciliation following mutual consultations all other means of resolution of disputes were non-zero sum games. One of the Special Rapporteurs, Professor Christopher Pinto, referred to some of the positive aspects of "trial by combat" adversarial procedures of the peaceful settlement of disputes.

4. Most speakers accepted the thesis that the history of international relations and international law had moved from the Westphalian system, to the Euro-centric paradigm to the contemporary decentralization of international society. Doubts were, however, expressed as to whether the structure and fabric of the society and the set of rules governing the international society had really changed their basic nature. International law was sometimes authoritative not because it was the law and must prevail. It was stated in this regard that contemporary international law often reflected the will and power of larger States over smaller States.

5. Several specific issues of the settlement of disputes and the prospects of their use in the Twenty-first Century were considered. The specific points raised in the aforementioned preliminary report and considered were Judicial Arbitration; Use of the International Court of Justice; and Alternative Dispute Resolution Mechanism including the role of regional bodies. As regards the role of the regional international organizations a view was expressed that consideration needed to be given to strengthening the role of regional organizations in the peaceful settlement of disputes. This reference to the role of regional organizations was further elaborated by a proposal that regional courts should be considered to supplement the working and role of the ICJ in the settlement of disputes. This greater use of the regional courts would strengthen the mechanism of peaceful settlement of international disputes.

6. One delegate laid emphasis on dispute avoidance and mode of resolution of disputes vis-a-vis avoidance of dispute. The view was expressed that a free exchange of information and harmonious good neighbourly relations could inter alia contribute to the prevention of dispute avoidance.

7. Questions relating to Alternative Dispute Resolution mechanism were also considered. The proposal relating to the establishment of a Permanent Conciliatory Committee (or alternately Permanent mediator Committee) was considered. A view was expressed in this regard that the choice of mode of peaceful settlement of disputes would largely depend upon the nature of the dispute. It was stated in this regard that experience had shown that territorial disputes had often satisfactorily been resolved by negotiations. In the Context of the consideration of establishment of a Permanent Conciliatory Committee, a view was expressed that conciliation was the most popular means of resolution of disputes.

8. A view was expressed that a dispute needed to be examined in its totality including its root causes. The examination of a dispute from the point of view of the victim of the dispute was mooted and a view expressed that the resolution of disputes should aim at addressing the very roots of the disputes per se rather than simply seek to offer a theoretical solution. It should be mentioned in passing that the issue of resolution of problems/disputes stemming from such political bodies as the Security Council needed to be addressed.

9. A number of specific issues relating to a wider or universal use of the ICJ were raised. A view was expressed that in the examination of this question of a wider use of the court emphasis requires to be shifted from the consideration of mere modification structural aspects of the Court to the modification, amendment and streamlining of the functions and practical aspects of the working of the Court. Consideration was given to the expansion of the competence of the Court and general issues including those relating to role of the Advisory Opinion of Court.

10. A view was expressed that the Advisory Opinion of ICJ had a positive role to play in the progressive development and codification of international law. Consideration was given to

expanding the competence of a large number of organs and specialized agencies of the UN to seek the Advisory Opinion of the court. The question of the authority of the Secretary General of the United Nations to seek advisory opinion of the Court appeared to find support.

11. The competence of non-governmental organizations to seek advisory opinions or to appear before the Court in contentions cases was considered but no pressed. No clear affirmation of the competence of the Non-Governmental Organizations emerged.

12. The meeting recognized that the court is seized of a matter and that the Court was not seize a matter. the issue of the acceptance of the jurisdiction of the court was debated. The majority appeared to favour reference of a dispute to the court by mutual consent. The prohibitive financial aspects for the developing countries, or referring a dispute to the court were also considered. The Under Secretary General for Legal Affairs and Legal Counsel of the United Nations invited attention to establishment by the Secretary General of a Voluntary Trust Fund for specific purpose of rendering assistance to developing countries keen to resort to the facilities offered by the court. It was stated that financial assistance would also be extended to those who wished to use the facilities of the Permanent Court of Arbitration.

13. Some delegates referred to the United Nations University and the proposed World School of International Law at the Hague. One proposal advanced was that regional law schools under the UN umbrella be established to supplement the world law school. Although the Meeting considered the proposal for the establishment of a High Level Committee of Jurists, no consensus, however, emerged. It was pointed out in this regard that the developing countries are not adequately represented in such specialized Committees.

14. It needs to be stated that the President of the Committee, Dr. P.S. Rao, requested the representatives of States of file with the Secretariat of the Committee their written comments, observations, and proposals relating to the issues considered for the enrichment of both the report of the Secretariat and the Report of the Special Rapporteurs on the subject.

ANNEX II

REPORT OF THE RAPPORTEUR OF THE SECOND SESSION, MR. KOJO Y. ASUAMAH, ON "INTERNATIONAL HUMANITARIAN LAW AND THE LAWS OF WAR", NEW DELHI 11TH FEBRUARY, 1999.

1. The Second Session of the Meeting was called to order at 3.00 by the Moderator Professor (Ms). Gulnihal Bozkurt under the Chairmanship of the President of the Committee, Dr. P.S. Rao, to consider the preliminary report on International Humanitarian Law and the Laws of War prepared by Professor Christopher Greenwood of the London School of Economics, whose absence at the meeting was sorely missed.

2. Presentations were made to the Session by Prof. B.S., Chimni (JNU), Dr. Zahra Noparast (Iran) and Mr. Umesh Kadam (ICRC).

3. In his contribution, Prof. Chimni expressed his gratitude for the opportunity to share his views on the report with the Committee. He stated that the key objective of the report was to conduct a review of the achievements and failures of the 20th Century and to identify problems which remained unresolved and to suggest how such problems might be addressed. The Report, he continued, concluded that no new laws were required but that existing laws should be made more effective.

4. Prof. Chimni's evaluation of the report identified what he called "the conceptual weaknesses" of the report. In the main, he identified the complete absence of some reference to the application of the relevant norms of International Humanitarian Laws and Laws of War to colonized peoples, the failure of report to show the multicultural roots of the rules of the laws of war and stressed that the laws of war were never intended to legitimize violence but to restrict or regulate the use of violence in the course of war. He also lamented the fact that the Laws of War had culminated in the development of even more

destructive weapons in total disregard of humanitarian considerations. In this regard, Prof. Chimni drew a distinction between the essentially humanitarian concerns which the ICRC promotes through the protection of the rights of individuals in times of war and the humanitarian which is invaded by its non-humanitarian character seeking to legitimize violence an a particular vision of world order.

5. Professor Chimni also expressed concern about the North-South divide which has affected the application of the Laws of War and wondered why some powerful countries should ignore the laws of war as a Vietnam and champion the establishment of tribunals for war crimes in Rwanda and former Yugoslavia whilst opposing the establishment of an International Criminal Court in the interest of resuming the application of international laws of war against its own people.

6. Finally, Professor Chimni drew attention to the inadequate examination of the relationships between International Human Rights Law and International Humanitarian Law in the context of internal conflicts (conflicts within States).

7. Dr. (Ms) Zahra Noparast's presentation essentially dealt with the need for international law to clarify the notion of the right of self-defence which tends to encourage States to resort to the use of force. It was argued that a sanctions regime coupled with a compulsory jurisdiction for the International Court of Justice to enforce compliance would have a restraining influence to those States which wage illegal wars under the guise of the right of self-defence. In this connection, Dr. Noparast expressed concern about the International customary definition of the right of self-defence, the vague manner in which the right of self-defence is defined in Article 51 of the Charter and the apparent changes which the concept has undergone. Referring to Prof. Greenwood's report which stipulates that the conditions of "necessity" and "proportionality" are requirements for the invocation of the right of self-defence, Dr. Noparast argued that it was necessary to have a time frame which would prevent arbitrary action in the use of the right of self-defence.

8. In his presentation, the Legal Officer of the ICRC Regional Delegation, Mr. Umesh Kadam, stated that the ICRC was in agreement with the conclusions of the Greenwood Report to wit - no new laws were required and that the effective implementation of existing laws remained the essential challenges today and tomorrow.

9. The ICRC representative emphasized that the terms "International Humanitarian Law" and the "Laws of War" did not reflect different areas of the law but, in effect, referred to the same thing. He referred to Article 51 of the Additional Protocol I which codifies the principle of proportionality and lamented the absence of a reference in the report relating to indiscriminate attacks where in spite of clear identification of military targets, civilians tend to suffer the consequences of such attack.

10. The representative also stressed the importance of discrimination of international humanitarian; law as espoused in the Geneva Conventions. The lack of implementation of existing international humanitarian law resulted from the lack of political will of States to fully apply the law and informed the meeting that the Advisory Service of the ICRC was addressing those concerns.

11. Finally, the representative informed the meeting of the impending 50th Anniversary of the Geneva Conventions on August 12, 1999 which would remain the cornerstone of protection for the victims of armed conflict and afford an opportunity for victims of war to share their experiences.

12. Before opening the floor for views and comments on the presentations made, the President stated that he agreed with Prof. Greenwood's emphasis on the protection of human; lives in armed conflict as well as the need to concentrate on new techniques for the effective compliance with existing laws.

13. Several participants suggested the conclusions of the Greenwood report to the effect that there was no need for new laws and stressed the need for the effective enforcement of existing International Humanitarian Law and Laws of War.

14. A suggestion was made by participants for the creation of an expert body to study the military manuals of armies throughout the world to facilitate the formulation of training programmes for military personnel which guaranteed adequate knowledge of International Humanitarian Law and the Laws of War for compliance in war situations.

15. In this regard, participants also suggested that dissemination of information on these laws should not be limited to military personnel but also to be general public, in the belief that an enlightened public opinion could positively affect violations of IHL in times of war. It was recommended that co-operation with ICRC in this regard would promote the objectives of the 50th Anniversary of the Geneva Conventions.

16. Participants also welcomed the establishment of war-crimes tribunals such as in Rwanda and former Yugoslavia and expressed concern about the delays between the apprehension of criminals, their trial and conviction. In this connection the UN Security Council's power to establish criminal courts as already demonstrated was highlighted.

17. Finally, the consensus emerged that whether it was International Humanitarian Law or Human Rights Law, the objective to protect human live and the vulnerable such as women and children in war situations remained the same. Participants also agreed that States should honour their obligations in the implementation of IHL and human rights laws.

ANNEX III

REPORT OF THE RAPPORTEUR ON THE THEME "DEVELOPMENT OF INTERNATIONAL LAW RELATING TO DISARMAMENTS AND ARMS CONTROL SINCE THE FIRST HAGUE PEACE CONFERENCE IN 1999".

1. The Third Session of the "AALCC Meeting to Consider the Preliminary Reports on the Themes on the First International Peace Conference" was chaired by Dr. P.S. Rao, President of the AALCC. The Moderator was Mr. Frank X. N'jenga, former Secretary General, AALCC and Dean, Faculty if Law, Moi University, Kenya. The key speakers were Dr. Raja Mohan, Dr. K. Subrahmanyam, and Professor V.S. Mani.

2. The Moderator said the armaments race during the last hundred years had destabilized the world community. In the light of this backdrop, he felt the Blix Report was an opportune development. He felt the Report was succinct and very clear in its historical disposition.

3. Professor Mani presented a paper entitled "The International Law of Disarmament: A Centennial Overview". Describing the subject as an important one, he wondered why the international legal community had stayed away. The Blix Report, in his view, chiefly focused on issues "concerning arms and disarmament". He however felt that the Report did not aim "to completely cover the issues or to examine all the Agreements...'. He felt the Blix Report could be divided into matters concerning:

1. Aims of the First Hague Peace Conference;

2. Focus on the time after the first Peace Conference;

3. Realization of the aims of the first Hague Peace Conference regarding disarmament and arms control; and

4. Common issues: seeking their solution.

4. The main thrust however he averred were on issues pertaining to compliance and verification of arms control and disarmament agreements. While appreciating the accumulated experience and first hand knowledge of Dr. Blix, he felt certain deficiencies of the Report needed to be highlighted and evacuated. In his view there were: (i) that most attempts at disarmament's have been tentative and partial with inadequate commitment on the part of State; (ii) the effort towards disarmament is underscored by mutuality of suspicion and distrust; (iii) the move towards disarmament have been a pragmatic step-by-step approach; (iv) Efforts towards nuclear disarmament have been discriminatory, especially the NPT regime which focuses on the ban on horizontal proliferation of weapons; (v) Furthermore, a discussion of non-proliferation must encompass issue of (oligopolistic) regimes like the London Club, Australia Club and the MTCR retime; (vi) The Blix Report had left untouched issues concerning the international transfer of armaments and related materials; (vii) the Report was largely an analysis of the verification and compliance mechanisms prevalent in disarmament agreements; and (viii) Lastly the Blix Report did not make an attempt to look into the legality of weapons. He concluded by suggesting some items for an agenda towards future disarmament efforts which would include:

1. Ban on nuclear testing coupled with an obligation to negotiate a treaty banning nuclear weapons.

2. Creation of reciprocal no first use arrangements among nuclear weapon States.

3. Stable non-use guarantees by Nuclear Weapon States to non-nuclear States.

4. Ending deployment of short range nuclear weapons.

5. Taking nuclear forces off alert.

6. The removal of nuclear warheads from delivery system (removal of hair trigger elements).

7. Control over fissionable material.

8. Ban/restrictions on development/production of new weapons.

9. Ban on first use of existing weapons of mass destruction.

10. Identification, and ban or restriction on the existing means and methods of warfare whose use violates Article 35 of Geneva Protocol I of 1977.

5. Mr. Subhramanyam felt that the title of the Blix Report "Development of International Law Relating to Disarmament and Arms Control since the First Hague Peace Conference" was misleading as it did not deal at al with the issue of legality of nuclear weapons, which had come up before the ICJ as an Advisory Opinion. In his view, the Blix Report also, did not speak about the 'legitimacy or the legality of the use of nuclear weapons'. A diabolical stand was adopted by the nuclear have, as there existed no obligation was regulation of nuclear weapons, when lesser weapons of mass destruction such as biological and chemical weapons were regulated upon. Furthermore, he felt that the Blix Report was silent on the important issue of nuclear weapon technology.

6. the most important event not considered by the Blix Report, he said, was the indefinite extension of the NPT after the 25 year review in 1995. This act, in his view, had once and for all legitimized nuclear weapons, in all its facets. the chief challenge before international lawyers, he felt, was to evolve ways and means to delegitimize this process.

7. Another issue, he touched upon related to the violation of a basic norm of the 1969 Vienna Convention relating to Law of Treaties, wherein obligations, arose when a State is a party to a treaty regime. In this regard, he felt the efforts of the Big Five nuclear powers to coerce India to adhere to the CTBT regime, violated the Law of Treaties.

8. Dr. Raja Mohan, while thanking the Committee for affording an opportunity to speak on this important topic, felt that security experts often felt international law, not germane to their discussions. However, he was quick to add, that it cannot be denied that international law regulated the use of force in international relations. The element of power prevalent in the international relations, he felt, often transcended the international legal processes. The challenge before international lawyers, he averred, was how to get around this dilemma. Considering the fact that, there was a discriminatory regime which created two sets of laws, one for the have an other for the have notes. The real challenge to international lawyers is to press for a "universal no first use treaty regime".

9. He felt, that the non-State actors, new entrants in the process of disarmament who could play a damaging role, especially after the collapse of the Soviet Union, where one never felt the need for a verification regime. Following these presentations, the floor was left open for discussions. the main points of discussion are briefly summarized as under:-

(a) There is an urgent need for a genuine universal disarmament regime.

(b) The Hans Blix Report does not cover important aspect - viz. Transfer and trade of nuclear technology.

(c) the strengthening of international law relating to disarmament, could be achieved only if international law is based on reciprocity as unilateralism has been the main stumbling block towards multilateral negotiations in addressing disarmament issues.

(d) Given the existence of a treaty regime prohibiting production, use and stockpiling of chemical and biological weapons, speakers questioned the differential approach to nuclear weapons, as both categories were weapons of mass destruction.

(e) A view was expressed that States should endeavour to have a "no first use treaty regime".

(f) Another view expressed was that the extension of NPT regime essentially calls for a de-legitimization of the nuclear weapons proliferation regime.

(g) A view was expressed that the report did not reflect on a number of relevant issues relating to the effects of infinite extension of NPT, evaluation of NPT regime, relationship between legal instruments created and complete disarmament and lack of future perspectives and direction towards disarmament in the next century.

ANNEX IV

STATEMENT ON BEHALF OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS MADE BY THE LEGAL OFFICER, ICRC REGIONAL DELEGATION, NEW DELHI

Mr. Chairman,

The ICRC is pleased to note that discussion on international humanitarian law is assuming a prominent place in the context of the Centennial Commemoration of the First International Peace Conference and also the United Nations Decade of International Law, I would like to convey the good wishes of my colleagues in Geneva to the AALCC for taking the initiative to organize the regional consultation to discuss the preliminary reports on the themes of the First International Peace Conference. The ICRC has studied with great interest these reports, particularly the report prepared by Professor Christopher Greenwood on international humanitarian law. This document thoroughly and objectively analyses the developments relating to different facets of this body of law. The ICRC is in agreement with most of the conclusions reached by Prof. Greenwood, especially the one identifying implementation of humanitarian law as today main challenge. The effective implementation of existing law, including the obligation to ensure its respect, is indeed the most pressing matter at present. We will revert to this issue later, but let me mention here that this conclusion counters arguments suggesting that existing humanitarian law is outmoded and inadequate to protect the victims of today's conflicts. The ICRC, for its part, is absolutely convinced that humanitarian law remains fully relevant.

Although, Mr. Chairman, we are in agreement with Prof. Greenwood's most of the conclusions, we would like to share a few thoughts and comments with Prof. Greenwood and also others who have studied the report, especially on this present occasion when we are having a critical look at the report.

Mr. Chairman, the report is titled as 'International Humanitarian Law and the Laws of War'. Perhaps the title may lead one to believe that international that international humanitarian law and laws of war are two different areas of law and some confusion regarding their content. In our view, both the terms, in effect, relate to the same thing these days. The term international humanitarian law, which has gained the approval of most publicists, has now become official in vie of the title of the Geneva Diplomatic Conference of 1974-77, on "the reaffirmation and development of international humanitarian law applicable in armed conflicts".

When the term 'humanitarian law' was first used to describe laws of war, it was said that it combined two ideas of different natures, one legal and the other moral. Indeed, the provisions constituting this discipline are, in fact, a transposition into international law of moral and more specifically of humanitarian concerns. Accordingly, the name, international humanitarian law, seems satisfactory.

Mr. Chairman, we agree with the view of Prof. Greenwood that Article 51 of the Additional Protocol I codifies the principle of proportionality, although it does not use that term (page 47). However, there is another equally significant principle that is also codified by Article 51 which prohibits indiscriminate attacks, which is not identified in the report. The principle of proportionality presupposes that a military objective has been identified and aimed at, but that the incidental damage is excessive compared with the military value of the target. However, the real problem that we face around the world today is that too many forces simply aim in the general direction of the "enemy" without isolating one or more military objectives. they simply do not care about the fact that civilians are there also - a fact of which they are fully aware and do not take a precaution of directing attacks at military objectives. Such blind attacks are certainly prohibited but do not clearly fall within either attacks aimed at civilians or disproportionate attacks. Such attacks are described in Article 51(4) of the Protocol which are in general considered as "indiscriminate attacks". We think that the report should make allusion to this point, which is very important in practice.

Mr. Chairman, let me draw your attention to one of the tests applied for determining the scope of application of the law of internal armed conflicts as mentioned in the report (page 60). Article 1(I) of the Additional Protocol provides that the Protocol applies to armed conflicts.

Which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

While commenting on this provision, the report says,

The requirement of territorial control means that the majority of internal armed conflicts fall outside the scope of Additional Protocol II, the application of which is confined to full scale civil wars of the kind which occurred in Nigeria in the late 1960s.

We have some doubts about this rather absolute affirmation, especially if one looks at the internal armed conflicts that occurred approximately during the last ten years, one discovers that in most cases, the armed opposition groups had indeed territorial control. Examples would be Mozambique Angola, Liberia, Sierra Leone, Gongo, Ethiopia, Somalia, Uganda, Sudan, Afghanistan, Sri Lanka, Cambodia, Tadjikistan, Chechnya, Azerbaijan, Armenia, Bosnia, Columbia etc. This list of course not exhaustive.

Mr. Chairman, another issue associated with the one just referred to is a conclusion of Prof. Greemwood that the comparatively high threshold for the applicability of the law of internal armed conflicts opened up the threat of a gap between the coverage of human rights treaties and the rules of that law (page 63). the gap is most likely to be widened, according to the report, because most human rights treaties permit derogation in case of national emergency. According to us the gap identified does not seem to be that important according to recent positions

in the field of human rights, as bodies implementing human rights treaties such as the United Nations Human Rights Committee, the European and American Court of Human Rights, stress that all rights apply at all times and that any derogations have to be strictly justified both as to their existence and as to their extent. As regards judicial guarantees, the importance of alternative safeguards are stressed by these bodies. It would therefore be useful to make a reference to the very restrictive conditions of derogation provided for in human rights treaties. In addition, most of the human rights instruments have incorporated the concept of inalienable or non-derivable "hard core" human rights which under any circumstances, shall not be derogated from or suspended. These non-derivable human rights come very close to some of the fundamental guarantees under the humanitarian law applicable to internal armed conflicts.

Mr. Chairman, in this connection, we appreciate that Prof. Greenwood considers it desirable to close that gap by adopting certain measures. Similar concerns led to production of the Declaration of Minimum Humanitarian Standards (the Turku Declaration) and other initiatives to elaborate a set of non-derivable standards drawn from both human rights law and the humanitarian law. The perception of the "gap" is today quite different compared to ten years ago when the Turku Declaration was drafted. The latter declaration would now seem a bit outdated. Therefore work on "Fundamental Standards of Humanity" as they are now called, is currently going on. The United Nations High Commissioner for Human Rights is worrying on this issue and is expected to produce a second report very shortly. Even is some principles are elaborated in course of time, it is always important to reaffirm existing law. In no way should such principles weaken today's hard law provisions.

Mr. Chairman, we appreciate the specific reference in the report (pages 74-75) to the need and importance of dissemination of international humanitarian law and to other measures which need to be taken in peacetime in order to ensure respect for this body of law when a conflict breaks out

and which might contribute to the creation of a culture of compliance. Prof. Greenwod had rightly referred to the duty of States to disseminate the provisions of relevant humanitarian law treaties. However, it might be useful to replace the reference to the relevant article from the Third Geneva Convention as an example with a more complete reference t the common article on dissemination found in all the four Geneva Conventions, namely, Article 47, 48, 127 and 144 of the first, second, third and fourth conventions respectively. A reference in this connection to article 83 of Additional Protocol I and article 19 of Additional protocol II would also be appropriate. However, a reference in the report to the role of Advisory services of the ICRC in International humanitarian law in disseminating this law may lead to some confusion. The Advisory Service is closely associated with national implementation of international humanitarian law.

Mr. Chairman, as mentioned earlier, we fully agree with Prof. Greenwood's conclusion that there is lack of implementation of existing international humanitarian law as a result of the lack of political will to fully apply the law. It is with this issue the Advisory Service of the ICRC is directly concerned with. The role and objective of this service is to secure the participation of the maximum number of states in international humanitarian law treaties. It also makes an attempt to advise States on all legal and administrative measures which they must take in order to comply with their obligations under the international humanitarian law. It is intended to supplement the governments' own resources by raising awareness of the need for implementing measures, to provide expert advice and to promote the exchange of information between governments themselves. In focusing specifically on legal advice to governments, it complements other ICRC activities aimed at increasing respect for international humanitarian law, notably its long standing dissemination activities.

Mr. Chairman, we now come to a very important recommendation made by Prof. Greenwood in his report (page 75). He has referred to the possibility of establishing a system of periodic reporting through an impartial body. In this regard, we

believe it might be helpful to recall that a proposal for the establishment of a possible reporting system for international humanitarian law had been raised in January 1995 by the Intergovernmental group of Experts for the Protection of War victims. This proposal was rejected by the majority of States that attended the Meeting. Instead, the experts proposed that States be encouraged to create national committees to advise their governments on implementation and dissemination of international humanitarian law, that States be invited to provide the ICRC with information regarding their efforts in the field of international humanitarian law implementation and dissemination and that the ICRC's capacity to provide advisory services to States in this regard be strengthened.

Mr. Chairman, in this connection it is also pertinent of note that further to the 26th International Red Cross and Red Crescent Conference, the National Red Cross European Legal Group put forward another proposal for a voluntary reporting procedure which is being currently examined. While the ICRC feels it is useful to explore all new initiatives which might serve to reinforce respect for international humanitarian law, it nevertheless considers that it would be premature to launch in the very near future an initiative to establish universal comprehensive reporting system, even if on a voluntary basis. In fact, many States have not only failed to adopt basic implementation measures such as legislation for repression of war crimes, legislation to protect the emblem of the red cross and red crescent, etc. What is more alarming is that many states may be unaware of their obligations under international humanitarian law. We, therefore, feel that it would be appropriate to focus primarily on ensuring the adoption of basic implementation measures through the already existing mechanisms and through, for example, the technical support from the ICRC Advisory Service on international humanitarian law, prior to considering the promotion of any new and perhaps more complex mechanism for ensuring adequate implementation of international humanitarian law. At present we are doubtful how far the proposed system will be acceptable to majority of states. However, when the time is ripe, such extra mechanism could well be useful.

Mr. Chairman, we agree with Prof. Greenwood's important conclusion that one of today's main challenge is not development of new rules, but adequate and effective implementation of the existing humanitarian law. However, at the same time we consider development of new norms of humanitarian law to meet the new humanitarian challenges equally important. In this connection, Mr. Chairman, the recently observed dynamic development of new norms reflects the willingness on the part of the community of states to constantly improve protection for the victims, for instance by banning "on humanitarian grounds" certain weapons, such as anti-personnel mines and binding lasers, as well as by creating an International Criminal Court which, in complement to the national courts, will help strengthen implementation of humanitarian law.

Mr. Chairman, may I now refer to an issue which is very closely associated with the process of revisiting the entire international humanitarian law, namely, the status of customary norms of humanitarian law at present. The ICRC has undertaken an extensive study on such customary norms in collaboration with experts from different part of the world. The preliminary findings of these experts are being examined by governmental experts. This research, which is important to the clarification of contemporary international humanitarian law, will be on the agenda of the 27th International Conference of the Red Cross and Red Crescent Movement. this conference "the high point of this exceptionally significant year from humanitarian law" will enable the International Red Cross and Red Crescent Movement to intensify its indispensable dialogue with the States party to the Geneva Conventions in regard to humanitarian action and implementation of humanitarian law.

Mr. Chairman, before I close, may I refer to one more development which is very closely associated with international humanitarian law. August 12, 1999 will mark the 50th Anniversary of the Geneva Conventions which, with their Additional Protocols, remain the cornerstone of protection for the victims of armed conflict. To mark the occasion, the ICRC has launched a world wide survey - the first of its kind-aiming

populations and persons affected by war. Its aim is to make people's voices heard by asking them to describe their personal experiences and express their opinions on principles limiting the use of force, as well as their expectations regarding what must be done to deal with such situations. We hope that this survey, whose slogan is "Even Wars have Limits" will spark a wide-ranging debate, to be carried on at the 27th International Conference and thereafter, on humanitarian law and the suffering caused by war.

Mr. Chairman, we hope that the reassessment of international humanitarian law on the occasion of the Centennial Commemoration and also the marking of the 50th Anniversary of the Geneva Convention will afford an opportunity to appreciate the importance and contribution of international humanitarian law, to reaffirm their faith in this law and to strengthen this law to make it more effective and useful to the New World order.

Mr. Chairman, on behalf of the ICRC, I thank you for giving us an opportunity to express our views on this occasion.

IV. EXTRA - TERRITORIAL APPLICATION OF NATIONAL LEGISLATION: SANCTIONS IMPOSED AGAINST THIRD PARTIES

(i) Introduction

At the 36th Session of the Asian African Legal consultative Committee (AALCC) the topic "Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties" was placed on the Provisional Agenda as a reference was made by the Government of the Islamic Republic or Iran in accordance with Article 4 (c) of the Statutes and sub-rule 2 of Rule 11 of the Statutory rules of the Committee. In an Explanatory Note submitted to the AALCC Secretariat the Government of the Islamic Republic of Iran had enumerated the following four major reasons for including this item: (i) that the limits of the exception to the principle of extraterritorial jurisdiction are not well established; (ii) that the practice of States indicates that they oppose the extraterritorial application of National Legislation; (iii) that extraterritorial measures infringe various principles of international law: and (iv) that extraterritorial measures, on the one hand, affect trade and economic co-operation between developed and developing countries and interrupt cooperation among developing countries, on the other.

The Explanatory Note *inter alia* requested the AALCC "to carry out a comprehensive study concerning the legality of such unilateral measures, taking into consideration the positions and reactions of various Governments, including the positions of its Member-States". The rationale for calling a comprehensive study of the legality of unilateral actions was that national legislation with extraterritorial effect violates the principles of international law including the impermissibility of unilateral imposition of sanctions. The Explanatory Note had maintained that "the actions of States to unilaterally exert coercive economic measures against other States have no foundation in international law. Various resolutions adopted by the United Nations organs affirm this point". It also demonstrated that the imposition of "unilateral sanctions

infringe upon the right to development" and that "the imposition of sanctions violate the principle .of non-intervention".

The preliminary study prepared by the Secretariat, and considered at the 36th Session (Tehran, 1997) of the AALCC, had pointed out that in the claims and counter claims that had arisen with respect to the exercise of extraterritorial jurisdiction the following principles have been invoked (i) principles concerning jurisdiction; (ii) sovereignty in particular economic sovereignty - and non-interference; (iii) genuine or substantial link between the State and the activity regulated; (iv) public policy and national interest; (v) lack of agreed prohibitions restricting States right to extend its jurisdiction; (vi) reciprocity or retaliation; and (vii) promotion of respect for law Notwithstanding the national interests of the enacting State, grave concern was expressed on the promulgation and application of municipal legislation whose extraterritorial aspects affect the sovereignty of other States.

While a growing number of other States have applied their national laws and regulations on extraterritorial basis, such fora as the General Assembly of the United Nations, the Group of 77, the Organization of Islamic Countries, the Inter-American Juridical Committee and the European Economic Community have in various ways expressed concern about promulgation and application of law and regulations whose extraterritorial effects affect the sovereignty of other States and the legitimate interests of entities and persons under their jurisdiction, as well as the freedom of trade and navigation.

The study prepared by the Secretariat drew attention to the opinions of such august bodies, as the Inter-American Juridical committee, the Juridical Body of the Organization of American States[1] and the International Chamber of Commerce.[2]

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1 For details see 35 *International Legal Materials* (1996) p.1322.

2 Dieter Lange And Gary Borne (Eds.): *The Extraterritorial Application of National Laws* (ICC Publishing S.A. 1987).

The preliminary study had demonstrated that the topic covered a broad spectrum of inter-State relations, that is to say, political, legal, economic and trade.

It recalled in this regard that the AALCC study on the "Elements of Legal Instruments on Friendly and God-Neighbourly Relations Between the States of Asia, Africa and the Pacific" had *inter alia* listed 34 norms and principles of international law, conducive to the promotion of friendly and good Neighbourly relations. The 34 principles enumerated *inter alia* included; (i) independence and state sovereignty; (ii) territorial integrity and inviolability of frontiers; (iii) legal equality of States; (iv) non-intervention, overt or covert; (v) non-use of force; (vi) peaceful settlement of disputes; (vii) peaceful coexistence; and (viii) mutual cooperation.[3]

The study also pointed out that the use of unilateral action, particularly those with extraterritorial effects, can impede the efforts of developing countries in carrying out trade and macro-economic reforms aimed at sustained economic growth.

At that Session it was submitted that it might perhaps, be necessary to delimit the scope of inquiry into the issue of extraterritorial application of national legislation in determining the parameters of the future work of the Committee on this item. It had asked for consideration to be given to the question whether it should be a broad survey of questions of extra territorial application of municipal legislation and, in the process, examining the relationship and limits between the public and private international law on the one hand and the interplay between international law and municipal law on the other. It recalled in this regard that, at the 44th Session of the International Law Commission, the

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3 AALCC Secretariat Study on "Elements of a Legal instrument on Friendly and Good Neighbourly Relations Between States of Asia. Africa and the Pacific "Reprinted in *AALCC Combined Report of the Twenty Sixth to Thirtieth Sessions* (New Delhi. 1992) p.192.

Planning Group of the Enlarged Bureau of the Commission had established a Working Group 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 and that one of the topics included in the pre-selected lists was the Extraterritorial Application of National Legislation.

The Secretariat had proposed that in determining the scope of the future work on this subject, the Committee may recall that the request of the government of the Islamic Republic of Iran is to carry out a comprehensive study concerning the legality of such unilateral measures i.e. Sanctions imposed against third Parties, "taking into consideration the position and reactions of various governments, including the position of its Member States". It was proposed that in considering the future work of the Secretariat on this item Member-States should consider sharing their experiences with the Secretariat on this matter.

In the course of deliberations on this item at the 36th Session a view was expressed that sanctions could only be imposed by the Security Council after it had determined the existence of a threat to peace, breach of peace and act of aggression and that unilateral sanctions were violative of the Vienna Declaration and Programme of Action of 1993[4] which inter alia recognize the right to development. It was pointed out that unilateral sanctions were violative of the principle of non-intervention.

It was also stated that national laws having extraterritorial effect had no basis in international law and that such laws primarily aimed at individuals or legal persons, were violative of the principle of non-intervention political independence and territorial sovereignty enshrined in several

[4] The World Conference on Human rights held in Vienna in 1993 had *inter alia* reaffirmed the right to development, as established in the Declaration on the Right to Development as a universal and inalienable right and an integral part of fundamental human rights.

treaties. Such acts it was observed were aimed at weaker developing countries.

Different views were expressed such as: "extraterritorial application of national legislation would affect international trade" and "in a changing scenario of globalizaton of trade and privatization of economies extraterritorial application of national laws would affect interdependence".

Also that extraterritorial application of national legislation infringed the soverign right of states, violated the principles of non-intervention and affected the economic and political relations amongst states. Elaborating that sanctions would disturb the North-South relations the member States were called upon to voice their protest.

The United Nations General Assembly 'Friendly Relations Declaration' was recalled and it was stated that although no State had the right to intervene directly or indirectly in the internal or external Affairs of other State and every State had an inalienable right to choose its political economic, social and cultural systems without interference in any form by another state, large and powerful States were using it as a weapon. It was pointed out that a particular country had within a short span of four years imposed around sixty-four unilateral sanctions against thirty-five countries. In the present era, the notion of inter-dependency among states had become quite obvious and the principles of non-intervention and non-aggression, the two principles of the well known five principles of peaceful coexistence have become all the more obvious and were universally accepted by nations big or small rich or poor. It was categorically stated that extraterritorial application of national laws had no basis whatsoever legal, moral or political. It blatantly violated the rules of international law and the rules of civilised law and amounts to infringement of internal affairs of other countries.

It was observed that the Helms-Burton Act relating to trade with Cuba. Kennedy-D'Amato Act relating to Libya, Iran and Iraq were examples of extraterritorial application of

national law in the form of sanction against third parties. Even though superficially one might think that these national laws relate to actions by individuals, their object is the imposition of sanctions against States.

It was also pointed out that extraterritorial application of national legislation was not entirely a new thing but had deep roots. It is the legacy of the colonial period. While the AALCC as a legal consultative body was not in a position to talk about political issues, underlying the extraterritorial application of national legislation it however could consider the legality of such actions. Under the United Nations Charter and international law, the Member-States of the United Nations had the obligation to support and implement the sanction measures taken by the Security Council against the law-breakers, in accordance with Chapter VII of the United Nations Charter.

As to the future course of action to be followed by the AALCC, it was pointed out that due to the complexity of the topic of extra-territoriality, an overall study of the subject was ruled out. To this end, it was felt that organizing one or two seminars in the inter-sessional period would be very useful.

Recognizing the significance, complexity and implications of "Extra Territorial Application of National Legislation: Sanctions Imposed Against Third Parties", the Secretariat was requested to monitor and study developments in regard to the Extraterritorial application of National Legislation: Sanctions Imposed Against Third Parties and urged Member States to share such information and materials that would facilitate the work of the Secretariat. The Secretary General was requested to convene a seminar or meeting of experts and, to ensure a scholarly and in-depth discussion, by inviting a cross section of professionals thereto.

The Secretary General was also requested to table a report of the seminar or meeting of experts on the subject at the next session of the Committee; and it was decided to inscribe the item "Extra-territorial Application of National

Legislation: Sanction Imposed Against Third Parties" on the Agenda of the 37th Session of the Committee.

In fulfilment of this mandate the Secretariat of the AALCC organized, with the financial assistance of the Government of the Islamic Republic of Iran a two day seminar in Tehran in January 1998. A Group of Experts from the Asian and African and experts from outside the region were invited to participate.

A Background Note prepared by the Secretariat for that Seminar included an overview of the United States: Iran and Libya Sanctions Act of 1996. References were also made to some of the earlier US laws such as the anti-trust legislation, the Regulations concerning Trade with USSR, 1982, and the National Defense Authorization Act, 1991. The legality of the two 1996 US enactments (the Helms Burton Act and the Kennedy-D'amato Act) were examined in terms of their conformity with the peremptory norms of international law; the law relating to counter-measures; the law relating to international sanctions principles of international trade law; the law of liability of States for injurious consequences of acts not prohibited by international law; impact of unilateral sanctions on the basis human rights of the people of the target state; and issues of conflicts of laws such as non-recognition, *forum non-convenience* and other aspects of extraterritorial enforcement of national laws.

The deliberations touched on a range of State responses to counter the possible impact of the US legislation in particular and the unilateral imposition of sanctions through extra territorial application domestic legislation in general. References were made in this regard to the response of the Inter-American Juridical committee and the European Union and the Measures discussed included 'blocking' legislation, Statutes with 'claw-back' provisions and laws providing for compensation claims, at the national level. At the internatonal level, the responses noted included diplomatic protests, negotiations for exemptions, waivers in application of the projected sanctions, negotiations for Settlement of disputes,

use of WTO avenues and measures to influence the drafting of legislation in order to prevent its adverse extra-territorial impact.

The deliberations revealed a general agreement that the validity of any unilateral imposition of economic sanctions through extra territorial application and national legislation must be tested against the accepted norms and principles of international law. The principles discussed included those of sovereignty and territorial integrity, sovereign quality, non-intervention, self-determination, and the freedom of trade. It was generally agreed that both the Helms-Burton Act and the Kennedy D'amato Act contravened such basic norms as the right to development and the principle of permanent sovereignty over natural resources.

It was agreed that the rules of prohibited counter measures as formulated by the International Law Commission in its draft articles on State Responsibility must be applied to determine the legality of counter measures purported to be effected by the extra territorial application of the two aforementioned impugned statutes. These rules include the prohibition of injury to third states; the rule of proportionality; and the rules relating to prohibited counter measures incorporated in Article 13 of the draft articles on State Responsibility as framed by the International Law Commission.

While considering the issue of countermeasures, it was emphasized that the presiding peremptory norm must be the peaceful settlement of disputes. The discussion highlighted the inter play between counter measures and non-intervention, and between counter measures and unilateral imposition of economic sanctions. The participants agreed that counter measures could not be a facade for unilateral imposition of sanctions in respect of matters that fell within the purview of Chapter VII of the Charter of the United Nations or the sanctions competence of other international organizations. It was argued that the differences between counter measures and sanctions of the nature of international sanctions should be recognized.

The debate revealed a divergence of views on three main issues viz. (i) whether the subject should be confined to secondary sanctions through extraterritorial application of national laws; (ii) the distinction between the prescriptive jurisdiction and the enforcement jurisdiction of every state; and (iii) the applicability of WTO disputes settlement procedure to resolve disputes relating to Helms-Burton Act and the Kennedy D'Amato Act in their extra-territorial application.

The Seminar had also addressed the question of the future work to be undertaken and a number of proposals were advanced by the participants for the consideration of the AALCC. The proposals with regard to the future work on the subject include (i) further study on all aspects of the subject and (ii) the formulation of principles.

Thirty-eighth Session: Discussion

The Deputy Secretary General Mr. Mohammad Reza Dabiri introduced the topic and recalled that the item 'Extraterritorial Application of National Legislation: Sanctions Imposed Against Third Parties" had been placed on the agenda of the committee following a reference made by the Government of the Islamic Republic of Iran. Tracing the work of the Committee at its 36th and 37th Sessions on this topic, he recalled that the 36th Session had recognized the significance, complexity and serious implications of the topic and had requested the convening of a seminar in the intersessional period. Accordingly, a Seminar on "Extraterritorial Application of National Legislation: Sanctions Imposed Against Third Parties" was convened in Tehran in January 1998. The Report of the Seminar, he stated, had been considered at the 37th Session of the Committee. He informed the Committee that the Secretariat had printed the Seminar Proceedings, following the receipt of a grant from the Islamic Republic of Iran. He also recalled that the Committee had requested the Secretariat to study and examine the issue of "executive orders".

With reference to the brief of documents presented before the 38th Session at Accra Mr. Dabiri stated that it was more broad based where apart from looking into municipal legislation, the document had considered and surveyed the local acts of USA, which sought to impose unilateral sanctions. The secretariat brief also enunciated four categories of executive orders. In this regard, he expressed the hope that the Session would guide the Secretariat on the future course of this topic.

On the issue of local acts of States having extraterritorial effects he felt that as a few of them had been declared *ultra vires* of the constitution of the land, their validity could also be questioned as international law which guides relations between States requires conformity with certain basic norms.

Imposition of unilateral sanctions or countermeasures that ensue, Mr. Dabiri added, must be amicably settled without resulting in economic difficulties to States. In this regard, he mentioned the Banana dispute between the US and EU, which had brought about a trade conflict between States and also questioned the non-discriminatory rule based regime of the WTO. He expressed the hope that the deliberations at the Session would help in determining the future work of the Secretariat on this item.

The *Delegate of the Islamic Republic of Iran* expressed his gratitude to the Deputy Secretary General for his introduction and the Secretariat for preparing background notes. He felt that the changing world scenario with increased globalization and liberalization called for respect of rule of law and friendly relations amongst States. He also highlighted the fact that the use of force as an instrument of national policy is prohibited under international law. In such a scenario, the continued use by some States of unilateral sanctions against States, particularly third parties, in his opinion, was illegal.

Drawing an analogy with laws of neutrality, he felt that third parties interests too, i.e. rights and duties must be

protected when economic sanctions are imposed He added that extraterritorial application of an essentially domestic legislation, violated the Charter of the United Nations and also a number of other human rights instruments, which guaranteed right to development and also the right to life.

Speaking on the legality of unilateral sanctions, he said that only the Security Council was authorized to impose sanctions in furtherance of its role to maintain or restore international peace and security in accordance with international humanitarian law. On the eve of the millennium and the close of the UN Decade of International law, there should be an international community where unilateralizing in international relations is done away with as it disrupts peaceful economic relations amongst states. He expressed the hope that the deliberations on this important topic amongst Asian African States would reinforce the need for pacific settlement of disputes and not resort to unilateral sanctions, which violate the sovereign equality and independence of States.

The *Delegate of India* felt that the topic touches areas relating to political, legal and trade aspect of international relations. She reiterated her country's stand that the Committee should strive, to study the 'legal and not political effects of the application of extra territorial sanctions and the effect on Third Parties. She was of the view that the discussion presented in the Seminar report showed that extra territoriality in itself was not an issue, but the fact that it did not fit in the traditional classification based on nationality, passive personality, protective principle, universality and the effects doctrine, created difficulties.

Extra territorial law, in her view, violated Third States interests on terms of trade and also human rights. She expressed the view that consent of States alone is the basis of international law and international cooperation and unilateralism can not solve international problems. Furthermore, the delegate said that extraterritorial application of national legislation violated the principle of non-intervention

and the Declaration Relating to Friendly Relations and Cooperation Amongst States, the Declaration on the Right to Development, the Vienna Declaration on Human Rights and the Charter of Economic Rights and Duties of States. Moreover, she added that such laws also violate the provisions of GATT and WTO.

However, she expressed the view that the topic was complex and certain issues such as those relating to the distinction between prescriptive and enforcement jurisdiction, extra-territorial jurisdiction, civil, criminal and trade matters, transfer of technology, sanctions and counter measures, need to be further studies. Besides, extra-territoriality the interface between international law and national law, public international law and private international law, she said, also needs to be looked into.

She expressed satisfaction that the Secretariat had chosen to focus attention on executive order or presidential determinations as her country had been made a target on many such matters. An executive order, in her view, was violative of the principle of non-discrimination provided in GATT/WTO retime, and the disputes arising therefrom lead to the erosion of the multilateral trading system which is rule based and aimed at ensuring stability in international trade relations.

The *Delegate of Myanmar* appreciated the fact that the topic under consideration was very important for his country. Tracing the historic origin and the ethnicity of his country, he said that his people had lived in unity despite the problem of armed insurrection. Despite this, he said his country was on the path to economic progress, wherein the private sector played an important role in attracting foreign investment in the country. He further added that his country was actively pursuing efforts to foster regional and global cooperation.

He expressed concern that despite all their efforts, some countries such as the United States had imposed unilateral sanctions against them. Commenting on the Massachusetts

Burma (Myanmar) Law of 1996, he said the Legislation was already struck down by a District Court which held that the State of Massachusetts was "infringing on the federal government's power to regulate foreign affairs". Finally, he expressed the hope, that the AALCC as a legal body, could play an important role in pointing out the illegality of the US action in imposing unilateral sanctions.

The *Delegate of the People's Republic of China* stated that her delegation believed that coercive measures imposed against third parties including restrictions on trade and investment were very likely to create long term effect on international transactions. In the light of the various rules established by the international community regarding free trade, the legal admissibility of such extraterritorial application of national legislation was questionable. Her Government, she stated, believed that disputes between states should be settled peacefully in accordance with the principles of mutual respect for each other's sovereignty and non interference in each other's internal affairs and that it was to advisable to resort to frequent sanctions which will lead to new disputes and friction. She expressed the hope that all the parties concerned would settle their disputes through bilateral or multilateral negotiations, dialogue and consultations on the basis of equality and mutual respect.

(ii) Decision on "the Extra-territorial Application of National Legislation: Sanctions imposed Against Third Parties"

(Adopted on 23.04.1999)

The Asian-African Legal Consultative Committee at its Thirty-eighth Session

Recalling the reference made by the Government of the Islamic Republic of Iran and its Resolutions 36/6 of 7th May, 1997 and 37/5 of 18th April 1998;

Appreciative of the printed report of the seminar on the Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties held in Tehran in January 1998;

Expressing its appreciation to the Government of the Islamic Republic of Iran for hosting the seminar on the Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties and for the financial grant for the printing of the papers and report of the seminar;

Having considered the Secretariat brief on the Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties as set out in Doc. AALCC/XXXVIII/Accra/99/S.6;

Having heard the statement of the Deputy Secretary General as well as the interventions of delegates of Members States;

Recognizing the significance, complexity and the implications of the Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties;

1. *Requests* the Secretariat to continue to study legal issues relating to the Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties and to

examine the issue of executive orders imposing sanctions against target States.

2. *Urges* Member States to provide relevant information and materials to the Secretariat; and

3. *Decides* to inscribe the item "Extra-territorial application of National Legislation: sanctions Imposed Against Third Parties" on the agenda of the Thirty-ninth Session of the Committee.

(iii) Secretariat Study: Extra-territorial Application of National Legislation Sanctions Imposed Against Third Parties

The Committee at its 37th Session (new Delhi, 1998) considered the Report of the Seminar on the Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties, held in Tehran, the Islamic Republic of Iran, in January 1998. That Report had pointed out that the discussions at the Seminar had revolved around a broad spectrum of politico-legal issues and focused on a broad range of legal and policy aspects of the subject mainly in relation to two United States enactments, namely the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, 1996 (commonly referred to as the Helms-Burton Act), and the United States Iran and Libya Sanctions Act 1996, (generally referred to as the Kennedy D'Amato Act).

It may be stated that the Secretariat has in the intervening period since the 37th Session (New Delhi, 1998) has with the financial assistance of the Government of the Islamic Republic of Iran published the Report and Proceedings of the Tehran seminar. The Report incorporates the Papers prepared for and oral presentations made by the Group of Experts invited to the Seminar. Apart from the inaugural and closing statements made by the then President, Dr. M. Javad Zarif, and the Secretary General, the Report includes full text of the Report of the Rapporteur.

The Committee at the New Delhi Session took note of the Report of the Tehran Seminar and reiterated the significance, complexity and the implications of the Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties. It requested the Secretariat to continue to study the legal issues relating to the topic.

It may be recalled that whilst introducing the item at the 36th session (Tehran, 1997) the then Assistant Secretary

General had observed that although jurisdiction in matters of public law character is territorial in nature some States are, however, known to give extraterritorial effect to their municipal legislation which has resulted in conflict of jurisdictions and resentment on the part of other States. Civil Law countries exercise jurisdiction over their nationals for offenses committed even while they were abroad. Among the Common Law Countries Untied Kingdom law allows such jurisdiction in select cases. The United States of America, however, exercises jurisdiction in a wide variety of cases. The National Association of Manufactures has stated that "resort to unilateral sanctions may be justified in some cases; it may be rationalized in many more. But it can rarely, if ever, be explained..."

The United States of America has armed itself with a plethora of laws which have hitherto allowed the Administration to extend its jurisdiction and impose unilateral sanctions against more than 70 States.[5] According to report of the Latin American Economic System (SELA), which groups 28 Latin American and Caribbean States, 76 States put up with or are seriously threatened by one or more trade sanctions. Unilateral trade sanctions severely threaten or punish 68 percent of the world population. The President's Export Council report on sanctions listed 73 States which, as of

[5] The targeted States include Afghanistan, Algeria, Angola, Armenia, Azerbaijan, Bahrain, Bangladesh, Belarus, Belize, Burma, Burundi, Cambodia, Canada, China, Columbia, Costa-Rica, Cuba, Djibouti, Egypt, Gambia, Georgia, Guatemala, Haiti, Honduras, Islamic Republic of Iran, Iraq, Italy, Japan, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Laos, Lebanon, Liberia, Libya, Maldives, Mauritania... Mexico, Moldova, Morocco, Nigeria, North Korea, Oman, Pakistan Panama, Paraguay, Qatar, Romania, Russia, Rwanda, Saudi Arabia, Somalia, Sri Lanka, Sudan, Syria, Taiwan, Tajikistan, Tanzania, Thailand, Turkmenistan, Uganda, Ukraine. United Arab Emirates, Uzbekistan, Vanuatu, Venezuela, Vietnam, Yemen, Federal Republic of Yugoslavia, and Zaire. In addition to these States unilateral sanctions have also been targeted at other newly independent States of the erstwhile Soviet Russia and *India*. In addition to these States. *Indonesia and Malaysia* are considered to be among the possible targets.

January 1997, had been subjected to some form of unilateral sanctions.

A report commissioned and published by the United States National Association of Manufactures (NAM) had, in March 1997, revealed that "from 1993 through 1996, 61 US laws and executive actions were enacted authorizing unilateral sanctions for foreign policy purposes. Thirty-five countries were specifically targeted".[6] The report had concluded that all economic sanctions "should be multilateral except in the most unusual and extreme circumstances.

Senator Jesse Helms, one of the promoters of the Helms Burton Act, however, has questioned the validity of the report of the National Association of Manufacturers.[7] According to him "between 1993 and 1996, the Congress passed and the President signed a grand total of five new sanctions laws: the Nuclear Proliferation Prevention Act, 1994; the Cuban Liberty and Democratic solidarity Act of 1996; the antiterrorism and Effective Death Penalty Act of 1996; the Iran Libya Sanctions Act. 1996; and the Free Burma Act. 1996." He goes on to emphasize that during "the same period, the President imposed just four new sanctions: declaring Sudan a terrorist state; banning imports of munitions and ammunition from China; tightening travel-related restrictions, cash remittance levels, and the sending of gift parcels to Cuba (restrictions that have since been lifted); and imposing a ban on new contractual

[6] See A Catalog of New US Unilateral Economic Sanctions For Foreign Policy Purposes 1993-96 (with analysis and Recommendations), March 1997. The Catalog was prepared under the direction of Professor Barry Carter of Georgetown University Law School. The analysis and recommendations were prepared by Marino Marcich of the NAM Trade and Technology Policy Department. For the text of the Catalog visit http:/www.usaengage.org/studies/nam.html

[7] The list of administrative actions taken by individual government agencies was compiled by the Georgetown University Law Center.

agreements or investments in Iran".[8] On the other hand, the former Secretary of State, Henry A. Kissinger, has observed that "these congressionally mandated sanctions are threatening to place American policy into a straitjacket".

Reasons for Imposition of Unilateral Sanctions

It may be stated that the reasons for the imposition of unilateral sanctions have ranged from boycott activity[9] to the issue of worker rights[10] and have hitherto included such other issues as communism[11], transition to democracy[12] environmental activity, expropriation[13] harbouring war criminals, human rights,[14] market reform, military aggression, narcotics activity, political stability; proliferation of weapons of mass destruction and terrorism.[15] The Federal Legislation invoked to impose unilateral sanctions and or impose secondary boycott have included the Andean Trade Preference Act; the Antiterrorism and Effective Death Penalty Act, 1996 (Antiterrorism, 1996): the Arms Export Control Act (AECA); the Atomic Energy Act; the Cuban Democracy Act, 1992; the

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[8] Senator Jesse Helms: "What Sanctions Epidemic?: U.S. Business 'Curious Crusade", Foreign Affairs, Jan-Feb. 1999.

[9] See the Foreign Relations Act. 1994.

[10] See the Andean Trade Preference Act.

[11] Aimed at Cuba and North Korea. See the Cuba Regulation and the North Korea Regulations.

[12] See the Cuban Democracy Act of 1992.

[13] The Helms-Burton Act. 1996.

[14] During 1993-96 human rights and democratization were the most frequently cited objectives foreign policy and 13 countries were specifically targeted with 22 measures adopted.

[15] The Iran Libya Sanctions Act. 1996. The Former Representative Toby Roth criticized the Iran-Libya Sanctions Act as "good politics... but bad law. Its only effect he said "so far had been to unify the European Union, all 15 members, against the US policy toward Iran and Libya".

Cuban Liberty and Democratic Solidarity Act, 1996 (Helms-Burton or LIBERTAD Act); the Department of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1990 (Commerce Appropriations, 1990); the Department of Defense Appropriations Act 1987 (Defense Appropriations Act 1987); the Export Administration Act; the Export-Import Bank Act ("Ex-IM"); the Fisherman's Protective Act 1967; the Foreign Assistance Act (FAA); foreign Relations Act; the Foreign Relations Authorization Act; the Foreign Operations, Export, Financing and Related Programs Appropriation Act, 1995; the General System of Preferences Renewal Act (GSP); the High Seas Drift Net Fisheries Enforcement Act (Drift Net Act); the Internal Emergency Economic Powers Act (IEEPA); the Internal Revenue Code; the Internal Security and Development Cooperation Act, 1985 (ISDCA); the International Financial Institutions Act; the Iran-Iraq Non Proliferation Act, 1992; the Iran and Libya Sanctions Act, 1996; the Iraq Sanctions Act, 1990; the Marine Mammal Protection Act, 1972 (Marine Act); the Narcotics Control Trade Act,[16] the National Defense Authorization Act, 1996 (Defense Authorization Act, 1996); the Nuclear Non-proliferation Act, (NNPA) 1994: the Omnibus Appropriation Act, 1997 (1997 Omnibus); the Spills of War Act; the Trade Act 1974 (Trade Act); Trading With The Enemy Act (TWEA).

Executive Orders/Presidential Determinations

During 1997-98 there have been four instances of unilateral imposition of sanctions by Executive Orders and Presidential Determinations. These include Executive Order 13047 of May 21, 1997 invoking a prohibition on new investment in Burma (Myanmar); Executive Order 13067 of November 3, 1997, imposing a comprehensive trade embargo on Sudan; Presidential Determination No. 98-22 of May 13, 1997, prohibiting the sale of specific goods and technology and United States Bank loans to the Government of India,

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[16] The uncertified drug producing/transit countries are Afghanistan, Burma. Colombia, Iran, Nigeria and Syria.

terminating sales of defence articles and design and construction equipment and services, and shutting down Export -Import Bank (Ex-Im), Overseas Private Investment Corporation (OPIC) and TDA; and Presidential Determination No.98-XX of May 30, 1998, prohibiting the sale of specific goods and technology and United States Bank loans to the Government of Pakistan, terminating sales of defence articles and design and construction equipment and services, and shutting down Ex-lm, OPIC and TDA.

State and Local Sanctions Acts

In addition to the Federal legislation State and Local Governments have been increasingly inclined over the last year and a half to impose sanctions against foreign countries in response to human rights practices. Some 12 US States, countries and cities have sought to establish their own measure against other countries and have imposed restrictions against States ranging from Myanmar to Switzerland. Thus, following the imposition of United States investments sanctions on Myanmar in May 1997[17] a dozen or so local governments restricted the granting of public contracts to companies that do business with Myanmar. These include the Commonwealth of Massachusetts, the Cities of San Francisco and Oakland, California and several other Governments which have enacted "selective purchasing ordinances" against domestic and foreign companies that do business with Myanmar. Some States have been contemplating similar procurement restrictions against companies that deal with Indonesia.

(a) The "Massachusetts Burma Law" of 1996

The "Massachusetts Burma Law" of 1996[18] was characterized by the United States District Court of the States

[17] See Executive Order 13047 of May 20. 1997. In imposing the investment ban the President is said to have exercised authority given by an amendment to the fiscal year 1997 Foreign Operations Appropriation Act.

[18] See Massachusetts Act of June 25, 1996. The State of Massachusetts admitted before the District Court of Appeal that

of Massachusetts as infringing "on the federal government's power to regulate foreign affairs. "In reaching its conclusion the Court had *inter alia relied on an amicus curiae* brief filed by the European Union.[19]

In its ***amicus curiae*** brief the European Union had called to the Court's attention the following points: (i) the Massachusetts Burma Law interferes with the normal conduct of EU-US relations; (ii) the Massachusetts Burma law has created a significant issue in EU-US relations including raising questions about the ability of the United States to honour international commitments it has entered into in the framework of the World Trade Organization ("WTO"); and (iii) failure to invalidate the Massachusetts Burma Law risks a proliferation of similar non-federal sanctions laws, aggravating these effects. As regards the first point it was stated that the Massachusetts Burma Law "constitutes a direct interference with the ability of the EU to cooperate and carry out foreign trade with the United States... The Massachusetts Burma Law is thus aimed at influencing the foreign policy choices of the Union and its Member States, and at sanctioning the activities of EU companies which are not only taking place in a third country but which are also lawful under EU and Member States' laws".

As to the impugned Massachusetts Burma Law having created an issue of serious concern in EU-US Relations the *amicus curiae* brief stated that the "Massachusetts Burma Law charts a very different course. It is a secondary boycott-- an extraterritorial economic sanction that it targeted not at the

the Statue "was enacted solely to sanction Myanmar for human rights violations and to change Myanmar's domestic policy".

[19] See the judgment of the Court of November 4, 1998 in *National Foreign Trade Council vs Charles D. Baker, in his official capacity as Secretary of Administration and Finance of the Commonwealth of Massachusetts and Philmore Anderson III in his official capacity as a State Purchasing Agent for the Commonwealth of Massachusetts.*

regime-but at nationals of third countries that may do business with Burma.

Finally, the European Union expressed its concern that the failure to enjoin the Massachusetts Burma Law will lead to the proliferation of US State and Local sanctions laws and stated that at least six US municipalities had enacted measures purporting to regulate business activities in Nigeria. Tibet or Cuba and 18 States and local governments had considered or "were considering similar measures restricting business ties to Switzerland, Egypt. Saudi Arabia, Pakistan, Turkey, Iran North Korea, Iraq, Morocco, Laos, Vietnam, Indonesia or China". It emphasized that "the United States and the European Union had expended considerable effort in seeking to resolve their differences over U.S. extraterritorial economic sanctions" and that "this effort has not yielded progress on the issue of extraterritorial sanctions" imposed by state and local governments, a shortcoming that is of considerable concern to the U.S." It went on to recall that in "recognition of this danger of proliferation of sanctions measures, the EU-US agreed at the EU-US Summit on May 18, 1998 on a set off principles covering the future use of sanctions in the context of the Transatlantic Partnership on Political Co-operation. this included agreeing that the EU and the US "*will not seek or propose, and will resist, the passage of new economic sanctions legislation based on foreign policy grounds which is designed to make economic operators of the other behave in a manner similar to that required of its own economic operators* and that such sanctions will be targeted directly and specifically against those responsible for the problem.[20]

The validity of punitive measures against Myanmar adopted by state and municipal governments and ordinance in the United States have been analyzed under various provisions

[20] See the *Amicus Curiae* Brief of August 13. 1998 filed by the European Union in support of Plaintiff National Foreign Trade Council in the *National Foreign Trade Council vs Charles D. Baker and Philmore Anderson III.* Emphasis Added.

of the United States Constitution and it has been said that such local measures are constitutionally infirm.[21] It has been pointed out in this regard that "Article VI of the Constitution provides that the laws and treaties of the United States are 'the Supreme Law of the Land' and prevail over, or preempt, state and local enactments. Thus any local law that purports to regulate or govern a matter explicitly covered by federal legislation is preempted, even if it is an area otherwise amenable to state regulation".[22]

The Banana War

The United States had last year accused the European Union of not complying with a ruling of the World Trade Organization (WTO) calling upon it to change its banana import regime, which had been ruled illegal because it favoured the produce of African, Caribbean and Pacific States (hereinafter called the ACP States), and had discriminated against imports of fruit marketed mainly by United States companies in Latin America". The European Union on its part believes that it has rectified the situation by making changes to its regime with effect from January 1, 1999 but the amendments are seen as being derisory by the United States, which has argued that it is within its rights to retaliate.

In October 1998 the United States Administration announced a series of steps that would lead to the imposition of trade sanctions under Section 301 of the Trade Act of 1974 against the European Communities by March 1999 in retaliation for what the US claims to be an incorrect implementation of the DSB[23] recommendations in the bananas

[21] David Schmahmann & James Finch: "The Unconstitutionality of State and Local Enactments in the United States Restricting Trade Ties With Burma "*Vanderbilt Journal of International Law* Vol.30, (1997).

[22] Ibid.

[23] The Complainants in the dispute before the dispute Settlement Body of the WTO had included Ecuador. Guatemala, Honduras, Mexico and the United States of America.

dispute. The United States of America had announced retaliatory 100% tariffs on 520 million dollars worth of imports of EC products should it find that the EC had failed to implement the DSB recommendations. A unilateral determination by the US Administration would violate the fundamental obligations of the WTO's Dispute Settlement Understanding. A unilateral decision to restrict imports from the EC would also violate substantive obligations such as those incorporated in Article I. II and XI of GATT. 1994 An overwhelming majority of the WTO's members [24] are opposed to United States embarking on unilateral action on the issue.

The threat to retaliate against the EU results from a unilateral judgment that the EU has not complied with a WTO ruling "condemning" EU banana import regime and the conflict has raised serious issues of interpretation of WTO laws and brought to light ambiguities in the WTO rule book.

Fifty-Third Session of the General Assembly

The General Assembly at its recently concluded 53rd Session had expressed its concern at the continued promulgation and application of laws and regulations the extraterritorial effects of which affect the sovereignty of other States, the legitimate interests of entities or persons under their jurisdiction and the freedom of trade and navigation. It took note of the declarations and resolutions of different intergovernmental forums, bodies and Governments that expressed the rejection by the international community and public opinion of the promulgation and application of such regulations and had reiterated its called to all States to refrain from promulgating and applying laws and measures the extraterritorial effects of which affect the sovereignty of other States, the legitimate interests of entities or persons, "in conformity with their obligations under the Charter of the

[24] At present 133 States are members of the World Trade Organization.

United Nations and international law, which *inter alia* reaffirmed the freedom of trade and navigation".[25]

Comments and Observations

As the Catalog of New US Unilateral Economic Sanctions for Foreign Policy Purposes 1993-96 revealed, the United States is resorting increasingly to unilateral economic sanctions against a broad range of countries for a wide variety of reasons. Apart from the increase in the instances of unilateral imposition of sanctions has been the wrinkle of "secondary boycott measures, which extended the reach of the United States law to oversees companies doing business in the targeted countries". the unilateral imposition of sanctions is at the core of the problem of extraterritorial application of national legislation.

Owing to its extraterritorial reach the imposition of unilateral sanctions for foreign policy purposes has often caused a new set of commercial problems with allies as it did in the instance of both the Helms-Burton Act and the D'Amato-Kennedy Act. The abrogation, annulment or revocation of extraterritorial provisions and Acts would require a new Act.

Just as the validity or constitutionality of municipal, local and state laws must be tested with the framework and parameters of the Constitution of that State the *vires* of the national legislation which imposes unilateral sanctions and has extraterritorial reach must be examined in the context of the provisions of the charter of the United Nations and other international instruments which that State has negotiated and ratified. The preliminary study prepared by the Secretariat had emphasized this point and had sought to demonstrate that national legislation with extraterritorial reach contravenes not

[25] See General Assembly Resolution 53/4 of 22 October 198 on the "Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba".

one or two but several norms and principles of contemporary international law.

Many of these international instruments had been negotiated, concluded and brought into force to establish a rule based system and to promote the rule of law in international relations. This is particularly true to international economic and trade relations where such legislation poses a challenge to the avowed objective of the international community to establish a rule based system to ensure stability and predictability in international trade relations. National legislation with extraterritorial reach, explicit implicit, undermines the further redevelopment and growth of the rule based system that the members of the international community is endeavouring to evolve. Such legislation apart from sapping the principle of rule of law in inter-state relations poses a challenge nay a threat, to the avowed objective of the international community to make international law the language of international relations in the next millennia.

V. REPORT ON THE WORK OF THE INTERNATIONAL LAW COMMISSION AT ITS FIFTIETH SESSION

(i) Introduction

The International Law Commission (ILC) established by General Assembly Resolution 174 (III) of 21 September 1947 is the principal organ to promote the progressive development and codification of international law. The Commission held the first part of its fiftieth session in Geneva from May 12 to June 12, 1998 and the second part in New York from July 20 to August 14, 1998. There were six substantive topics on the agenda of the aforementioned Session of the Commission. These included:-

(I) State Responsibility;

(II) International Liability for injurious Consequences Arising Out of Acts Not Prohibited by International Law;

(III) Reservations to Treaties;

(IV) State Succession and its Impact on the Nationality of Natural and Legal Persons;

(V) Diplomatic Protection; and

(VI) Unilateral Acts of States

It may be recalled that the General Assembly at its 52nd Session had, by operative paragraph 3 of its resolution 52/156 of December 15, 1997, *inter alia*, recommended that the International Law Commission continue its work on the topics in its current programme.

The Commission at its fiftieth Session considered all the above mentioned items and some notes and comments on these topics may be found in the latter part of this Report.

As indicated in the report on the work of its forty-ninth session the first part of the Fiftieth session of the ILC session was devoted to discussion of the various reports, whereas the second part, held in New York was used for the adoption of draft articles with commentaries and of the report of the Commission.

As regards "State Responsibility", the Commission commenced the task of second reading of the draft articles on the basis of the comments of member States on the draft articles as adopted by the Commission on first reading and the first report of the Special Rapporteur, Mr. James Crawford The first report of the Special Rapporteur dealt with general issues relating to the draft articles as adopted on first reading, the distinction between "crimes" and "delictual responsibility, and articles 1 to 15 of Part One of the draft articles. The Commission established a Working Group to assist the Special Rapporteur in the consideration of various issues during the second reading of the draft articles. The Commission decided to refer draft articles 1 to 15 to the Drafting Committee. The Commission took note of the report of the Drafting Committee on draft articles 1, 3, 4, 5, 6, 7, 8, *bis*. 9, 10, 15, 15 *bis* and A. The Commission also took note of the deletion of the text of 6 draft articles viz. 2, 6 and 11 to 14. For details of the draft articles as adopted by the Drafting Committee of the ILC see *Part I* of the present report.

The Commission has invited the views of the General Assembly on whether with respect to Part One of the draft articles, the conduct of an organ of a State is attributable to that State under draft article 5, irrespective of the *jure gestionis* or *jure imperii* nature of the conduct? As regards Part Two of the draft articles, the Commission has sought guidelines as to the appropriate balance to be struck between the elaboration of general principles concerning reparation and the more detailed provisions relating to compensation?

As regards "International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law", the Commission after consideration of the

First Report of the Special Rapporteur, Dr. P.S. Rao, adopted on first reading a set of 17 draft articles on Prevention of Transboundary Damage from Hazardous Activities. The Commission decided to transmit the draft articles together with the commentaries thereon, as adopted on first reading, to Governments for comments and observations. The details of the draft articles as adopted on first reading by the ILC are set out in *Part II* of the present report.

The Commission has referred to the General Assembly two issues related to the "International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law". The issues referred are (i) for the purpose of developing and applying the duty of prevention, what kind of regime should be made applicable to activities which actually cause harm and (ii) in a prevention regime whether the duty of prevention should be treated as an obligation of conduct or failure to comply and be met with suitable consequences under the law of State responsibility or civil liability or both where the state of origin and the operator are both accountable for the same? If the answer to the question is in the affirmative, what type of sanctions are appropriate or applicable?

The first of these issues is based on the fact that the Commission intended to separate activities which have a risk of causing significant harm from those which actually cause such a harm for the purpose of developing and applying the duty of prevention to the latter type of activities. It is generally understood that the duty of prevention is an obligation of conduct and not of result and non-compliance with duties of prevention in the absence of any damage actually occurring would not in itself give rise to any liability. The Commission having decided to recommend a regime on prevention, separating it from a regime of liability, it has to address the question whether the duty of prevention should be treated as an obligation of conduct or failure to comply be visited with suitable consequences under the law of State responsibility or civil liability or both.

With respect to the topic of "Reservations of Treaties", the Commission considered the third report of the Special Rapporteur, Professor Alain Pellet, concerning the definition of reservations (and interpretative declarations). The Commission adopted seven draft guidelines on definition of reservations, subject of reservations, instances in which reservations may be formulated, reservations having territorial scope, reservations formulated when notifying territorial application, reservations formulated jointly and on the relationship between definitions and admissibility of reservations,. For details of the draft guidelines as adopted on first regarding by the ILC see *Part III* of the present report.

The Commission has invited comments and observations from Governments on whether unilateral statements by which a State purports to increase its commitments or its rights in the context of a treaty, beyond those stipulated by the treaty itself, ought or ought not to be considered to be reservations. The Commission would appreciate receiving any information or materials relating to State practice on such unilateral statements.

As regards the topic of "Nationality in Relation to the Succession of States" the Commission considered the fourth report of the Special Rapporteur. Mr. Vaclav Mikulka, and established a Working Group to consider the question of the possible orientation to be given to the second part of the topic dealing with the nationality of legal persons. The Commission has once again emphasized the desirability of receiving comments and observations on the practical problems raised by the succession of States affecting the nationality of legal persons to assist the Commission in its future work. It has reiterated its request to Governments for written comments and observations on the draft articles on Nationality of natural persons in relation to the succession of States adopted on first reading in1997, so as to enable it to begin the second reading of the draft articles at its next session.

The Commission has recommended that the General Assembly invite States having undergone a succession of

States, to indicate, how the nationality of legal persons was determined; what kind of treatment was granted to the legal persons which, as a result of the succession of states became "foreign legal persons'.

The Commission considered the preliminary report of the Special Rapporteur, Mr. M. Bennouna, on "Diplomatic Protection" which dealt with the nature of diplomatic protection and the nature of the rules governing the topic. It established a Working Group to consider possible conclusions which might be drawn on the basis of the discussion as to the approach to the topic and also to provide directions in respect of issues which should be covered by the report of the Special Rapporteur for the next Session of the Commission. The Working Group suggested that the Special Rapporteur, in its second report, should concentrate on the issue raised in Chapter One "Basis for Diplomatic Protection" of the outline proposed by the last year's Working Group".

The Commission has sought comments and observations by Governments on the conclusions drawn by the Working Group. The Commission would also request Governments to provide the Commission with the most significant national legislation, decisions by domestic courts and State practice relevant to diplomatic protection.

As regards the topic "Unilateral Acts of States" the Commission examined the preliminary report of the Special Rapporteur Mr. Rodriguez Cedeno. At the instance of the Special Rapporteur the Commission reconstituted the Working Group that it had established at the Forty-ninth Session. The discussion concentrated mainly on the scope of the topic, the definition and elements of unilateral acts, the approach to the topic and the final form of the Commission's work thereon. There was general endorsement for limiting the scope of the topic to unilateral acts of States issued for the purpose of producing international legal effects and for elaborating possible draft articles with commentaries on the matter. The Commission requested the Special Rapporteur, Mr. Rodriguez Cedeno, when preparing his second report, to submit draft

articles on the definition of unilateral acts and the scope of the draft articles and to proceed further with the examination of the topic, focussing on aspects concerning the elaboration and conditions of validity of the unilateral acts of States.

The Commission has invited views and comments on whether the scope of the topic should be limited to declarations, as proposed by the Special Rapporteur in his first report, or whether the scope of the topic should be broader than declarations and should encompass other unilateral expressions of the will of the State. Comments have also been invited on whether the scope of the topic should be limited to unilateral acts of States directed at or addressed to other States, or whether it should also extend to unilateral acts of States issued to other subjects of international law.

Thirty-eighth Session: Discussion

Introducing the brief of documents prepared by the Secretariat the Deputy Secretary-General Mr. Mohammad Reza Dabiri stated that there was as many as six substantive topics on the agenda of the 50th Session of the Commission. These included (I) State Responsibility; (ii) International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law; ; (iii) Reservations to Treaties; (iv) State Succession and its Impact on the Nationality of Natural and Legal Persons; (v) Diplomatic Protection; and (vi) Unilateral Acts of States. He said that the Commission at its 50th Session had considered all these items and notes and comments on these subjects were set out in the brief of documents prepared by the Secretariat. He pointed out that the first part of the 50th session of the Commission had been devoted to discussion of the reports of the Special Rapporteurs whereas the second part had been used for the adoption of draft articles with commentaries and of the report of the Commission.

Referring to the item "State Responsibility", the Deputy Secretary General pointed out that the Commission commenced the task of second reading of the draft articles on the basis of the comments of member States on the draft

articles as adopted by the Commission on first reading and the first report of the Special Rapporteur, Mr. James Crawford. The details of the work of the Commission were set out in Part I of the brief of documents.

On the issue of the International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law, the Commission had adopted on first reading a set of 17 draft articles on Prevention of Transboundary Damage from Hazardous Activities. The details of the draft articles as adopted on first reading by the ILC were set out in Part II of the Secretariat brief. The Commission had two issues related to the International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law, to the General Assembly.

With respect to the topic "Reservations to Treaties", Mr. Dabiri recalled that the Commission had adopted seven draft guidelines on definition of reservations, object of reservations, instances in which reservations may be formulated, reservations having territorial scope, reservations formulated when notifying territorial application, reservations formulated jointly and on the relationship between definitions and admissibility of reservations. Details of the draft guidelines as adopted on first reading by the ILC were set out in Part III of the brief, he stated.

As regards the topic "Nationality in Relation to Succession of States" he stated that the Commission had considered the question of the possible orientation to be given to the second part of the topic dealing with the nationality of legal persons. It had emphasized the desirability of receiving comments and observations on the practical problems raised by the succession of States affecting the nationality of legal persons to assist the Commission on its future work and had reiterated its request to Governments for written comments and observations on the draft articles on Nationality of natural persons in relation to the succession of States so as to enable it to begin the second reading of the draft articles at its next session.

The other two subjects, viz. Diplomatic Protection and the Unilateral Acts of States, on the agenda of the Commission were at a preliminary stage of their consideration. Finally, the Deputy Secretary General said that the Commission at its 50th Session had identified "The Law of Environment" as one of the topics which the Commission could consider in future. A feasibility study prepared by Ambassador Chusei Yamada together with the preliminary list of issues to be studied could be found in Part VIII of the Secretariat brief.

The Representative of the International Law Commission (Ambassador Chusei Yamada) in his statement conveyed the greetings of the Chairman of the ILC Ambassador Baena Soares and offered a broad overview of the current work programme of the Commission. The ILC presently had seven substantive items on its agenda. As regards the topic of the "State Responsibility", he informed that the Commission had began the second reading of the draft articles last year. The notion "crime of State" as provided in article 19 in Part I of the Draft Articles, he said, was a contentious issue and there existed a wide measure of support for the idea that the criminal liability of states should not be dealt within the regime of state responsbility, and thus for the deletion of Article 19 from the draft. Yet, he clarified that this does not mean the existence of the "crime of state" in internatioinal law is to be denied. The Commissioin intends to complete its second reading by end of the year 2001.

With respect to the topic "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law", he recalled that the earlier decision of the Commission to separate the question of "Prevention of Transboundary Damage Arising from Hazardous Activities". Last year, the ILC had completed the first reading of 17 draft Articles. Though some countries particularly from the developing world considered that the core issue is that of "liability" rather than "Prevention", Ambassador Yamada was of the view that it would be difficult to expect any early solution on the issue. In his opinion, it would be more conducive to

approach the issue of "liability" from the perspective of environmental law.

As regards the ILC work on "Reservations to Treaties", he said that the Commission was primarily formulating guidelines on the subject based on State practice and it did not intend to alter the reservation regime established by the Vienna Conventions on Treaties. The work of the Commission on the two new topics "Diplomatic Protection" and "Unilateral Acts of States" were yet in a preliminary stage.

The first reading of a set of 27 draft articles on "Nationality of Natural Persons in relation to the Succession of State" was completed in 1997 and the ILC was currently awaiting comments from States.

Recalling the Draft convention on Jurisdictional, Immunities of States and their Property adopted by the ILC in 1991, Ambassador Yamada stated that the ILC would at its forthcoming session, pursuant to a decision by the General Assembly inviting the Commission to consider outstanding issues and present preliminary comments on this topic, engage in the study of this matter.

Drawing attention to proposals before the ILC on a long-term programme for environmental law, he stated that the Commission welcomes any input from the AALCC in this regard. Expressing satisfaction at the traditional close cooperation between ILC and AALCC, he regretted that the participation of Asian and African-States in the process of codification and progressive development of international law had been less than that by the Western States. In this context, he said that the ILC welcomes more active representation of Asian and African States through AALCC.

Recalling the Asian-African contribution to the progressive development and codification of international law the *Delegate of the Arab Republic of Egypt* urged Member States of the AALCC to bear in mind Ambassador Yamada's call for

wider participation in the affairs of the international legal community.

Speaking on substantive topics on the agenda of the ILC, he said that the fiftieth session witnessed the commencement of the second reading of the topic of State Responsibility. Commending the good work done by Special Rapporteur Professor James Crawford, he added that the subject matter was linked to that of state Liability. He expressed the view that before a convention or draft text on the topic is concluded, AALCC Member States must strive to study the elements of liability and settlement of disputes covered under the topic.

The ILC had completed a first reading of the topic of International Liability for Injurious acts not Prohibited by International Law. The Topic had been divided into two sub-topics namely prevention of trnasboundary damage caused by hazardous substances and liability. He stated that the main issue in the former related to the study of the principles of precaution, polluter pays, equity and justice; and as regards the latter, that is liability, entailed compensation.

As regards the topic of Reservation to Treaties, he said that the 37th session of the AALCC held in New Delhi had exhaustively dealt with the topic. Articles 19-23 of the Vienna Convention on the Law of Treaties, which covered reservation, he felt, was a time-tested and flexible regime. The final text, which may be adopted on the topic, should reflect the AALCCviews, as was also desired by Prof. Alain Pellet, the Rapporteur on the topic.

On the topics of Diplomatic Protection and Nationality of Persons arising out of succession of states, he felt that they were recently placed on the agenda of the ILC and hence AALCC Member States must actively participate and send their replies on the topic to the ILC.

Furthermore he commended the work of Rapporteur Rodriguez Cedeno on the topic of Unilateral Acts of States. He

expressed the view that the topic was complex and reliance had to be placed on the limited state practice and customary laws available, by the Rapporteur. Thorough discussions on all these topics, he felt, were necessary for evolving a distinct Asian-African view.

The Delegate of the Islamic Republic of Iran, thanked Ambassador Yamada, Member of the ILC for his presentation on the work of the Commission at its fiftieth Session. He also expressed his appreciation to the AALCC Secretariat for its concise documentation on this item. Expressing appreciation for the valuable work of the Special Rapporteur Professor Alain Pellet on the formulation of a set of Guidelines relating to "reservation to treaties", he said that this Guide would be of great practical value in filling up any gap left in the Vienna regime on treaties. Highlighting the practical utility of the Vienna regime on treaties, he said the delicate balance between the customary rules of integrity and universality should be preserved. On the item relating to Diplomatic Protection, the delegate complimented the Special Rapporteur for the preparation of the preliminary report. His delegation shared the view that the discussion of the PCIJ in the Mavrromatis Palestine Concessions Case embodies the customary origin of diplomatic protection. This concept, in his view, had practical significance for international relations-more particularly – in terms of investment and protection agreements. On the topic of "Unilateral Acts of States", the delegate said that in light of the divergent forms of acts of states and the absence of any coherent doctrine encompassing all types of unilateral acts, the ILC's work on developing rules or guidelines on this topic would add clarity to aspects of state actions and help ensure stability in international relations.

The Delegate of India commended the work of the ILC at its 50th Session, and said that it was a productive session wherein all the seven topics on the agenda of the ILC were considered.

On the topic of "Diplomatic Protection", she stated that it had evinced considerable interest, wherein the focus was

now on individual rights as opposed to the right of the state of nationality. On the topic of Unilateral Acts of States, the delegate felt that they have legal effect, and so far as they create obligations for the state performing the act. Furthermore, she added that the unilateral acts do not represent the source of international law, but only international obligations. Speaking on the scope of the act, she felt that the Commission had narrowed the scope. While supporting the approach recommended by the Special Rapporteur Mohammed Bennouna, that acts of organizations not giving right to any legal obligations could be excluded she added that acts of state are regulated by the law of treaties or laws of state responsibility, should also be excluded.

As regards 'State Responsibility' the delegate applauded the commencement of the second reading of the draft articles on the subject. This reading, she felt, should be based on universal consensus amongst states. The delegate supported the basic point that state responsibility would give certain rights to the injured state, but called for a differentiation between legal injury and material damage. As regards the notion of an injured state the delegate felt that a clarification needs to be made with respect to *erga omnes* obligations and *jus cogens*, whereby there existed a graduated response to designating an injured state, having the right to respond to crime by means of counter measures. In such a situation, the delegate felt that countries could abuse this right to take counter measures, in the name of protecting a community interest.

As regards, the subject of 'Reservations to Treaties', the delegate recalled the special meeting on the subject, held under the auspices of the AALCC. She supported the approach of the Commission that the preparation the guide, should not in any way disturb the Vienna regime on reservation to treaties. While commending the work of the special Rapporteur on the subject, she called for intensifying efforts towards more substantive result. On the topic of nationality of legal persons in matters of state succession, the delegate felt that the topic should be taken up cautiously.

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

(Adopted on 23.4.99)

The Asian-African Legal Consultative Committee at its Thirty-eighth Session

Having taken note with appreciation of the Report of the Secretariat on the work of International Law Commission at its Fiftieth Session as set out in Document No. AALCC/XXXVII/ACCRA/99/S.1.

Having heard the statement of the Deputy Secretary General;

Expresses its appreciation on the comprehensive statement made by the Representative of the ILC on the work of the Commission;

1. *Affirms* the significance of the contribution of the ILC to the progressive development of international law and its codification;

2. *Commends* the International Law Commission on the progress of work on the items on its agenda;

3. *Requests* the Secretary General to bring to the attention of the International Law Commission at its 51st session the views expressed on the different items on its agenda during the Thirty-eighth Session of the AALCC; and

4. *Decides* to inscribe on the agenda of its Thirty-ninth Session an item entitled "The Report on the Work of the International Law Commission at its Fifty-first Session"

(ii) Secretariat Study: Report of the International Law Commission on the Work of its Fiftieth Session

Long-term Programme of Work of the Commission

It will be recalled that a Planing Group established by the Commission for the Forty-ninth Session[1] had considered the Work Programme of the Commission for the present quinquennium had taken the view that substantial progress should be made on those topics on which substantive work had already been undertaken and that it would be desirable to complete the first or the second reading, as the case may be, of those topics within the present quinquennium. It had invited the Working Groups on the respective topics to consider the matter and to make recommendations.

The Planning Group had established a Working Group on the Long Term Programme of Work[2] to consider the topics which may be taken up by the Commission beyond the present quinquennium. The Working Group while emphasizing the role of the General Assembly in the selection of topics recommended that the selection of topics particularly within the Commission should be guided by the following criteria:-

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[1] The Planning Group was composed of Mr. J. Baeba Soares (Chairman), Mr. M. Bennouna, Mr. J. Crawford, Mr. L. Ferrari Bravo, Mr. R. Goco, Mr. Q. He, Mr. L. Illueca, Mr. J. Kataka, Mr.I. Lukashuk, Mr. V. Mikulka, Mr. D. Opertti-Badan, Mr. G. Pambou-Tchivounda, Mr. A. Pellet, Mr. B. Sepulveda, Mr. B. Simma, Mr. D. Thiam and Mr. Z. Galicki (ex-officeio member).

[2] The Working Group on the long-term programme of work established at the Forty-ninth Session of the Commission was composed of Mr. I.V.Lakashuk (Chairman); Mr. J. Baena Soares; Mr. Ian Brownlie; Mr. C. Dugard; Mr. L. Ferrari Bravo; Mr. R. Goco; Mr. Qizhi He; Mr. A. Pellet; Mr. B. Simma; Mr. Chusei Yamada and Mr. Z. Galiki (ex officio member).

(a) that the topic should reflect the requirements of States in respect of the progressive development and codification of international law;

(b) that the topic is sufficiently advanced in stages in terms of State practice to permit progressive development and codification;

(c) that the topic is concrete and feasible for progressive development and codification.

It had also proposed that the Commission should not restrict itself to traditional topics but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole. While a process for the selection of topics within the Commission was outlined the selection of topics, on the basis of the above mentioned criteria, would be made at the fiftieth session of the Commission and the selected topics will be presented to the fifty third session of the General Assembly, in1998, together with an indication of how the Commission intends to proceed with the study of each topic.

The Commission at its Fiftieth Session has identified "The Law of Environment" as one of the topics which the Commission could consider in the future.

All the items currently on the agenda of the Commission are of immense interest to the Asian African Legal Consultative Committee. The Committee had organized, within the administrative arrangements of its 37th session, a Special Meeting on the Reservations to Treaties. A report on the special meeting convened in New Delhi in April 1998 to consider the Preliminary Conclusions on 'Reservations to Normative Multilateral Treaties', Including Human Rights Treaties adopted by the International Law Commission at its forty ninth session was thereafter submitted to the Commission at its recently concluded fiftieth session.

The item Law of Environment that the Commission proposes to take up for progressive development and codification is also of great interest to the Committee. The item is proposed to be considered in the course of the meeting of the Legal Advisers of Member States to be convened at the United Nations headquarters in New York during the fifty third session of the General Assembly. The item is also likely to be debated at a special meeting to- be convened within the administrative arrangements of the 38th Session of the Committee scheduled to be held in Accra, Ghana, in early 1999.

I. State Responsibility

It will be recalled that the General Assembly at its fifty-first session had by its Resolution 51/163 drawn the attention of the Governments to the importance, for the International Law Commission, of having their views on the draft articles on State Responsibility adopted on first reading by the Commission at its forty-eight session, and urged them to present in writing their comments and observations by 1 January 1998, as requested by the Commission.

The Commission at its Forty-ninth session decided to establish a Working Group. The Working Group on State Responsibility, *inter alia*, proposed that the Commission appoint a Special Rapporteur for the topic and the Commission accordingly appointed Mr. James Richard Crawford, Special Rapporteur for the topic.

At its fifty-second session the General Assembly recommended that the International Law Commission continue its work on the topics in its current programme, including State Responsibility. At its fiftieth session the Commission had before it the comments and observations received from Governments on the draft articles provisionally adopted by the Commission on first reading.[3] Also before the Commission was

[3] A/CN4/488 and Add. 1 and 2.

the first report of the Special Rapporteur, Mr. James Crawford.[4] The report was divided into two parts and dealt with general issues relating to the draft articles, the distinction between "crimes" and "delictual" responsibility. It also dealt with draft articles 1 to 15 of Part One of the draft articles as adopted on first reading.

Presenting his Report the Special Rapporteur identified five general issues relating to the draft articles viz. (i) the distinction between primary and secondary rules of state responsibility; (ii) the scope of the draft articles; (iii) the inclusion of the detailed provisions on counter measures and dispute settlement; (iv) the relationship between the draft articles and other rules of international law; and (v) the eventual form of the draft articles.

In presenting these issues the Special Rapporteur recalled that the distinction between the primary and secondly rules of state responsibility had formed the basis of the Commission's work since 1963. He recalled in this regard that "it is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequence of the violation. Only the second aspect of the matter comes within the sphere of responsibility proper". The purpose of the secondary rule was to lay down the framework within which the primary rules would have effect in so far as situations of breach were concerned. Although it was a coherent distinction it was nevertheless sometimes difficult to draw. He accordingly suggested that the Commission's aim should be to lay down the general framework within which the primary substantive rules of international law would operate in the context of State responsibly.

As to the scope of the draft articles the Special Rapporteur suggested three matters that in his opinion required elaboration. These were (i) reparation, particularly the

[4] A/CN4/490 and Add. 1 – 6.

payment of interest; (ii) *erga omnes* obligations, which were presently dealt with in draft article 40, paragraph 3; and (iii) responsibility arising from joint action of States or what is known in some legal systems as joint and several liability. Although some draft articles dealt with the issue they did so somewhat haphazardly. During the debate on the issue of this scope of the draft articles it was suggested that "State Responsibility Under International Law" would perhaps be more juridically precise and emphasize the international law element of his responsibility.

With regard to the inclusion of detailed provisions on counter measures and dispute settlement the Special Rapprochement, Mr. James Crawford, noted down that some governments had expressed concerns regarding the inclusion of the detailed provisions on counter measures in part Two and on dispute settlement in Part Three of the draft articles and that the Commission would consider these issues at a later stage.

Apropos, the relationship between the draft articles and other rules of international law he noted that some Governments believed that the draft articles didn't fully reflect their residual character and had therefore suggested that draft article 37 on *lex specialis* be made into a general principle. The proposal seemed valid, except possibly as to issues of responsibility arising out of obligations of a *jus cogens* character. The Rapporteur had accordingly proposed that the Commission discuss the draft articles on the assumption that, where other rules of international law, such as specific treaty regimes, provided their own framework for responsibility, that framework would ordinarily prevail.

As regards the eventual form of the draft articles the Special Repporteur observed that the Commission had not generally decided this issue until it had completed consideration of matter. On the other hand in certain other topics such as Reservations to Treaties and Succession in respect to nationality the decision had been made earlier. The draft articles on state responsibility had been drafted as a

neutral set of articles that were not designed either as a convention or a declaration. Recognizing that the dispute settlement issues relating to counter measures in Part two could be considered independently of the question of the form of the draft article, he felt, would need to take a position on this question when considering the dispute settlement provisions in Part Three which could be included in a Convention but not a Declaration.

In the First Part of the Report which addressed the issue of the distinction between "crimes" and "delictual" responsibility,[5] the Special Repporteur indicated that draft article 19 (1) indicated the irrelevance of the subject matter of the obligation in determining the existence of a breach of a wrongful act. While this proposition was already clear from draft article 1, draft article 19 (4) defined an international delict as anything that was not a 'crime'. Draft Article 19 (2) defined an international crime as an internationally wrongful act which resulted from by a State of an international obligation so essential for the protection of the fundamental interests of the international community that its breach was recognized as a crime by the community as a whole. Paragraph 2 of draft article 19 was thus problematic.

Draft Article 19 (3) in the opinion of the Special Rapporteur was defective for seven reasons which included (I) it failed to define crimes; (ii) its obscurity made it impossible to know what, if anything was a crime; (iii) because it was merely indicative; (iv) it was not exclusive; (v) it subjected the notion of crimes to numerous qualifications; (vi) it provided a series of examples which, because of those qualifications, were not examples at all; and (vii) it contradicted paragraph 2 by introducing a new criterion of the seriousness of the breach.

The Special Rapporteur's examination of the treatment of State crimes in the draft articles as adopted on first reading also included the comments of governments on state crimes;

[5] See A/CN4/Add.1-3.

the existing international law on the criminal responsibility of states; and the relations between the international criminal responsibility of states and certain cognate concepts. He drew attention to five possible approaches for dealing with international crimes of states. The approaches to international crime of States proposed by the Special Rapporteur included (a) the approach embodied in the present draft articles; (b) the replacement by the concept of "exceptionally serious wrongful acts"; (c) a full-scale regime of State criminal responsibility to be elaborated in the draft articles; (d) the rejection of the concept of State criminal responsibility; and (e) the exclusion of the notion of criminal responsibility of States from the draft articles, without prejudice to the general scope of the draft articles and the possible further elaboration of the concept of "state crimes" in another text. The approach of separating the question of the criminal responsibility of states from the questions relating to the general law of obligations addressed in draft articles, while recognizing the possible existence of crimes and the corresponding need to elaborate appropriate procedures for the international community to follow in responding thereto would, the Special Rapporteur said, be consistent with all legal systems which treated criminal responsibility separately. It would also facilitate the elaboration of the special procedure required by international standards of due process.

The Commission at its fiftieth session established a Working Group to assist the special Rapporteur in the consideration of various issues during the Second Reading of the draft articles.

As mentioned earlier the International Law Commission adopted a set of 10 articles relating to Chapter One entitled General Principles and Chapter Two on Acts of State under International Law. The following section sets out brief notes and comments on the draft articles adopted at the fiftieth session.

Part One of the draft articles as adopted, on first reading together with commentaries thereto, in 1980 is in principle

divided into five chapters. Chapter 1 entitled General Principles comprised 4 articles devoted to the definition of a set fundamental principle of the draft articles "origin of State responsibility" be replaced by "basis of responsibility" sense the term origin was somewhat unusual and had a broader connotation than merely an inquiry into the issues of responsibility.

Of the four draft articles adopted on first reading in 1980 the Special Repporteur was of the opinion that the provisions of draft Article 2, entitled "possibility that every state maybe held to have committed an internationally wrongful act", were a complete truism which had never been denied. Its denial would amount to a denial of the principle of equality of states and, indeed, of the whole system of international law. Besides its provisions dealt not with the topic of international responsibility but rather with the possibility of such responsibility. Accordingly, draft article 2 on the Possibility that every State may be held to have committed an internationally wrongful act has been deleted.

Draft article 1 on "Responsibility of a State for its internationally wrongful acts "stipulates that every internationally wrongful act of a State entails the international responsibility of that State. The provision is intended to cover all internationally wrongful conduct constituting a breach of an international obligation, whether arising from an act of commission or omission. There was no general requirement of fault or damage for a state to incur responsibility for an internationally wrongful act. This provision is intended to cover all internationally wrongful conduct constituting a breach of an international obligation whether arising from act of commission or omission or failure to act.

Draft 3 entitled "Elements of an internationally wrongful act of State" provides that there is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.

Draft article 4 on the "Characterization of an act of a State as internationally wrongful is governed by international law and such characterization is not affected by the characterization of the same act as lawful by internal law. The characterization of an act as unlawful is an autonomous function of international law not contingent on characterization by national law and unaffected by the characterization of the same act as lawful under national law. This, however, does not mean that internal law is irrelevant to the characterization of conduct as unlawful. The characterization of an act as unlawful is an autonomous function of international law not contingent on characterization by national law and unaffected by the characterization of the same act as lawful under national law.

The Special Rapporteur has proposed that consideration be given to changing the order of the draft articles such that draft article 3 would precede draft article 1.

Chapter Two of Part One of the draft articles on the **Act of State under International Law** as adopted on first reading in 1980 is concerned with the subjective element of the internationally wrongful act, and the provisions of draft articles 5 to 15 are addressed to the determination of the conditions in which particular conduct must be considered as an "Act of State" under international law. The Special Rapporteur observed that chapter two of the draft articles defined the conditions in which conduct was attributable to a state under international law and that the provisions of the draft article in this Part must be considered in the context of draft article 3 which set forth the two essential conditions for step responsibility viz. (i) an act of commission which is attributable to a State; and (ii) a breach of an international obligation of that State. Chapter Two of the draft articles dealt with the first of these conditions. In this part of the draft articles the Special Rapporteur has proposed the deletion of the text of draft articles 6 and 11 to 14.

Draft article 5 addresses the question of the "Attribution to the State of the conduct of its organs". Paragraph 1 of the

draft article stipulates that the conduct of any State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State. Paragraph 2 then goes on to clarify that for the purposes of paragraph 1, an organ includes any person or body which has that status in accordance with the internal law of the State.

Draft Article 7 on the "Attribution to the State of the conduct of entities exercising elements of the governmental authority" stipulates that the conduct of an entity which is not an organ of the State under draft article 5 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the entity was acting in that capacity in the case in question.

Draft Article 8 entitled "Attribution to the State of conduct in fact carried out on its instructions or under its direction or control" provides that the conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons was in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Draft Article 8 *bis* then goes on to provide for the "attribution to the State of certain conduct carried out in the absence of the official authorities". The draft article lays down that the conduct of a person of group of persons shall be considered an act of the State under international law if the person or group of persons was in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Draft Article 9 entitled "Attribution to the State of the conduct of organs placed at its disposal by another State" stipulates that the conduct of an organ placed at the disposal

of a State by another State shall be considered an act of the former State under international law if the organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it had been placed.

Draft Article 10 on the "Attribution to the State of the conduct of organs acting outside their authority or contrary to instructions" provides that the conduct of an organ of a State or of an entity empowered to exercise elements of the government authority, such organ or entity empowered to exercise elements of the government authority, such organ or entity having acted in that capacity, shall be considered an act of the State under international law even if, in the particular case, the organ or entity exceeded its authority or contravened instructions concerning its exercise.

As stated earlier, the Special Rapporteur has proposed the deletion of draft articles in 11 to 14 as adopted on first reading. It will be recalled that draft article 11 was addressed to the "conduct of persons not acting on behalf of the state; Draft articles 12 to 14 were entitled "conduct of organs of another state"; "conduct of organs of an international organization"; and the "conduct of organs of an insurrectional movement" respectively.

Draft Article 15 on the "Conduct of an insurrectional or other movement" comprises of three paragraphs. Paragraph 1 of draft article 15 provides that the conduct of an insurrectional movement, which becomes the new government of a State shall be considered an act of that State under international law.

Paragraph 2 of draft article 15 then goes on to stipulate that the conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international Law. Paragraph 3 of the draft article is of the nature of a saving clause and reads "This article is without prejudice to the attribution to a State of any conduct, however related to that of

the movement concerned, which is to be considered an act of that State by virtue of articles 5 to 10".

It may be mentioned that the original title of draft article 15 had read "attribution to the state of the act of an insurrectional movement which becomes the new government of a state or which results in the formation of a new state".

Draft Article 15 *bis* relating to "conduct which is acknowledged and adopted by the State as its own" lays down that conduct which is not attributable to a State under draft articles 5, 7, 8, 8 *bis*, 9 or 15 shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

Draft Article A entitled "Responsibility of or for conduct of an international organization" provides that these draft articles shall not prejudge any question that may arise in regard to the responsibility under international law of an international organization, or of any State for the conduct of an international organization. The Commission will take decision as to the place of draft article A at a later stage of the second reading of the draft articles.

The Commission has invited the views of the General Assembly on whether, with respect to part One of the draft articles, the conduct of an organ of a State is attributable to that State under draft article 5, irrespective of the *jure gestionis* or *jure imperii* nature of the conduct?

As regards Part Two of the draft articles, the Commission has sought guidelines as to the appropriate balance to be struck between the elaboration of general principles concerning reparation and the more detailed provisions relating to compensation?

II. International Liability For Injurious Consequences Arising Out Of Acts Not Prohibited By International Law

The Commission at its 48th Session, it will be recalled, had decided to transmit the report of the Working Group on "International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law", consisting of a set of 23 draft articles. The General Assembly at its fifty first session had urged Governments to provide their comments and observations on the report of the Working Group on International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law annexed to the report of the International Law Commission in order that the Commission may, in the light of the report of the Working Group and such comments and observations as may be made by Governments and those that have been made in the Sixth Committee, consider at its forty-ninth session how to proceed with its work on the topic and make early recommendations thereon.

The Commission at its forty-ninth session resumed its work in order to complete the first reading of the draft articles relating to the activities that risk causing transboundary harm and established a Working Group which *inter alia* recommended that the Commission appoint a Special Rapporteur. The Commission accordingly appointed Dr. P.S. Rao, Special Rapporteur, for "Prevention of Transbounary Damage from Hazardous Activities".

The Commission at its 49th Session had decided to divide the topic of International Liability for Injurious Consequences Arising Out of Acts Not Prohibited By International Law into two parts. It had decided to first address the "Problem of Prevention of Transboundary Effects of Hazardous Activities" and then consider the "Question of Liability".

The Commission at its Fiftieth Session considered the First Report of the Special Rapporteur, Dr. P.S. Rao.[6] The Report on the "Prevention of Transboundary Damage from Hazardous Activities" was divided into three parts, the first of which dealt with the Concept of Prevention and Scope of the Draft Articles. In this report Dr. Rao had emphasized that the Commission's work on the subject of prevention be placed in the context of sustainable development for it was in the broader context of sustainable development that the concept of prevention had assumed great significance and topicality. The objective or prevention of transboundary harm arising from hazardous activities had been incorporated in Principle 2 of the Rio Declaration and confirmed by the International Court of Justice in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons as forming a part of the corpus of international law.

Introducing his report the Special Rapporteur, Dr. P.S. Rao, stated that prevention should be a preferred policy because, in the event of harm, compensation often could not restore the situation that had prevailed prior to the event or accident. The discharge of the duty of prevention or due diligence was all the more necessary as knowledge regarding the operation of hazardous activities, materials used, the process of managing them and the tests involved was steadily growing. From a legal standpoint, the enhanced ability to trace the chain of causation and even when several intervening links existed made it imperative for operators of hazardous activities to take all necessary steps to prevent harm. The European Commission, which had drawn up several sophisticated schemes for prevention of transboundary damage, had emphasized that a growing economy was a necessary precondition for sustainability in that it created the resources needed for ecological development, the restoration of environmental damage and the prevention of future harm.

[6] A/CN,4/487 and Add.1.

Part Two of the Reparation Prevention of Transboundary Damage from Hazardous Activities addressed the issues relating to the "Concept of Prevention: Principles of Procedure and Content". Section 1 of Part Two of the Report identified five principles of Procedure viz. (I) the principle of prior authorization; (ii) the principle of international environmental impact assessment; (iii) the principles of Cooperation, exchange automation of information, notification, consultation and negotiation in good faith; (iv) the principle of dispute prevention or avoidance and settlement of disputes; and (v) the principle of non-discrimination.

Section 2 of Part Two of the Report set out three principles of content viz. (i) the principle of precaution; (ii) the polluter pays principle and (iii) the principles of equity, capacity building and good governance. It may be mentioned that the principle of equity had two components namely intra-generational equity, and inter-generation equity.

The texts of the draft articles adopted on first reading at the Fiftieth Session address the first set of problem, that is, the question of prevention.[7] The Special Rapporteur for prevention of transboundary effects of hazardous activities, Dr. P.S. Rao had proposed a complete set of articles on the subject, a total of 17 articles. The articles were basically drawn from the articles worked out by the 1996 Working Group of the Commission.

Many of these draft articles and the ideas developed in them had already been worked out by the Drafting Committee from 1993, and in1996 the work was completed on the topic. The commentaries to the articles, which were completed in1996, carefully explain the scope of each article and the important criteria, which are essential to the understanding of the articles.

[7] See Document A/CN.4/L.554 Add.1.

Draft article 1 defines the scope of the articles. It is identical to paragraph (a) of article 1 of the 1996 Working Group draft and limits the scope of the draft articles to activities not prohibited by international law which create a risk of causing significant transboundary harm through their physical consequences. The text of the draft article incorporates three criteria. The first criterion refers to "activities not prohibited by international law" and is crucial in drawing a distinction between the articles of this topic and that of State responsibility.

The Second criterion is that the activities to which preventive measures are applicable bear a risk of significant trnsboundary harm. The element of risk is intended to exclude from the scope of activities, which in fact cause transboundary harm in their normal operation (such as creeping pollution). The element of transboundary harm is intended to exclude activities which cause harm to the territory of the State within which the activity is undertaken, or those activities which harm the global commons *per se* but do not harm any other State. The phrase "risk of causing significant transboundary harm" should be taken as a single term, as it is defined in draft article 2.

The third criterion is that the significant transboundary harm must have been caused by the physical consequences of such activities. This understanding is consistent with the long standing view of the Commission that this topic should remain within a manageable scope and that it should exclude transboundary harm which might be caused by policies of States in economic, monetary, socio-economic or similar fields. The activities should therefore have physical consequences which in turn result in significant harm.

The title of the draft article 1 remains unchanged from the title adopted in the 1996 text. There would appear to be a discrepancy between the title of the draft articles and their scope as defined in draft article 1. This is a matter that the Commission will eventually have to resolve at some point. The draft articles come under a sub-topic of International liability

for injurious consequences arising out of acts not prohibited by international law and therefore they deal in fact with activities not prohibited by international law. However if the draft articles are to stand on their own, then the title of the topic would need to be brought in line with the scope of the draft articles.

Draft articles 2 on "Use of terms defines five terms commonly used in the draft articles. While four of these terms i.e. those in subparagraphs (a), (c) and (d) are identical to the terms used in draft article 2 of the 1996 text, the definition of the term 'harm "in subparagraph (b) is new.

Subparagraph (a) of draft article 2 defines the concept of "risk of causing significant transboundary harm as encompassing a low probability of causing disastrous harm and a high probability of causing other significant harm". The adjective "significant" applies to both risk and harm. For the purposes of these articles, "risk" refers to the combined effect of the probability of the occurrence of an accident and the magnitude of its injurious impact. It is therefore the combined effect of those two elements that sets the threshold: the combined effect should reach a level that is deemed significant. The word "encompasses" is intended to highlight the fact that the spectrum of activities covered is limited and does not, for example include activities where there is a low probability of causing significant transboundary harm.

While subparagraph (b) is new it does not, strictly speaking, provide a definition of the term "harm". It provides a scope for harm in that it indicates that harm includes "harm caused to persons, property or the environment". It is a useful clarification of the text.

Subparagraph (c) defines "transboundary harm as meaning "harm caused in the territory of or in places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned shared a common border. The definition is self-explanatory and makes it clear that the articles do not apply to circumstances where harm

affects the "global commons" *per se*. It includes, however, activities conducted under the jurisdiction or control of a state, for example on the high seas, with effects in the territory of another State or in places under the jurisdiction or control of a State with injurious consequence on, for example, ships of another States on the high seas.

Subparagraph (d) 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 I are carried out.

Finally subparagraph (e) of draft article 2 defines "State likely to be affected" as the State in the territory of which the significant transboundary harm is likely to occur or which has jurisdiction or control over the place where such harm is likely to occur. The Drafting Committee changed the tense of "has occurred" of the 1996 draft to "is likely to occur" which seems more appropriate in the context of prevention. There may be more than such State likely to be affected in relation to any given activity.

Draft article 3 entitled "Prevention" imposes on the State duty to "take all necessary measures to prevent and minimize the risk of significant transboundary harm". It sets forth the general obligation of prevention on which the entire set of draft articles is based. While drafted along the lines of draft article 4 of the 1996 text, the present provision departs from the 1996 text in that it does not deal with the obligation to take all appropriate measures to minimize the effects of harm once it has occurred, as the Drafting Committee considered that this related to the liability aspect of the topic.

The obligation to take effective necessary measures could involve, *inter alia*, taking such measures as are appropriate by way of abundant caution, even if full scientific certainty does not exist, to avoid or prevent harm, which has a risk of causing serious or irreversible damage. This is articulated in the Rio Declaration and is subject to the capacity of States concerned. It is realized that a more optimum and

efficient implementation of the duty of prevention would require upgrading the input of technology in the activity as well as the allocation of adequate financial and manpower resources with necessary training for the management and monitoring of the activity.

The operator of the activity is expected to bear the costs of prevention to the extent that he is responsible for the operation. The State of origin is also expected to undertake the necessary expenditure to put in place the administrative, financial and monitoring mechanisms referred to in draft article 5.

Draft article 4 entitled "Cooperation", is also based on a corresponding article of the 1996 text. However, once again, the issue of the minimization of the effects of harm that has occurred was considered to be outside the scope of the present exercise. Accordingly, the text requires the States concerned to cooperate in good faith and to seek the necessary assistance of one or more international organizations in preventing or in minimizing the risk of significant transboundary harm.

The commentary clarifies that the organizations referred to in this article are those which have the competence to assist the States concerned in preventing, or in minimizing the risk of, significant transboundary harm and that in addition to providing such assistance, international organizations can provide a framework for States to fulfill their obligation of cooperation in the field of prevention under this article.

Draft article 5 entitled "Implementation" is based on article 7 of the 1996 draft and retains the title. It states that a State Party to the draft articles would be required to take the necessary measures to implement them. Such measures may be of legislative, administrative or other character. Such measures include the establishment of suitable monitoring mechanisms to implement the provisions of the present draft. In this the provision emphasizes the continuing character of the duty under these draft articles.

Draft article 6 entitled "Relationship to other rules of international law" is in effect a simplified version of article 8 of the 1996 draft. It makes it clear that the present draft articles are without prejudice to the existence, operation or effect of any other rule of international law, whether treaty-based, or based on customary international law, relating to an act or omission to which these draft articles might otherwise – in the absence of such an obligation – apply.

Draft article 7 is entitled "prior authorization". Introducing his Report the Special Rapporteur, Dr. P.S. Rao had stated that the requirement of prior authorization of an activity that involved a risk of causing significant transboundary harm implied that the granting of such authorization was subject to the fulfillment of certain conditions to ensure that the risk was properly assessed, managed and contained. The requirement obligates States to put in place appropriate monitoring machinery to ensure that the risk bearing activity was conducted within the prescribed limits and conditions.

The first part of paragraph 1 of draft article 7 sets forth the basic rule that activities within the scope of the draft articles require the prior authorization of the State of origin. The Drafting Committee felt it necessary to also spell out in that sentence an element that was previously included in the commentary to the corresponding article 9 of the 1996 text, namely that prior authorization is also required for a major change planned in a hazardous activity that has already been authorized. As explained in that commentary, a "major change" would be one that increases the risk or alters its nature or scope.

The second sentence of paragraph 1 addresses a different type of change, namely one that transforms an activity without risk into one that involves a risk or transboundary damage. The Drafting Committee deleted the qualified "major" which existed in the 1996 text, since any change that would result in an activity falling within the scope

of the draft articles would trigger the requirement of prior authorization.

Paragraph 2 of draft article 7 deals with those activities within the scope of the draft articles already carried out before these articles become applicable. It will be recalled that under the 1996 draft, this issue was addressed in a separate article, i.e. article 12. The proposal by the Special Rapporteur was couched in more general terms than the 1996 provision which spelled out the various procedural steps involved. The Drafting Committee introduced two changes in the Special Rapporteur's text viz. (I) it deleted the word "prior" which was not considered appropriate in the context of a pre-existing activity; and (ii) it deleted the reference to paragraph I which could be misinterpreted as the two paragraphs deal with entirely different situations.

The Drafting Committee deemed it important to include a provision dealing with the consequences of the operator's failure to conform to the requirements of the authorization. Indeed, the rule of prior authorization embodied in this article would lose much of its practical effect if the State of origin did not also have the obligation to ensure that the activity was carried out in accordance with the conditions established by that State when authorizing the activity. The manner in which this obligation is to be fulfilled is left to the discretion of States. Paragraph 3 of draft article 7 indicates, nevertheless, that in some cases the operator's action may result in the termination of the authorization.

Draft article 8 entitled "Impact Assessment" is based on draft article 10 of the 1996 text. Draft article 10, it will be recalled was entitled "Risk Assessment". It basically provides that before granting authorization for an activity within the scope of the present draft articles, there must be an assessment of the transboundary impact of the activity. This assessment enables the State to determine the extent and the nature of the risk involved in an activity and consequently the type of preventive measures it must take. The question who should conduct the assessment is left to States. The article

does not specify what the content of the risk assessment should be. Obviously the assessment of risk of an activity can only be meaningfully prepared if it relates the risk to the possible harm to which the risk could lead.

Draft Article 9 on "Information to the Public" is based on article 15 of the 1996 text. It requires that States provide the public likely to be affected with information relating to the risk of harm that might result from an activity subject to authorization, in order to ascertain their views. This article is inspired by the new trends in international law of seeking to involve in the State's decision-making processes, those people whose lives, health and property might be affected, by providing them with a chance to present their views to those responsible for making the ultimate decisions. The obligation contained in the article is circumscribed by the phrase "by such means as are appropriate". This phrase gives the choice of the means by which information can be provided to the public. The title of the article remains the same as the 1996 text.

Draft Article 10 on Notification and Information corresponds to article 13 of the 1996 text. It addresses a situation where the assessment conducted under article 8, indicates that the activity planned does indeed have a risk of causing significant transboundary harm. This article together with articles11 and 12, provides for a set of procedures which are essential in attempting to balance the interests of all the States concerned by giving them reasonable opportunity to find a way to undertake reasonable preventive measures.

The basic idea of this provision is the duty of the State of origin to notify those States that are likely to be affected by the activity that is planned. The text is slightly different from that of draft article 13 of the 1996 text. As the Chairman of the Drafting Committee, Mr. Bruno Simma pointed out, it transfers an idea from the commentary to draft article 13 into the text. The State of origin is now required *"pending any decision on the authorization* of the activity, [to] provide the State likely to be

affected with timely notification" of that activity. The 1996 text had employed the term "without delay".

As regards the timing within which a response from the States likely to be affected should be forthcoming, the 1996 text provided that in its notification, the State of origin should indicate time within which a response would be required. Under the new draft, there is no such requirement. In accordance with paragraph 2, the States likely to be affected should provide a response within "a reasonable time". Again this formula was considered more flexible.

The expression "reasonable time" so far as it applies to prescribed time limits for procedures before undertaking an activity, should be interpreted in the following manner; that no authorizations may be granted prior to the lapse of the so-called "reasonable time".

Draft article 11 entitled "Consultations on preventive measures", which is based on corresponding article 17 of the 1996 text. It deals with the question of the consultations between States concerned in respect of measures, which should be taken in order to prevent the risk of causing significant transboundary harm, and attempts to strike a balance between two equally important considerations. First, it is to be kept in mind that the article deals with activities that are not prohibited by international law and that, normally, are important to the economic development of the State of origin. But second, it would be unfair to other States to allow those activities to be conducted without consulting them and taking adequate preventive measures. The draft article provides, neither a mere formality which the State of origin has to go through, with no real intention of reaching a solution acceptable to the other States, nor a right of veto for the State that is likely to be affected. To maintain such a balance, it places emphasis on the manner in which, and the purpose of which, the parties enter into consultations. They must do so in good faith and taking into account each other's legitimate interests.

Draft article 12 corresponds to article 19 the 1996 text. This article, with the exception of subparagraph (d), is taken verbatim from the 1996 text. The purpose of this article is to provide some guidance for the States in their consultations about an equitable balance of interests. In reaching an equitable balance of interests, one has to establish many facts and to weigh all the relevant factors and circumstances. The provisions of this draft article should be interpreted in the light of the rest of the draft articles, in particular draft article 3 which places the obligation of prevention on the State of origin.

The opening clause of the draft article provides that "in order to achieve an equitable balance of interests,..., the States concerned shall take into account all relevant factors and circumstances". The draft article then sets forth a non-exhaustive list of such factors and circumstances. The wide diversity of types of activities which is covered by these articles, and 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. Some of the factors may be relevant in a particular case, while others may not, and still other factors not contained in the list may prove relevant. Furthermore, no priority of weight is assigned to the factors and circumstances listed, since some of them may be more important in certain cases while others may deserve to be accorded greater wightage in others.

Paragraph (a) of the draft article compares the degree of risk of significant transboundary harm to the availability of means of preventing harm or minimizing the risk thereof. For example, the degree of risk of harm may be high, but there may be measures that can present or reduce that risk, or there may be good possibilities for repairing the harm. The comparisons are both quantitative and qualitative.

Paragraph (b) of the draft article compares the importance of the activity in terms of its social, economic and technical advantages for the State of origin and the potential harm to the States likely to be affected.

Paragraph (c) of the draft article compares, in the same fashion as paragraph (a), the risk of harm to the environment and the availability of means of preventing or minimizing such a risk and the possibility of restoring the environment.

Paragraph (d) of draft article takes into account the fact that States concerned frequently embark on negotiations concerning the distribution of costs for preventive measures. In doing so, they proceed from the basic principle derived from article 3 according to which these costs are to be assumed by the operator or the State of origin. These negotiations mostly occur in cases where there is no agreement on the amount of the preventive measures and where the affected State contributes to the costs of preventive measures in order to ensure a higher degree of protection that it desires over and above what is essential for the State of origin to ensure. This link between the distribution of costs and the amount of preventive measures is in particular reflected in sub-paragraph (d).

Paragraph (e) of the draft article provides that the economic viability of the activity in relation to the costs of prevention and the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity should be taken into account. This is one of the criterion of balancing interests.

Paragraph (f) of the draft article compares the standard of prevention demanded of the State of origin to that applied to the same or comparable activity in the State likely to be affected. The rational is that, in general, it might be unreasonable to demand that the State of origin should comply with a much higher standard of prevention than do the States likely to be affected. This factor, however, is not in itself conclusive.

Draft article 13 entitled "Procedures in the absence of notification" addresses the situation in which a State has reasonable grounds to believe that an activity planned or carried out in another State may have a risk of causing

significant transboundary harm although it has not received any notification to that effect. This issue had been dealt with in draft article 18 of the 1996 text, but the Special Rapporteur deemed it preferable to use in this connection the language of Article 18 of the Convention on the Non-navigational Uses of International Watercourses which envisages a more progressive mechanism. Thus, instead of immediately proceeding to request consultations as in the 1996 text, the State which believes that it is likely to be affected would first request the State of origin to notify the activity and to transmit relevant information. It is only if the State of origin refuses, on the grounds that it is not required to do so that consultations may take place at the request of the other State.

It was felt necessary to specify in paragraph 2 of the draft article that the response of the State of origin must be given "within a reasonable time". Indeed, consultations are preempted as long as this response is not forthcoming, and State which believes that an activity in the State of origin may have a risk of causing significant transboundary harm would be left without recourse.

Paragraph 3 of draft article 13 envisages that the State which believed that the activity was hazardous could request the State of origin to suspend the activity for six months. It was felt that this obligation imposed on the State of origin was unduly stringent in view of the fact that the draft articles deal with an activity which is not prohibited by international law in the circumstances where there is disagreement between States concerned as to whether or not it involves a risk of significant transboundary harm. The obligation of the State of origin in this regard has been softened by requiring it to take appropriate and feasible measures to minimize the risk". Suspension of the activity would only be required "where appropriate". There is thus a sliding scale of measures that can be taken by the State of origin.

Draft Article 14 on the "Exchange of Information" deals with the steps to be taken after an activity has been undertaken. The purpose of this step is to prevent, or minimize

the risk of causing, significant transboundary harm. It is based on the phraseology employed in draft article 14 of the 1996 text except for the addition of the word "available" before the word "information" in the second line as the title of the draft article suggests its provisions require the exchange of information between the State of origin and the States that are likely to be affected, after the activity involving risk has been undertaken. The prevention of transboundary harm and minimizing the cause thereof is a continuing effort and, therefore, the duties of prevention do not terminate after granting authorization for the activity; they continue for as long as the activity continues.

The information that is required to be exchanged, under this draft article comprises whatever would be useful and relevant for the purpose of prevention. The information required under this article has been qualified by the word "available" and refers to "all available information relevant". Under this article such relevant information should be exchanged in a "timely manner". That means that when the State becomes aware of such information, it should inform the other State quickly so that there will be enough time for all States concerned to consult on appropriate preventive measures. The requirement of this article becomes operational only when States have information relevant to preventing, or minimizing transboundary harm.

Draft Article 15 entitled "National Security and Industrial Secrets" reproduces without change the corresponding draft article 16 of the 1996 text. The Drafting Committee felt that draft article 15 reflected in an adequate manner a narrow exception to the obligation of the State of origin to provide information under the other provisions of the draft articles. This type of clause is not unusual in treaties, which require exchange of information. However, Article 31 of the Watercourses Convention only deals with national defense or security information, while the present draft article 14 also protects industrial secrets. In the context of this topic, it is highly probable that some of the activities might involve the use of sophisticated technology protected under domestic

legislation as industrial secrets. As in all provisions in the present draft article, an attempt has been made to balance the legitimate interests of all States concerned. Thus, the State of origin, while allowed to withhold certain information, must "cooperate in good faith with the other States concerned to provide as much information as can be provided under the circumstances."

Draft Article 16 entitled "Non-discrimination" is based on Article 32 of the Convention on the Law of the Non-navigational uses of International Watercourses. It sets out the basic principle that the State of origin is to grant access to its juridical and other procedures without discrimination on the basis of nationality, residence or the place where the damage occurred. The provisions of this draft article would obligate States to ensure that any person, whatever his or her nationality or residence should, regardless of where the harm may occur, receive the same treatment as that afforded by the State of origin to its nationals under its domestic law. This provision should be understood as preventing States discrimination based on their legal systems and not as a general non-discrimination clause in respect to human rights. In fact, it deals with equal access by nationals and non-nationals and by residents and non-residents to courts and administrative agencies of the State concerned.

Finally, draft article 17 entitled "Settlement of Disputes" is a new provision proposed by the Special Rapporteur and does not have an equivalent in the 1996 draft. It is inspired by article 33 of the Convention on the Non-Navigational Uses of International Water courses, 1997 in that it envisages compulsory resort to a fact-finding commission at the request of one of the parties if the dispute has to been settled by any other means within a period of six months. Among these other means, the Special Rapporteur had highlighted the binding procedures of arbitration and judicial settlement. The Drafting Committee, however, felt that it was also important to expressly mention other means of third-party settlement, in particular mediation and conciliation. As regards the fact-finding procedure, the Drafting Committee was aware of the

fact that the basic obligation in draft 17 for the parties to "have recourse to the appointment of an independent and impartial fact-finding commission" will not be sufficient in practice for the actual establishment of such commission. In international instruments this type of provision is normally accompanied by a detailed procedure on the appointment and functioning of the commission, as it the case for example in Article 33 of the Watercourses Convention. However, since the nature of the draft articles on the topic of prevention had yet to be decided, the Drafting Committee deemed it premature to set out such a detailed procedure in the text.

As mentioned earlier, the Commission has referred two issues to the General Assembly related to the further work on this topic. The issues referred are (i) what kind of regime should be made applicable to activities which actually cause harm for the purpose of developing and applying the duty of prevention, and (ii) in a prevention regime whether the duty of prevention should be treated as an obligation of conduct or failure to comply and be met with suitable consequences under the law of State responsibility or civil liability or both where the state of origin and the operator are both accountable for the same? If the answer to the question is in the affirmative, what type of sanctions are appropriate or applicable?

The first of these issues is based on the fact that the Commission intended to separate activities which have a risk of causing significant harm from those which actually cause such a harm for the purpose of developing and applying the duty of prevention, the latter type of activities. It is generally understood that the duty of prevention is an obligation of conduct and not of result and non-compliance with duties of prevention in the absence of any damage actually occurring would not in itself give rise to any liability. The Commission have decided to recommend a regime on prevention, separating it from a regime of liability, it has to address the question whether the duty of prevention should be treated as an obligation of conduct or failure to comply be visited with suitable consequences under the law of State responsibility or civil liability or both.

III. Reservations to Treaties

The International Law Commission had at its 49th session, adopted a set of Preliminary Conclusions On Reservations To Normative Multilateral Treaties, Including Human Rights Treaties. The General Assembly at its 52nd session had taken note of the Commission's preliminary conclusions and of the invitation to all treaty bodies set up by normative multilateral treaties that might wish to do so to provide their comments and observations on the conclusions.

The General Assembly has by its Resolution 52/156 drawn the attention of Governments to the importance for the International Law Commission of having their views on the Preliminary Conclusions on reservations to normative multilateral treaties, including human rights treaties.

In response to that invitation the Secretariat of the Asian African Legal Consultative Committee had organized, within the administrative arrangements of the Thirty seventh session of the Committee held in New Delhi in April 1998,. a Special Meeting on the Reservation To Treaties.

Thereafter, when the Secretary -General of the Asian African Legal Consultative Committee visited Geneva to participate in the Fiftieth session of the International Law Commission he presented to the Chairman of the Commission a Report of the Special Meeting on the Reservations to Treaties that the Committee had organized. It maybe mentioned that the Special Reapporteur had in his Third Report on the Reservation to Treaties made a mention of the aforementioned Special Meeting.

At its fiftieth session the Commission considered the Third Report of the special Rapporteur, Professor Alain Pellet, on the reservation to treaties.[8] The Third report of the Special Rapporteur was divided into two chapters, the first of which surveyed the earlier work of the Commission on the topic. The

[8] A/CN.4/491 and Add. 1-5.

second chapter of the Report of the Special Rapporteur addressed the question of definition of reservations (and interpretative declarations), and to reservations (including interpretative declarations) to bilateral treaties.

While presenting his report the Special Rapporteur said that "he had been favourably impressed by the interest which states had shown in the Commission's work on reservations to Treaties. That interest was illustrated not only by the large number of statements made in the Sixth Committee, but also by the work done on the topic by the Asian-African Legal Consultative Committee and the Council of Europe's Committee of Legal Advisers on Public International Law (CAHDI), which had established a group of specialists on reservations to international treaties".

In his survey of the earlier work of the Commission on the topic, the special Rapporteur drew attention to 2 decisions of the Commission (a) that in principle and subject to an unlikely "state of necessity", the Commission would not call into question the provisions of the Vienna Conventions on reservations and would simply try to fill the lacunae and if feasible to remedy the ambiguities and clarify the obscurities in them; and (b) that its work would lead to the preparation of a Guide to Practice, which would-be grafted on to the existing provisions, filling the lacunae therein and would-be accompanied by model clauses relating to reservations which the Commission would recommend to States and international organizations for their inclusion in treaties they would conclude in future.

As to the definition of reservations to Treaties and of interpretative declarations the Special Rapporteur, Mr. Alain Pellet, observed that none of the 3 Vienna Conventions furnished a comprehensive definition of reservations and he had therefore drafted a composite text. The definition, he suggested, could be used at the beginning of the Guide to Practice and could be called the "Vienna definition".

The Special Rapporteur had proposed that the Commission refer the 8 draft guidelines of the Guide to Practice which he had proposed in his report to the Drafting Committee. Accordingly, the Commission decided to transmit the draft guidelines on the (1) definition of reservations; (2) Joint formation of a renovation; (3) moment when a reservation is formulated; (4) reservations formulated when notifying territorial application; (5) object of reservation; (6) statements designed to increase the obligations of their author; (7) statements designed to limit the obligations of their author; (8) reservations relating to non-recognition; (9) reservations having a territorial scope; (10) definition of interpretative declarations; and (11) scope of definitions to Drafting Committee.

The Drafting Committee adopted the text of 9 guidelines of the Guide to Practice and referred them to the International Law Commission. The titles and the text of the draft guidelines adopted by the Drafting Committee had included the (1) definition of reservations; (2) object of reservations;(3) instances in which reservations may be formulated; (4) reservations having territorial scope; (5) reservations formulated when notifying territorial application; (6) statements designed to limit the obligations of their author; (7) statements purporting to increase the obligations of their author; (8) reservations formulate jointly; and (9) an untitled provision relating to the scope of the draft guidance.

Draft Guidelines adopted at the Fiftieth session of the International Law Commission

The Commission at its fiftieth session has adopted the text of 7 guidelines of the guide to practice relating to the reservations to treaties together with commentaries thereto.[9] The text of the provisions adopted include the guidelines relating to (i) the definition of reservations (draft guidelines 1.1); (ii) object of reservations (draft guideline 1.1.1.); (iii) cases

[9] See A/CN.4/L.561 and Add 1-4.

in which reservations may be formulated (draft guideline 1.1.2); (iv) reservations having territorial scope (draft guideline 1.1.3); (v) reservations formulated when notifying territorial application (draft guideline 1.1.4); (vi) reservations formulated jointly; and (vii) a provision relating to unilateral statement of reservation.

Definitions

Draft Guideline 1.1 defines the term reservations as a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification or succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

The Special Rapporteur has pointed out that the definition incorporates three formal components viz. (1) a unilateral statement; (2) the moment when the State of international organization expressed its consent to be bound by the treaty; and (3) its wording or designation. The definition of reservation must also contain the substantive element that the reservation was intended to exclude or to modify the legal effect of certain provisions of the treaty.

The aim and function of the definition of reservations contained in the first part of the Guide to Practice is to distinguish between reservations and other unilateral statements with respect to a treaty. The largest group of such unilateral statements is that of interpretative declarations, but the two are subject to different legal regimes.

Object of Reservations

Draft Guideline 1.1.1 on the Object of reservations stipulates that a reservation may relate to one or more provisions of a treaty or, more generally, to the way in which

the State intends to apply the treaty as a whole. The aim of this draft guideline is to take into account the well established practice of across - the -board reservations in the interpretation of the Vienna definition, a simple reading of which would lead to an interpretation that may be restrictive and contrary to the reality.

Cases in which reservations may be formulated

Drat Guideline 1.1.2 entitled Cases in which reservations may be formulated provides that instances in which a reservation may be formulated under guideline 1.1. include all the means of expressing consent to the bound by a treaty mentioned in article 11 of the Convention of 1969 and 1986 on the Law of Treaties. It is felt that the provisions of articles 2, paragraph 1(d) on one hand and article 11 on the other both of the 1969 and 1986 Vienna Conventions are not formulated in the same terms and may give rise to confusion. The primary purpose of the present draft guideline is to see to remedy that in those formulations.

Reservations having territorial scope

Draft Guideline 1.1.3. on Reservations having territorial scope provides that a unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation. As the title of this draft guideline indicates, it relates to unilateral statements by which a State purports workers to exclude the application of a treaty, in part or in whole, *ratione loci* A state consents to the application of the treaty as a whole except in respect of one or more territories which are under its jurisdiction. In the past such reservations were known as "colonial reservations" but the practice of formulating territorial reservations persists in the context of non-colonial situations for a number of reasons.

Reservations formulated when notifying territorial application

Draft Guideline 1.1.4 relating to Reservations formulated when notifying territorial application lays down that a unilateral statement by which a State purports to exclude or to notify the legal effect or certain provisions of a treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation. While draft guideline 1.1.3. deals with the scope *ratione loci* of certain reservations the present guideline deals with the time factor of the definition. It thus relates to the moment when certain: "territorial reservations" can be made.

Reservations formulated jointly

Draft Guideline 1.1.7 entitled Reservations formulated jointly lays down that the joint formulation of a reservation by several States or international organizations does not affect the unilateral nature of that reservation. A fundamental characteristic of reservations is that they are unilateral statements and nothing prevents a number of states or international organizations from formulating a reservation jointly, that is to say in a single instrument addressed to the depository of a multilateral treaty in the name of a number of parties. This stipulation reinforces one of the three formal components of the definition of reservations incorporated in draft guideline 1.1. mentioned above.

The Drafting Committee has also adopted an untitled and as yet unnumbered Guideline which reads "The definition of a unilateral statement as constituting a reservation does not prejudge its permissibility or its effects in the light of the rules governing reservations". This guideline has been adopted provisionally and its title and placement within the guide to practice is to be determined at a later stage. The Commission also proposes to consider the possibility of referring both to reservations and to interpretative declarations which pose identical problems.

In its Report to the General Assembly the Commission has invited comments and observations from Governments on whether unilateral statements by which a State purports to increase its commitments or its rights in the context of a treaty, beyond those stipulated by the treaty itself, ought or ought not to be considered to be reservations. The Commission would appreciate receiving any information or materials relating to States practice on such unilateral statements.

IV. Nationality in Respect of Succession of States

The General Assembly by its resolution 51/160, had taken note of the completion of the preliminary study of the topic "State Succession and its impact on the nationality of natural and legal persons", and requested the Commission to undertake the substantive study of the topic entitled "Nationality in relation to the succession of States". The Assembly had also invited governments to submit comments on the practical problems raised by Succession of States affecting nationality of legal persons. The Planning Group established at the forty ninth session of the Commission had recommended that the Commission endeavour to complete its first reading of the draft articles on the topic.

At its forty ninth session the Commission considered the Third Report of the Special Rapporteur, Mr. Vaclav Mikulka, which contained a set of draft articles together with commentaries thereto. After considering the Third Report of the Special Rapporteur the Commission adopted on first reading, a draft preamble and a set of 26 draft articles on "Nationality of Natural Persons in Relation to the Succession of States." The Commission decided to transmit the draft articles to Governments for comments and observations. Thereafter the General Assembly at its fifty-second session drew the attention of the Governments to the importance for the International Law Commission of having their views on the draft articles on the nationality of natural persons in relation to the succession of states as adopted on first reading by the Commission. By its resolution 52/156 of December 15, 1997 the General Assembly

urged Governments to submit their comments and observations to the Commission by October 1, 1998.

At its fiftieth session the Commission had before it the fourth report of the Special Rapporteur, Mr. Vaclav Mikulka, dealing with the second part of the topic of topic viz. the question of the nationality of legal persons in relation to the succession of States.[10] Whilst introducing his report the Special Rapporteur observed that a preliminary exchange of views at the present session on possible approaches to the second part of the topic would facilitate the future decision to be taken by the Commission on this question, in particular given the fact that Governments had so far not submitted any written observations in response to the request contained in General Assembly resolution 52/156. In his report, following an overview of the discussion that had taken place thus far on the issue both in the Commission and in the Sixth Committee, the Special Rapporteur had therefore raised a number of questions as regards the orientation to be given to the work on the nationality of legal persons and he suggested that they be discussed in the framework of a Working Group.

Accordingly the International Law Commission at its Fiftieth Session established a Working Group on the topic "Nationality in relation to the succession of States" under the chairmanship of Mr. Viclav Mikulka, Special Rapporteur,[11] to consider the question of the possible orientation to be given to the second part of the topic dealing with the question of the nationality of legal persons in order to facilitate the Commission's decision on this issue. The preliminary conclusions of the Working Group are set out below:

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[10] Document A/C.4/489.

[11] The Working Group was composed of: Mr. Vaclav Mikulka (Special Rapporteur, Chairman of the Working Group), Mr. Emmanuel Akwei Addo; Mr. Hussain Al-Baharna; Mr. Ian Brownlie; Mr. Enrique J.A. Candioti; Mr. Constantin P Economides; Mr. Zdzislaw Galicki; Mr. Gerhard Hafner; Mr. Robert Rosenstock and Mr. Christopher John Robert Dugard (ex officio).

The second part of the topic "Nationality in relation to the succession of States" includes the problem of the nationality of legal persons that the Commission has not yet studied. In the view of the Working Group, as the definition of the topic now stands, the issues involved in the second part are too specific and the practical need for their solution is not evident. In addition to considering the possibility of suggesting to the Commission not to undertake work on this part of the topic, the Working Group considered it useful to examine the possibility of alternative approaches, as they emerge from Part III of the Fourth report of the Special Rapporteur. It agreed that there are, in principle 'two options for enlarging the scope of the study of problems falling within the second part of the topic. They would both require a new formulation of the mandate for this part of the topic.

1. Nationality of Legal Persons in International Law

The first option would consist in expanding the study of the question of the nationality of legal persons beyond the context of the succession of State to the question of the nationality of legal persons in international law in general. As the notion of the nationality of legal person is not known to all legal systems, it would be advisable that the Commission examine also similar concepts on the basis of which the existence of a link analogous to that of nationality is usually established.

The benefits of such an approach would be in the view of the Working Group, that it would contribute to the clarification of the general concept of the nationality of legal persons in international relations. It would also enable the Commission to further consider in a more systematic manner the problems it has been confronted with when studying the topics of State responsibility, Diplomatic protection and Succession of States.

The problems that the commission could encounter, in opting for this approach, would be the fact that, due to the wide diversity of national laws in this respect, the Commission would be confronted with problems similar to those that have arisen during the consideration of the topic of Jurisdictional immunities. There would also be a certain overlap with the topic of Diplomatic Protection. Moreover, such study would lend itself to a more theoretical analysis than to the development of rules of immediate practical applicability. But above all, the enormity of such a task should not be underestimated. It would be difficult to keep the study within manageable limits.

II. Status of Legal Persons In Relation to the Succession of States

The second possibility would consist in keeping the study within the context of the succession of states, but going beyond the problem of nationality to include other questions, such as the status of legal persons (in particular rights and obligations inherent to the legal capacity of legal persons, including those determining the type of legal person etc.) and, possibly, also the conditions of operation flowing from the succession of States.

The benefits of such an approach would be, in the view of the Working Group, that it would contribute to the clarification of a broader area of the law of the succession of States.

The problems that the Commission could encounter, in opting for this would be the fact that the Commission would be confronted with the wide diversity of national laws in this direction, it would, moreover, be difficult to establish a new delimitation of the topic.

If the work is continued, Commission has further to decide which categories of "legal persons" covered by the study, to which legal relations the study should be limited and what

could be the possible outcome of the work of the Commission on this part of the topic.

In the absence of positive comments from States, the commission may, perforce, have to conclude that States are not interested in the study of the second part of the topic. the Commission should in its report, remind the General Assembly of the desirability of obtained the reaction f States on the question asked in paragraph 5 of General Assembly resolution 52/156 of General Assembly resolution 52/156 of 15 December 1997. The Assembly should, in particular, invite States having undergone a succession of States, to indict e.g. how the nationality of legal persons was determined, what kind of treatment was granted to the legal persons which as a result of the succession of States became 'foreign" legal persons etc.

During the consideration of the Working Group's preliminary conclusions several members expressed a preference for the second option, i.e. the study of the status of legal persons in relation to the succession of States and encouraged the Special Rapporteur to examine it further in his next report concerning this part of the topic of Nationality in relation to the succession of States.

In its report to the General Assembly the Commission has emphasized the desirability of receiving comments and observations on the practical problems raised by the succession of States affecting the nationality of legal persons to assist it in its future work. It has reiterated its request to Governments for written comments and observations on the draft articles on Nationality of natural persons in relation to the succession of States adopted on first reading in 1997, so as to enable it to begin the second reading of the draft articles at its next session.

The Commission has recommended in this regard that the General Assembly invite States having undergone a succession of States, to indicate, how the nationality of legal persons was determined; what kind of treatment was granted to the legal persons which, as a result of the succession of states became "foreign legal persons".

V. Diplomatic Protection

It had been suggested that work on the subject of "Diplomatic Protection:" would complement the work of the International Law Commission on State Responsibility and would be of interest to all the Member States. The Commission at its forty ninth Session established a working Group[12] and on the recommendation of that Working Group appointed Mr. M. Bennouna Special Rapporteur for the topic Diplomatic Protection. At its fifty second session the General Assembly endorsed the decision of the Commission to include the item in its agenda.[13]

At its fiftieth session the International Law Commission considered the preliminary report of the Special Rapporteur, Mr. M. Bennouna. Introducing his report the Special Rapporteur said that, in appointing him Special Rapporteur, the Commission had recommended that he submit a preliminary report at the present session and had decided that the Commission would endevour to complete consideration on first reading by the end of the quinquennium. The preliminary report was a stepping stone to the in-depth consideration of the topic and the possible incorporate in a treaty or other instrument of what had emerged as established practice.

During the course of the Working Group's consideration of the topic, members had argued that preliminary analysis was indispensable to any comprehensive study of diplomatic protection. One member of the Commission had taken the view that the Special Rapporteur would have to consider the very notion of diplomatic protection, which was increasingly geared in modern law to the rights of the individual; because a right to diplomatic protection did exist. That member believed that

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12 The working Group composed of Mr. M. Bennouna (Chairman); Mr. J. Crawford: Mr. N. Elaraby: Mr. R.Goco: Mr. G. Hafner: Mr. M. Herdocia Sacasa: Mr. J.Kateka: Mr. I. Lukashuk: Mr. T. Melescanu: Mr. G. Pambou-Tchivounda: Mr. B. Sepulveda: Mr. R. Rosenstock: Mr. B. Simma: and Mr. Z.Galicki (ex-officio member).

13 See General Assembly Resolution 52/156 of 15 December 1997.

diplomatic protection was based on jurisdiction *ratione personae* over the individual. Those views had been supported by a number of other members of the Commission.

Another member had drawn attention to the complete lack of symmetry in diplomatic protection. A State whose national had been injured could exercise its diplomatic protection against the State causing the harm, but the reverse was not true: a State that had suffered harm as a result of an individual could not complain to the State of which that person was a national. He had suggested that positions of political and economic strength explained why diplomatic protection was a one-way institution. Another member had emphasized that multinational corporations were often more powerful than States.

The view had also been expressed that the fact that individuals were nowadays increasingly recognized as subjects of international law was a dimension that would necessarily have to be taken into account in the Special Rapporteur's first report. Taking the idea still further the view had been expressed that the judgment of the Permanent Court of international Justice in the *Mavromatis Palestine Concessions* case had been based on what was now an outdated theory under which the State had been regarded as "master" of its citizens. The special Rapporteur had pointed out that major developments in recent years meant that the topic had to be viewed from a new and "fresher" angle.

The Special Rapporteur had taken the view that a preliminary report should lay out the various options available. Rather than indicate the Rapporteur's concept of the topic. While he remained open-minded it did seem clear that the traditional view of diplomatic protection was no longer satisfactory, unless one was to cling to the iron-clad conservatism of which the Commission had sometimes been accused. The traditional view could be adapted to modern-day reality in a variety of ways, and a single legal construct was not necessarily the only solution. The Commission had already wrestled with the distinction between primary and secondary

rules, relating to State responsibility and the Working Group had suggested in its report that the topic be confined to secondary rules of international law, i.e. the consequences of an internationally wrongful act (by commission or omission) which had caused an indirect injury to the State usually because of injury to its nationals. The Working Group had likewise indicated that the topic would not address the specific content of the international legal obligation that had been violated.

The view was also expressed that that the "clean hands" rule and exhaustion of local remedies would mean venturing into the field of primary rules. Since the topic of State responsibility would require a similar effort, it may be necessary to consider general categories of obligations and the work on the two topics could perhaps, be coordinated.

A Committee on Diplomatic Protection of Persons and Property set up in 1996 by the International Law Association (ILA) had grappled with the same questions as the Commission was about to consider. The Special Rapporteur stated that the Chairman of the aforementioned Committee had written to him to indicate how the traditional principles of international law relating to diplomatic protection had changed in contemporary practice. Specifically, the Committee would look into what acts by a State constituted espousal; whether a State could exercise diplomatic protection even if its nationals had declined espousal; whether espousal deprived claimants of the right to pursue claims of their own accord; and whether individual claimants should be able to opt out of group or lump sum claims. Indeed, the number of questions raised came back to the basic one; what was the nature of diplomatic protection and how should it be defined?

It seemed that the Commission would have to come up with a response, and the Rapporteur envisaged two approaches. The first, would be to work out a definition and only then determine the course of future work on the topic. The second approach would be to leave the question of definition wide open at the outset and to develop it out of a

study of actual practice with a view of codification of the topic. While both approaches had their relative merits and demerits what seemed essential was to make a critical analysis of the traditional view of diplomatic protection in order to furnish criteria for evaluating contemporary practice. The Special Rapporteur was of the view that there was a constant dialectical relationship between theory and practice and that there was nothing to prevent legal experts from occasionally playing with theoretical underpinnings.

In submitting the Commission's previous report to the General Assembly, the then Chairman of the Commission had emphasized the need for preliminary evaluation of the nature of diplomatic protection, including the question whether it was a right of an individual or might be exercised only at the discretion of a State. He had added that "the question might even be raised as to whether the legal fiction on which diplomatic protection was based was still valid at the end of the twentieth century".

It might be argued that it was futile to question the existence of diplomatic protection: the principle that any harm done to a member of a group or tribe was an attack on the tribal chieftain or head was immutable. The law on the subject, it has been stated was full of fictions and would make an excellent novel if redrafted as one. Like the novel, the law transformed an aspect of reality into a different element. The legal or juridical person, for example, was one of the most celebrated of legal fictions. The International Court of Justice, in its judgment in the *Barcelona Traction case*[14] had stated that the law had recognized that the independent existence of the legal entity could not be treated as absolute and that "lifting the corporate veil" or "disregarding the legal entity" had been found justified and equitable in certain circumstances. The Court had thus exploded the fiction surrounding the concept of the corporate entity (*society anonyme*), showing that it was possible, and acceptable to get back to the underlying reality

[14] I.C.I. Reports 1970, p.39.

and that legal fictions could not be deemed to be immutable. they were invented to correspond to certain needs.

That was certainly true of the legal fiction of diplomatic protection. International law had progressed considerably since the mid-nineteenth century and the dualist approach to international law that had underpinned the notion of diplomatic protection was no longer in vogue. International norms were increasingly being aimed directly at individuals, and that was a positive development, as it gave individuals increasingly direct access to the courts to defend their rights at the international level. States and international as well as domestic courts were increasingly obliged to take account of the situation of individuals in elaborating or implementing rules of international law. There was thus greater continuity between the international and domestic legal arenas, even though each retained its own specific character.

The reasons for inventing diplomatic protection as a legal fiction-to justify the intervention of a State on behalf of its nationals - had gradually disappeared. When the veil of legal fiction was lifted, the rights of the individual were increasingly seen to be replacing the rights of the State. the 1930 Hague Convention on certain questions relating to the conflict of nationality laws had compounded the fiction of diplomatic protection by propounding the theory that the State did not bear responsibility for any individual who held dual nationality. Today, however, the fact that State were responsible at the international level for their treatment of their nationals was generally acknowledged. that was true even if an individual held dual nationality, as long as the criterion of effective nationality was met. The Iran-United States Claim Tribunal had *inter alia* indicated that the trend toward modification of the Hague Convention rule was scarcely surprising as it was consistent with the contemporaneous development of international law to accord legal protection to individuals even against the State of which they were nationals.

On what basis could foreigners claim respect for the rules of international law and obtain the protection of their own State yet deny such protection to nationals affected by the same violations of international law? The International Court of Justice had in the *Barcelona Traction* case taken a step in that direction by recognizing the possibility for all States to act on behalf of an individual whose fundamental rights had been violated it is now acknowledged that a State could act internationally to protect certain universal rights of the individual without having to prove any link of nationality.

The respect for the sovereignty of the host State which had inspired the Hague Convention of 1930 also justified the rule of exhaustion of local remedies. In its draft articles on State Responsibility the Commission had included draft article 22, on the exhaustion of such remedies, proceeding on the basis that rule was substantive and not procedural and that the violation of international obligation and the State's international responsibility came into play only on completion or rather exhaustion of the available internal procedures. The special Rapporteur therefore asked the Commission to note the effects of the dualism which sought to substantiate the idea that the application of domestic law was a matter for international procedures and that the application of international law as a matter for international ones.

Attention was drawn to the fact that the initial act could itself constitute a violation of the international obligation when, in proceedings before a national court, an individual invoked international rules, asserting his own rights under international law from the outset. It was only on completion of the internal procedures that the case was taken over by the State of nationality. At that stage the question was whether the complainant State was acting to secure respect for a right of its own or as the representative or agent of its national when it invoked the international responsibility of the host State. The main question to be discussed was a legal and practical question and not a philosophical issue. There was in principle no obstacle to arguing that, in espousing the case of its

national, a State was enforcing his right under the rules of international law addressed to him.

Taken to its extreme, the legal fiction of diplomatic protection led to the conclusion that the reparation was due to the State even if it was the damage suffered by the individual which provided the reparation measure (*Chorzow Factory case*). Increasing recognition was being given to the right of an individual to claim compensation from his national State before the domestic courts and of his right to contest the conditions of the distribution of the compensation if it was shred between several parties. Domestic case law tended to give providence to the reality of the harm suffered by the individual over the fiction of the damage to the State.

The Commission, the Special Rapporteur suggested, could start from the assumption that diplomatic protection was a discretionary power of the State to bring international proceedings, not necessarily to assert its own right but o secure observance of the international rules operating in favour of its nationals, and to invoke the international rules operating in favour of its nationals, and to invoke the international responsibility of the host State. That assumption should be debated by the Commission with a view to advancing its understanding of the legal nature of diplomatic protection. The discussion on the issue would assist the Rapporteur in preparing his report on the substance of the topic for next year. The Commission might be reluctant to rid itself of the traditional concept of diplomatic protection, but it must acknowledge that concept had been largely overtaken by recent developments in the international law on the rights of the human person and that it was the Special Rapporteur's duty to take due account of that point in his work on progressive development and codification of the law on the topic.

The fiction of diplomatic protection as the application of a right of the State had played a positive role when it had represented the only means of advancing the case of an individual in the international sphere and invoking the

international responsibility of the host State in its relations with that individual. Clearly, the situation no longer applied, and rigid maintenance of the fiction might be perceived as retrograde or even reactionary in the light of all the implications of the notion of globalization.

In sum in his preliminary report the Special Rapporteur had raised the question of the relationship between the topic of diplomatic protection and the topic of international responsibility, seeking clarification of the restriction of the Commission's investigations to secondary rules of international law. He had not meant that the Commission must choose between primary and secondary rules. Diplomatic protection certainly fell in the category of secondary rules but it thus prompted the question of the significance of secondary rules in relation to primary rules. When analyzing the underlying law (questions of nationality, the "clean hands" rule, et c.) the Commission would necessarily come to rely on the categories of primary rules in order to draw some conclusions on the question of diplomatic protection.

The Commission it was suggested might wish to consider the advisability of reconvening the Working Group on Diplomatic Protection for the purpose of assisting the Special Rapporteur in focusing on the elements to be covered in his second report.

The International Law Commission, at its Fiftieth Session *inter alia* established an open-ended Working Group, chaired by Mr. M. Bennouna, Special Rapporteur of the topic, to consider possible conclusions which might be drawn on the basis of the discussion as to the approach to the topic and also to provide directions in respect of issues which should be covered in the second report of the Special Rapporteur for the fifty-first session of the Commission.

As regards the approach to the topic, the Working Group agreed to the following:

(a) The customary law approach to diplomatic protection should from the basis for the work of the Commission on this topic:

(b) The topic will deal with secondary rules of international law relating to diplomatic protection, primary rules shall only be considered when their clarification is essential to providing guidance for a clear formulation of a specific secondary rule;

(c) The exercise of diplomatic protection is the right of the State. In the exercise of this right, the State should take into account the rights and interests of its national for whom it is exercising diplomatic protection;

(d) The work on diplomatic protection should take into account the development of international law in increasing recognition and protection of the rights of individuals and in providing them with more direct and indirect access to international forums to enforce their rights. The Working Group was of the view that the actual and specific effect of such developments, in the context of this topic, should be examined in the light of State practice and insofar as they relate to specific issues involved such as the nationality link requirement:

(e) The discretionary right of the State to exercise diplomatic protection does not prevent it from committing itself to its nationals to exercise such a right. In this context, the Working Group noted that some domestic laws have recognized the right of their nationals to diplomatic protection by their Governments;

(f) The Working Group believed that it would be useful to request Governments to provide the Commission with the most significant national legislation, decisions by domestic courts and State practice relevant to diplomatic protection:

(g) The Working Group recalled the decisions by the Commission at its forty -ninth session to complete the first reading of the topic by the end of the present quinquennium.

As regards the second report of the Special Rapporteur, Mr.Bennouna, the Working Group suggested that it should concentrate on the issues raised in chapter one "Basis for Diplomatic Protection" of the outline proposed by the last year Working Group. It may be recalled that that outline had envisaged a comprehensive analysis of the basis of diplomatic protection of (a) natural persons; (b) legal person; (c) other cases; and (d) the transferability of claims. The issues identified by the Commission are set out below for ready reference.

A. Natural persons.

1. Nationals, continuous nationality

2. Multiple nationals; dominant nationality, genuine link, effective nationality, bona fide nationality;

   (a) As against third States

   (b) As against one of the States of nationality

3. Aliens in the service of the State

4. Stateless persons

5. Non-nationals forming a minority in a group of national claimants

6. Non-nationals with long residence in the State espousing diplomatic protection

7. Non-nationals in the framework of international organizations of integration.

B. Legal persons

1. Categories of legal persons

(a) Corporations, and other associations in varying forms in different legal systems

(b) Partnerships

2. Insurers

3. Right of espousal in multiple nationality and in special cases (factors; nationality of legal persons, theories on control or nationality of share holders).

C. Other cases (ships, aircraft's, spacecraft's, etc.)

D. Transferability of claims

Whilst endorsing the recommendation of the Working Group in respect of the issues which should be covered by the report of the Special Rapporteur for the next session of the Commission viz. that the Special Rapporteur, should concentrate on the issues raised in Chapter One entitled "Basis for Diplomatic Protection" of the outline proposed by the Working Group established at the forty-ninth session of the Commission. The Commission has invited comments and observations by Governments on the conclusions drawn by the Working Group the Commission has requested Governments to provide the Commission with the most significant national legislation, decisions by domestic courts and State practice relevant to diplomatic protection.

V. Unilateral Acts of States

The Commission has considered the subject "Unilateral Acts of States" appropriate for immediate consideration as it is a well delimited topic and 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 International Court of Justice, 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 had been 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 of States could be approached.

By its operative paragraph 13 of Resolution 51/160 the General Assembly had invited the Commission to examine the topic "Unilateral Acts of States", and to indicate the scope and the content of the topic in the light of the comments and observations made during the debate in the Sixth Committee on the report and any written comments that Governments may wish to submit. The Planning Group established by the Commission at its forty ninth session had deemed it desirable that a work plan and detailed outlines be prepared by a Working Group on the topic of Unilateral Acts of States.

At its forty ninth session recalling the mandate given to it by the General Assembly the Commission established a Working Group[15] and on the recommendation of the Working Group the Commission at its forty ninth Session appointed Mr. V. Rodriguez Cedeno, Special Rapporteur, for the topic "Unilateral Acts of States". Thereafter, the General Assembly by its resolution 52/156 of 15 December 1997 had endorsed the decision of the International Law Commission to include in its agenda the topic "Unilateral Acts of States".

At it fiftieth Session the Commission considered the First Report of the Special Rapporteur, Mr. Rodriguez Cedeno,

[15] The Working Group comprised of Mr. E. Candioti (Chairman); Mr. Baena Soares; Mr. J. Dugard: Mr. C. Economides; Mr. L. Ferrari Bravo; Mr. N. Elaraby: Mr. G.Hafner; Mr. Qizhi He : Mr. I Lukashuk; Mr. V. Rodriguez Cedeno; Mr. B. Sepulveda and Mr. Z. Galiciki (ex-officio member).

on the Unilateral Acts of States. The main purpose of the Report was to decide on a systematic study of unilateral acts of States. The Preliminary Report consisted of an Introduction and Two chapter.[16] The introduction drew a distinction between non-legal unilateral acts - or political acts, unilateral legal acts of international organizations and the conduct, attitudes and acts of States which though carried out voluntarily were not performed with the intention of producing specific legal acts.

In his report the Special Rapporteur had pointed out that both the Permanent Court of International Justice and the International Court of Justice have considered unilateral declarations of States on a number of occasions and concluded that they were binding regardless of whether they fell in the treaty sphere (*Eastern Greenland Case*). In two cases the International Court of Justice has held that there had been legal unilateral declarations (*Nuclear Tests Cases*) while in other that there had been political declarations (*Frontier Dispute case* and *Military and Paramilitary Activities case*).

The first Chapter of the report was addressed to the existence of unilateral acts of States. It considered the fundamental question of sources of international law and international obligations, distinguishing between formal legal acts and legal rules that created such acts. It focused on unilateral declarations, as legal acts, whereby legal rules and in particular legal obligations were created for the declarant State. In the opinion of the Special Rapporteur a unilateral declaration was a formal legal act whereby legal rules could be created and accordingly it could be the subject of special rules governing its operation. The Special Rapporteur aimed at defining strictly unilateral, acts with a view to preparing precise reports on rules pertaining to the preparation, validity, effects, nullity, interpretation, rvocation and modification of such acts.

[16] See UN Doc. A CN.4/486.

Recognizing that a definition is fundamental for the future work of the Commission the Report of the Special Rapporteur sought to submit its component parts. A strictly unilateral declaration, the Special Rapporteur said, could be regarded as a clear and unambiguous autonomous manifestation of will, expressed explicitly and publicly by a State, with the object of creating a legal relationship and of creating international obligations for itself, in relation to one or more states which had not participated in its elaboration, without any need for that state or those states to accept it or for subsequent conduct signify such acceptance.

The Second Chapter of the first Report of the Special Rapporteur related to strictly unilateral acts of States. The latter term was employed to differentiate such acts from non-autonomous or dependent acts whose operation was governed by existing rules. In treaty law every treaty has to be performed in good faith and likewise given the need for mutual trust and international legal certainty a unilateral declaration had to be respected and good faith had to be regarded as fundamental to the binding nature of unilateral acts of states. Emphasizing that the rule of *pacta sunt servanda* was the basis of the binding nature of the law of treaties the Special Rapporteur suggested that a special rule, such as *promissio est servanda* could be used for the specific case of promise.

At its fiftieth session the Commission reconvened the Working Group on Unilateral Acts of States. The Working Group in its Report to the Commission endorsed the approach adopted by the Special Rapporteur which concurred with the outline adopted by the Commission at its 49th session and which restricted the topic to unilateral acts of States issued for the purpose of producing international legal effects. Thus, the scope of the topic would exclude (i) acts of States of a purely non-legal nature; (ii) unilateral acts of States which are linked a specific legal regime; and (iii) acts of other subjects of international law, such as international organizations.

It maybe recalled in this regard that the Special Rapporteur had in his report suggested that acts which were

regarded as strictly political, which produced purely and solely political effects could be excluded from the scope of the proposed study. The proposal was advanced in light of the fact that the intention of the State was essential in determining the nature of the unilateral act and it would be for the court to interpret whether a State had in performing on a political act had intended to enter into Legal obligations. This, it was pointed out, was apparent from the *Nuclear Tests Cases* and the decisions taken by the International Court of Justice when it had inferred that political declarations made outside the context of negotiations could contain legal elements binding on a state.

The Working Group was, however, divided as to whether the scope of the topic ought to extend to unilateral acts of States issued in respect of subjects of international law other than States or *erga omnes*, and whether the effects of unilateral acts of states issued in respect of states could be extended to other subjects of international law. It was felt that work could for the present proceed without making a final decision on the matter and subject to further examination by the Special Rapporteur and the Commission and further clarification in the course of further consideration.

Apropos, the final form of the work of the Commission the Working Group generally felt that the elaboration of draft articles with commentaries on the matter would be the most appropriate way to proceed. The preparation of draft articles with commentaries it was felt would ensure concision, clarity, compactness and systematization of a codification exercise without prejudging the final legal status which might be reserved for such draft articles viz. a convention, guidelines, restatement etc.

The Working Group felt that the Special Rapporteur may already be in a position to formulate a number of draft articles viz. (i) on the scope of the draft articles; (ii) the use of terms; (iii) the non-applicability of the draft articles to acts of States linked to a pre-existing international agreement; (iv) the non-

applicability of the draft articles to draft articles to acts of subjects of international law other than States etc.

The Special Rapporteur, the Working Group recommended, could formulate a draft article stating that the draft articles would apply to the unilateral acts of states. This recommendation of the Working Group is based on the fact that the Special Rapporteur's report did not the deal with the unilateral acts of international organizations.

A second draft article, it was proposed, could specify the "Use of Terms" stating that a unilateral act (declaration) is an autonomous unequivocal and notorious expression of the will of a State, issued for the purpose of producing international legal effects. A third provision, it was proposed could stipulate that the fact that the draft articles did not apply to a unilateral acts of states which are linked to a pre-existing -existing international agreement, e.g. the Law of Treaties, by the Law of the Sea, by the law of international arbitral or judicial procedure or by other specific legal regimes, was without prejudice to the application to them or any of the rules set forth in the draft articles to which they would be subject under international law, independently of the draft articles.

The Working Group was also agreed that the elaboration of the aspects related to the element of the above definition consisting in the "purpose of producing legal effects" was well within the topic but pertained also to some other section of the draft articles, such as the effects of unilateral acts. This it was felt would cover the study of possible effects of the act, such as the creation of international obligations for the State issuing the act (promise), the renunciation of its rights, and the declaration of opposability to the claims of another State or of a particular legal situation (recognition or protest). It could also cover the question whether it would be necessary or not, in order for the act to produce legal effects, for the addresses to accept it to subsequently behave in such a way as to signify such acceptance.

The Special Rapporteur had indicated in his Report that *estoppel*, a rule of evidence, had now found a place in the doctrine and jurisprudence of international law. While it had been considered on a number of occasions by international judicial bodies it had rarely been used as the basis for any ruling. The judgments in the *Eastern Greenland* Case; the *North Sea* Continental Shelf cases; the *Preah Vihear Temple* case; *Nottebohm* case; *Barcelona Traction* case: and the *Arbitral Award of the King of Spain* were cited in this regard.

The Working Group has recommended that the Special Rapporteur examine at the appropriate time the *question of estoppel* and the *question of silence* with a view to determining the rules, if any, that could be formulated in that respect in the context of the unilateral acts of States. The recommendation has been made in light of the views of the members of the Commission expressed in the plenary.

As to the future work on the topic the Working Group recommended that the Commission request the Special Rapporteur Mr. Rodriguez Cedeno to submit draft articles on the definition of unilateral acts and the scope of the drat articles on the basis of its (the Working group's) Report. It further recommended that the Special Rapporteur "proceed further with the examination of the topic, focusing on aspects concerning the elaboration and conditions of validity of the unilateral acts (declarations) of States".

To sum up, while there was general endorsement for limiting the topic to unilateral acts of States issued for the purpose of producing international legal effects and for elaborating possible draft articles with commentaries on the matter. The Commission requested the Special Rapporteur, Mr. Rodriguez Cedeno, when preparing his second report, to submit draft articles on the definition of unilateral acts and the scope of the draft articles and to proceed further with the examination of the topic, focusing on aspects concerning the elaboration and conditions of validity of the unilateral acts of States.

The Commission has invited views and comments on whether the scope of the topic should be limited to declarations, as proposed by the Special Rapporteur in his first report, or whether the scope of the topic should be broader than declarations and should encompass other unilateral expressions of the will of the State. Comments have also been invited on whether the scope of the topic should be limited to unilateral acts of States directed at or addressed to other States, or whether it should also extend to unilateral acts of States issued to other subjects of international law.

The Secretariat of the Asian African Legal Consultative Committee will continue to monitor the work of the International Law Commission on this subject.

INTERNATIONAL LAW COMMISSION LONG TERM PROGRAMME OF WORK

FUTURE TOPICS

FEASIBILITY STUDY ON THE LAW OF ENVIRONMENT

CHUSEI YAMADA

Since the 1972 Stockholm Declaration on the Human Environment, many important developments have occurred in international environmental law. Its present situation is characterized by an abundance of multilateral conventions and other international instruments, no fewer than 120 of them, which cover many fields and constitute an impressive network of rights and obligations of States. They should be considered as a successful achievement of contemporary international law, as the International Court of Justice has noted that "the existence of the general obligations of States to ensure that obligations within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* para. 29). However, the "Sector-by Sectors" approach, which has been adopted so far in the conclusion of various multilateral conventions, often dictated by the need to respond to urgent and specific requirements, runs the risk of not addressing the need for an integrated approach to the prevention of pollution and the continuing deterioration of the global environment. Wide gaps exist in the net work of obligations of States contained in the multilateral instruments, particularly in the field related to global concerns.

In view of the interests expressed widely by Governments in the Sixth Committee of the General Assembly, as well as in other legal forums such as the Asian-African

Legal Consultative Committee, for the Commission to engage in the codification and progressive development of international environmental law, the Commission has since 1993 considered this subject within the framework of its long term programme of work. Some preliminary outlines were prepared ("Global commons" by Christian Tomuschat; "Rights and duties of the States for the protection of the Human environment", by Chusei Yamada). However, as the subject it substantive, wide, complex and technical, the Commission has not yet identified the scope and content of the topic it would take up under the rubric of the law of environment.

A brief overview of the historical development of international environmental law would be relevant to our review:

(a) Traditional environmental problems are distinguished by the fact that they normally arise between neighbouring States. The prevailing rules of international law have been based on the premise of sovereign equality of territorial States in which the State is expected to exercise due diligence over the economic activities within its territory so that they will not cause any harm to other States;

(b) When at a later stage environmental degradation came to cover not only the injury to the neighbouring States, but also the widespread damage to more extended areas, modifications had to be introduced into the applicable rules of international law. While specific conventions were concluded in the areas of damages caused by ultrahazardous activities such as oil transport, nuclear or space activities, there is no general convention stipulating the rights and duties of States in respect of ultra-hazardous activities;

(c) With the recent drastic expansion of the global economy, significant technological innovations and the explosive population growth, such global environmental problems as the depletion of the ozone layer, climate change (global warming), acid rain, the destruction of tropical forests and bio-diversity have come to be embraced as important topics of international

law. Global environmental problems typically caused gradual but widespread and long-lasting, sometimes, irreparable harm to the global environment as a combined result of various activities carried out in various States. These problems, which are the common concern of mankind, give rise to a tally new question of the rights and duties of States which would take the form of "*erga omnes* obligations" in its contents, nature and method of implementation.

The Commission has already formulated drat articles which were the basis of the United Nations Convention on the Law of Non-navigational Uses of International Water courses. The work on "State responsibility" and "International liability arising out of acts not prohibited under international law", which is currently being carried out by the Commission, is very relevant to the environmental problems mentioned in paragraph 3(a) and (b) above.

It is the view of the author of the present paper therefore that the Commission should focus more on those problems mentioned in paragraph 3(c), that is, the field of duties erga omnes where the complaint of deterioration of the environment is directed towards the international community at large, rather than individual States. It would be possible to draft a comprehensive umbrella or framework convention, extracting principles of international law commonly found in existing multilateral instruments and also filling lacuna in them.

At the same time, it is the considered view of the author that the Commission should not initiate the work on a topic if the scope and content are not clearly defined and generally endorsed by the members of the Commission. The Commission should avoid the repetition of difficulties in encountered with the topic "International liability". Accordingly, the author proposes that the Commission authorize, as a first step, a feasibility study of the topic provisionally entitled "The law of environment", so that it would be in a position, after such a study were presented, to decide the exact s cope and content of the future topic. A preliminary list of issues to be considered in such a feasibility study is annexed hereto.

ANNEXURE

REPORT OF THE RAPPOTEUR OF THE SPECIAL MEETING ON THE RESERVATION TO TREATIRES HELD ON 14 APRIL 1998

The Special Meeting on the 'Reservation To Treaties' was convened within the administrative arrangements of the 37th Session of the Asian African Legal Consultative Committee. The Special Meeting was chaired by the President (Dr. P.S. Rao) and it was understood that the Bureau of the 37th Session would also be the Bureau of the Special Meeting. Thus Hon'ble Mr. Martin A.B.K. Amidu, the Deputy Minister of Justice and the deputy Attorney Generally of Ghana, who had been elected the Vice President of the 37th Session was the Vice -President of the Special Meeting. The Special Meeting appointed deputy Secretary General, Ambassador Dr. W.Z. Kamil, as the Rapprteur for the Special Meeting.

The Secretary General welcomed the delegates and experts who in response to the invitation of the Secretariat lent their consent to make presentations and steer the discussions in the Special Meeting on the Reservations to Treaties. He further stated it was the third of the Special Meetings to be organized by the Secretariat within the administrative arrangements of the annual sessions of the Committee. He recalled that during the 35th Session of the Committee held in Manila in 1996 a Special Meeting had been convened on the Establishment of an International Criminal Court and that during the 36th Session a Special Meeting had been convened to consider the Interrelate Aspects Between the International Criminal Court and International Humanitarian Law. A large number of delegates to the 35th and 36th Sessions of the committee had considered the two Special Meetings to be useful.

He traced the genesis of the present Special Meeting to a meeting of the Legal Advisors of Members States held, during the 51st session of the General Assembly in New York in October 1996, where a view was expressed that the AALCC

Secretariat consider convening a Seminar on the Law of Treaties. The proposal was advanced in view of the consideration of the question of "the Law and Practice Relating to the Reservation of Treaties" on the work program of the International Law Commission.

The Secretary General stated when the International Law Commission, at its 49th Session, adopted set of Preliminary conclusions on Reservations to Normative Multilateral Treaties Including Human Rights Treaties, the Secretariat proposed the convening of a Special Meeting on the Law of Treaties i particular the question of Reservations to Treaties during the curse of the 37th session f the Asian African Legal Consultative Committee. The Secretariat proposal to convene a Special Meeting was considered at a meeting of the Legal Advisers of member States of the Committee held during the 52nd session of the General Assembly in New York.

The Secretary General concluded his welcome ad dress by saying that the Secretariat had prepared a Background Note on the subject to facilitate the deliberations on the Preliminary Conclusions on Reservations to Multilateral Treaties, and invited the Deputy Secretary General Ambassador Dr. W.Z. Kamil, to introduce the Brief of Documents prepared by the Secretariat.

Inviting attention to the Note of the Secretary General prepared for the Special Meeting Doc. No. AALCC/XXXVII/New Delhi/98 SP.1. the Deputy Secretary General, Ambassador W.Z. Kamil, recalled that the Special Meeting on the Establishment of an International Criminal Court and the Interrelated Aspects Between the International Criminal Court and International Humanitarian Law organized within the administrative arrangements of the 35th and 36th Sessions of the AALCC held in 1996 and 1997 respectively had been considered to be useful.

He pointed out that the Preliminary Conclusions on Reservations To Normative Multilateral Treaties Including Human Rights Treaties adopted by the International Law

Commission at its 49th session reiterate that articles 19 to 23 of the Vienna Conventions on Treaties of 1969 and 1986 govern the regime of reservation to treaties and that the "object and purpose of the treaty" is the most important criteria for determining the admissibility of reservations. The Commission has taken the view that the regime of the Vienna Conventions strikes a balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty. It accordingly considered the flexibility of that regime to be suited to all treaties, of what ever nature or object.

The Commission is of the opinion that the twin objectives (i) of the preservation of the integrity of the text of the treaty, and (ii) universality of participation in the treaty are equally applicable in the case of reservations to normative multilateral treaties including treaties in the area of human rights, and consequently the general rules enunciated in Articles 19 to 23 of the Vienna Convention of 1969 and 1986 govern reservations to such instruments. It has further taken the view that the establishment of monitoring bodies by many human rights treaties had, however, given rise to legal questions that had not been envisaged at the time of drafting those treaties connected with appreciation of the admissibility of reservations formulated by States.

The Deputy Secretary General stated further that the Preliminary Conclusions adopted by the Commission recognize that where human rights treaties are silent on the subject of the formulation of reservations the monitoring bodies, established by the Human Rights Treaties, are competent to comment upon and express recommendations with regard to the admissibility of reservations by States in order to carry out the functions assigned to them. Several members of the Commission had however disagreed with this principle as incorporated in paragraph 5 of the preliminary conclusions.

The Commission, it was pointed out, has suggested that the competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the

contracting parties, in accordance with the provisions of the Vienna Convention of 1969 and, where appropriate by the organs for settling any dispute that may arise concerning the interpretation or application of the treaties.

The Commission has proposed providing specific clauses in multilateral normative treaties, including human rights treaties, or elaborating protocols to existing treaties if States seek to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation. It was pointed out in this regard that the legal force of the findings made by the monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers vested in them for the performance of their general monitoring role. It has also called upon States to cooperate with monitoring bodies and give due consideration to any recommendation that they may make or to comply with their determination if such bodies were granted competence to that effect.

Finally, he stated that the International Law Commission has invited comments on the Preliminary Conclusions adopted on the Reservations to Normative Multilateral Treaties, including Human Rights Treaties and consideration could be given to forwarding the views of Members States of the AALCC on the issue of reservation to treaties expressed during the Special Meeting together with any report or recommendation that the Committee may adopt at the current Session.

The discussions during the Special Meeting revolved largely around the presentations made by a group of experts specially invited to make presentations. These had included Mr. B.Sen (Member of UNIDROIT Governing Body and Former Secretary General of the AALCC), Professor F. X. Njenga (Dean, Faculty of Law, Moi University, Kenya and former Secretary General of the AALCC); Professor (Ms) S.K. Varma (Dean Faculty of Law, University of Delhi); Professor M.K. Nawaz (Visiting Professor, National Law School, Bangalore); Professors R.P. Anand; V.S. Mani and Y. K. Tyagi (all of the School of

International Studies, Jawaharlal Nehru University). A paper on "Reservations to Normative Multilateral Treaties and Human Rights Treaties" written by Professor M.K. Nawaz was circulated during the Meeting.

It may be stated that Ambassador Chusei Yamada, member of the International Law Commission represented the Chairman of the Commission and Special Rapporteur of the topic, Professor Alain Pellet.

Following the presentations by the six Special Experts, delegates of 8 Member States, one observer State and two international organizations made statements. These had included China, Egypt, Ghana, India, Islamic Republic of Iran, Kuwait, Sri Lanka and Sudan from among the Member States; Sweden from among the Observer States; and the International Law Commission and the Organization of Islamic Conference from among the international organizations.

The deliberations focused on a wide range of issues arising out of the reservations to treaties. Most participants addressed, in one form or other, the "vexing question" of the effect of reservations to plurilateral treaties, mainly in relation to the provisions of Articles 19 to 23 of the Vienna Convention on the Law of Treaties 1969. Reference was made to a whole host of other international instruments such as the UN Charter, Statute of the International Court of Justice; Nuclear Test Ban Treaty; Antarctic Treaty; Berne Convention on Intellectual Property; UN Framework Convention on Climate Change; UN Convention on Bio-diversity; IMO Convention; Disarmament Conventions(s); United Nations Convention on the Law of the Sea; Convention on the Elimination of Discrimination Against Women (CEDAW); International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights, ; Genocide Convention; Convention on the Reduction of Statelessness; Refugee Convention.

The Special Meeting considered the relevant provisions of the Vienna Conventions of the Law of Treaties, 1969 viz.

Articles 19 to 23. It also took note of the relevant provisions of the 1978 Convention and the 1986 Convention on the subject. The Special Meeting also considered the Preliminary Conclusions on Reservation to Multilateral Normative Treaties including Human Rights Treaties adopted by the International Law Commission. The Meeting also recalled that the General Assembly at its 52nd Session had drawn the attention of Governments to the importance for the International Law Commission, of having their views on the preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties, including human rights treaties.

The view was expressed that while the Vienna Regime of Reservations to Treaties was based on the assumption that a multilateral treaty is in effect a combination of several bilateral treaty relationships there were a certain category of treaties which, by the very nature of the subject matter addressed by them, did not admit of any reservations. Treaties relating to the protection and preservation of the Environment, Disarmament treaties and Human Rights Treaties were identified as the category of treaties which are applicable and binding upon not only the States Parties but on all members of the international society. The United Nations Convention on the Law of the Sea. 1982 was yet another example of a treaty which by the nature of being a "package deal" did not admit of reservations.

The Special Meeting considered the functions and role as well as the competence of the monitoring bodies to appreciate or determine the admissibility of a reservation. The view of the Commission that the legal force of the findings made by such bodies in the exercise of their functions could not exceed those resulting from the powers given to them, met with approval. However, the suggestion of providing specific clauses in normative multilateral treaties or elaborating protocols to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation met with resistance.

Many of the participants addressed themselves to the provisions of the international instruments on human rights. The right to religion, the right to work, right to health and the right to compulsory education were among those that were cited and debated. Several views were expressed on the specific provisions of human rights treaties and the reservations thereto. While some identified the lack of resources, unrealistically high international human rights standards, among others, some participants listed the different socio-economic, cultural and political backgrounds of the people and states as the reasons for the formulation of reservations to human rights treaties. It was pointed out that the provisions of some of the human rights treaties could be subclassified as those (i) requiring intervention of States; and (ii) those not requiring any action or intervention by States parties.

Points of convergence

The deliberations in the Seminar revealed a convergence of views on a wide range of issues. These included:-

(i) The law of reservation ushered in by the Vienna Convention has, by and large, served well the needs of the international community of States. It may be unwise to derail the Vienna regime on reservations. The provisions of the Vienna Convention on Treaties had been and continue to enjoy wider acceptance. In as much as these provisions had stood the test of time they should not be tampered with. There was no need to amend or alter them. The majority of participants were of the view that the right to formulate and express reservations to one or more provisions of a convention is an attribute of State sovereignty and power to make or express reservation can only be restricted by a treaty.

(ii) The existing regime of reservations as incorporated in Articles 19 to 23 of the Vienna Convention on Law of Treaties, 1969 were sufficiently flexible and whilst recognizing the inherent right of a State t make a reservation merely restricted that right by stipulating that the reservation or declaration

that may be amenable to misuse. It was stated in this regard that the Commission should avoid handing out political handles which could result in the defeating the very object of universality of participation in a treaty.

Recommendations

A number of recommendations were made in the curse of the Special Meeting. The proposal advanced included:

(i) One view suggested that the International Law Commission undertake an empirical study of state behaviour and study the reservations to treaties and if feasible the motives thereof. It could thereafter seek to develop the reservation regime by way of "interpretative codification".

(ii) Another view emphasized the universal acceptability of the existing reservation regime and proposed that the gaps and lacunae could be filled by commentaries on the existing provisions of the Vienna Convention. He favoured the preparation of a guide to state practice rather than the formulation of model clauses or a protocol.

(iii) It was recommended that the ILC consider concluding its work on this topic not on the basic of "intuitive feeling" but on the basis of an empirical study of the behavour of States.

(iv) The Commission should approach its future work on the subject with due caution and not be guided by the European precedents which may not always be relevant or appropriate to the universal context. One view was that a realistic stance would require taking note of the different political, social economic and cultural milieu of the States and accepting some reservations to treaties as the price to be paid for the promotion and achievement of universality.

(v) The Secretariat should report the debate of the Special Meeting to the International Law Commission. It also requested the Representative of the International Law Commission to report his findings to the Commission at its forthcoming 50th Session.

VI. UNITED NATIONS DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT-ROME, ITALY 15TH JUNE TO 17 JULY 1998: A REPORT

(i) Introduction

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC) held in Rome from 15 June to 17 July 1998, is considered by international Lawyers and large number of experts to be the most important institutional decision making process since the establishment of the UN itself. The ICC would deal with exceptional situations, where the state machinery fails or where the judicial system is either so flawed, inadequate or non-existent that justice has to be meted out through an international court, redressal being unavailable within the country. "The institution of the Court will prevent national sovereignty being used as a convenient shield behind which violence and outrage are committed." In short the International Criminal Court is being established to deal with truly exceptional situations, and to try individuals who, on the gross scale, violate rights of individuals. It would be a crucial instrument to fight against crime, violence and genocide and would establish law, justice and peace. In words of the UN Secretary General "The Establishment of the International Criminal Court was a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law".

The Secretariat of the AALCC has in the past very closely followed the evolution of the work of the United Nations, paving the way to an International Criminal Court. It followed very closely the work of the ILC on the establishment of an ICC, in the context of its work on the Draft Code of Crimes Against the Peace and Security of Mankind. The matter has been extensively discussed at the 33rd, 35th 36th and

37th Sessions of the AALCC held in Kampala, Tokyo Doha, Manila, Tehran and New Delhi respectively. The AALCC closely monitored the work done in the *Ad hoc* Committee[1] as well as Preparatory Committee[2] on the Establishment of an International Criminal Court and participated in the PREPCOM meeting in New York in August 1996.

The topic has been considered at two Special Meetings held during 35th (Manila, 1996) and 36th (Tehran, 1997) Sessions of the AALCC.

A Special Meeting held during the 35th Session (Manila) in March 1996, had requested the Secretary General of the AALCC to transmit, the report and the proceedings of the special Meeting to the Chairman of the Preparatory Committee and directed the AALCC Secretariat to monitor the outcome of the meetings of the PREPCOM to be held in New York. It may

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[1] The question of establishment of the ICC was debated in the *ad hoc Committee* established by GA Resolution 49/53 of 9 December 1994. The *ad hoc Committee* open to all States Members of the United Nations or Members of Specialized Agencies, was established to review the major substantive and administrative issues arising out of the draft statute prepared by the ILC.

[2] The Preparatory Committee on the Establishment of an International Criminal Court was established by G.A. Resolution 50/46 of 11 December 1995 to "further consider substantive and administrative issues arising out of the draft statute of an ICC prepared by the ILC in 1994 and to draft texts with a view to preparing widely acceptable consolidated text of a convention for an ICC for consideration by a Conference of Plenipotentiaries. The mandate of the PREPCOM was thereafter reaffirmed by GA Resolution 51/207 of 17 December 1996. Under the Chairmanship of Mr. Adriaan Bos, the PREPCOM held a total of six sessions: (i) March 25 to April 12, 1996; (ii) August 12 to August 30, 1996; (iii) February 10 to February 21, 1997; (iv) August 4 to 15, 1997; (v) December 1 to 12, 1996; and (vi) March 16 to April 3, 1993. The precom also held an inter-sessional meeting in Zutphen, Netherlands, in January (19 to 30), 1998. The Secretariat of the AALCC was represented only at the second session of the PREPCOM.

be stated that deliberations at the Special Meeting had revolved around the following 6 issues Viz. (i) Mode of Establishment; (ii) The Principle of Complementarity; (iii) Issues Pertaining to Jurisdiction and Applicable Law; (iv) ICC and its Relationship with the Security Council; (v) Procedural Issues; and (vi) Consent and Accountability.

Another Special Meeting on Inter-related Aspects between the International Criminal Court and International Humanitarian Law organized by the AALCC Secretariat during the 36th Session held in Tehran 1997 facilitated exchange of views on the work of the PREPCOM on the Establishment of an ICC as well as the measures towards the implementation of International Humanitarian Law. During this Meeting discussions revolved among other things around 5 issues namely (i) Mode of Establishment; (ii) Principle of Complementarity; (iii) Jurisdiction and Applicable Law; (iv) ICC and its relationship with the Security Council; and (v) Procedural Issues.

The 37th Session of the AALCC was held in New Delhi in April 1998, shortly after the Meeting of the PREPCOM in Zutphen a short while before the Rome Conference of Plenipotentiaries. The Member States of AALCC had laid great emphasis on the universality, independence and impartiality of the ICC. Discussion among other things revolved around the following issues: (i) Mode of Establishment; (ii) Issue of Complementarity; (iii) Trigger Mechanism; (iv) Jurisdiction and Applicable Law; (v) ICC and its relationship with the Security Council; (vi) Procedural Issues; (vii) Financing of the Court; (viii) Role of the Prosecutor; (ix) Penalties; and (x) Number of Ratifications.

The work of the Prepcom Culminated in the convening of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. The 37th Session of the AALCC had mandated the Secretariat to participate actively, as well as to convene one or two meetings of its Member States with the aim of collating

the views and presenting a collective view regarding the contentious issues to the Conference.

Thirty -Eighth Session: Discussion

The *Deputy Secretary General* Ambassador Dr. Wafik Zaher Kamil while introducing the topic stated that the adoption of the Statute of the International Criminal Court in Rome in June -July last year is considered by the international legal fraternity to be the most important decision since the establishment of the United Nations. The aim of the international community, is to create within the framework of the United Nations a permanent independent judicial body with clearly defined rules, empowered to prosecute individuals alleged to have committed international crimes deemed to be the most serious by the international community.

He pointed out that the culmination of the work of the PREPCOM resulted in the convening of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, in Rome from 15th June to 17th July 1998. The 37th Session of the AALCC held in New Delhi in April 1998, had mandated the Secretariat to "monitor and report the developments and outcome of the Conference to the 38th Session, as well as to convene one or two meetings of AALCC Member States during the Rome Conference with the aim of collating the views and presenting a collective stance regarding the contentious issues to the Conference.

He noted that the imperfections of the Statute need not be a cause for despair, on the contrary the fact that a significant number of states with varied legal systems and cultural ethos had agreed upto a common text, is an indication of the strong will and political commitment of these states to address international crimes that have hitherto gone unpunished.

He stated that the Statute had been adopted by a vote of 120 for 7 against and 21 abstentions. Not all the task had been

accomplished. 75 States had signed the Statute and it is a matter of pride that Senegal, one of the Member States of the AALCC, had been the first State to ratify the Statute. Still to be prepared are other instruments within the Preparatory Commission, as well as the ratification in a sufficient number before the Court can start its work.

He emphasized that it was imperative that the AALCC Member States evolve common strategies in furthering the progress achieved at Rome. In the short term the work in the Preparatory Commission offers scope for articulating AALCC's viewpoints. Care should be taken to ensure that the Court's rules are simple and clear as far as possible and to have it protected from undue interference which would damage its credibility. In the long run, the provision for a Review Conference could provide the suitable forum for pursuing the tasks left unaccomplished at Rome.

The *Delegate of India* stated that her country had actively participated in the process aimed at the establishment of the ICC, with the goal of realizing a universally acceptable, independent and efficient court to deal with not only traditional crimes grave crimes of war and genocide, but also the most, heinous crimes such as 'international terrorism' and 'drug-trafficking'. Unfortunately these topics, she said, were belied on several counts - both in the manner of their inclusion of the Statute as well as their substantive contents. She charged that the Conference failed to include international terrorism in the list of the crimes and failed to provide flexibility in the nature of the jurisdiction of the Court. It blurred the distinction between customary law and treaty obligations in respect of the definitions of internal conflicts and crimes against humanity, legitimized the overstitched interpretation of the powers of the Security Council by subordinating the future Court to the discretion of the P-5 States. While the Statute treats offences such as 'murder' as international crimes, she termed it ironic that it refuses to do so with regard to the first use of nuclear weapons-which posses annihilatory potential of a great mass of humanity.

Against this backdrop, she expressed doubts over whether the ICC had the prospects of becoming truly universal.

With reference to the on-going work within the Preparatory Commission, more particularly the commission's deliberations which commenced at its first session in February 1999, the Indian delegate stated that the formulation of "Rules of Procedure and Evidence" should be guided by the consideration that these do not make ICC more intrusive then the Statute adopted in Rome. Drawing attention to the Conference's recommendations pursuant to Article 111 of the Statute, calling for a Review Conference to arrive at an acceptable definition of the crimes of terrorism and drug trafficking and consider its inclusion in the Statute, she drew attention to the fact that the Preparatory Commission had not been expressly assigned any role in this process, as it was the case with the crime of aggression. Therefore, it was her delegation's view that the Preparatory Commission, on a priority basis, prepare proposals for a provision on terrorism, including the definition and elements of the crime of terrorism.

The *Delegate of the Arab Republic of Egypt* stated that his country had consistently supported the efforts to establish the International Criminal Court and had actively contributed to this effort. While welcoming the adoption of the Statute of the Court in Rome there were, however, some misgivings regarding a number of issues relating to the non-inclusion of the crime of aggression, the relationship of the Statute to the non-party States, the relation of the Court with the Security Council especially the Statute regarding Article 16 and the power it grants to the Security Council. He observed that in light of the above and in order for the Statute to attain universality he hoped that the following points will be resolved through the Preparatory Committee. (i) Agreement on the definition of the crime of aggression to enable it to be included in the jurisdiction of the Court; (ii) the principle of Complementarity needs clarification, since its current mention in the Preamble could lead to confusion; and (iii) the relation with the Security Council needs to provide for maintaining the independence of the Court as a juridical body free from the

political influence of the Council. Thus acknowledging the existence of a role for the Council regarding the determination of the crime of aggression.

The Delegate of Palestine thanked the Deputy Secretary General for his introductory statement. Welcoming the adoption of the ICC Statute at Rome, he hoped that the legal framework established by the Statute would operate to curb the potential for selectivity and double standards in the administration of criminal justice. To ensure an independent and effective functioning of the court, the delegate called for more clarification on the role of the Security Council in relation to the ICC. Stating that the response of the Asian-African States to the proposed establishment of the ICC had thus far been encouraging, he called for a more active role by the AALCC in sustaining and carrying forward this process.

The *Delegate of Iran*, expressed the hope, that the establishment of the ICC would promote respect for international law, especially humanitarian law-and the wider participation of States at the Rome Diplomatic Conference was a manifestation of the resolve of the international community to pursue this endeavour in right earnest. While lauding the successful adoption of the ICC Statute, he reminded the Committee that much work still needed to be completed within the Preparatory Commission. The Preparatory Commission has been mandated to prepare proposals for a provision on aggression (including the definition and elements of the crime of aggression) with a view to submitting it to the Assembly of States parties at a Review Conference, so as to arrive at an acceptable provision for inclusion in the Statute. The Islamic Republic of Iran, he informed, has unanimously been designated as the coordinator of the NAM on this subject. Though some delegations at the Rome Conference had been sceptical on the definition and elements constituting the crime of aggression, the delegate pointed out that the consensus definition of aggression articulated in the General Assembly Resolution No.3314 dated 14th December, 1974 is a compromise of three proposals, viz. Western, Eastern and NAM tests could be a useful reference point. Towards achieving the

primacy of order and justice over political considerations, he urged the AALCC Member States to actively participate in the work of the Preparatory Commission.

The *Delegate of the People's Republic of China* observed that the establishment of an International Criminal Court to punish the most serious crimes of international concern had been a goal actively pursued by the international community for nearly a century. The Chinese Delegation had actively participated in the formulation of the Statute. She added that it was regrettable that the Rome Conference was not able to reach consensus on a number of important issues and had to resort to a vote to adopt the Statute. Some of the provisions of the Statute do not fully reflect international political realities and the development of international law, thereby going beyond what a considerable number of countries considered acceptable. It had failed to fully ensure the participation of all countries in the elaboration of the statute on the basis of equality, democracy and transparency. The Statute did not address many major problems such as the (i) jurisdiction mechanisms; (ii) definitions of crimes; (iii) the opt-in approach for accepting jurisdiction of the court; (iv) the authority of the Prosecutor to initiate investigations *proprio motu* and (v) the principle of complementarity.

She further added that the Chinese delegation maintained that a realistic approach be taken in finding a proper solution on the basis of democracy and transparency, and that one should not be pressured to meet deadlines at the expense of the quality of the document and substitute ideals for reality. Her delegation would continue to actively participate in the Preparatory Committee, and would actively participate in framing the elements of crimes and the Rules of Procedure and Evidence.

The *Delegate of Kuwait* said that his country had actively participated in the process leading to the adoption of the Statute of the ICC. The resolve exhibited by the States to adopt the Statute, he said, was a reflection of the determination of the international community to construct an

effective and universal criminal justice system. The jurisdiction of the Court, as a supplement to an ineffective or lack of national jurisdiction on matters relating to the core crimes was a step towards fulfilling a long standing aspiration of the international community. He noted that the task towards formulating the crime of aggression was crucial in the effective functioning of the Court. Commenting on the differing views among States on the nature of punitive measures designed for the core crimes, he said that such matters should be sufficiently deterrent in form so as to prevent the commission of serious crimes. Noting that the AALCC Member States need to consolidate their stand prior to the meeting of the Preparatory Commission he urged the Committee to explore the prospects of holding a Special Session for this purpose.

The *President*, in response to this said that the AALCC should seek to undertake follow-up action before the Review Conference scheduled to be held in August 1999. On the suggestion for a Special Session to coordinate the views of AALCC Member States to consider making an offer to convene the special Session.

The Observer to the International Committee of Red Cross (ICRC) stated that the agenda of this session included several substantive matters of current importance and of concern to the ICRC. The adoption of the Stature of the ICC in July reflected the resolve of States to ensure that those who commit the gravest crimes do not go unpunished. She noted that the ICC would provide international humanitarian law with an instrument that would remedy the shortcomings of the current system of repression of violations of humanitarian law. The obligation to prosecute persons alleged to have committed grave breaches of international humanitarian law already existed under the Geneva Conventions of 1949 and the Additional Protocols but was frequently ignored. She hoped that the ICC, which is intended to be complementary to national criminal jurisdictions, will encourage States to adopt the legislation necessary to implement international humanitarian law by bringing violations before their courts. She informed the meeting that ICRC through its Advisory

services would be available to assist States in adoption of national legislation.

In her view a welcome feature was that the Court could try individuals for crimes committed during non-international armed conflicts. The Statute had adequately widened the scope of jurisdiction in relation to war crimes. According to her, the greatest disappointment arose in relation to Article 124 of the Statute, she urged States not to make the declaration required under the article. She congratulated the Republic of Senegal on becoming the first State Party to ratify the Statute. Finally, she hoped that the centennial commemoration of the First International Peace Conference and 50th Anniversary of the Geneva Convention of 1949 would provide the international community with an opportunity to appreciate the importance and relevance of international humanitarian law and to reaffirm its commitment to ensure that the victims of atrocities are not forgotten and that those who commit such acts do not go unpunished.

(ii) Decision on the "Report on the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome-Italy 15th June to 18th July 1998

(Adopted on 23.04.1999)

The Asian African Legal Consultative Committee at its Thirty-eighth Session.

Taking note with appreciation of the Brief prepared by the Secretariat contained in Document No. AALCC/XXXVIII/Accra/99/8;

Mindful of the adoption of the Rome Statute for an International Criminal Court.

1. *Welcomes* the successful conclusion of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in Rome, Italy, from 15th June to 17th July 1998;

2. *Takes note* of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court done at Rome on 17 July 1998;

3. *Recalls* that the Statute was opened for signature in Rome from 17 July until 17 October 1998 and that thereafter it will remain open for signature at United Nations Headquarters in New York until 31 December 2000;

4. *Notes that* a significant number of States have signed the Rome Statute;

5. *Reiterates* the vital importance of the universal acceptance of the International Criminal Court;

6. *Urges* Member States to consider ratifying the Rome Statute;

7. *Also urges Member States* to actively participate in the work of the Preparatory Commission which has the mandate to prepare proposals for practical arrangements for the establishment and coming into operation of the Court, including the finalization before 30 June, 2000 of the draft texts of the rules of procedure and evidence and of the elements of crimes;

8. *Requests* the Secretary General of the AALCC to monitor and report the developments in the Preparatory Commission;

9. *Also request* the Secretary General to explore the possibilities of convening a seminar or workshop in 1999 before the August meeting of the PREPCOM, if feasible, with the view to present the consensus stance of AALCC Member States on the issues to be discussed by the PREPCOM during the said meeting; and

10. *Decides* to place the item "Establishment of an International Criminal Court" on the agenda of its Thirty-ninth Session.

(iii) Secretariat Study: Report on the United Nations Diplomatic Conference of Plenipotentiaries on the Establishing of an International Criminal Court 15 June-17 July 1998

AALCC's Participation During the Rome Conference

The Deputy Secretary General, Ambassador Dr. W.Z. Kamil represented the AALCC at the Rome Conference. The AALCC organized two meetings parallel to the Rome Conference which were Chaired by Dr. P.S. Rao. Dr. Kamil and Mr. Bhagwat Singh AALCC's Permanent Observer in New York represented the AALCC during these meetings. In his opening statement, the Deputy Secretary General stated that the aim of these meetings was to collate the views of the Member States and to present a collective view regarding the contentious issues to the Committee of the Whole. The meetings were attended by most of the Member States of the AALCC present at the Conference and were appreciated to the extent that some non-member States also requested to attend these meeting as Observers. Prior to the meetings an overview of the Draft Statute, prepared by the Secretariat was circulated among the Member States, and this document was considered useful by them.

The meetings discussed *inter alia* the following issues which were to be settled during the Conference:

(i) Principle of Complementarity: It was emphasized that one of the fundamental features of the future Court will be its complementary status; it must only institute proceedings when national Courts fail to act, or fail to act effectively. For the Permanent Court is not intended to replace national courts, but to work by their side and resorted to only in the event of the national courts' unwillingness or inability to prosecute. Several delegates observed that a mere reference to the principle in the Preamble was insufficient and had emphasized on the drawing up of clear jurisdictional boundaries between

the jurisdiction of the Court's functioning within the criminal legal systems of the States and the Court so as to avoid overlapping of jurisdiction in the administration of justice over serious international crimes.

(ii) Jurisdiction of the Court: The issues relating to the exercise of jurisdiction *ratione temporis* were central to the effective application of the Statute. The Conference had to decide as to which crimes would come within the jurisdiction of the Court. These would be crimes against general international law ("core crimes") such as war crimes, crimes against humanity and crimes against peace. Defining war crimes would raise particular difficulties because no common agreement exists and some States wanted the inclusion of "weapons of mass destruction i.e. nuclear, chemical and biological weapons, in the provision and some others wanted to know whether or not local/internal conflicts qualified for inclusion in "war crimes". Another sensitive aspect considered by the delegates was whether to include the crime of aggression among the core crimes, and if so, how to define it, coinciding as it does with aggression which is defined as a State crime for which the United Nations Security Council already has jurisdiction under Chapter VII of the United Nations Charter. Besides any attempt to elaborate a definition of the crime of aggression one must take into account the fact that most of the time it was not an individual act, instead wars of aggression existed.

(iii) Role of the Security Council: Another very crucial aspect which was discussed during the two meetings was the "role of the Security Council". It was felt that the Court would enjoy a close relationship with the United Nations. This was necessary for bringing universality and standing of the Court. This would also relate to the invocation of the substantive jurisdiction or *rationae materiae* of the Court by the Security Council acting under chapter VII of the Charter of the United Nations. Referral by the Security Council could cloud the

objectivity and independence of the Court and would not therefore be conducive to the establishment and independent functioning of a uniform, non-discriminatory, and impartial criminal system.

At the end of these two meetings, the President of the AALCC, communicated the views of the member States, to the Chairman of the Committee of the Whole, Mr. Philippe *Kirsch*, who welcomed the views and appreciated the efforts of the States which had whole heartedly participated in this endeavour.

Dr. Kamil also attended all Regional Group Meetings i.e. (NAM, Arabic Group, African Group etc.) and actively participated in them on the various conflicting items discussions. He participated in informal consultations among some delegations of AALCC and expressed his legal point of view to the questions raised.

1. Overview of the Rome Statute for an International Criminal Court

The UN Diplomatic Conference of Plenipotentiaries on Establishment of International Criminal Court elected Mr. Giovanni Conso (Italy) as President. It elected as Vice-Presidents the representatives of 32 States.[3] In addition four Committees were set up by the Conference: (i) General Committee;[4] (ii) Committee of the Whole;[5] (iii) Drafting Committee;[6] and (iv) Credentials Committee.[7]

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[3] Algeria, Austria, Bangladesh, Burkina Faso, China, Chile, Colombia, Costa Rica, Egypt, France, Gabon, Germany, India, Iran (Islamic Republic of), Japan, Kenya, Latvia, Malawi, Nepal, Nigeria, Pakistan, Russian Federation, Somoa, Slovakia, Sweden, the former Yugoslav Republic of Macedonia, Trinidad and Tobago, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and Uruguay.

[4] Comprising of the President of the Conference and members i.e. the President and Vice-Presidents of the Conference, the Chairman

Participating in the Conference were delegations from 160 countries, 17 Inter-governmental organizations, 14 specialized agencies and funds of the United Nations and 124 organizations. The Statute of the Court was adopted by a non-recorded vote which was requested by the United States, 120 in favour to 7 against with 21 abstentions.

Salient Features of the Statute

The "Rome Statute for the Establishment of an International Criminal Court", comprising of a Preamble, 128 articles, is substantially longer than the ILC Draft Statute of 60 articles[8] that was the starting point for the *ad hoc* Committee's and Preparatory Committee's work. The Preamble to the Statute sets out the main purpose of the Court and refers to "common bonds" that unite peoples and to a "shared heritage"

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of the Committee of the Whole and the Chairman of the Drafting Committee.

5 Chairman Mr. Philippe Kirsch from Canada and 4 Vice-Presidents i.e. ms. Silvia Fernandez de Gurmendi (Argentina), Mr. Constantin Virgil ivan (Romania) and Mr. Phakiso Mochochoko (Lesotho) and a Rapporteur, Mr. Yasumasa Nagamine (Japan).

6 The Drafting Committee was chaired by Mr. M. Cherif Bassiouni (Egypt) and 24 members from Cameroon, China, Dominican Republic, France, Germany, Ghana, India, Jamaica, Lebanon, Mexico, Morocco, Philippines, Poland, Republic of Korea, Russian Federation, Solvenia, South Africa, Spain, Sudan, Switzerland, Syrian Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela. The Rapporteur of the Committee of the Whole participated *ex officio* in the work of the Drafting Committee in accordance with rule 49 of the rules of procedure of the Conference; and

7 The Credentials Committee was chaired by Ms. Hannelore Benjamin (Dominica) and its Members were from Argentina, China, Cote d"Ivoire, Dominica, Nepal, Norway, Russian Federation, United states of America and Zambia.

8 Report of the International Law Commission UN, GAOR, 49 Session, Suppl. No. 10 (A/49/10) 1994.

formed by their cultures; recalls the millions of children, women and men who, during the twentieth century, "have been victims of unimaginable atrocities that have deeply shocked the conscience of humanity' and recognizes that such grave crimes threaten the peace, security and well being of the mankind. The Preamble also affirms that "the most serious crimes of concern to the international community as a whole must not go unpunished", and their effective prosecution must be insured by measures at the national level and by enhancing international co-operation. The determination to put an end to impunity for the perpetrators of these crimes thus contributing to their prevention is set forth and the duty of states to exercise their criminal jurisdiction over those responsible for international crimes is recalled.

It further continues, that for the sake of present and future generations an independent permanent International Criminal Court is established, in relationship with the United Nations system, "with jurisdiction over the most serious crimes of concern to the international community as a whole". The Preamble states that the court shall be complementary to national criminal jurisdictions and expresses its resolve to guarantee lasting respect for and the enforcement of international justice.

The 128 Articles are grouped together in 13 parts viz. *Part 1* Establishment of the Court (Articles 1-4); *Part 2* Jurisdiction, Admissibility and Applicable Law (Articles 5-21); *Part 3* General Principles of Criminal Law (Article 22-33); *Part 4* Composition and Administration of the Court (Articles 34-52); *Part 5* Investigation (Article 53-61); *Part 6* The Trial (Articles 62-76); *Part 7* Penalties (Articles 77-80); *Part 8* Appeal and Review (Article 81-85); *Part 9* International Cooperation and Judicial Assistance (Article 86-102); *Part 10* Enforcement (Articles 103-111); *Part 11* Assembly of States Parties (Articles 1 12); *Part 12* Financing of the Court (Articles 113-118); *Part 13* Final Clauses (Articles 119-128); The text of these provisions along with their alternative formulations, (the draft provided by the Preparatory Commission) constituted the basic

working document for the Conference of Plenipotentiaries convened at Rome. Following are the salient features of the Statute:

(i) Establishment and Structure of the Court

The Statute establishes an International Criminal Court as a permanent institution with power to exercise jurisdiction over persons for the most serious crimes of international concern and which is complementary to national criminal jurisdiction.[9] Besides providing for the institutional structure, it lays down the general principles of criminal law[10] to be applied by the Court and hence is both a constituent instrument as well as a codification treaty.

The Statute establishes the following organs of the Court: the Presidency, an Appeals Division, a Trial Division, and a Pre-Trial Division; the office of the Prosecutor and the Registry.[11] The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties,[12] with functions such as (i) providing management oversight to the principal organs i.e. the Presidency, Prosecutor and Registrar regarding the administration of the Court; (ii) considering and approving the budget of the Court; (iii) determining whether to alter the number of judges serving on a full or part time basis and (iv) perform any other function or take any other action as specified in the Statute of the rules of Procedure and Evidence. The Assembly of States Parties can, upon the recommendation of the Court or its own Bureau, consider any question relating to non-cooperation by States parties and take appropriate

[9] See Part I, Article 1 of the Rome Statute of the International Criminal Court Doc. A/CONF/183/9 dated 17 July 1998.

[10] See Part 3 (Articles 22-33) of the above stated document.

[11] See Part 4 Composition and Administration of the Court of the Rome Statute A/CONF/183/9.

[12] See Article 112 in part 11 of the Statute, see also Part 13 on final Clauses A/CONF/183/9.

measures. The Seat of the Court shall be established in Hague in the Netherlands.[13] According to the Statute, the Court may sit elsewhere, whenever it considers it desirable.

It may be mentioned that the two *ad hoc* Tribunals for the former Yugoslavia and Rwanda were created by the UN Security council after shocking crimes had been committed. The jurisdiction of these tribunals is limited to the time and territories concerned and were not intended to address violations that occurred elsewhere or to prevent future violations. The International Criminal Court will be a permanent institution not constrained by these limitations of time and place, as a permanent entity its very existence will be a deterrent to would be perpetrators of heinous crimes.

It may be recalled that during the Special Meeting on International Aspects Between the International Criminal Court and International Humanitarian Law held during the 36th Session of the AALCC held in Tehran in May 1997, delegates had unanimously favoured the establishment of an independent and impartial international criminal court, free from political pressures and tendencies. Preference was for the establishment of the Court by a multilateral treaty.

(ii) Material Jurisdiction of the Court

The Court would be competent to adjudicate upon the core-crimes i.e. the most serious crimes of concern to the international community as a whole, including genocide; crime against humanity; war crimes and the crime of aggression.[14]

Article 6 of the Statute deals with Genocide and covers those specifically listed prohibited acts such as killing, causing serious harm committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group. Article 7 covers crimes against humanity as those specifically listed

[13] See Art. 3, Part I, Doc A/CONF/183/9.

[14] Part 2, Arts 5-8 of the Statute Doc.A/CONF/183/9.

prohibited acts when committed as part of a wide spread or systematic attack directed against any civilian population. Such acts include murder, extermination, rape, sexual slavery, the enforced disappearance of persons and the crime of apartheid. Genocide and crimes against humanity are punishable irrespective of whether they are committed in time of peace or war. Article 8 enlists war crimes, it covers grave breaches of the Geneva Conventions of 1949 and other serious violations, as listed in the Statute, committed on a large scale in international armed conflict. In the past fifty years, the most serious violations of human rights have occurred, not in international conflicts, but within States. Therefore the Court's Statute incorporates contemporary international humanitarian law standards that criminalize, as war crimes, serious violations committed in internal armed conflicts, excluding internal disturbances or riots.

The Preparatory Commission[15] shall *inter alia* determine the definition and elements of crimes of aggression and the conditions under which the Court shall exercise its jurisdiction with regard to this crime. In one of the six resolutions adopted at the Conference, it was recognized that terrorist acts were serious crimes of concern to the international community, and that the international trafficking of illicit drugs was a very serious crime, sometimes destabilizing the political, social and economic order in States. It was regretted that no generally acceptable definition of the crimes could be agreed upon for inclusion within the jurisdiction of the Court. It was recommended that the Review Conference provided for in Article 123 of the Statute should consider them, to arrive at an acceptable definition and their inclusion in the list of crimes within the court's jurisdiction.

Article 24 of the Statute deals with non-retroactivity *ratione personae* and emphasizes that the Court has jurisdiction only with respect to crimes committed after the entry into force of the Statute it states that "no person shall be

[15] See Art 121 and 123 of the Statute Doc. A/CONF/183/9.

criminally responsible under this Statute for conduct committed prior to its entry into force". An article concerning preconditions to the exercise of jurisdiction provides that a State, by becoming a party to the Statute, accepts the jurisdiction of the Court with respect to crimes mentioned in its provisions.

With regard to *rationae personae* it may be stated that the statute contemplates jurisdiction of the court over legal persons, with the exception of States,[16] Article 25 of the Statute deals with individual criminal responsibility and clearly states that the court is primarily to have jurisdiction over natural persons. It may be mentioned here that in the context of applicable penalties, that the Court shall have no jurisdiction over persons under 18 years of age.[17] As to the jurisdiction *rationae temporis* of the court paragraph 1 of Article 8 of the Statute states that the "Court has jurisdiction only in respect of crimes committed after the date of entry into force of this Statute".

(iii) Complementarity

The third preambulary paragraph provides that the principle of jurisdiction of the International Criminal Court is to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective. Besides the preambulary paragraph the principle of Complementarity involves issues of admissibility; *ne bis in idem*'; initiation of an investigation; general obligation to cooperate and surrender of a person to the Court. More specifically attention needs to be drawn to the vague formulations involved in determination of the actions of a State or its legal system as regards unwillingness or inability to prosecute, doubts on the independence or impartiality of proceedings, etc. These issues involve subjective element of determination and the real implications of the Complementarity principle could be known only when the Court starts applying a set of identifiable criteria to decide

[16] Art. 25 of the Statute.

[17] Art. 26 of the Statute.

when the national legal systems are ineffective or inavailable. The views as expressed by the AALCC Member States are still valid as regards the drawing up of clear jurisdictional boundaries between the jurisdiction of the Courts functioning with the criminal legal systems of States and the Court so as to avoid overlapping of jurisdictions in the administration of justice.

(iv) Trigger Mechanism

Although the consent of the State is primary in deciding the extent of jurisdiction of the Court the "trigger mechanism" was carefully considered by the Conference of Plenipotentiaries. This mechanism touches upon two main clusters of issues (i) acceptance of the Court's jurisdiction, State consent requirements and conditions for the exercise of jurisdiction and (ii) who can trigger the system and the role of the Prosecutor.[18]

The jurisdiction of the Court over a person with respect to a crime referred to in the Statute of the Court may be invoked by either (i) a State Party; (ii) the Prosecutor or (iii) the Security Council.

(v) Role of the Security Council

Under the Charter of the United Nations the Security Council is entrusted with the task of maintaining international peace and security. Article 39 of the UN Charter confers on the Council the power to determine an act constituting aggression or threat to international peace. Besides enabling the Security Council to refer a matter to the Court for its exercise of jurisdiction, the Statute empowers the Security Council to seek a deferral of any investigation or prosecution for a period of 12 months from the date of its request.[19] Article 16 of the Statute states that no investigation or prosecution may be

[18] Articles 13 (Exercise of Jurisdiction) 14 (Referral of a Situation by a State Party and 15 (Prosecutor) Doc No. A/CONF/183/9.

[19] See Article 16 referral of investigation or prosecution.

commenced or proceeded with for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect. Serious apprehensions have been raised as to the potential for mischief inherent in the provision. The propensity to abuse the power to seek deferral and use it selectively to block investigation or prosecution cannot be ruled out. Hence it was felt that the Security Council should have a minimum role to play in the functioning of the Court or else it could cloud the independent functioning of the Court.

(vi) Principles of Criminal Law

Although there were different views on many aspects of the Court, there was a broad agreement that the fundamental principles of criminal law be applied to the crimes punishable under the Statute of the Court be clearly pronounced in accordance with the principle of legality, *nullum crimen sine lege; nulla poena sine lege*. Accordingly part 3 of the Statute (Articles 22-33) addresses the General principles of Criminal Law. The principles of criminal law identified in this Part of the Statute include: (i) nullum crimen sine lege; (ii) non-retroactivity; (iii) individual criminal responsibility; (iv) irrelevance of official capacity; (v) exclusion of jurisdiction over persons under eighteen; (vi) responsibility of commanders and other superiors; (vii) non-applicability of statute of limitations; (viii) mental element; (ix) grounds for excluding criminal responsibility; (x) mistake of fact or law; (xi) superior orders and prescription of law; and (xii) applicable Law.

The General Principles of Criminal Law are to be supplemented by Rules of Procedure and Evidence to be prepared by the Preparatory Commission established by the Rome Conference. The draft text of the Rules and Procedures and Evidence would thereafter be approved and adopted by the States Parties to the Statute.

The Statute incorporates fairly detailed and elaborate provisions for conducting investigations and prosecution of cases (part 5- Art.53-61); The Trial (Part 6-Art. 62-76);

Penalties (Part 7-Art. 77-80); Appeal and Review (part 8 art. 80-84); and Enforcement (Part 10-Art. 103-111). It also stipulates the Court's organizational law, by specifying the required qualification of judges etc. (Part 4).

The Statute does away with death penalty and instead allows imprisonment for maximum of 25 years; a term of life imprisonment in addition of fines which can be imposed which are provided under the Rules of Procedure and Evidence.

(vii) Preparatory Commission

A Preparatory Commission has been established by Resolution F of the Final Act adopted at the Conference of Plenipotentiaries, which shall prepare proposals for practical arrangements for the establishment and coming into operation of the Court, it shall *inter alia*, prepare draft texts of:

(i) Rules of Procedure and Evidence to be finalized before 30 June 2000;

(ii) Elements of Crimes including the definition and elements of crimes of aggression and the conditions under which the Court shall exercise its jurisdiction with regard to this crime;

(iii) A relationship agreement between the Court and the UN;

(iv) basic provisions governing a headquarters agreement to be negotiated between the Court and the host country;

(v) Financial regulations and rules;

(vi) a budget for the first financial year; and

(vii) Rules of Procedure of the Assembly of States Parties.

The Commission shall prepare proposals for a provision on aggression, including the definition and elements of crimes of aggression and the conditions under which the ICC which exercise its jurisdiction with regard to this crime. It shall submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable

provision relating to the crime of aggression shall enter into force for the States Parties in accordance with the relevant provisions of this Statute. The Commission shall remain in existence until the conclusion of the first meeting of the Assembly of States Parties.

The Commission shall remain in existence until the conclusion of the first meeting of the Assembly of States Parties,[20] Part 11, Article 115 of the Statute establishes the Assembly of States parties, on which other States which have signed the Statute or the Final Act may take part as observers. Among other functions, the Assembly shall consider and adopt recommendations of the Preparatory Commission; provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court; consider and decide the budget for the Court; decide whether to alter the number of judges; and consider any question relating to non-cooperation; it shall prepare a report on all matters within its mandate and submit it to the Assembly of States Parties and shall meet at the Headquarters of the United Nations.

(viii) Financing of the Court

Part 12 of the Statute comprising of 6 articles (113-118) concerns financing of the Court, Article 115 of the Statute states that expenses of the Court and of the Assembly of States Parties shall be provided by mainly two sources i.e. assessed contributions made by States Parties, and funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council. It also provides that the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties. This was an issue where there was divergence

[20] See Article 115 of the Statute.

in views in the Preparatory Committee. It may be recalled that during the 37th Session of the AALCC concern was expressed by Member States that a financial system was essential to ensure smooth and effective functioning of the Court.

(ix) Review Conference

Article 123 addresses the issue of the Statute's review and provides that seven years after entry into force, the Secretary General of UN is to convene a *Review Conference*[21] to consider any amendment to it. Such a review may include but is not limited to the list of crimes under the jurisdiction of the Court. Subsequent debates in the Sixth Committee reveal that delegates do favour only a review of matters but are against altering the basic elements of the Court.

(x) Ratification

Article 126 in Part 13 of the Statute deals with Entry into Force. It states that the Statute shall enter into force on the first day of the month after the 60th day following the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary General of the United Nations. It may be recalled that the Statute was opened for signature in Rome on 17 July 1998 and will remain open for signature at the United Nations Headquarters until 31 December 2000. (We already have before us the experience of the UN Convention on the Law of the Sea which required 60 ratifications to enter into force, and about which it was felt that in a bid to ensure universality of participation too large a number delayed its entry into force. But a lower number of ratifications could jeopardize the objective of universality of acceptance of an international jurisdiction).

[21] See Article 123 of the Statute.

Discussion in the Sixth Committee and Resolution Adopted by the 53rd Session of the General Assembly

The Sixth Committee witnessed a debate on the future of the International Criminal Court with several speakers urging that its Preparatory Commission commence work at the earliest possible dates in 1999. The Preparatory Commission, provided for by the Statute of the International Criminal Court adopted in Rome in July 1998, will lay the groundwork for the functioning of the Court. Among its first tasks, the Commission would begin drafting the Court's rules of procedure and evidence, and elements of crime as well as a budget for the Court's first financial year. These are to be finalized before 30 June 2000. All these elements are critical to the manner in which the Statutes will actually be applied and implemented. The Commission will also be involved in making arrangements for the physical establishment of the Court. Participation in the Preparatory Commission is open to all States even those that have not signed the Statute.

Resolution 53/105 adopted by the General Assembly during the 53rd Session[22] *inter alia* has requested the Secretary General to convene the Preparatory Commission to meet, in accordance with Resolution F[23] adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, in order to perform the mandate of that resolution, and in that connection to discuss ways to enhance the effectiveness and acceptance of the Court from, 16 to 26 February 1999. For effective participation in the work of the Preparatory Commission the Secretary General has been requested to take steps to expand the mandate of the trust fund established in General Assembly Resolution 51/207 for voluntary contributions towards meeting the cost of participation of the least developed countries.

[22] Annexure I to this brief.

[23] Annexed herewith as Annexure II.

First Session of the Preparatory Commission for International Criminal Court, held at United Nations Headquarters, New York, 16-26 February, 1999

Pursuant to Resolution F of the Final Act adopted at the Rome Conference on the establishment of an International Criminal Court, and by General Assembly resolution 53/105 of 8 December, 1998, the Preparatory Commission was directed to finalize draft texts on rules of procedure and evidence and elements of crimes before 30 June 2000. The Preparatory Commission is entrusted with laying the groundwork for the operation of the Court, once the Statute enters into force with 60 ratification.

The Officers of the Preparatory Commission are Mr. Philippe Kirsche (Canada), Chairman; Mr. Muhamed Sacirbey (Bosnia and Herzegovina), Mr. Medard Rwellamira (South Africa), and Mr. George Mckenzie (Trinidad and Tobago), Vice Chairmen and the Rapporteur is Mr. Salah Suheimat (Jordan).

Two co-ordinators were appointed one for each group, the coordinator for the Working Group on Rules of Procedure and Evidence is Ms. Silvia Fernandez de Gurmendi (Argentina), while Mr. Herman Van Hebel (Netherlands) is coordinator of the Working Group on Elements of Crimes.

During the session, the Preparatory Commission agreed to the appointment by the Chairman of Additional Co-ordinators. They were Mr. Rwellamira (South Africa) to co-ordinate matters relating to Part 4 of the Statute (Composition and Administration of the court); Mr. Rolf File (Norway) on Part 7 (Penalties); Mr. Phakiso Mochochoko (le-sotho) on Part 9 (International Co-operation and Judicial Assistance); and Mr. Tuvalu Manongi (United Republic of Tanzania) on the definition of the Crime of Aggression.

Report of Working Group of Rules of Procedure and Evidence

Ms. Silvia Fernandez de Gurmendi, Coordinator for this group while presenting an oral report on its work, said it held nine meetings. It deferred decisions relating to the final structure of the rules of procedure and evidence. The group considered a number of proposals submitted by delegations on Part 5 of the Statute. It was suggested that the authors should consult with a view to merging the proposals into one consolidated document. An informal consultation, open to all delegations, was coordinated by the representative of Switzerland. In the end document PCNICC/1999/WGRPE/RT.4 was drawn up to serve as a basic document for future discussions.

Document PCNICC/1999/DP.8 and Adds. 1 and 2 were also discussed by the Working Group, but due to lack of time no single text based on them could be produced. In view of the difficulties encountered the Coordinator urged delegations to present their proposals well in advance of the next session. At its next session the Working Group should attempt to complete work on Parts 5,6 and 8 of the Statute.

Summary of Discussion Papers

The Coordinator of the Working Group of Rules of Procedure and Evidence submitted four discussion papers. The Working Group focused only on Part 5 of the Rome Statute, which deals with investigation and prosecution.

The first discussion paper (PC NICC/1999/WGRPE/RT.I) dealt with the determination by the Prosecutor to proceed an investigation. Among the views presented were that: the Prosecutor may seek additional information from States, organs of the United Nations, intergovernmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony. Secondly, when the Prosecutor decides that here was not sufficient basis for prosecution, he or she shall inform in

writing the Pre-Trial chamber together with State or States that referred a situation to him or her.

The second discussion paper (PC NICC/1999/WGRPE/RT.2) dealt with procedure to be followed in the event of an application of a decision by the Prosecutor not to proceed with an investigation or not to prosecute. In that regard the views expressed included: where the Pre-Trial Chamber requested the prosecutor to review his or her decision not to initiate an investigation or not to prosecute, the Prosecutor shall reconsider that decision as soon as possible. Another view was that once the Prosecutor has taken a final decision, he or she shall notify the Pre-Trial Chamber in writing. That notification shall contain the Prosecutor's conclusion, the reasons for the conclusion as well as a full explanation of those reasons. Finally, the Pre-Trial chamber may, on its own initiative, review a decision of the prosecutor of its intention to review his or her decision and shall establish a full-frame during which he or she may submit observations.

The third discussion paper (PC NICC/1999/WGRPE/RT.3) dealt with proceedings with regard to the confirmation of charges. In that regard, the views expressed included: A person subject to a warrant of arrest or a summons to appear in the Court shall appear before the Pre-Trial Chamber in the presence of the Prosecutor. At this first appearance, the Pre-Trial Chamber shall set the date on which it intends to hold a hearing to confirm the charges. Between the first appearance and confirmation hearing, evidence shall be disclosed. The victims and their legal representatives, who shall have access to the proceedings, shall be notified to the date of the confirmation hearing. They may also asked to intervene during the hearing, by addressing a written request to that effect to the Pre-Trial Chamber. Finally states wishing to challenge the jurisdiction of the court or the admissibility of the case before the Pre-Trial chamber at the time of the confirmation hearing shall make a written request to that effect no later than 30 days before the hearing.

The fourth discussion paper (PC NICC/1999/WGRPE/RT.4) dealt with disclosure of evidence. In that regard, the views expressed included: The Pre-Trial chamber shall hold status conferences to ensure that disclosure takes place under satisfactory conditions. For each case, a pretrial judge be appointed to organize such status conferences. The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify at trial and copies of statements made by those witnesses. However, the question of non-disclosure of the identity of witnesses who need to be kept anonymous, needs further discussion. The defence shall notify the Prosecutor of its intent to plead an alibi, in which case the defence shall specify the details of the alibi. The defence shall also give notice to both the Trial Chamber and Prosecutor if it intends to raise a ground for excluding criminal responsibility.

Report of Working Group on Elements of Crimes

At the fist stage of discussions the Working Group considered the elements of the Crimes of genocide in article 6 of the Rome Statute, as well as paragraph 2(a) of article 8 concerning war crimes, on the basis of proposals before it. The Working Group completed general discussion on genocide and grave breaches. The discussions focused mostly on substantive issues. Further discussion was necessary in order to design a structure acceptable to delegations. The Working Group would continue its consideration of the elements of crimes at the next session of the Preparatory Commission.

Summary of Discussion Papers

The Coordinator of the Working Group on Elements of Crimes submitted three discussion papers. The Working Group focused only on article 8 (war crimes).

The first discussion paper (PC NICC/1999/WGRPE/RT.1) dealt with article 6 (the crime of genocide). That paper states that the crime of genocide was the intent to destroy, in whole or in part, a national, ethnical, racial or religious group: Genocide shall also occur if the accused knew

or should have known that his or her actions would destroy a group or the conduct was part of similar conduct directed against that group. The paper further defines five different types of genocide crimes.

The second discussion paper (PC NICC/1999/WGRPE/RT.2) dealt with article 8 (war crimes). It stated that war crimes would occur if the conduct took place in the context of and was associated with an international armed conflict; and if the person or persons affected by the conduct were protected under one or more of the Geneva Conventions of 1949 and the accused was aware of the factual circumstances that established this status.

The paper discussed five types of war crimes : (i) the war crime of wilful killing; (ii) the war crime of torture; (iii) the war crime of inhuman treatment; (iv) the war crime of biological experiments and (v) the war crime of wilfully causing great suffering.

The third discussion paper dealt with suggested comments relating to the crime of genocide. Among the suggestions the paper stated that it is recognized that rape and sexual violence may constitute genocide in the same way as any other act, provided that the criteria of the crime of genocide were met.

At the end of the first session of the Preparatory Commission, Mr. Philippe Kirsch, Chairman of the Commission, said it was essential that every effort was made by delegations to agree on common approaches to issues before the Preparatory Commission, and to undertake real and effective negotiations. The essential objective was to establish an International Criminal Court which functioned fairly and effectively and was widely supported.

The Chairman designated Mr. Hiroshi Kawamura (Japan) to serve as the contact point for some of the issues to be discussed by the Commission, including: the draft text of financial regulation and rules and the rules of procedure of the

Assembly of States parties. He also designated Mr. Christian Maquieira (Chile) to serve as the contact point for work on the following topics: a relationship agreement between the Court and the United Nations; a draft text of basic principles governing a headquarters agreement to be negotiated between the Court and the host country, and a draft agreement on the privileges and immunities of the Court.

Future Sessions of the Preparatory Commission

The Second Session of the Preparatory Commission is scheduled to be held from 26 July to 13 August. A third Session is planned for 29 November to 17 December. During the July/August Session, the coordinator on the question of aggression would report on the result of his contacts on that questions.

Comments

It is the view of the AALCC Secretariat that the Statute as adopted, although remains far from reaching a unanimous approval is a product of pragmatic compromises. It is satisfying to note that the efforts of the international community to establish an International Criminal Jurisdiction to try heinous crimes has become a reality. The Rome Conference witnessed a considerable number of thorny and extremely sensitive issues being resolved - more particularly issues linked with exercise of national jurisdiction, criminal jurisdiction, matters of national security and sovereignty and role of the Security Council. Concessions have been made by all sides to reach a consensus. The Lacunae and unaccepted dispositions for some countries which are in the present Statute, need not be a cause for acute despair and complete rejection, on the contrary the mere fact that a significant number of States with varied legal systems and cultural ethos have voted for a common text, is an indication of the strong will and political commitment of these States to address international crimes, that have hitherto gone unpunished, and it is indeed a first progressive step taken by these countries to accept therefrom that their own

nationals, perpetrators of these crimes be tried outside their own boundary.

Furthermore, against the backdrop of the discussions held among AALCC Member States during the annual Sessions, the two Special Meetings sand subsequently during the Rome Conference, it can be asserted that the Statute goes only half way to meet the aspirations of the AALCC Member States, the task of identifying common grounds has not been an easy one. Nevertheless the explanations offered by AALCC Member States during the adoption of the Statute reveal certain issues that are of common concern;

Firstly, States have taken objection to the exclusion of weapons of mass destruction including nuclear, chemical and biological weapons in general and nuclear weapons in particular from the jurisdiction of the Court. This non-inclusion will be behind the abstention of some States to sign this Statue. An ICC, whose Statute was being negotiated fifty years after the invention and first use of nuclear weapons should explicitly ban their use and consider it a "crime against humanity". However, this has not happened, the message this sends is that, the international community has decided that the use of nuclear weapons, the most inherently indiscriminate of weapons, in not a crime. Another Lacuna which is related to the serious nature of offences, States expressed regret that the Statute had failed to address the crimes of terrorism and drug trafficking.

Secondly, some States have questioned the conferment of *proprio moto* powers on the Prosecutor, on the ground that such right to initiate prosecutions places State Sovereignty on the subjective decisions of an individual. The Pre-Trial Chamber provisions to check these powers was felt to be inadequate.

Thirdly, some States felt that the Statute lacked a clearer definition of Complementarity. Concerns were also expressed about the role of the Security Council in relation to the Court to off set any unilateral reference by the Security-

Council. Some States argued for including the General Assembly also in the process of determination of a reference. The Statute gives to the Security council a role in terms that violate international law. It was argued that the Council be given a role in the Statute because it had set up the *ad hoc* tribunals for the former Yugoslavia and for Rwanda and has therefore established its right to do so. Those decisions were not legally perfect. It will be recalled, that the Preparatory Commission had taken the view that the International Criminal Court be established by a treaty. Whilst the Security Council can create an institution for a particular situation which is determined to be a threat to the peace and security i.e. under Chapter VII of the UN Charter, it could be an expansive view to suggest that the powers of the Security Council go so far as to create a standing body which would or could deal with situations which had not yet arisen or occurred, much less than be determined to be a threat to the peace and security of mankind.

But what the Council seeks from the ICC through the Statute, is the power to refer, the power to block and the power to bind non-States Parties. The Power to refer would be unnecessary because the Security Council set up *ad hoc* tribunals at a time when no judicial mechanism existed to try the heinous crimes committed in former Yugoslavia and Rwanda. With the establishment of an ICC the States Parties would have right to refer cases to it and hence there is no need for the Security Council to refer cases.

A view expressed during the "AALCC meeting to consider the Preliminary Reports on the Themes of the First International Peace Conference" raised troubling questions relating to the basic principle of equality among nations and peoples and the five permanent members of the Council had been placed on the pedestal by the rest of the world accepting that their leaders, officials, soldiers, cannot ever be accused before the International Criminal Court of committing grave crimes of international concern.

Since the Council has been provided the power even to capture non-Parties to the ICC within its purview there might arise a legally absurd situation of non-parties triggering ICC jurisdiction on otheir non-Parties. Under the Law of Treaties, no State can be forced to accede to a treaty or be bound by the provisions of a treaty it has not adhered to or ratified. The Statute violates this fundamental principle of international law by conferring on the Council a power which it cannot have. The Statute will, therefore, given non-States Parties, working through the Council the power to bind other non-States Parties. The role of the Security Council built into the Statute of the ICC and how much control it should have over the Court, will be a cause of concern to the majority of States.

Notwithstanding the inspiration that springs from the rocks of the Statute, it must be considered that many difficult legal issues of highly political and extremely technical nature have to be solved.

Not all the tasks have been accomplished. Other instruments within the Preparatory Commission are still to be finalized, and ratification in a sufficient number is required so that the court can start its work. 75 States have so far signed the Statute to establish the International Criminal Court. Senegal has become the first State to ratify the Statute.

It will not be out of place to mention that the Under Secretary General and Legal Counsel of the United Nations, Mr. Hans Corell at the meeting of the Legal Advisers of Member States of the AALCC convened at the United Nations Office on 30th October, 1998 in New York, as well as during the recently concluded AALCC Meeting to consider the Preliminary Reports on the Themes of the First International Peace Conference, held in New Delhi on the 11th and 12th February, 1999 recognized that the adoption of the Statute of the International Criminal Court in Rome was a major achievement and urged delegates to take a closer look at the Statute and find ways and means of ratifying the same. He felt that the AALCC could act in a manner akin to the Law of the Sea Convention, and be an

organization which encourages its Member States to sign and ratify the Statute at the earliest.

While recognizing the significance of the historic compromise which culminated in the adoption of the Statute it is desirable that the AALCC Member States evolve common strategies in furthering the progress achieved at Rome. For the Court to succeed in its tasks, it would need the widest support of the International Community. In the short term the work in the Preparatory Commission offers scope for articulating AALCC's view points. In the long run, provision for a Review conference could provide a suitable forum for pursuing with renewed vigor tasks unaccomplished at Rome.

VII. STATUS AND TREATMENT OF REFUGEES

(i) Introduction

The subject, "Status and Treatment of Refugees" was initially included in the agenda of the Asian-African Legal Consultative Committee (AALCC) following a reference made by the Government of Egypt in 1964. These discussions culminated in the adoption, at the 8th Session of the AALCC, of a set of guidelines titled "Principles Concerning the Status and Treatment of Refugees, 1966", (commonly referred to as the 'Bangkok Principles'). Subsequently in 1970 and 1987, as a step towards updating the Bangkok Principles, the Committee adopted two addenda on the right of refugees to return and the norm of burden-sharing respectively. Since then, the issues concerning refugees have been subject matter of discussion at successive Sessions of the Committee. The work of the AALCC in this area has been assisted by close functional relationship developed with the Office of the United Nations High Commissioner for Refugees (UNHCR).

At the Thirty-fifth Session of the AALCC (Manila 1996), the UNHCR Representative, commending the work of the AALCC in the field of refugees recalled that the year 1996 marked the 30th anniversary of the adoption of the Bangkok Principles. She felt that the commemoration of this occasion would afford a good opportunity for the AALCC member States to take stock of the experience acquired during the last thirty years. In this context, she expressed the willingness of UNHCR to co-sponsor with the AALCC a Seminar or Colloquium on refugee law whose point of departure will be a review of the Bangkok Principles. Pursuant to its deliberations at the Session, the Committee in its resolution on the 'Status and Treatment of Refugees', took note of the proposals advanced by the Representative of the UNHCR and requested the AALCC Secretariat, "to organize in collaboration with the financial and technical assistance of the UNHCR, a Seminar in 1996, on the

Status and Treatment of Refugees to commemorate the 30th Anniversary of the Principles of Refugees adopted by the AALCC at its 8th Session in Bangkok in 1966".

A Preparatory Meeting of the AALCC Member States held at New Delhi in September 1996 adopted the main objectives and format of the Commemorative Seminar:

(i) It was agreed that the Seminar should be held from 11 to 13 December 1996 at Manila, the Philippines;

(ii) The aim of the commemorative event should be:

(a) the promotion of the knowledge of these principles; and

(b) their re-examination in the light of developments in law and practice in the Afro-Asian region since 1966, with a view to recommending further action.

(iii) The following four subjects were identified for focussed consideration at the Manila Seminar: the refugee definition; asylum and standards of treatment; durable solutions; and burden-sharing.

The Seminar, jointly organized by the AALCC and UNHCR, with financial support from the Government of Japan was held at Manila from 11 to 13 December 1996. The Seminar was attended by Representatives of 26 Member States, 2 Observer States and officials of the AALCC Secretariat and the Office of the UNHCR. In order to facilitate discussion it was agreed to constitute four Working Groups to debate the issues relating to (i) definition of refugees; (ii) asylum and standards of treatment; (iii) durable solutions; and (iv) burden-sharing.

The deliberations conducted in parallel sittings of the Working Groups were guided by the moderators. At the end of the deliberations the moderators of the respective Working Groups submitted a report to the Plenary.

The Seminar also recommended that the Secretary General of the AALCC submit the final report and conclusions of this Seminar to the Thirty-sixth Session of the AALCC to be held in Tehran in 1997, and that the re-examination of the Bangkok Principles on Status and Treatment of Refugees be introduced at that Session as a key sub-item under the item "Status and Treatment of Refugees".

Accordingly, the Secretary General in his report to the Committee at its Thirty-sixth Session (Tehran, 1997) conveyed the outcome of the deliberations and the set of recommendations adopted at the Manila Seminar. While some delegates wished to carry forward the process of review set in motion by the Manila Seminar, others had called for a more detailed study of the recommendations before undertaking any further work. Hence, the Committee in its resolution on this item, while acknowledging the importance of the recommendations adopted at the Manila Seminar, requested "the Secretary General to convene as appropriate, a meeting of experts in order to conduct an in-depth study of the issue, in light of the recommendations of the Manila Seminar as well as the comments thereon at the current Session and report to the Thirty-seventh Session.

Expert Group Meeting on Status and Treatment of Refugees, Tehran, 11-12 March 1998

In fulfillment of this mandate, at the invitation of the Government of the Islamic Republic of Iran, a meeting of experts was convened with the financial and technical assistance of UNHCR at Tehran from11 to 12 March 1998. The Meeting was attended by 29 Member States, as well as officials from the AALCC Secretariat and UNHCR. The deliberation at the Expert Meeting was again with reference to the following four themes: definition of refugees; asylum and standards of treatment; durable solutions; and burden-sharing.

The deliberations at the Expert Meeting, while reviewing the Manila recommendations, also offered scope for addressing specific issues regarding the four identified themes. Drawing

upon their national experience in dealing with refugee problems, delegates examined the formulations arrived at the Manila Seminar. Overall, the discussions focussed on the need to reconcile the fundamental interests of States and the humanitarian obligations of States to protect refugees.

The Expert Meeting also directed the AALCC Secretariat to prepare an in-depth study of the refugee issue in the region and to formulate draft proposals to the Bangkok Principles, so as to reflect the contemporary regional characteristics as expressed in the recommendations of the Manila Seminar and the deliberations at the Tehran Expert Group Meeting.

Thirty-eighth Session: Discussion

The Deputy Secretary General, Mr. Ryo Takagi introduced the Report of the Secretary General on this subject. Recalling the mandate of the 37th Session of AALCC which requested the Secretary General to undertake consultations with AALCC Member States on the consolidated text on revision to the Bangkok Principles, he said that the Secretary General had in May, October and December 1998 written to the Member States seeking their response on the consolidated text. Accordingly, the Secretariat has received comments from ten Member States – China, Indonesia, Japan, Jordan, Pakistan, Saudi Arabia, Singapore, Sudan, Tanzania and Turkey. With a view to ensuring progress on this item, he urged the other Member States to communicate their views to the Secretariat at the earliest.

The Representative of the Office of the United Nations High Commissioner for Refugees (UNHCR), Mr. Richard Towle) conveyed the wishes of Mrs. Sadako Ogata, the UN High Commissioner for Refugees for the success of the 38th Session. The phenomenon of forced displacement of people is clearly universal and hence the response of the international community, he stated, must equally be a global one. With its special responsibility to provide protection to refugees, he declared that UNHCR fully recognizes and appreciates the generous hospitality extended by AALCC Member States to

countless millions of refugees. At a time of increasing complex humanitarian emergencies world-wide, UNHCR believes that a broadly agreed framework of legal principles provides the basis for any predictable, principled and balanced action. Characterizing the 1966 AALCC's Bangkok Principles as one such legal framework that has withstood the passage of time, he said that new reference points are also required to ensure their continued relevance and flexibility to the problems of the present and future. In this connection, he recalled the exercise undertaken towards a comprehensive revision of the Bangkok Principles, within the AALCC, over the past three years.

Commenting on the draft consolidated text on the proposals for the revision of Bangkok Principles submitted to the 37th Session of the AALCC, he said that the text reflects the individual views and concerns of States – either in the body of the text or through a helpful series of footnotes. Acknowledging that not all of the principles are applicable to every context, he was of the view that, the consolidated text provides a broad and balanced framework by which States future policies and practices can be guided. Terming the response of AALCC Member States to the consolidated text as encouraging, he expressed the belief of UNHCR that the time was now ripe to bring this particular series of consultations to some positive conclusion. Pledging the continued support of UNHCR to this process, he expressed the hope that AALCC will continue to be a forum where the basic principles of refugee protection in the Asian and African regions can be frankly debated, revitalized and reinforced.

The Delegate of Palestine recounted the experience of Palestinian refugees during the last 50 years. Condemning Israeli practices that triggered mass influx of Palestinian refugees, he stated that the 'right of return' of Palestinian people as affirmed by the resolutions of the UN General Assembly have not been honoured. While citing instances of Israeli practices violating international humanitarian law, he drew attention to the plight of Palestine refugees being hosted in Egypt, Lebanon, Syria and Jordan. Making a reference to the Camp-David Agreement, he said that Israel has for the past 20

years since the signing of that agreement failed to fulfil its obligation to facilitate the return of a stipulated number of Palestinian refugees. Citing the example of Kuwait and Kosovo – wherein the world community had actively intervened on behalf of the victims, he said that the international community had adopted double standards in responding to the resettlement policies pursued by the Israeli Government.

To appropriately address the situation of Palestinian refugees, he suggested that the AALCC could examine the legal characteristics of the phenomenon of "deportation" within the refugee law framework.

The Delegate of Ghana commended to the Session to ponder over the views of the President of Ghana on the need to study and promote the status of women and children. Drawing attention to the vulnerable character of this section of the population, he urged effective action as outlined in the UN Convention on the Elimination of All Forms of Discrimination against Women and the Convention of the Rights of the Child. He recommended that the Committee consider including this topic in its agenda.

The Delegate of the Islamic Republic of Iran recalling the work of the Committee on this topic since1963, stated that the Asian-African countries had over the past three decades developed a positive practice on the treatment of refugees. He informed that in the 1990s Iran had hosted 4.5 million exiles from Afghanistan and Iraq – the largest number of refugees handled in recent years. With the ongoing crisis in the neighbouring countries rendering the situation further complex, he said that prospects for durable solutions remained elusive. As regards the consolidated text tabled at the 37th Session at New Delhi, the delegate made elaborate comments on issues pertaining to – definition of a "refugee", asylum to a refugee, minimum standards of treatment, right to return, other solutions and burden sharing. Expressing his support to the initiative for updating the Bangkok Principles he reaffirmed Iran's readiness to co-operate with the AALCC and UNHCR in this regard.

The Delegate of Pakistan affirmed the importance of the study on refugees and invited attention to the observations of the President of Ghana in his inaugural address that the international community needs to evolve concerted strategies to address the burden of refugee movements. Speaking on the experience of his own country, he said Pakistan had earlier hosted 3.5 million Afghan refugees and is currently hosting 1.5 million refugees. Speaking on the AALCC- UNHCR initiative to revise the Bangkok Principles, he stated that there was considerable consensus on many provisions of the consolidated text and hence the AALCC Secretariat must examine the proposals in the light of the comments received from the Member States. He recommended the convening of a meeting to consider the objections or modifications, if any, that the Member States may propose to the text. It was his delegation's view that the revised text be adopted as early as possible.

The Delegate of the Arab Republic of Egypt thanked the Secretariat for its report and the Representative of the Office of UNHCR for his statement. The AALCC-UNHCR Tehran Expert Group Meeting held in 1998, he said, provided the opportunity for the AALCC to consolidate its work on the subject. Drawing attention to the proposal submitted by Egypt at the Tehran Meeting, he offered brief comments on certain aspects of the issues under consideration for revision. As regards the "refugee definition", he said that the consolidated text should ensure that persons charged with crimes of terrorism are excluded from availing the status of refugees. In this connection, he called for enunciation of a clear definition of "political crimes". Thus, the establishment of appropriate Principle's and mechanisms (Article 11 of UN Convention on Suppression of Terrorist Bombings) to exclude such terrorist elements from enjoying refugee status, is imperative to protect genuine refugees and prevent the abuse of the institution of asylum. With respect to "minimum standards of treatment", he said that most of the refugee hosting countries were developing countries and hence require support from the international community to ensure compliance with their obligations in this regard. On durable solutions, his delegation was of the view that voluntary repatriation was the most appropriate one for

resolving refugee problems in Asian African region. In this regard, he emphasized the importance of assisting the countries of origin in facilitating the peaceful return and integration of refugees. In response to a proposal for establishment of a working group to discuss the responses on the consolidated text, he conveyed his delegation's willingness to participate in the deliberations of the Working Group.

The Delegate of Ghana in his intervention stated that consideration needed to be given to translating the Bangkok Principles into binding obligations possessing the character "hard" law. He also exhorted the AALCC Member States to accede to the 1951 Convention and the 1967 Protocol on Refugees.

(ii) Decision on the Status and Treatment of Refugees

(Adopted on 23.4.99)

The Asian African Legal Consultative Committee at its Thirty-eighth Session

Having considered the item Status and Treatment of Refugees and the Secretariat Document No.AALCC/ XXXVIII/Accra/ 99/S.2;

Recalling its Resolution 37/4 which requested the Secretary General to undertake consultations with Member States and with the office of the United Nations High Commissioner for Refugees, in particular on the consolidated text of proposed revisions to the Bangkok Principles with a view to submitting to the Thirty-eighth Session recommendations on the said revisions;

Recalling the Report of the Secretary-General entitled "Status and Treatment of Refugees" and the consolidated text of revised proposals for the Bangkok Principles annexed thereto and presented to this Thirty-eighth Session;

1. Expresses appreciation to the Secretary General for undertaking consultations with Member States and with the Office of the United Nations High Commissioner for Refugees;
2. Takes note with interest of the Report of the Secretary General on the Status and Treatment of Refugees, the consolidated text of proposed revisions to the Bangkok Principles and the comments submitted by Member States, appearing as Annexes I, II and III to the said Report;
3. Acknowledges that the Bangkok Principles and consolidated text of proposed revisions thereto are of a declaratory and non-binding character on Member States and are intended to guide and inform Member States on relevant principles

and general practices relating to the status and treatment of refugees in the Asian and African regions;

4. Recognizes, the need to bring the process of updating the Bangkok Principles initiated in Manila in 1996 to a conclusion and the importance of further and on-going consultations between Member States on the Status and Treatment of Refugees generally;

5. Requests the Secretary General to undertake further consultations with Member States and with the Office of the United Nations High Commissioner for Refugees, in particular on the draft consolidated revised text, with a view to finalize the text of the revised Bangkok Principles;

6. Urges Member States which have not yet done so, to forward their comments on the consolidated revised text to the Secretary General as soon as possible; and

7. Decides to place the item "Status and Treatment of Refugees" on the Agenda of the Thirty-ninth Session.

(iii) Secretariat Study: Status and Treatment of Refugees

The outcome of the Expert Group Meeting at Tehran was placed before the AALCC at its Thirty-seventh Session held in New Delhi (April 1998). A consolidated text containing a revised version of the Bangkok Principles was also tabled at that Session. This consolidated text had incorporated the recommendations of the Manila Seminar and the Tehran Meeting.

The Committee, while taking note of the Secretary General's Report and the consolidated text of proposed revisions to the Bangkok Principles, in a resolution adopted on this item had requested "the Secretary General to undertake consultations with Member States and with the Office of the UNHCR, in particular on the consolidated text, with a view of submitting to the Thirty-eighth Session recommendations on the revisions to the Bangkok Principles".

Consistent with this mandate the Secretary General had written to AALCC Member States in May, October and December 1998 drawing their attention to the above-noted resolution and requested them to send their comments on the text of the revised version of the Bangkok Principles.

Response from AALCC Member States

In Response to the request from the Secretary General, the AALCC Secretariat, as of 17 March 1999, is in receipt of comments from 8 Member States. The list of Member States that have responded includes: People's Republic of China, Republic of Indonesia, Japan, Pakistan, Saudi Arabia, Singapore, Republic of the Sudan, and Turkey. Besides this, the following four governments – the Arab Republic of Egypt, Ghana, Uganda and the Islamic Republic of Iran have, in the course of the Tehran Expert Group Meeting offered specific proposals towards the revision of the Bangkok Principles.

It may be stated that the proposals by Egypt, Ghana, Uganda and Iran have been made at a stage prior to the formulation of the consolidated text on the revised Bangkok Principles. During the Expert Group Meeting held at Tehran (Annex II of this document) Egypt proposed that the crime of 'terrorism' should be included as an element in the exclusion provisions of the refugee definition. Ghana had proposed a comprehensive definition for refugees. Uganda suggested that "colour" as a criteria for defining refugees may be included. The Islamic Republic of Iran stated that, taking into consideration that voluntary repatriation constitutes a right of the refugee, Article IV (right to return) of the Bangkok Principles should stress the importance of strengthening, extending and promoting the ways and means to facilitate conditions for voluntary return.

Following, in essence, are the comments received from Member States on the consolidated text of the revised version of the Bangkok Principles (Annex III). The People's Republic of China has at this stage, no comments on the consolidated text. While Japan has no particular comments, it is agreeable to the revision of the AALCC's Bangkok Principles. The Republic of Indonesia had stated that it has studied the consolidated text, and recommends submitting it without any further revisions. The salient features of the recommendations from Singapore are as follows.

- While the revision is consistent with the intention of being guiding principles, many of the provisions are not specific enough to create binding legal norms and may attract controversy, as they are more akin to principles of aspirational value only. Accordingly, it would be preferable that the non-binding status of the principles be clearly stated in the preamble, as this was the original intention of the Bangkok Principles in 1966.

- This revision is an opportunity to make clear that the primary obligation for refugees should lie with States that cause mass exodus, whether States of origin or a third State whose acts of aggression or invasion has caused the

movement of persons. Instead, this primary obligation is only alluded to in a minor provision in Part III of the revised principles.

It may be suggested that, in line with seeking durable solutions and burden sharing, instead of broadening the definition of refugees other avenues may be explored. For example, the concept of temporary safe havens within the State of Origin or the wider protection and co-ordination of both local and international aid agencies to provide for persons within the State of origin could be developed so as to prevent the occurrence of mass exodus.

The Government of Pakistan in its response on the subject, supports in principle the provision and amendments relating to: minimum standards of treatment, expulsion and deportation, right of return, voluntary repatriation, other solutions and co-operation with international organizations. Besides, with respect to the definition of the term "refugee", it supports the inclusion of the reference to "ethnic origin". On the provision of "Asylum to a refugee", the Pakistan Government agrees that the erroneous impression that all refugees are terrorists should be avoided. On non-refoulement, it assure that Pakistan has not resorted to harsh measures of rejection, return or expulsion of refugees, yet, does not support the proposal to make it legally binding on States. The right to compensation is perceived to create financial hardships for developing and third world countries, including Pakistan. It supports the provision of 'burden-sharing' with the recommendation that the major share of the financial contribution be borne by rich countries and there should be minimum financial burden on the developing countries.

The Government of Saudi Arabia in its comments, has *inter alia* drawn attention to the following two aspects. First, it proposes that a provision to the effect that "a person who uses or presents false/counterfeit travel documents, which enabled him to enter the State of asylum, will not be considered a refugee", could be included in the revised text of the Bangkok Principles. Second, the absence of specific rules in the Bangkok

Principles as to the treatment and status of refugees who die in the country of asylum, could be a potential issue of disagreement between the country of asylum and country of origin. Hence, it is suggested that a provision may be added to the revised text of the Bangkok Principles, stating that the body of the deceased refugee shall be returned to the country of origin, unless there is a written request ('will') by the deceased to the contrary.

The Republic of the Sudan, in its written comments noted its agreement with most aspects of the consolidated text. As regards Article V on the Right to Compensation, the Sudan Government does not agree with what has been mentioned in this article as it entails financial costs on the part of the countries left by the refugees, the majority of which are developing countries with difficult economic situations and in no position to compensate the refugees.

The communication for Turkey states that the consolidated text of the AALCC is agreeable in principle. The Turkish Government noted the following amendments, *inter alia*, would enhance the acceptability of the text.

- The terms 'national', 'country of nationality' and 'habitual resident' may be deleted in Article I, para (a) of the consolidated text and should be replaced with "persons", to be consistent with Article 1 of the 1951 Refugee Convention.

- As regards Article 3, para 1 of consolidated text, the alternative formulation on the basis of Article 14 of the Universal Declaration of Human Rights would be preferable.

- Article V on right to compensation may be deleted as it seeks to bring a new element to the Law of Refugees without due regard to its implications.

- A new Article should be formulated before Article VIII, concerning the responsibilities of the refugee along the lines and in the spirit of Article 2 of the 1951 Refugee Convention.

In light of the above comments received by the AALCC Secretariat, the Committee may direct the Secretariat as to the future course of work on this item. It was proposed at the Accra Session, if feasible to convene an open-ended Working Group to consider the comments and recommendations of the AALCC Member States.

ANNEX-I

REVISED PROPOSALS FOR THE "BANGKOK PRINCIPLES"[1]

1. The Refugee Definition

Article I

Definition of the term "refugee"

1. A Refugee is a person who, owing to persecution or a well-founded fear of persecution for reason of race, colour, *nationality, ethnic origin*[2], political *opinion*[3] or membership of a particular social group.

a) leaves the State of which he[4] is a national, or the Country of his nationality, or, if he has no nationality, the State or Country of which he is a habitual resident; and[5]

b) being outside of such a State or Country, is unable or unwilling to return to it or to avail himself of its protection.

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[1] In this draft, the parts in regular characters are from the Bangkok Principles, their Exceptions, Explanations, Notes, and Addenda. The texts in italics come from other sources, including recommendations of the Manila Seminar or the Tehran Meeting of Experts, and provisions of other International instruments. All sources other than Articles of the Bangkok Principles are specified in footnotes.

[2] Both the Manila Seminar and Tehran Meeting of Experts strongly recommended adding the ground of "nationality". The Tehran Meeting of Experts recommended "ethnic origin".

[3] The term "opinion" is used in all the other international refugee definitions, instead of "belief".

[4] It may be preferable in these times to use, whenever appropriate, the formulas "he/she" and "his/her".

[5] Recommended as a substitute for "or" in Note (iv) to Art. I of the Bangkok Principles: this is also consistent with all other international refugee definitions.

2. The term "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[6] in another place outside his country of origin or nationality.

3. A person who was outside of the State of which he is a national or the Country of his nationality, or if he has no nationality, the State of which he is a habitual resident, at the time of the events which caused him to have a well-founded fear of the above-mentioned persecution, and is unable or unwilling to return or to avail himself of its protection shall be considered a refugee.[7]

4. The dependents of a refugee shall be deemed to be refugees.[8]

5. A person having more than one nationality shall not be a refugee if he is in a position to avail himself of the protection of any State or Country of which he is a national.[9]

6. A refugee shall lose his status as refugee if:[10]

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[6] Art. I (2) of the 1969 OAU Convention governing the Specific Aspects of Refugee Problems in Africa. This addition was recommended both at the Manila Seminar and at the Tehran Meeting of Experts. This paragraph also reflects Note (ii) to Art. I the Bangkok Principles which refers to "invasion" and "occupying" of the State of origin, and para.I of the 1970 Addendum to the Bangkok Principles, which lists "foreign domination, external aggression or occupation". In conformity with the discussions at the Tehran Meeting of Experts, it does not include the formula of the 1983 Cartagena Declaration on Refugees which refers to "generalized violence, [...], internal conflicts, massive violation of human rights [...]". One participant at the Tehran Meeting of Experts was unfavourable to an expansion of the definition.

[7] Note (vi) to Art. I of the Bangkok Principles.

[8] Explanation of Art. I of the Bangkok Principles.

[9] Exception (I) to Art. I of the Bangkok Principles.

[10] This paragraph is Art. II (Loss of Refugee Status) of the Bangkok Principles, the latter's cessation provisions, with some modifications derived from the Notes to the same Article and from the 1951 Convention.

(i) he voluntarily returns to the State of which he was a national, or the Country of which he was a habitual resident; or

(ii) He has voluntarily re-availed himself of the protection of the State or Country of his nationality; *it being understood that*[11] the loss of status as a refugee under *this sub*-paragraph[12] will take place only when the refugee has successfully re-availed himself of the protection of the State of his nationality;[13] or

(iii) he voluntarily acquires the nationality of another State or Country and is entitled to the protection of that State or Country; or

(iv) [...] he does not return to the State of which he is a national, or to the Country of his nationality, or if he has no nationality, to the State or Country of which he was a habitual resident, or if he fails to avail himself of the protection of such State or Country after the circumstances in which he became a refugee have ceased to exist.

Provided that this paragraph shall not apply to a refugee [...] who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality.[14]

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[11] Stylistic addition.

[12] Idem.

[13] This sentence is derived from Note (ii) to Art. II of the Bangkok Principles.

[14] Art IC (5) of the 1951 Convention. This sub-paragraph useful complements the rest of the text, the core of which is protection, as repeatedly indicated at the Tehran Meeting of Experts. It is also consistent with the recommendation of a participant at the Tehran Meeting that the changes justifying cessation of refugee status should be of a fundamental nature.

7. A person[15] who, prior to his admission into the Country of refugee, has committed a crime against peace, a war crime, or a crime against *humanity as defined in international instruments drawn up to make provisions in respect of such crimes*[16] or a serious non-political crime *outside his country of refuge prior to his admission to that country as a refugee*[17], or has committed acts contrary to the purposes and principles of the United Nations, shall not be a refugee.

II Asylum and Treatment of Refugees

Article III

Asylum to a Refugee

1. *Everyone without any distinction of any kind, is entitled to the right to seek and to enjoy in other countries asylum from persecution.*[18]

[15] This paragraph is derived from Exception (2) of the Bangkok Principles. It is a set of exclusion clauses. Exclusion clauses were recommended at the Tehran Meeting of Experts. The text is modified to correspond to the formulations of existing universal and regional instruments on refugees, as specified below. One participant proposed a specific reference to terrorism as a ground for exclusion. It was pointed out that, if properly applied, the exclusion clauses as stated in this paragraph and indeed in all the major international refugee instruments, should exclude a terrorist. While the problem of terrorism is not to be denied, it was deemed important to avoid giving the erroneous impression that all refugees are terrorists, which would in turn undermine the institution of asylum.

[16] Art I (5) (a) of the OAU Convention and Art. IF (a) of the 1951 Convention.

[17] Art I (5) (b) of the OAU Convention and Art. IF (b) of the 1951 Convention.

[18] Para. 23 of the 1993 Vienna Declaration on Human Rights. An alternative formulation might be: "Everyone has the right to seek and to enjoy in other countries asylum from persecution [...]". (Art. 14(I) Universal Declaration of Human Rights.

2. A State has the sovereign right to grant or to refuse asylum in its territory to a refugee in accordance with its international obligations and national legislation.[19]

3. The grant of asylum to refugees is a peaceful and humanitarian act.[20] It[21] shall be respected by all other States and shall not be regarded as an unfriendly act.

4. Member States shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.[22]

Article III A[23]

Non-refoulement

1. No one seeking asylum in accordance with these Principles shall be subjected to measures such as rejection at the frontier, return or expulsion which would result in his life or freedom being threatened on account of his race, religion,

[19] This insert was recommended by the Manila Seminar and amended by the Tehran Meeting of Experts from "domestic" to "national". One participant also proposed placing the word "its" in front of "National".

[20] Art. II (2) of the OAU Convention and the preamble of the United Nations Declaration on Territorial Asylum.

[21] Stylistic substitution.

[22] Art. II (I) of the OAU Convention. This proposed paragraph would indeed reflect the positive State practice in the Afro-Asian region in the past three decades.

[23] The Manila Seminar proposed removing para.3 from Art.III of the Bangkok Principles and making it into a separate Article in two paragraphs, as per the first two paragraphs below. The third paragraph below is actually para.3 of Art. III of the Bangkok Principles.

nationality, ethnic origin,[24] membership of a particular social group or political opinion.[25]

2. The provision as outlined above may not however be claimed by a person when there is reasonable ground to believe the person's presence is a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.[26]

3. In cases where a State decides to apply any of the above-mentioned measures to a person seeking asylum, it should grant provisional asylum under such conditions it may deem appropriate, to enable the person thus endangered to seek asylum in another country.[27]

Article VI

Minimum Standards of Treatment

1. A State shall accord to refugees treatment no less favourable than that generally accorded to aliens in similar circumstances, with due regard to basic human rights as recognized in generally accepted international instruments.[28]

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[24] The addition of "ethnic origin" in the non-refoulement provisions was recommended at the Tehran Meeting of Experts. It is in any case consistent with the grounds in the refugee definition.

[25] Rephrasing of Art. III as per footnote (23) above.

[26] Idem.

[27] Para 3 of Art. III as per footnote (23) above.

[28] Insert recommended by the Manila Seminar. At the Tehran Meeting of Experts, one participant suggested substituting "as regards" for "with due regard". No explanation was given. Another suggested substituting "international human rights conventions" for "generally accepted international instruments". One participant in the Meeting of Experts complained that refugees were sometimes given a higher standard of treatment than nationals. Another doubted this, pointing out that the rules of operation were precisely not to give the refugees higher treatment than the locals. On the contrary, the services made available to refugees in a given area often extended, as necessary, to internally displaced persons and the local population as well.

2. The standard of treatment referred to in paragraph I[29] shall include the rights relating to aliens contained in the Final Report of the Committee on the status of aliens, to the extent they are applicable to refugees.

3. A refugee shall not be denied any rights on the ground that he does not fulfil requirements which by their nature a refugee is incapable of fulfilling.

4. A refugee shall not be denied any rights on the ground that there is not reciprocity in regard to the grant of such rights between the receiving State and the State or Country of nationality of the refugee or, if he is stateless, the State or Country of his former habitual residence.

5. *State undertake to apply these principles to all refugees without distinction as to race, religion, ethnic origin, gender, membership of a particular social group or political opinions, in accordance with the principle of non-discrimination.*[30]

6. States shall adopt effective measures for improving the protection of refugee women and, as appropriate, ensure that the needs and resources of refugee women are fully understood and integrated to the extent possible into their activities and programmes.[31]

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[29] As this is a treatment of Para.2 of this Art. VI, it had to be rephrased accordingly.

[30] Derived from art. IV of the OAU Convention and Art. 3 (partially) of the 1951 Convention. The grounds of "ethnic origin" and "gender" are added to reflect current international standards, the latter reflecting Art. 18 of the Vienna Declaration on Human Rights and foreshadowing the next paragraph. This clause reflects recommendation (d)of the Manila Seminar under "Points for Further Review".

[31] See para (a) of UNHCR Executive Committee Conclusion No.64 (XLI) on Refugee Women and International Protection. At the Tehran Meeting of Experts, during the discussion of a possible provision on women, children and elderly refugees, one participant proposed a general provision on vulnerable groups as an alternative to a separate one on each such groups as in paragraphs 6, 7 and 8.

7. States shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Principles and in other international human rights instruments to which said States are Parties.[32]

8. States shall give special attention to the protection needs of elderly refugees to ensure not only their physical safety, but also the full exercise of their rights, including their right to family reunification. Special attention shall also be given to their assistance needs, including those relating to social welfare, health and housing.

Article VIII

Expulsion and Deportation

1. Save in the national or public interest or in order to safeguard the population,[33] the State shall not expel a refugee.

2. Before expelling refugee, the States shall allow him a reasonable period within which to seek admission into another State. The State shall, however, have the right to apply during the period such internal measures as it may deem necessary and as applicable to aliens under such circumstances.[34]

3. A refugee shall not be deported or returned to a State or Country where his life or liberty would be threatened for reasons of race, colour, nationality, ethnic origin,[35] religion, political opinion,[36] or membership of a particular social group.

4. The expulsion of a refugee shall be 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 be represented for the purpose before the competent authority or a person or persons specially designated by the competent authority.[37]

III. Durable Solutions

Article IV

Right of Return

1. A refugee shall have the right to return if he so chooses to the State of which he is a national or the country of his

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[32] Art. 22 (I) of the 1989 Convention on the Rights of the Child.

[33] This excerpt is taken from Art. 3(2) of the UN Declaration on Territorial Asylum. It substitutes for "on the ground of violation of the conditions of asylum". Another alternative proposed in Note (I) to art. VIII of the Bangkok Principles would Be: "save on ground of national security or public order, or a violation of the vital or fundamental conditions of asylum"; "national security and public order" are the only grounds provided for by the 1951 Convention in Art. 32 (I).

[34] The phrase "as applicable to aliens under the same circumstances" is taken from Note (2) to Art. VIII.

[35] These additional grounds were recommended for the refugee definition by the Manila Seminar and the Tehran Meeting of Experts respectively. See footnote (2) above.

[36] See footnote (3) above.

[37] Art. 32(2) of the 1951 Convention. This paragraph is consistent with the recommendation of a participant of the Tehran Meeting of Experts that a refugee should not be expelled without due process of law. It is also in conformity with Art. 13 of the 1966 International Covenant on Civil and Political Rights. In the national context, the refugee's right to due process of law in expulsion cases was reaffirmed in the January 1996 decision of the Supreme Court of India in the case of *National Human Rights Commission v. State of Arunachal Pradesh and Another* (1996 [I] SC 295).

national and in this event it shall be the duty of such a State or Country to receive him.

2. [38] This principle should apply to, *inter alia*[39], any person who because of foreign domination, external aggression or occupation has left his habitual place of residence, or who[40] being outside such place desires to return thereto.

3. It shall [...] be the duty of the Government or authorities in control of such place of habitual residence to facilitate, by all means at their disposal, the return of all such persons as are referred to in the foregoing paragraph, and the restitution of their property to them.[41]

4. This natural right of return shall also be enjoyed and facilitated to the same extent as stated above in respect of the dependants of all such persons as are referred to in paragraph I[42] above.[43]

Article V

Right to Compensation

1. A refugee shall have the right to receive compensation from the State or the Country which he left or to which he was unable to return.[44]

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[38] This and the next two paragraphs are paras. (1), (2) and (3) of the 1970 Addendum to the Bangkok Principles. The incorporation of this Addendum was understood as appropriate in both Manila and Tehran.

[39] Stylistic addition.

[40] Idem

[41] 1970 Addendum, para.2.

[42] Modified due to change in paragraph numbering.

[43] 1970 Addendum, para.3.

[44] While a Tehran Meeting of Experts participant called compensation a utopia, another called attention to its necessity when, for example, refugees' property has been confiscated. He was probably referring to historical cases of compensation and restitution from Germany and from Uganda.

2. The compensation referred to in paragraph 1 shall be for such loss as bodily injury, deprivation of personal liberty in denial of human rights, death of the refugee or of the person whose dependant the refugee was, and destruction of or damage to property and assets, caused by the authority of the state or country, public officials or mob violence.

3.[45] Where such person does not desire to return, he shall be entitled to prompt and full compensation by the Government or the authorities in control of such place of habitual residence as determined, in the absence of agreement by the parties concerned, by an international body designated or constituted for the purpose by the Secretary General of the United Nations at the request of either party.

4. If the status of such a person is disputed by the Government or the authorities in control of such place of habitual residence, or if any other dispute arises, such matter shall also be determined, in the absence of agreement by the parties concerned, by an international body designated or constituted as specified in paragraph (3)[46] above.[47]

Article V(A)[48]

Voluntary Repatriation[49]

1. The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.

2. The country of asylum, in collaboration with the country of origin, shall make adequate arrangements for the safe return of refugees who request repatriation.

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[45] This paragraph and the next are paras. (4) and (5) of the 1970 Addendum. See footnote (38) above for explanation.

[46] Numbering modified as per the new numbering of the paragraphs.

[47] 1970 Addendum, para.5.

[48] Under "Durable Solution" the Manila Seminar made detailed recommendations on voluntary repatriation which are reflected in this new article taken from the OAU Convention.

[49] Art. V of the OAU Convention. Similar provisions are found in UNHCR's EXCOM Conclusion No.40 (XXXVI) Voluntary Repatriation.

3. The country of origin, on receiving back refugees, shall facilitate their resettlement and grant them the full rights and privileges of nationals of the country, and subject them to the same obligation.

4. Refugees who voluntarily return to their country shall in no way be penalized for having left it or for any of the reasons giving rise to refugee situations. Whenever necessary, an appeal shall be made through national information media and through the relevant universal and regional, organisations[50] inviting refugees to return home without risk and to take up a normal and peaceful life without fear of being disturbed and punished, and that the text of such appeal should be given to refugees and clearly explained to them by their country of asylum.

5. Refugees who freely decide to return to their homeland, as a result of such assurances or on their own initiative, shall be given every possible assistance by the country of asylum, the country of origin, voluntary agencies and international and intergovernmental organisations to facilitate their return.[51]

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[50] This phrase is substituted for "the Administrative Secretary General of the OAU".

[51] This and the other paragraphs of this proposed Article should meet the requirements of the Tehran Meeting of Experts participants who called for "ways and means to facilitate return", for "the means of integration after return", and for "sustainable reintegration".

Article V (B)[52]

Other solutions

1.[53] Voluntary repatriation, local settlement or resettlement, that is, the traditional solutions, all remain viable and important responses to refugee situations, even while voluntary repatriation is the pre-eminent solution. To this effect, States should undertake, with the help of international governmental and non-governmental organisations,[54] development measures which would underpin and broaden the acceptance of the three traditional durable solutions.

2. States shall promote comprehensive approaches, including a mix of solutions involving all concerned States and relevant international organization in the search for and implementation of, durable solutions to refugee problems.[55]

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[52] While the Manila Seminar expressed the sense that the international climate was not ripe for a formal inclusion of local integration as a solution, it conceded that it had provided some positive experiences. As for third-country resettlement, while the Seminar deemed it not a solution for the vast majority of refugees in the Afro-Asian region, it nevertheless agreed that the resettlement option needed to be left open. (Report of the Seminar, p.6). At the Tehran Meeting of Experts, both views were expressed and several participants called attention to the need to preserve these three traditional solutions in light of positive experiences in specific refugee contexts. This proposed Article reflects these views.

[53] UNHCR's EXCOM Conclusion No.61 (XLI) Note on International Protection, paras. (iv) and (v).

[54] Stylistic insertion.

[55] Manila Seminar (see Report of the Seminar, p.6). At the Tehran Meeting of Experts, one participant recommended the consideration of "regional approaches" which in fact are not at all excluded from the concept of "comprehensive approaches".

3. The issue[56] of root[57] causes is crucial for solutions and international efforts should also be directed to the removal of the causes of refugee movements[58] and the creation of the political, economic, social humanitarian and environmental conditions conducive to voluntary repatriation.[59]

IV. Burden Sharing

Article IX[60]

Burden Sharing

1. The refugee phenomenon continues to be a matter of global concern and needs the support international community as a whole for its solution and as such the principle of burden sharing should be viewed in that context.

2. The principle of international solidarity and burden sharing needs to be applied progressively to facilitate the process of durable solutions for [...] refugees, whether within or outside a particular region, keeping in perspective that durable solutions in certain situations may need to be found by allowing access to refugees in countries outside the region, due to political, social and economic considerations.

3. The principle of international solidarity and burden sharing should be seen as applying to all aspects of the refugee situation, including the development and strengthening of the standards of treatment of refugees, support to States in protecting and assisting refugees, the provision of durable solutions and the support of international bodies with responsibilities for the protection and assistance of refugees.

4. International solidarity and co-operation in burden sharing should be manifested whenever necessary, through effective concrete measures in support of States requiring

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56 The word "issue" is substituted for "aspect" for stylistic purposes.

57 The word "root" is added to the text in order better to reflect the recommendation made at the Tehran Meeting of Experts.

58 UNHCR's EXCOM Conclusion NO.40 (XXXVI), para. (c).

59 Addressing the root causes of refugee movements by ensuring "sustainable repatriation" was recommended at the Tehran Meeting of Experts.

60 The Manila Seminar recommended that paras. I to IV of the 1987 Addendum be incorporated into the Bangkok Principles under the heading of "Burden Sharing" and become a new Art. IX (Report of the Seminar P.6).

assistance refugees, the provision of durable solutions and the support of international bodies with responsibilities for the protection and assistance of refugees.

5.[61] In all circumstances, the respect for fundamental humanitarian principles is an obligation for all members of the international community. Giving practical effect to the principle of international solidarity and burden sharing considerably facilitates States' fulfilment of their responsibilities in this regard.

Additional Provisions[62]

Article X[63]

Rights granted apart from these Principles[64]

Nothing in these Articles shall be deemed to impair any higher rights and benefits granted or which may hereafter be granted by a State to refugees.

Article XI[65]

Cooperation with international organisations

States shall cooperate with the Office of the United Nations High Commissioner for Refugees and, in the region of its mandate, with the United Nations Relief and Works Agency for Palestine Refugees in the Near-East.[66]

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61 This paragraph is added to ensure a more complete statement of the principle of burden sharing and arises out of the discussions at the Tehran Meeting of Experts.

62 Title added for clarity.

63 This is the former Art. IX. The Manila Seminar had recommended that a new Art. IX be inserted under the rubric "Burden Sharing" and that this text be renumbered Art. X.

64 Title added for clarity.

65 Under the heading of "Cooperation with international organisations", the Manila Seminar "expressed its appreciation to UNHCR as well as to UNRWA for their dedication to their duties on behalf of refugees". (Report of the Seminar, p.5).

66 On cooperation with UNHCR, see Art. VIII (I) of the OAU Convention, Art. 35 of the 1951 Convention, and Art. II of the 1967 Protocol relating to the Status of Refugees.

ANNEX-II

Proposal Submitted at the Experts Group Meeting in Tehran.

1. Egypt

The delegation of Egypt proposed that an expanded definition should include, in its "exceptions" part, the "crime of terrorism". Moreover the crime of terrorism should also be considered as one of the reasons for the loss of status as refugee.

2. Ghana

The Delegate of Ghana proposed a definition of refugee as follows: "A refugee is a person who... Is outside the country of his nationality and is unwilling or cannot, for the time being, return to his home country because his life, freedom or personal security would be at risk there; the risks emanating from a pattern of persecution on account of race, religion, nationality, membership of a particular social group or political opinion and or from generalized violence (international war, internal armed conflict, foreign aggression or occupation, severe disruption of public order) or from massive violations of human rights in the whole or part of the country of nationality".

3. Uganda

The delegate of Uganda proposed to include 'colour' in the definition of refugees i.e. "persecution as result of colour ethnicity..." etc.

4. Islamic Republic of Iran

Proposal made by the delegate of the Islamic Republic of Iran concerning Article IV (right to return):

Taking into consideration that voluntary repatriation constitutes a right of the refugee, the importance of strengthening, extending and promoting the ways and means to facilitate conditions for voluntary return should be emphasized.

ANNEX-III

Comments Received by the Secretariat as of 18 March 1999 from AALCC's Member States on the Consolidated Text on the Revised Bangkok Principles

1. People's Republic of China

The Government of the People's Republic of China has no comments on the consolidated text on the revision of the Bangkok Principles at this stage". (Letter from the Embassy of the People's Republic of China, dated July 31, 1998).

2. Republic of Indonesia

The Government of Indonesia has studied the text on the Revision of Bangkok principles on Status and Treatment of Refugees and recommends to submit it without any further revisions. (Letter from the Embassy of the Republic of Indonesia, New Delhi, dated July 30, 1998).

3. Japan

The Government of Japan has no particular comment on the above revision and is agreeable to the Revision of the AALCC's Bangkok Principles on Status and Treatment of Refugees. (Letter from the Embassy of Japan, New Delhi, dated August 13, 1998).

4. Pakistan

Definition of the term "refugee"

In these Revisions we support the additions of the words "ethnic origin" as proposed in Tehran as far as the term "he" is concerned the substitution 'he/she' and 'his/her' may be adopted.

Asylum to a Refugee

We support the details already provided and agree that we should avoid giving erroneous impression that all refugees are terrorists which would in turn undermine the institution of asylum from persecution according to universal declaration of human rights.

Non-refoulement

This article laid down the condition that no one seeking asylum in accordance with these principles shall be subjected to measures such as rejection at the frontier, return or expulsion from the host country. Although Pakistan has not resorted to using these harsh measures against refugees yet we do not support making it legally binding.

Migrant standards of treatment

We support in principle the provision and amendments made in this article.

Expulsion and deportation

We support in principle the provision and amendments made in this article.

Right of return

We support in principle the provision and amendments made in this article.

Right to compensation

Implementation of this article is likely to create financial hardships for developing and third world countries including Pakistan.

Voluntary reparation

We support in principle the provision and amendments made in this article.

Other solutions

We support in principle the provision and amendments made in this article.

Burden Sharing

We support the provision in the article with the recommendation that major share of the financial contribution be borne by such countries and there should be minimum financial burden on the developing countries.

Rights granted apart from the Principles

Nothing in these Articles shall be deemed to impair any other rights and benefits granted or which lay thereafter be granted by a State to refugees.

Cooperation with international organizations

We agree that all States shall cooperate with the office of the United Nations High Commissioner for Refugees and in the region of its mandate, with the United Nations Relief and Works Agency for Palestine Refugees in the Near-East. (Letter from the Ministry of Foreign Affairs, Islamabad addressed to the Office of the UNHCR, dated March 12, 1999).

5. Saudi Arabia

First, regarding the loss or theft of travel documents or counterfeit travel documents and its use by persons seeking asylum and due to the increase in the number of applications for asylum, we feel obliged to add to these principles on article which could read:

"A person who uses or presents false or counterfeit travel documents, which enabled him to enter the State of asylum, will not be considered a refugee".

Secondly, the Bangkok Principles do not envisage the treatment and status to be accorded to a refugee who dies in the country of asylum, more specifically as regards the final rites to be conducted (burial). This could be a strong point of disagreement, between the country of asylum and the country of origin, visa-a-vis political refugees. We would like to add an article to the Bangkok Principles, which could read as follows:

"The body of the refugee shall be returned to the State of Origin after his death, or to the country of which he was the habitual resident – even if it is not to the country of his nationality, unless there is a written request ('will') by the deceased refugee himself stating that the should not be buried in such a place."

The concerned authorities in Saudi Arabia are of the following opinion concerning the Bangkok Principles.

- Add to Article I the phrase "unless he was tried for his crime"
- Delete paragraph 2 of the Article II, as it contradicts with paragraph 1
- Add to paragraph 1 of Article III, the phrase: "or because the internal rules of the country of asylum do not permit the granting to him of this rights".
- Add to paragraph 1, of Article V: "unless it is proved that he has committed an act which threatens or hinders the protection of the population of that State".

(Letter from the Royal Embassy of Saudi Arabia, New Delhi, dated March 9, 1999).

6. Singapore

The revised proposals for the Bangkok Principles are drafted with a view to concluding a Restatement of the Bangkok Principles. The nature of the restatement, when it is

concluded should affirm the understanding that these principles are only recommendatory in nature and not legally binding.

It may be useful to note that not all the proposed articles are accepted as legal norms and are reflective of the forward looking attributes of the AALCC's work in this area. It may be argued that whilst it is commendable that the AALCC progressively develop guiding principles concerning refugees, to avoid the lack of commitment evidenced by the low ratification of the 1951 Convention and 1967 Protocol, the status and treatment of refugees should be left largely to be dictated by the abilities and resources of each State.

Addressing root causes should remain a primary focus in any document concerning mass exodus. There is great suffering associated with the plight of persons who are uprooted from their homes and forcibly displaced. However, despite the consideration of providing relief, the necessity to find durable solutions should not be obscured. New Articles 5 (A) and (B) have been inserted under Part III of the revised principles on 'Durable Solutions'. These two articles deal with voluntary repatriation and other solutions, respectively. Essentially, the provisions oblige receiving States not to repatriate against the will of the refugee, and for States of origin to facilitate the voluntary return of refugees and asylum-seekers. Inter-State and inter-agency cooperation is also requested to ease voluntary repatriation. Voluntary repatriation is deemed".. the pre-eminent solution" (Article 5(B) para 1), and the issues of root causes is considered "..crucial for solutions... to the removal of the causes of refugee movement" (Article 5(B), para.3).

Part VI on 'Burden Sharing' incorporates the 1987 Addendum to the Bangkok Principles. Part V on 'Additional Provision' includes a new final Article 11 which is an obligation on States to cooperate with the office of the United Nations High Commissioner for Refugees and the United Nations Relief and Works Agency for Palestine Refugees in the Near-East.

General Comments

As a general observation, the revision is consistent with the intention of being guiding principles. Many of the provisions are not specific enough to create binding legal norms and would attract controversy, as they are more akin to principles of aspiration-value only. Accordingly, it would be preferable that the non-binding status of the principles be clearly stated in the preamble, as this was the original intention of the Bangkok Principles in1966.

As with other international documents dealing with the status and treatment of refugees (the 1951 Convention and 1967 Protocol, OAU Convention, and Cartagena Declaration), the focus of these revisions are on establishing a definition from which rights can be claimed. These rights are accorded because the title, 'refugee', and are claimed against States of refugee, other resettlement States, and the State of origin. The revision has an opportunity to make clear that primary obligation for refugees should lie with States that cause mass exodus, whether States of origin or a third States whose acts of aggression or invasion has caused the movement of persons. Instead, this primary obligation is only alluding to in a minor provision in Part III of the revised principles. Further, the traditional solutions to refugee crises, namely, resettlement in third States or voluntary repatriation are both reactive rather than proactive solutions, such as, crisis prevention and early warning or implementing sound economic policies. A comprehensive plan of action must be multi-disciplinary with a strong focus on developing the political, social and economic solution within States to prevent mass exodus.

With regard to definition issues, there are disadvantages with an expanded definition of refugees. For example, it may be argued that it would prolong the internal conflict or foreign domination, assist the conduct of unlawful policies of forced displacement of persons, and might act to apply undue pressure on the economic or social conditions with the receiving State, particularly where persons arrive in large numbers. It may be suggested that inline with seeking durable

solutions and burden sharing, instead of broadening the definition of refugees, other avenues may be explored. For example, the concept of temporary safe havens within the State of origin or the wider protection and coordination of both local and international aid agencies to provide for persons within the State of origin could be developed so as to prevent the occurrence of mass exodus. (Letter from the Singapore High Commission, dated September 30, 1998).

7. Sudan

1. Refugee Definition

Article 1: Definition of the term "Refugee".

What has been mentioned in the Bangkok Principles regarding the definition of the term "Refugee" is in compliance with what has been mentioned in the Geneva Convention of 1951, the amended protocol of 1967 and that of the 1969 (O.A.U.) Convention governing the Specific Aspects of Refugee Problem in Africa. Moreover, the exemptions included in the Bangkok Principle regarding the same are in conformity with the International Characters. As such the Government of the Sudan agrees to Article 1.

2. Asylum and Treatment of Refugees

Article III – Sub-Article 1

The Sudan Government Agrees to it.

Article VI: Minimum Standard of Treatment

It is in accordance with the International Characters. Thus the Sudan Government agrees to it.

Article VIII: Expulsion and Deportation

The Sudan Government agrees to it.

1. Durable Solutions:

Article IV: Right to return:

It is comprehensive and accurate. As such the Sudan Government agrees to it.

Article V: Right to Compensation

This Article stipulates that a refugee shall have the right to receive compensation from the state or the country which he left or to which he was unable to return.

Article V(A): Voluntary Repatriation

The Sudan Government agrees to it.

Article V(B): Other Solutions

This article stipulates the voluntary repatriation local settlement or resettlement, that is, the traditional solutions, all remain viable and important responses to the refugee situation, even while voluntary repatriation is the pre-eminent solution. To this effect, states should undertake, with the help of international government and non-governmental organizations, development measures which would underline and broaden the acceptance of the three traditional durable solutions.

The Sudan Government agrees to that.

4. Burden Sharing

Article IX: Burden Sharing

The Sudan Government agrees to that

5. Additional Provisions

Article X: rights granted apart from Bangkok Principles.

The Sudan Government agrees to that.

(Letter from the Embassy of the Republic of the Sudan, dated March 1, 1999).

8. Turkey

The consolidated text of the AALCC is agreeable in principle. That said, the following amendments are recommended for the revision of the text, which, in our view, will improve the text and thereby enhance its acceptability.

- Arti.1, Para.1 (a), Page 1:

Delete: "national", "country of nationality" and "habitual resident"

Insert: "persons"

These three terms in this para and in the other parts of the text should be replaced with "persons" which is consistent with Art.1 of the 1951 Convention.

Art.1, Para.2, Page 1:

Delete: "events seriously disturbing public order"

Insert: "armed conflict"

Art.1, Para.7, Page 3

Insert: in the second line, after "crime against humanity" add "including terrorist act"

Delete: "serious" before "non-political crime"

Insert: "any"

Attempting to qualify the nature and magnitude of non-political crime would not be appropriate

Art.3, Para 1, (footnote 18) Page 3:

Alternative formulation on the basis of Art.14 of the Universal Declaration of Human Rights would be preferable to the existing text based on the Vienna Declaration.

- Art.3, Para.3, Page 3:

Insert "so long as its peaceful and humanitarian nature is maintained" to end the second sentence.

- Art.3 A, Para.1, Page 4:

Delete: "nationality" and "ethnic origin"

- Art.3 A, Para.2, Page 4:

- Insert "national security" and "public order" This amendment would reflect the essence of Art. 32 of the 1951 Convention.

Delete: "serious"

Insert: "any"

-Art.4, Para.2, Page 7

Delete: "foreign domination, external aggression or occupation"

Insert: "international or internal armed conflict"

- Art.4, Para.3, Page 7:

Insert to the end of the sentence after "them "... taking into consideration the agreements reached with the government or authorities of those persons and with a view to preventing further displacement of other already displaced persons as a result".

-Art.5, Page 7-8:

Delete the article as a whole since this article seeks to bring a new element to the Law of the Refugees without due regard to its implications.

- Art.5B, Para.1, Page 9:

Insert "third country" before "resettlement".

- Art.6, Para.1, Page 4:

Delete: "generally accepted"

Insert: "applicable"

- Art.6, Para5, Page 5:

Delete: "nationality" and "ethnic origin"

- Art.8, Para.3, Page 6:

Delete: "nationality" and "ethnic origin"

- A new article should be formulated before article 8, concerning the responsibilities of the refugees along the lines and in the spirit of Art.2 of the 1951 Convention.

The Turkish authorities, in the context of Article 3 (A), para 3, would like to recall and confirm the validity of the geographical limitations it has introduced under the 1951 Convention.

I would kindly request that the proposed amendments should be incorporated in the next edition of the revised text and express my readiness to discuss with the Secretariat in greater detail the rationale of our proposals, should you deem appropriate. (Letter from the Turkish Embassy dated January 21, 1999).

VIII. DEPORTATION OF PALESTINIANS AND OTHER ISRAELI PRACTICES AMONG THEM THE MASSIVE IMMIGRATION AND SETTLEMENT OF JEWS IN OCCUPIED TERRITORIES IN VIOLATION OF INTERNATIONAL LAW PARTICULARLY THE FOURTH GENEVA CONVENTION OF 1949

(i) Introduction

The item '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' was first placed on the work programme of the Secretariat of the Committee at its 27th Session (Singapore) following upon a reference by the Government of Islamic Republic of Iran. During that Session it was pointed out by the delegate of the Islamic Republic of Iran 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 of people from the occupied territory, both in the past and recent times constituted a severe violation of the principles of International law and also violated the provisions of international instruments and conventions such as the Hague Conventions of 1899 and 1907, the U.N. Charter 1945 and the Geneva Convention relative to protection of Civilian Persons in time of war 1949 all of which prohibited deportation as a form of punishment of deterrent factor, especially in an occupied territory". After preliminary exchange of views the Islamic Republic of Iran had submitted to the AALCC Secretariat a Memorandum, and the Secretariat was called upon to study the legal consequences of the deportation of Palestinians from occupied territories.

The topic was considered at the 28th and 29th Sessions of the Committee held at Nairobi and Beijing respectively. The

study presented at the 28th Session concluded that the deportation of Palestinians did indeed constitute a flagrant violation of customary international law of armed conflicts as well as contemporary international humanitarian law, and hence the occupying powers were acting in flagrant violation of international law. It also affirmed the inalienable right of Palestinian people for 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 of Palestinians. Pursuant to that decision the study presented at the 29th Session tried 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 study also emphasized that not only had the Palestinian people been denied exercise of their fundamental human rights and freedoms but grave injustice had been perpetrated against them. After due consideration of the topic at Beijing (1990) the Secretariat was directed to follow up the subject with consideration of legal aspects, of the resettlement in violation of international law by the State of Israel, of a large number of Jewish migrants in Palestine.

The Study presented at the 30th Session held in Cairo in 1991 focused 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 had also been discussed in the Secretariat study. During the Session concern was expressed at the continuing denial and deprivation of the inalienable human rights of the Palestinian People including the right to self-determination and the right to return and establishment of their independent State on their national soil. The AALCC was directed to continue to monitor the events and legal developments in the occupied territories of Palestine and decided to include the item on the agenda of its 31st Session.

Following the conclusion of a Co-operation Agreement with the League of Arab States, the Secretariat convened in conjunction with the office of the League of Arab States, 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 32nd session held in Kampala in 1993, reflecting the developments since the Islamabad Session included a report of the aforementioned Workshop for which the Secretariat had prepared a Working Paper on the Legal Aspects of the Palestine Question. The brief of documents prepared for consideration at the AALCC's 32nd session (Kampala, 1993) established that the Hague Conventions of 1899 and 1907 were applicable to the territories occupied by the Israelis since 1967 as their occupation stems from acts of aggression and invasion. It also demonstrated 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 changes, is a crime against humanity.

The study prepared for the 34th Session held in Doha reflected the events and developments following the Middle East Peace Process including the principles on Interim self Government Arrangement of September 1993 and, the 1994 Agreement on the Gaza Strip and Jericho area. At that Session, the Committee, *inter alia*, decided that this item be considered in conjunction with the question of the Status and Treatment of Refugees. After due deliberations the AALCC at its 35th Session (Manila 1996) took cognizance of the hardships suffered by the Palestinian refugees and directed the Secretariat to continue to monitor the developments in the

occupied Territories from the view point of relevant legal aspects. It also decided to place the item on the agenda of the 36th Session.

Pursuant to the resolution adopted at the 35th Session, the Secretariat monitored with great concern the important events which occurred in Palestine and the occupied territory within the context of this agenda item since the Manila Session. It registered through events and the specialized comments and analysis contained in Legal Journals of International Law the major developments concerning the Deportation of Palestinians and massive immigration of Jews. The study prepared for the 36th Session had exposed to the AALCC Member States the serious developments in the occupied territories which could lead to deterioration of the situation in the region and to resumed cycle of tension and violence, endangering peace and security not only in the Middle East but throughout the world.

In view of the importance of the subject it had been placed on the agenda of the 37th Session. The Secretariat had monitored the situation over the past one year and the situation was not satisfactory. The Israeli Government had continued to evade the implementation of the agreements and commitments that had been agreed upon thus endangering the whole peace process.

The decision of the Israeli Government to build a Jewish residential neighbourhood on Jabal-Abu-Ghneim, South of Arab Jerusalem, was a step in flagrant violation of principles on which the peace process was based and of all international laws and resolutions in particular Security Council resolutions 242 and 338. The Deputy Secretary General was of the view that these measures were strongly condemned. These decisions violated international law, were a threat to the peace process and could plunge the region into struggle, tension and instability. The systematic violation of the "peace process" had compelled the international community to take some decisive decision on bringing peace to the region.

The Deputy Secretary General informed the Committee that during its 52nd Session the General Assembly vide resolutions 52/66 and 52/67 had expressed grave concern about the decision of the Government of Israel to resume settlement activities, including construction of the new settlement in Jabal Abut Ghneim, in violation of international humanitarian law, relevant United Nations resolutions and agreements between the parties, as well as the dangerous situation resulting from Israeli actions in the occupied territory.

The 10th Emergency special Session (ESS) of the General Assembly (Uniting for Peace Formula) was resumed a second time on 13 November, 1997, to consider the continuation of illegal Israeli actions in occupied East Jerusalem and the rest of the occupied Palestinian Territory. The resumption was a follow up of the results of previous meetings of the ESS and to specifically consider the report of the UN Secretary General on the issue of convening a conference of the High Contracting Parties to the fourth Geneva Convention of 12 August 1949, on measures to enforce the Convention in the occupied Palestinian Territory, including Jerusalem. The resumed 10th ESS was a tremendous success as it had put the international community on the road to convening a conference on the enforcement of the Fourth Geneva Convention.

The *Delegate of Palestine* appreciated the work undertaken by the Secretariat on this subject of vital importance. He stated that even after fifty years of suffering just and durable peace evaded the people of Palestine.

Even though the Palestinian Liberation Organization adopted all diplomatic ways and means on the path of peace, justice and rightness, the beam of light which appeared after the conclusion of the Madrid and Oslo Agreements had vanished due to the policies adopted by the Israeli Government. The policies adopted by the Israelis were in contravention of established principles of international law. Instead, Israel was attempting to place new principles and

rules which in effect nullify all agreements and the land for peace' formula. The practice of these new policies not only was the cause of immense suffering for the Palestinian people but against the international community as a whole which rejected these practices.

The AALCC in his view provided a forum for exchange of views on this topic and could provide a united stance of justice and condemnation of violence perpetuated against the Palestinians. *He suggested that the AALCC "continue to monitor the developments to include all Israeli practices in violation of international law"*. He also drew attention to the General Assembly Resolutions adopted during the 52nd. Session which had called for the convening of a Conference of the contracting Parties to see how the four Geneva Conventions could be applied to the Palestinian problem.

The Delegate of Islamic Republic of Iran recalled that the item "Deportation of Palestinians in violation of International Law" was taken up by the Committee at its Singapore Session (1988) upon the proposal of the Iranian Delegation. He said it was unfortunate that Palestinian people still continued to suffer and supported the proposal to continue to keep the item on the agenda of the AALCC.

The Delegate of Pakistan stated that his country had always considered that Deportation of Palestinians and establishment of Jewish Settlements in Palestine, were violative of the Hague Convention of 1907, the fourth Geneva Convention of 1949 and 1977 Protocols. He also condemned these and other acts that are in violation of international law, UN Resolutions and international agreements that denied the Palestinians their rights, including the right of self-determination. He supported the retention of this item on the agenda of the Committee.

The Delegate of Ghana requested the Secretariat to continue to monitor the situation in Palestine and submit a report to the next Session of the Committee.

The Delegate of Syria highlighted the need to solve the Palestinian issue. Expressing hope that there would be a just and lasting solution to the Palestinian issue, he condemned Israel for disrupting the peace process. In this regard he mentioned the mandate of the Security Council Resolutions 242, 328 and 425 which had called for complete withdrawal of Jews from all Palestinian territories. The non-compliance of these resolutions, showed disrespect and violation of established international law. The deportation of Palestinians and resettlement of Jews in his government's view, tantamount to violation of all international legal instruments applicable to the region. He warned that the situation had international complications and West Asia should be able to live as a zone of peace. He supported the view that the topic be placed on the agenda of the 38th Session of the AALCC.

After extensive discussion on the topic and keeping in view the suggestions forwarded by member States, the resolution adopted during the 37th New Delhi Session, expanded the item to include other Israeli practices, thus "Deportation of Palestinians and Other Israeli Practices among them the massive Immigration and Settlement of Jews in the Occupied Territories in Violation of International Law Particularly the Fourth Geneva Convention of 1949" and decided to place the item on the agenda of the 38th Session (Accra).

Thirty -eighth Session: Discussion

The Deputy Secretary General Ambassador Dr. W.Z. Kamil while introducing the item "Deportation of Palestinians and other Israeli Practices among them the massive Immigration of and settlement of Jews in occupied Territories in violation of International Law Particularly the fourth Geneva Convention of 1899", stated that this item had been on the agenda of the AALCC for the last ten years when it was taken up by the Committee at the 27th session upon the reference by the Government of Islamic Republic of Iran. The Secretariat has monitored the legal aspects of the topic at successive Sessions, and the subject had undergone three phases, during

the first phase the Secretariat had highlighted the massive immigration of Jews from the former Soviet Union and the Israeli Practices of Settlement of Jews in the occupied Palestinian territory. The second phase began, and agreements were signed between the parties, the process began at Madrid with the signing of the Declaration of Principles on Interim Self Government Arrangements of 1993 as well as subsequent implementation agreement of 1995 and 1998. At consecutive Sessions of the AALCC it was felt that these steps towards peace, would settle all pending issues including the deportation of Palestinians in violation of International Law and would restore full respect and implementation of international instruments including the fourth Geneva Convention and rules of international law. He further noted that the Secretariat had continued to monitor development and at the 37th Session after deliberations the scope of the topic was broadened to include "other Israeli practices".

He observed that during the third phase it was unfortunate that despite international efforts which had raised expectations of peace in Middle East, had come to a settlement due to numerous set backs and violations of all international law instruments by the Israeli Government. Thus the situation has continued to deteriorate, and tension had increased in the region as a whole. He said, there was an urgent need to reach a final settlement of the question of Palestine that will allow Palestinian people to attain all their legitimate fundamental rights, in keeping with international law, basic principles established at the Madrid, Oslo, and subsequent conferences which would ensure security and stability for the entire region and just and lasting peace in the Middle East.

The Delegate of Palestine wanted the inclusion of "torture" to the topic, because in his view the plight of one third of the Palestinians languishing in Israel prisons was pathetic and deplorable. The agreement signed with Israel the occupying powers were far from settling the pending issues which could bring lasting peace, in the region. This he said, was largely due to the double standards adopted in dealing

with the Palestinians situation, where international legitimacy was completely ignored. The provisions of the Geneva Conventions failed to apply in their cases. He expressed his appreciation of the role of the ICRC, which had stood by the needs of the Palestinian people. He also recalled the UN General Assembly resolution of 28th February 1999, which *inter alia* drew attention to non-compliance by Israel of the four Geneva Conventions. In his view the list of crimes within the jurisdiction of the International Criminal Court should also include forceful settlement of people, as a crime to be tried by the ICC. Settlement continued to be the major stumbling block in all the peace efforts with Israel. The AALCC in his view provided an appropriate forum for exchange of views on this crucial topic and could provide a united stance of justice and condemnation of violence perpetuated against the Palestinians. He suggested that AALCC continue to monitor the developments to include all Israeli practices including, torture which was a violation of International Law.

The *Delegate of Pakistan* considered deportation and transfer of Palestinians from occupied territories and settlement of Jews in violation of the Hague Convention of 1907, the IV Geneva Convention of 1949 and its Protocol of 1977. He also condemned these and other acts that are in violation of international law, UN Resolutions and International Agreements that denied the Palestinians their Rights, including the right of self-determination.

The Delegate of the Arab Republic of Egypt stated that the topic had extensively been discussed in the Committee for the last 10 years and needed to be studied on continued basis for the following reasons: (i) that the continued discussion of this item is a reflection of the Committee's awareness of the importance of consistently exposing the Israeli violations of international law and particularly of the Geneva Conventions in the occupied territories; (ii) that the expansion, of the scope of this item to include other Israeli violation in addition to the deportation of Palestinians and settlement of Jews, is a welcome development; (iii) that the demolition of houses, collective punishment and legally condoned and sanctioned

torture of Palestinians, are all forms of Israeli violations of international law and of its obligations as an occupying power; (iv) that the objectives of these Israeli practices is to change the demographic structure in the territories to the detriment of the final settlement of the political issues; and therefore his delegation supported the points made by the Palestinian Minister of Justice which outlined in detail the legal aspects of the Israeli violation in the occupied territories.

The Vice President concluded the debate on the item with the comment that AALCC had an important role to play and decided to keep this item on the agenda and to report to the 39th Session.

(ii) Decision on the "Deportation of Palestinians and Other Israeli Practices among them the Massive Immigration and Settlement of Jews in Occupied Territories in Violation of International Law Particularly the Fourth Geneva Convention of 1949"

(Adopted on 23.04.1999)

The Asian African Legal consultative Committee at its Thirty-eighth Session.

Having considered Doc. No. AALCC/XXXVIII/Accra/99/S3;

Having heard the comprehensive Statement of the Deputy Secretary General;

Having heard also the comprehensive statement of the Head of Delegation of Palestine and other related statements;

Following with interest and hope the peace efforts being made by the international community for the achievement of a just and comprehensive solution of the question of Palestine on the basis of Security Council resolutions 242 (1967), 338 (1973) and 425 (1978) on the formula of "land for peace" and the legitimate rights of the Palestinian people shall bear fruit.

Mindful of the difficulties being faced in the implementation of the peace process;

1. *Expresses* hope that a just and durable solution will allow Palestinian people to attain their legitimate rights among them the right of self determination;

2. Directs the Secretariat to monitor the developments in the occupied territories from the viewpoint of relevant legal aspects; and

3. *Decides* to place the item "Deportation of Palestinians. And other Israeli Practices Among them the Massive Immigration and Settlement of Jews in Occupied Territories in Violation of International Law Particularly the Fourth Geneva Convention of 1949", on the agenda of its Thirty-ninth Session.

(iii) Secretariat Study: Deportation of Palestinians and other Israeli practices among them the Massive Immigration and Settlement of Jews in Occupied Territories in Violation of International Law Particularly the Fourth Geneva Convention of 1949

Pursuant to the resolution adopted at the New Delhi Session the AALCC Secretariat monitored the developments on the subject. The Israeli Government, since taking office, has adopted guidelines contradicting the letter and spirit of the agreements reached, made it clear that the time table agreed upon would not be respected, resumed settlement activities in the occupied territory and opened a tunnel in the vicinity of Al-Asqa Mosque in occupied 'East Jerusalem. It did not close that tunnel, in flagrant violation of Security council resolution 1973 (1996) of 28 September 1996, and has continued with and even intensified its settlement activities including building of new settlements in Jabal Abu Ghneim to the South of occupied East Jerusalem, and attempted to build a settlement in Ras-Al-Amud. It is clear that the Israelis have continued the drive to Judaize Jerusalem and to change its status and demographic composition.

These and other Israeli illegal practices are in flagrant violation of international law, fourth Geneva Convention of 1949 and the UN resolutions, they tantamount to reversing the path of Palestinian-Israeli reconciliation, and possibly bringing to an end the whole middle East Peace process.

In fact concern needs to be expressed over the current deadlock of the Palestinian Israeli track of the middle East Peace Process as a result of the policies of the Israeli Government, in violation of existing agreements, including settlement activities repressive measures and economic suffocation of Palestinian people. There is an urgent need for increasing efforts to ensure compliance by Israeli with the legal International and Bilateral binding agreements and their timely implementation. The international community did take

some decisive decisions on how to bring back peace to the region, and enhance the applicability of the rule of Law. Some steps taken in this regard are enumerated below:

A. XIIth Summit of Heads of State of the Non-Aligned Movement

The Non-Aligned Movement NAM) convened its Summit of the Heads of State or Government i n Durban, South Africa from 29th August to 3 September 1998. The Heads of State called for the implementation of all U.N. resolutions on the question of Palestine including these related to Palestinian refugees. They reiterated their support for the inalienable rights of the Palestinian people, including their right to return to their homeland and to have their own independent State with Jerusalem as its capital and, they reiterated their demand for the withdrawal of Israel, the occupying Power, from all the Occupied Palestinian Territory, including Jerusalem, and the other Arab Territories occupied since 1967.

The Heads of State or Government reaffirmed their position on occupied East Jerusalem, the illegal Israeli Settlements, and the applicability of the Fourth Geneva Convention of 1949 to all of the occupied Palestinian Territory, including Jerusalem. They demanded that Israel the occupying Power, implement relevant Security Council resolutions in this regard and abide by its legal obligation. They reiterated their support for the recommendations contained in the resolutions adopted during the Tenth Emergency special Session (ES-10/2, ES-10/3, ES-10/4 and ES-10/5) including *inter alia* the recommendation to convene a Conference of the High Contracting Parties to the Fourth Geneva Convention on measures to enforce the Convention in the Occupied Palestinian Territory, including Jerusalem, and to ensure its respect in fulfillment of their collective responsibility as stipulated in Common article 1 of the Fourth Geneva Convention.

B. 25th Session of the Foreign Ministers of Organization of Arab States

The 25th Session of the Foreign Ministers of the Organization of Arab States (OIC) convened in Doha, Qatar from March 15-17, 1999 had adopted several resolutions reaffirming *inter alia*, the OIC's full support for the Palestinian struggle to end the Israeli occupation and establish their own independent state. They also reaffirmed that Jerusalem is an integral part of the Palestinian territory occupied in 1967.

C. The Wye River Memorandum

Another important event in the last year was the signing on 23 October 1998, of the Wye River Memorandum. It was concluded after intensive negotiations between the Palestinian and Israeli sides for about 10 days at the Wye River Center, with full scale U.S. Participation, including that of the US President himself. The Memorandum comprised of steps to facilitate implementation of the Israeli Palestinian Interim Agreement of 1995 and other related agreements, including the Note for the Record of 1997. The Memorandum states that "these steps are to be carried out in a parallel phased approach in accordance with this Memorandum and the attached time limit. They are subject to the relevant terms and conditions of the prior agreements and do not supersede their other requirements".

Five basic issues are dealt with in the Memorandum, namely (i) further deployment; (ii) security (iii) interim committees and economic issues (transitional period issues); (iv) permanent status negotiations and (v) unilateral actions.

The signing of the Wye River Memorandum by the Government of Israel and the Palestinian Liberation Organization is a promising development. This agreement complements and adds detail to the accords that the parties concluded in the past and, paves way to permanent status negotiations. It is to be hoped that the Wye agreement will bring to an end delays and unilateral actions that have

hampered progress in the Middle East Peace Process back on track and bring the two sides to a new threshold, and will ensure the achievement of a major step towards peace and stability.

D. The General Assembly : Fifty -Third Session

The fifty-third Session of the General Assembly adopted 24 resolutions relating to different aspects of the Palestinian-Israeli conflict, of which 20 resolutions dealt specifically with the Palestine question. Those resolutions dealt with the same subjects as the resolutions adopted during the 52nd Session with one new resolution, entitled "Bethlehem 2000". The subjects addressed in those resolutions included the following: Jerusalem Settlements, refugees and displaced persons, UNRWA, the right to self determination, principles of peaceful settlement, permanent Sovereignty over natural resources, and assistance.

In addition to the resolutions, the General Assembly adopted a new decision, requesting the Secretary General to use the term "Occupied Palestinian Territory, including East Jerusalem", when appropriate, in his reports.

Overall, the 53rd Session reflected and reaffirmed the position of the international community in support of the Palestinian cause and the just struggle of Palestinian people to achieve their rights and also reaffirmed support for the Middle East peace Process and the full implementation of the agreements reached between the sides. Such a reaffirmation by the General Assembly is an integral part of the permanent responsibility of the UN towards the Question of Palestine and in upholding international law and Security Council resolutions as well in this regard.

E. Tenth Emergency Special Session

In an important development, the 10th Emergency Special Session (ESS) of the United Nations General Assembly adopted resolution ES-10/6, which recommends the convening

of a Conference of the High Contracting Parties to the Fourth Geneva Convention on measures to enforce the Convention in the Occupied Palestinian Territory, including Jerusalem, and to ensure its respect in accordance with common article I. The resolution specifically recommends the convening of the Conference on 15 July 1999 at the UN Office in Geneva and further invites the Government of Switzerland in its capacity as the depository of the Geneva Convention, to undertake whatever preparations are necessary prior to the Conference.

The Session was resumed for the fourth time on 5 February, 1999, since its initial convening in April 1997, to consider "Illegal Israeli Actions in occupied East Jerusalem and the rest of the Occupied Palestinian Territory". The resumption came at the request of Jordan, in its capacity as Chairman of the Arab Group, and with support of the Non-Aligned Movement. The Palestinian decision to reconvene the 10th ESS was based on the fact that Israel did not comply with any of the demands made in the previous resolutions of the Session and on the fact that the conference which was recommended three times by the Session, had not yet been convened. the resumption also came in response to the deterioration of the Peace Process and the freeze in the implementation of the existing agreements by the Israeli Government.

On 9 February, the General Assembly adopted resolution ES-10/6 by a vote of 115 in favour and 2 against, with 5 abstentions. the resolution condemns Israeli's lack of compliance, recounts the previously made demands, reaffirms the established position of the international community on Jerusalem and the rest of the Occupied Palestinian Territory and reiterates the call for the Conference. The resolution also maintains the possibility of the future reconvening of the Session.

The convening of the Conference, which represents the first time in the history of the treaty that the High Contracting Parties meet to consider a specific situation, will undoubtedly become a major development in the history of international

humanitarian law and, just as important, in the history of the Palestinian people, the protection of whom is being sought by convening of the Conference. In the words of a delegate, resolution ES-10/6, and e specially the call for the Conference, may just be the beginning of the end of the culture of impunity.

IV. Assessment

It is rather unfortunate to note that despite all these international efforts the violations of the rule of law remain and also, no progress has been made with regard to the implementation of the agreements reached, the situation has continued to deteriorate, and tension has increased in the region as a whole, all as a result of the policies and practices pursued by the Israeli Government in violation of international law.

The AALCC fully supports the ongoing peace process, which began in Madrid, the Declaration of Principles on Interim Self-Government Arrangements of 1993, as well as the subsequent implementation agreements, including the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip of 1995, and the most recent Wye River Memorandum, and expresses the hope that the process will lead to the establishment of a comprehensive just and lasting peace in the Middle East. However, there is necessity for commitment to the principle of "land for peace" and the implementation of Security Council resolutions 242 (1967) and 338 (1973), which form the basis of the Middle East Peace Process, and the need for immediate and unfailing implementation of the agreements reached between the Parties.

In fact it is the violation of the rule of law, in other words of the above mentioned agreements, Security Council resolutions, international law particularly the IVth Geneva Convention of 1949, that is hindering the peace process. Following examples are illustrative of the violations made by Israel.

The issue of house demolition, has been a fact of life in the West Bank since 1967. Since the beginning of the peace process, the Israeli government has accelerated the destruction of Palestinian homes. Israel contends that the demolitions are merely an act of law enforcement; however the demolition are in the violation of the law. According to the Ambassador and Permanent Observer of Palestine in UN Dr. Nasser Al-Kidwa "To deprive hundreds of people of their homes is deplorable, but Israel is using this measure as a tool to clear areas of the West bank of a Palestinian presence prior to the final status negotiations". Thus, imposing the "defacto" status.

The Interim Agreement signed in Oslo in 1995, created a situation where most Palestinians live in fragmented enclaves of Areas A and B. Israel which was temporarily in charge of Area C, prevented Palestinian expansion out of those enclaves. House demolition play an important role in enforcing this. Other instruments used are settlement expansion, land confiscation and by-pass road construction, which have continued since the signing of the Oslo Accord in September 1995. The restriction of Palestinian growth is an expansion of the Israeli Jewish settler presence in the West Bank. "Nearly all the houses which have been demolished, or are likely to be demolished are near by-pass roads or settlements, or lie in the path of their expansion. Israel is using house demolition as a means of eliminating, a Palestinian presence in areas which it seeks to retain in any final status arrangement with the Palestinian authority.[1]

This house demolition policy is inhumane, unjust and in flagrant violation of the rule of law contrary to the established principles of international law, it violates the letter and spirit of the Oslo accords which state. "Neither side shall initiate or take any step that will change the Status of the West Bank and Gaza Strip pending the outcome of the final status

[1] Houssari Parastou, "Bulldozed into Cantons", Israeli's Demolition Policy in the West Bank since the signing of the Oslo Agreements; September 1993-November 1997 - p.4.

negotiations" (Article XXXI, of the Israeli-Palestinian Interim Agreement on West Bank and Gaza Strip).

Further Israel's settlement activities violate international law, as well as the private property rights and the collective and individual human rights of the Palestinian people. International law *inter alia* prohibits an occupying power from transferring civilian population into the territory it occupies and from creating any permanent change in an occupied territory not intended for the benefit of the occupied population. The building and expansion of settlements also violates the letter and spirit of agreements the Israeli government has signed with the Palestinians.

In its occupation of the West Bank and Gaza Strip, Israel is subject to the international law of belligerent occupation, which provides special protection for an occupied civilian population (giving its members the status of Protected Persons), while ceding to the occupying Power the right to maintain temporary control. The law of belligerent occupation is found in customary international law, which has evolved from the Fourth Hague Convention of 1907. These norms were codified and elaborated upon in the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, which regulates, *inter alia,* the occupation of foreign territory, and to which Israel is a Party. These legal norms prohibit Israel's Settlement activities, which have all along been condemned.

The Fourth Geneva Convention is paramount and overrides the Oslo Agreements. Israel continues to be subject to the provisions of the Convention in respect of its relations with the Palestinian people, and thus its settlement activities in the occupied territories are in violation of international law. This policy is clearly aimed to divide the occupied Territories into small cantons under Palestinian control, and to prevent the territorial contiguity of Palestinian areas.

These policies and practices of Israel in establishing settlements in the Palestinian territories have no legal validity

and constitute a serious violation of the rule of law which obstructed all efforts in achieving a comprehensive, just and lasting peace in the Middle East. Mr. Kofi Annan, the United Nations Secretary General stated recently that: "Real, tangible progress is the best antidote to violence and the best answer to the force of disruption, distraction and doubt".

In view of the deliberations and resolution of the 37th (New Delhi 1998) Session as well as the development thereafter, the AALCC at its 38th Session (Accra,) would consider the future work of the Secretariat on the topic.

IX. AALCC's SPECIAL MEETING ON EFFECTIVE MEANS OF IMPLEMENTATION, ENFORCEMENT AND DISPUTE SETTLEMENT IN INTERNATIONAL ENVIRONMENTAL LAW

(i) Introduction

At the 259th Meeting of the Liaison Officers, the Secretariat had invited views of the Member States, to suggest a theme for the Special Meeting proposed to be organized within the administrative arrangements of the 38th Session. In response thereto the Government of Singapore had indicated that it favoured environmental law as the possible theme of the Meeting. Subsequently, the item "Law of Environment" was placed on the agenda of the Meeting of the Legal Advisers of Member States of the AALCC held in New York in October 1998.

The discussion therein revealed a general support for environmental law', as the theme topic for the Special Meeting. Accordingly the Secretariat identified three aspects of International Environmental Law for consideration at the Special Meeting which included: (i) principles of international environmental law; (ii) effective means of enforcement, implementation and dispute resolution in international environmental law; and (iii) harmonization of trade, investment and environment.

At the 262nd Meeting of the Liaison Officers held on the 4th February, 1999, it was generally agreed that the Special Meeting on Environment should focus its discussion on item, "Effective Means of Implementation, Enforcement, and Dispute Resolution in International Environmental Law". Accordingly

the Special Meeting was held in conjunction with the Accra Session on the 20th April 1999.

Thirty-eighth Session: Discussions

The Special Meeting on 'Effective Means of Implementation, Enforcement and Dispute Settlement in International Environmental Law was convened within the administrative arrangements of the 38th Session of the Asian-African Legal Consultative Committee. The Meeting was chaired by the President of the Thirty-eighth Session of the Committee Mr. Martin A.B.K. Amidu, Deputy Minister of Justice and Deputy Attorney General of Ghana. Mr. Sirilius Matupa, Senior State Attorney, Government of Tanzania was elected the Rapporteur of the Special Meeting.

The *Deputy Secretary-General* Mr. Ryo Takagi while introducing the Secretariat study welcomed the delegates and experts and expressed the hope that the deliberations would find the Special Meeting helpful to Member States. He thanked the UNEP and expressed the Secretariat's gratitude to Dr. Donald Kaniaru, Acting Director, Division of Environmental Policy Development and Law and Mr. Lal Kurukulasuriya, UNEP, Chief, Environmental Law and Institutions, for their help in the publication of the Asian-African Handbook on Environmental Law. In his view the implementation of international agreements were impeded chiefly because of lack of resources, technology and absence of trained personnel. In the light of this, he felt that the topic chosen for the Special Meeting, was an important one, as it would help Member States to find ways and means to improve capacities for enhanced implementation, compliance and enforcements of international legal agreements.

The *President* invited the experts Mr. Donald Kaniaru, UNEP and Mr. Larsey Mensah, Deputy Director, Environmental Protection Agency, Government of Ghana to make their presentations.

Dr. *Kaniaru* traced the role of the organization in the development of international environmental agreements a mandate granted to it by Chapter 38 of Agenda 21. In this regard, he outlined the role of UNEP wherein a long-term, Montevideo Programme for the Development and Periodic Review of Environmental Law for the 1990's, was adopted by the Governing Council in 1982. This Programme, he added, facilitated the drawing up of a number of international and regional conventions such as the Vienna Convention for the Protection of the Ozone Layer 1985, the Montreal Protocol on the Substances that Deplete the Ozone Layer 1987, the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal 1989, the Convention on Biological Diversity 1992 and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 1998. Furthermore, he also highlighted the pioneering role played by the UNEP in the development of Regional Seas Programmes and actions plans, besides the assistance rendered in drawing up regional instruments and a number of soft laws. The soft laws which have been handled by the Programme include the areas of shared natural resources, weather modifications, and information exchange on hazardous chemicals, marine pollution from land-based sources and environmental impact assessment.

Speaking on the topic of the Special Meeting, Dr. Kaniaru said the UNEP's Montevideo Programme for the 1990's is aimed at increasing the capacity of states in participation, negotiation and implementation of international legal instruments. In this regard, he urged Member States to avail themselves of the UNEP assistance in their endeavour to draw up 'coherent and cost-effective schemes', for implementing international legal instruments at all levels.

Another important element for enhancing implementation, he felt, was improving technical infrastructures at national levels. In this regard, he provided an account of the technical assistance provided by the UNEP and its endeavour with International Union for Conservation of

Nature (IUCN) to disseminate information on environmental law, wherein a Joint Environmental Law Information System has been developed.

On the issue of enforcement, he noted that the UNEP plays an important role in assisting States to strengthen capacities in carrying out the responsibility of improving reporting systems and thereby enhancing compliance.

Dispute avoidance in the view of the UNEP, is one of the objectives of the Montevideo Programme. Mechanisms such as collection of data, reporting, fact finding, inquiry notification, inspection, compliance procedures, consultation and others, he added, were found in a number of international legal instruments. In this regard, he mentioned the institution of an International Expert Group, which prepared a very useful study on dispute avoidance and settlement and submitted the same to the Governing Council in February 1999. In this regard, he was of the view that the UNEP and AALCC could play an important role in facilitating dispute avoidance, by providing technical expertise, fact finding services and other administrative and logistical support.

Concluding his presentation, Dr. Kaniaru called for increased collaboration between AALCC and the UNEP, noting that this could go a long way in serving global and community interests in the task of preserving the environment.

The Expert from the Republic of Ghana, while stating that all states are equally bound under international law, called for reaffirmation of the principle of common but differentiated responsibilities. As regards implementation of an international environmental agreement, he was of the view, that financial assistance and technical knowledge need to be provided at the national level. A number of principles and procedures such as reporting, environmental impact assessment, precautionary rule, polluter pays and tradable permits helped better implementation.

As regards the enforcement, he was of the view that though States had the primary responsibility to enforce environmental law at the national level, non-governmental organizations had begun to play an important role in the field of environmental management. On the issue of liability, he was of the view, that apart from state responsibility, civil liability regimes such as those provided in the Vienna Convention on Civil Liability for Nuclear Pollution Damage, 1971 and the International Civil Liability Convention 1969, must also be established for redressing injuries suffered by private parties.

He expressed the view that redressal for environmental pollution would essentially involve issues such as definition of environmental damage, the standard of care that is required, the threshold of liability and the nature of the remedy involved.

On the issue of dispute avoidance, he felt mechanisms such as notification; consultation, prior informed consent and environmental impact assessment could play an important role in avoiding environmental disputes. Furthermore, he stated that formal or institutional dispute mechanisms in the form of the International Court of Justice (ICJ) or the European Court of Justice (ECJ), were available for the resolution of environmental disputes. Apart from these time-tested modes of settlement and arbitration procedures, he was of the view that UNCLOS'82 provided a unique regime for dispute settlement. He also highlighted the importance of the Special Environmental Chamber established by the ICJ in 1993, for dealing with environmental disputes.

Following the presentation by the two experts, delegates of eight Member States made statements. These included Pakistan, Kenya, the People's Republic of China, Nigeria, Arab Republic of Egypt, Ghana, Sri Lanka, and Japan. Indonesia provided a written statement to the Secretariat of the Committee. The discussion that followed raised a number of issues concerning environment.

Delegates expressed the view that the legal interface between the environment and trade, be discussed, especially

with regard to environment related disputes coming before the WTO. A reference was made to the Shrimps Case, wherein the exports of shrimps from developing countries was objected to, for not using turtle excluding devices. Such cases, it was felt, often affected the economic development under the guise of protecting the environment.

Capacity building in the area of framing legislation at the national level, with the help of UNEP was also stressed upon. Capacity of states, it was felt, was the primary element for improving efforts for negotiating, implementing and enforcing agreements. In this regard, some delegates called for allocation of new and additional financial resources to developing countries, to enable them to meet the escalating costs incurred in fulfilling commitments under a number of conventions. Some delegates also urged for replenishment of the funds of the Global Environmental Facility (GEF) and other such agencies.

Views were also expressed that dissemination of information and creation of public awareness were vital for implementation of environmental regimes. In this regard, delegates commended the efforts of the UNEP and AALCC in preparing a Handbook on Environmental Law. This Handbook, delegates felt, would help in enhancing knowledge on the international law on environment, spreading awareness and also aiding government officials and environment enforcing personnel in AALCC Member States.

A view was also expressed calling for "preservation of environment" and 'sustainable development'. It was noted that this, would entail formulation of international commitments acceptable to all and recognize the common but differentiated responsibilities of states. It was observed in this connection that non-compliance with international obligations should not lead to counter measures. Instead, it was felt that monitoring agencies could play an important role in improving the effectiveness of environmental implementation regimes. Moreover, an opinion was also expressed whereby state commitments should be based on a graduated approach

relying on capacity of states. Examples appended include the framework convention/protocol approach found in UN Climate Change Convention and the Montreal Protocol on the Depletion of the Ozone Layer.

Rejoinder by Resource Persons:

The UNEP resource person while appreciating the views of Member States on diverse issues relating to environment commended the efforts of Ambassador Chusei Yamada, Member of ILC in preparing a background paper on the Long-term work Programme of the Commission, on the Law of Environment. He was also of the view that the AALCC Handbook was only the beginning and efforts would be undertaken in the future to bring out other works on environmental law, with detailed commentaries.

While agreeing absolutely that participation at international conferences by developing countries was important, he noted with concern that despite UNEP's efforts to provide some assistance, not all countries availed themselves of this assistance.

The UNEP expert felt that soft laws being non-binding instruments helped to build consensus on matters related to the environment, than hard laws that entailed binding obligations. He was of the opinion that capacity building was indeed, the need of the hour and the UNEP is playing an important role in providing the necessary assistance.

The *Expert from Ghana* fully supported the views of some delegates that the interface between environment and trade be studied. He was also of the view that hazardous wastes regulated by the Basel regime at the international level and the Bamako Convention regionally played an important role in preserving the environment of the region.

The *Secretary General* called for enhancing the capacities of States, information sharing by the UNEP with Member States of its knowledge on dispute avoidance and

settlement and also assistance to States to participate in the international conferences.

Concluding Remarks

The deliberations during the course of the Special Meeting did bring to notice some salient aspects:

(i) International environmental law is largely based on treaties following a sectoral approach. Delegates expressed concern that an integrated and comprehensive approach is needed to address global environmental problems.

(ii) A number of delegates felt that with increasing liberalization and expansion of trade the legal interface between trade and environment needed to be studied.

(iii) A view was expressed supported by a number of participants that capacity building of States was very important for effective implementation, which would involve technology transfer and financial resources to developing and least developed states.

(iv) On the issue of enforcement, delegates agreed that States alone enforce international obligations relating to environment.

(v) There was a novel suggestion that alternate dispute resolution (ADR) could be an important method of settling environmental disputes.

The **Rapporteur of the Special Meeting Mr. Sirilius Matupa, Senior State Attorney, Government of Tanzania** in his report on the Special Meeting on Effective Means of Implementation, Enforcement and Dispute Settlement in International Environmental Law" recalled that the Meeting was convened on the 20th of April, 1999 within the administrative arrangements of the 38th Session. It was chaired by the President of the 38th Session, Mr. Martin A.B.K.

Amidu, Deputy Minister of Justice and Deputy Attorney General of Ghana. Experts for the Special Meeting included Mr. Donald Kaniaru Director of Environmental Law Centre, UNEP and Mr. Larsey Mensah, Deputy Director, Environmental Protection Agency, Government of Ghana.

Apart from the introduction provided by the Deputy Secretary General, Mr. Ryo Takagi, Mr. Kaniaru's presentation mainly focused on the work of the UNEP in the field of environment. Speaking on the topic of the Special Meeting, he said that the UNEP's Montevideo Programme for the 1990's aims at increasing the capacity of states in participation, negotiation and implementation of international legal instruments. He urged Member States, to avail themselves of the UNEP assistance, in their endeavour to draw up "coherent and cost-effective schemes" for implementing international legal instruments at all levels.

Another important element for enhancing implementation, he felt, was improving technical infrastructure at all levels. On the issue of enforcement he noted that UNEP plays an important role in assisting States to strengthen capacities in carrying out the responsibility of improving reporting systems and thereby enhancing compliance. Speaking on dispute avoidance, he was of the view that the UNEP and AALCC could play an important role in facilitating dispute avoidance, by providing technical expertise, fact finding services and other administrative and logistical support.

The *Expert from Ghana* (Mr. Larsey Mensah) speaking on enforcement, was of the view that though States had the primary responsibility to enforce environmental law at national level, non-governmental organizations had begun to play an important role in the field of environmental management. As regards implementation of an international environmental agreement, he was of the view, that financial assistance and technical knowledge need to be provided at the national level. A number of principles and procedures such as reporting, environmental impact assessment, precautionary rule, polluter

pays and tradable permits, would help better implementation of the environmental conventions.

Following the presentations by the two Experts, delegates of eight Member States made statements. These included: Pakistan, Kenya, China, Nigeria, Egypt, Ghana, Sri Lanka and Japan. Indonesia provided a written statement to the Secretariat of the Committee. The discussions that followed raised a number of issues.

The *Rapporteur* in his concluding remarks raised some salient aspects which had emerged during the Special Meeting:-viz. (i) The law on environment is largely based on treaties and is a complex web of rights and obligations. (ii) These complexities need to be addressed by looking into the legal interface between trade and environment as sustainable development largely depends upon the balance of this interface (iii) A view which was supported by a number of participants was that capacity building of States is very important for effective implementation. In this regard, views were unanimous, that technology transfer and financial resources were needed for increased capacity, especially, for developing and less developed States, (iv) On the issue of enforcement, delegates agreed that States alone, by and large, enforce international obligations, with respect to environment; and (v) There was a novel suggestion that alternate dispute resolution (ADR) technique could be considered as another important method of settling future environmental disputes.

The *President* then invited comments from the floor.

The *Delegate of Kenya* said that the report was a fair reflection of the proceedings and it be adopted.

The *Delegate of China* shared the view of the delegate of Kenya.

The *Delegate of Sudan* observed that the issues relating to environment were very relevant to the developing countries, because maximum damage to environment is done by the

developed countries. He felt that the concept of burden sharing should be introduced to redress the damage caused to environment by the developed countries. Furthermore, the UNEP should play a more active and comprehensive role in the field of international environmental law.

The *Delegate of Pakistan* felt that the concerns expressed by States should be reflected in greater detail.

The *Delegate of Egypt* observed that a number of points had not been fully reflected, for instance the concluding remarks should have reflected the concerns of Egypt and Pakistan, the issue of trade vis-a-vis environment law needed further elaboration.

The *President* asked the Secretariat to take into consideration the views expressed by the delegates while finalizing the Report. He also requested the delegates to assist the Secretariat in this regard.

Thereafter the report was adopted unanimously.

(ii) Decision on the "Special Meeting on International Environmental Law"

(Adopted on 23.04.1999)

The Asian-African Legal Consultative Committee at its Thirty-eighth Session

Appreciating the efforts of the Secretary General to convene the Special Meeting on "Effective Means of Enforcement, Implementation and Dispute Resolution in International Environmental Law";

Having considered the Doc. No.AALCC/XXXVIII/Accra/99 Sp.1 prepared by the Secretariat:

1. *Expresses* its gratitude to the Government of Ghana for hosting the Special Meeting on International Environmental Law;

2. *Expresses* its gratitude to the UNEP and other experts for their contribution to the success of the Meeting;

3. *Appreciates* the publication of the "Asian-African Hand Book on Environmental Law" by the Secretariat, in co-operation with UNEP;

4. *Requests* the Secretary General to explore the possibility of organizing further meetings for in depth consideration of the issues raised in the Special Meeting in co-operation with UNEP, United Nations agencies and other inter-governmental organizations engaged in environmental law matters; and

5. *Adopts* the Report of the Special Meeting.

(iii) Secretariat Study: "Special Meeting on Effective Means of Implementation, Enforcement and Dispute Settlement in International Environmental Law

International Law of Environment: From Stockholm to Rio De Janeiro

The growth of international law of environment, from Stockholm, 1972 to Rio, 1992 is a product of numerous conventions, customs, principles, judicial decisions, teachings of publicists and other hortatory principles.[1] While the Rio Conference was successful in bringing in a new concept of sustainable development with a plan of action in Agenda 21, its main contribution, however, lies in the development of a number of soft laws. As opposed to 'hard laws' where treaties provide for binding obligations, 'soft laws', are largely norm creating, wherein through international consensus States agree to certain norms and principles, which at a later stage are formulated into binding obligations in a treaty.[2] Principle 21 of the Stockholm Declaration is one good example, which exhorted States to frame a number of conventions on Transboundary pollution and damage.

One of the important matters of concern in the field of international environmental law is ensuring compliance of agreements and thereby improving their effectiveness. The Vienna Convention on the Law of Treaties 1969, provides that every treaty must be complied with in good faith, as *pacta sunt servanda* is the cardinal principle upon which the whole edifice of law of treaties is based. A breach of an International

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[1] See generally, Geoffrey Palmer, "New ways to make International Environmental Law, *American Journal of International Law*, vol.86, (1992), pp.259-283.

[2] For an excellent analysis of hard law vs. soft law debate see Chistine Chinkin, "Challenge of Soft Law": Development and Change in International Law" *International and Comparative Law Quarterly*, vol.58, 1989, pp.850-866.

obligation entails state responsibility and the remedy lies in suit for reparation.[3] As against these formal dispute settlement procedures, one notices that a number of modern day environmental agreements or treaties lay emphasis on dispute avoidance, wherein more technical means of compliance or implementation are relied upon. It may thus be stated that non-compliance of a treaty obligation, would in effect raise three issues relating to:

(i) the implementation of an agreement or treaty;

(ii) enforcement wherein breach or non-fulfillment of obligation occurs; and

(iii) dispute avoidance or dispute settlement mechanisms for redress.

For the purpose of this study compliance would involve implementation and enforcement, which are two logical steps that States would have to undertake after an agreement has been negotiated. States, it is observed, largely comply with agreements, as environmental problems call for greater interdependence and often reflect collective aspirations or individual interests. Under international law there could be different approaches to the enforcement of an environmental obligation. State responsibility for a breach of obligation would involve reparation. Such responsibility could also entail liability for risk creating activities. Enforcement involves enactment of domestic legislation made applicable to their nationals. The central facet of compliance and the effectiveness of an environmental regime is dependent upon the capacity of States to enforce laws. Non-fulfillment of this obligation at the domestic level would involve recourse to administrative, civil and criminal bodies. The settlement of disputes would involve recourse to either diplomatic or judicial means of settlement.[4]

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3 *Chorzow Factory* (Germany v. Poland), PCIJ, Ser. A.No.17, p.29.

4 For a comprehensive study of 'Dispute Avoidance and Dispute Settlement' see the Report of the International Group of Experts, UNEP/GC.20/INF/16, 1999, pp.1-70.

It is against this backdrop that this Background Note would attempt and seek to portray the broad contours of developments occurring in this area with a view to facilitate the consideration of the ways and means of effective implementation, enforcement and dispute settlement in international environmental law,[5] by the representatives of Member and Observer delegates to the Accra Session.

Implementation

States adopt different ways and means to fulfill environmental obligations when an agreement enters into force. The implementation of environmental treaties generally involves change in or an enactment of domestic legislation to secure compliance with international standards. In this regard it may be recalled that Agenda 21 calls upon States to adopt national policies by way of local Agenda 21's to fulfill international commitments.[6]

Moreover, Principle 11 of the Rio Declaration calls upon States to enact effective environmental legislation. A progressive model for a comprehensive legislation is provided by the United Nations Convention on the Law of the Sea, (UNCLOS) 1982. It provides for state jurisdiction over pollution from different sources and enforcement by States by applying laws consistent with international law and also application of international rules and standards. It also calls upon States to provide legal redress by courts for damage caused by marine pollution.

Several States administer such legal redress through their public authorities. Principle 10 of the Rio Declaration in its concluding section states that "....effective access to

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5 for a detailed analysis of the subject, refer to Phillipe Sands, *Principles of International Environmental Law: Framework, Standards and Implementation* (Manchester, 1995), pp.141-178.

6 Report of the United Nations Conference on Environment Development (UNCED) A/Conf.151/126/Rev.1. (vol.1) 1993. Chapter 8.

judicial and administrative proceedings including redress and remedy shall be provided". The Rio Declaration also casts responsibility upon the civil society to participate in resolving environmental issues. Citizen suits or public interest group litigation or *actio popularis*/class actions, though very successful in domestic legal systems, are not available under international law. Non-governmental organizations play an important role in disseminating information on the environment and increasing public awareness about environmental protection. Though States alone have a standing in international law to implement international obligations, there are a few treaty institutional frameworks which allow enforcement of environmental obligations by some international environmental bodies.

A number of instruments provide compliance mechanisms for improving their institutional effectiveness. These mechanism are measures or procedural requirements which States undertake to implement their international environmental obligations. They include

(a) monitoring of agreements;

(b) reporting the progress;

(c) inspection;

(d) fact-finding missions;

(e) consultations; and

(f) in-built compliance mechanisms.

State lay emphasis on these dispute avoidance techniques to address environmental problems at the implementation stage, as they are largely non-confrontational and transparent in nature.

Monitoring of Agreements

Monitoring of an environmental agreement would generally involve collection of data which would help in identifying a problem, assessing and evaluating its performance. The UNEP's Global Environment Monitoring System (GEMS) performs such a role. There are a number of treaties, which provide for such a mechanism. Article 7 of the Montreal Protocol on Substances that Deplete the Ozone Layer, 1987 prescribes submission of "statistical data on its production, imports and exports...., or the best possible estimate of such data where actual data are not available". Similarly, Article VIII, paragraph 7, of the Convention on the International Trade in Endangered Species, 1973 (CITES) requires Parties to "transmit statistics annually on the number and types of permits and certificates granted; the States with which such trade occurred...". Monitoring provisions, it is thus seen, play an important role in collection, collation and dissemination of data necessary for the improvement of implementation of an agreement.

Reporting includes a timely appraisal in the form of a report often sent either to the conference of contracting parties, standing committees, secretariats or other review bodies set up under an agreement. Reporting plays an important function in: (i) assessing the implementation of international commitments; (ii) making aware of the difficulties faced by Parties in implementation; and (iii) making aware of the need for review or strengthening the mechanism needed for improving implementation. For example, Article 12 of the United Nations Framework Convention on Climate Change hereinafter referred to as (UNFCC) requires all Parties to communicate to the Conference of Parties steps taken to implement the Convention. Moreover, a Subsidiary Body for Implementation (SBI) was established under Article 10, paragraph 2 (a) to assist the Conference of Parties in implementation of the Convention.

Article 13, paragraph 3 of the Basel Convention on the Control of the Transboundary Movement of Hazardous Substances and their Disposal, 1989 provides that States shall

"transmit, through the Secretariat, to the Conference of the Parties..... a report on the previous calendar year, containing the following information....'. Similar reporting provisions exist in Articles 7 and 8 of the Kyoto Protocol to the UNFCC 1997; Art. VIII of the CITES, 1973; Article 26 of the Convention on Biological Diversity, 1992; and Article 26 of the UN Convention on Combating Desertification 1994.

Inspection

Inspection serves the purpose of verification of reports. They are conducted either by States or international bodies. Instances of inspection can be seen in the International Whaling Convention, 1946; Article VII of the Antarctic Treaty, 1959 and in Article 220 of UNCLOS, 1982.

Fact - finding

This tool of dispute avoidance essentially consists of an inquiry conducted by a fact-finding body constituted by States Parties to agreements. Fact-finding as opposed to inspection provisions, which are found as a necessary clause in agreements, is resorted to in exceptional circumstances. The CITES and the Espoo Convention on Environmental Impact Assessment in a Transboundary Context, 1991 contain provisions on fact-finding.

Consultations

Consultation between parties serve as useful confidence-building measures that help to avoid escalation of an issue into a dispute. Principle 19 of the Rio Declaration states that "States shall provide prior and timely notification and relevant information to potentially affected states... and shall consult with those states at an early stage in good faith". An advanced consultative mechanism is found in the UNFCC wherein Article 13 provides for a Multilateral Consultative Process. The Ad Hoc Group responsible for finalizing work on this mechanism has concluded its task in 1997. Consultation mechanisms found in General Agreements on Tariffs and Trade (GATT) and in Article 4 of the WTO Dispute Settlement

Understanding serve as an advanced dispute settlement procedure. Other instances where consultation is provided for include Article 6 of the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses and Article 14 of the Convention on Biological Diversity.

Compliance Mechanism

Besides dispute avoidance techniques, there exist a number of compliance procedures, which have been developed under environmental agreements. These procedures are co-operative, non-confrontational and non-judicial in nature. They are instrumental in a large way for amicable settlement of environmental disputes. One such developed mechanism is the non-compliance procedure found in the Article 8 of the Montreal Protocol on Substances that Deplete the Ozone Layer, which was further strengthened upon the creation of an Implementation Committee consisting of ten Parties, by the Copenhagen Amendments in 1992. This Committee can receive written submission from a Contracting Party, which expresses its inability or reservations in compliance, owing to the status of another party, regarding similar efforts towards implementation. Furthermore, the Implementation Committee may request information on non-compliance and submit the same to the Secretariat of the Convention to be reported at the Conference of Parties. The Conference of Parties can then recommend a number of steps to be undertaken to ensure full compliance. The function of the Committee therefore is to help all States to comply with the Protocol and thereby fulfill their obligations. Similar provisions of implementation mechanism are present in the Long Range Transboundary Air Pollution Convention, 1979 and the South Pacific Nuclear Free Zones Treaty (Raratonga), 1985.

The effectiveness of a convention depends directly upon the capacity of States in implementing its provisions at the domestic level. Developing States, it may be stated, face a number of constraints in fulfilling international commitments. Chief among them being the lack of resources, lack of technical know-how and trained personnel, absence of public awareness

and often a deficient growth of environmental laws and institutional capacities. The UNEP's Montevideo Programme for the Development and Periodic Review of Environmental Law of 1990's is an important endeavour in this regard.[7]

Enforcement

Though dispute avoidance and other confidence-building measures are now the preferred modes of ensuring compliance, conflicts can arise when a State fails to fulfill its obligation under a treaty. Therein lies the need for resorting to formal means of responsibility of a State for breach of an international obligation. Enforcement involves the right of a State to take measures to implement an international legal obligation or to obtain a ruling by an appropriate international court, tribunal or other body, including an international organization, that obligations are not being fulfilled. Breach of an international obligation would involve reparation to the injured State.[8] Under customary law an injured State has a right of reprisal and peaceful counter measures.[9] State responsibility for an 'injured State' according to Draft Article 5 of the International Law Commission work on the same topic, could arise from the provisions of a bilateral or multilateral treaty, a binding decision of an international court or organization, and a rule of customary international law.

However, there are difficulties in applying the traditional test of state responsibility in the field of environmental law. Customary international law in the field of environment suffers from doctrinal inconsistencies as regards breach of an obligation in the strict sense. There are two schools of thought on the subject. While one believes that state responsibility

7 UNEP Governing Council Decision 17/25, May 1993. The mid-term review of the Montevideo Programme for the Development and Periodic Review of Environmental Law-II, conducted in 1996 stressed on the importance of strengthening implementation mechanism of existing multilateral environmental instruments.

8 Supra f. n.3.

9 Naulillaa Case, 2 RIAA (1928), p.1012.

arises out of breach of obligation, which is supported by existing, though limited State practice, the other approach believes that strict and absolute liability exists not based on any breach of obligation, but arising independently out of general principles of law, good neighbourliness or doctrine of abuse of rights.

Furthermore, the ILC making a subtle difference in state responsibility for internationally wrongful acts and liability for risk bearing albeit lawful activities, placed a new topic on its agenda entitled "International Liability for Injurious consequences Arising out of Acts Not Prohibited by International Law". In this regard, it may be noted that the ILC has completed a first reading of the draft articles on 'Prevention of Transboundary Damage from Hazardous Activities'.

State responsibility will flow wherein environmental damage is caused: (a) to the environment of a State; and (b) to the area beyond national jurisdiction.

A. Damage to environment of a State

Though customary international law offers few instances of state practice having developed in the area of state responsibility for environmental damage, there are a few cases, which have stood the test of time. In the *Trial Smelter Case*,[10] the United States brought a case against Canada for being affected by Transboundary air pollution by sulphur fumes. The case established that responsibility would flow on account of an internationally wrongful act committed by a State using its territory in a deleterious way causing detriment to the rights of others. Similarly in the *Lake Lannoux Arbitration*,[11] wherein the issue was the use of the River Carol by riparian States in such a way that the proposed works by one (France) would affect the right to use of the another (Spain), it was held that notice of harm ought to be given, when it was known that the activity

10 Trial Smelter Arbitration (US V. Canada) 3 RIAA 1907 (1941).

11 Lac Lannoux Arbitration (France V. Spain) 24 ILR 101 (1957).

could cause Transboundary harm. More recently, similar considerations arose in the construction of a dam and the sharing of the River Danube in the Case Concerning the *Gabcikovo-Nagymaros Project*,[12] between Hungary and Slovakia on the basis of a treaty signed for sharing of waters.

B. Damage to 'international environment'

Situations that arise out of a bilateral agreement are easy to be disputed, adjudicated and even enforced. The same cannot be true when dealing with open spaces or global commons, as an element of '*erga omnes*' or an interest as against the whole international community is involved. In the *Nuclear Test Cases*,[13] Australia and New Zealand brought forth complaints that the nuclear tests conducted by France in the South Pacific created radioactive fallout affecting the whole region. The question that arose was whether Australia and New Zealand had a right to bring a claim 'erga omnes' on the basis of an obligation owed to the entire community. A similar claim of obligations of '*erga omnes*' came up before the ICJ in the Barcelona Traction Case.[14] The Court while recognizing the relationship between *actio popularis* and *erga omnes* stated that:

"An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-a-vis another state in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection, they are obligation erga omnes".[15]

As outlined above, the concept of *actio popularis* and *erga omnes* become relevant in the context of protection of the

[12] ICJ Reports, 1997.

[13] ICJ Reports 1974, pp.253-270.

[14] (*Belgium V. Spain*) *ICJ Reports 1970.*

[15] Ibid., p.32.

global commons for present and future generations.[16] There can be *erga omnes* obligations to protect the areas suffering environmental damage beyond national jurisdiction, in addition to the recognized acts of genocide and protection of non-derogable fundamental human rights. Moreover Principle 21 of the Stockholm Declaration and Articles 192 and 235 of UNCLOS 1982 accord customary status to the international obligation of protecting and preserving the marine environment.

Besides publicists,[17] support for this view is seen in Part I, Article 19 on the Draft Articles on State Responsibility wherein 'massive pollution of the atmosphere or the seas', is characterized as an international crime. It is believed that environmental obligations associated with community interests and related to the concepts of common concern or common heritage of mankind, could be probable situations wherein *actio popularis* could be entertained. Be that as it may, sovereign States do not easily give in to assertions of legal rights on behalf of the international community. In some situations wherein States did try, on the basis of existing customary law, courts refused to entertain them on jurisdictional grounds.[18]

[16] For a pioneering work on planetary obligations, intra-generational and inter-generational equity see, E. B. Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (New York 1989).

[17] See Brownlie, "A Survey of International Customary Rules of Environmental Protection", in L. Teclaff and A Utton (eds.), *International Environmental Law - I*, 1975; He calls for an expansion of standing at the international level.

[18] *South West Africa (Ethiopia v. South Africa and Liberia v. South Africa) Second Phase (Judgment) ICJ Reports, 1966*, p.6.

C. Enforcement by International Organizations

Though international organizations are legal persons[19] States have not been willing to grant too much enforcement power to them. However, it cannot be denied that international organization/institutions play an important role in limited, collective supervision arrangements relating to enforcement of certain rules and standards. Such regulatory role is seen in the Antarctic Treaty System wherein States parties have been able to draw up a number of treaties relating to conservation of seals, marine living resources minerals exploitation and protection of flora and fauna. For example, under the Convention for the Regulation of Antarctic Mineral Resource Activities (CRAMRA), 1988, it is envisaged that an Antarctic Mineral Resources Commission be established. Under Article 7(7), the Commission can draw the attention of all Parties to any activity that affects the implementation of the Convention, or hampers compliance by a party.

Similarly, the International Oil Fund Convention gives a legal status to the Fund, wherein it can be a party to enforcement proceedings in the domestic court of a State party. As regards UNCLOS 1982 some of the institutions are vested with enforcement powers. The Council of the International Sea Bed Authority (ISBA) can supervise and co-ordinate the implementation of Part XI and also draw the attention of the Assembly to cases of non-compliance; institute proceedings on behalf of the Authority before the Sea Bed Disputes Chamber and issue emergency orders to prevent serious harm to the marine environment arising out of activities in the Area.

Another well established regional institutional mechanism for dispute avoidance or enforcement is the European Community Commission. The EEC Treaty, 1957 in Article 155 ensures that provisions of the Treaty and other

[19] *Reparations for Injuries suffered in the service of the United Nations, ICJ Reports, 1949,* p.185.

secondary legislation are applied under Article 168 of the EEC Treaty. The Commission may after giving the State concerned an opportunity to submit its observations, being cases of alleged non-compliance before the European Court of Justice.

International supervision by organizations often place emphasis on consultative processes for discussion within a forum for ensuring treaty compliance and improving institutional effectiveness, rather than going in for dispute settlement. Examples of consultative meetings are those of the London Convention as amended by the 1996 Protocol, the International Whaling Commission and the UNEP Regional Seas Programme. Under the London Convention, amendments are adopted by tacit consent wherein rules agreed upon by all contracting parties are made applicable. A stricter enforcement of treaty obligation is observed in the International Convention for Prevention of Pollution from Ships MARPOL 73/78 that sets standards for pollution from all sources.

Dispute Settlement Mechanism

Effective dispute avoidance may not be possible when State are unable to fulfill obligations or undertake implementation owing to lack of capacity, resources or technical know-how. All such cases of non-compliance would be needed to be adjudicated upon by a dispute settlement process/body. Dispute settlement, can sometimes be confrontational, time consuming, adversarial, largely bilateral, and often expensive. Despite these limitations, a formalistic adjudicative process can play an important role in supervising treaty compliance and clarifying and determining the applicable rules and principles of international environmental law.[20]

[20] *North Sea Continental Shelf cases, ICJ Reports 1969.* The Court held that customary laws could evolve through conventional norms too.

Principle 26 of the Rio Declaration states that "States shall resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations". Article 33 of the UN Charter reads: "The Parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their own choice". Dispute settlement means can be broadly classified on the basis of their legal content into two categories (a) diplomatic mode of settlement; and (b) judicial mode of settlement.

(i) Diplomatic means of dispute settlement

The diplomatic method of settlement would include resort to negotiation, good offices, enquiry, mediation and consultation and conciliation. Negotiation would entail proposals and counter proposals being discussed in good faith with a view to finding a peaceful and amicable solution. A good example was the negotiated settlement over the damage suffered by Canada in the Cosmos 954[21] satellite, which disintegrated over its territory. The parties (Canada and erstwhile USSR) agreed to abide by a negotiated settlement of claims as provided in the Convention on International Liability for Damage caused by Space Objects, 1972. Good offices generally involve a third party intervention trying to persuade parties to a peaceful settlement. Enquiry would involve a determination being made by an independent fact-finding body.

In cases of mediation, the third party is actively involved in the dispute settlement, often providing an informal proposal too. Consultation is another means of dispute settlement, which rather than being strictly on the lines of negotiation, involves confidence-building measures and resort to

[21] Settlement by Protocol 2 April 1981 wherein USSR agreed to pay $300,000 to Canada.

discussions between states to resolve a dispute. A number of agreements require parties to consult each other in times of emergencies. Article III (a) of the International Civil Liability Convention, 1969 provides for measures to prevent pollution of coastlines from oil pollution incidents on the high seas. Similarly Article XIV (3)of the African Nature Convention. 1985 provides for consultations with regard to development plans which may affect the natural resources of another State. In the same vein, the 1996 Protocol to the London Convention, 1972 in Article 8 provides for authorization of ocean dumping in emergency operations'.

Conciliation in essence is a combination of mediation and enquiry. After the third party has established facts of the case, it also makes proposal for the settlement of the dispute. Such a function is established under the Dispute Settlement Procedures of GATT and the Dispute Settlement Understanding of the WTO. Article XXIII (2) of GATT provides that the Dispute Settlement Panels help the parties to reach a solution by conciliation. Failing this, the panels make an objective assessment of the matter in accordance with GATT rules. The Panel can also make recommendation/or a ruling, if requested to do so by the contracting parties. Similar provisions for settlement by conciliation are found in Article 27 (4) of the Convention on Biological Diversity, 1992. Articles 14(5) to (7) of the UNFCC, and the Vienna Convention on the Protection of the Ozone Layer 1985, and many other environmental agreements and regional agreements.

(ii) Judicial means of dispute settlement

Legal means of dispute settlement would in essence be accusatory and adversarial in nature. Remedies would lie in compensation largely in monetary terms, often unable to restore the environment to its former self before destruction. Moreover, States are always wary of being litigious as this could lead to chain reaction wherein other states would be encouraged to being cases leading to a 'boomerang effect'. Two such time-tested modes of settlement are arbitration and

recourse to the International Court of Justice and other tribunals.

Arbitration

This mode of quasi-judicial settlement would involve parties appointing arbitrators by choice. The decision of the arbitral body/tribunal is final and binding as between the Parties. Arbitration with its flexibility and choice of law and forum, with increased party autonomy, can be a favoured mode of dispute resolution in environmental matters. Recourse to arbitration is provided in a number of conventions. An Annex on Arbitration is found in the Convention on Biological Diversity 1992; Climate Change Convention, 1992; Basle Convention on Transboundary Wastes 1989; International Oil Pollution Fund Convention, 1969; Marpol 73/78; Barcelona, 1976 and the Noumea Convention, 1989. There have also been proposals suggesting of a possible role for the Permanent Court of Arbitration, Hague relating to the development of special procedures in environmental matters.

Judicial Settlement

Judicial settlement essentially involves an adjudicative process by the International Court of Justice or such similar judicial bodies. States must explicitly accept its jurisdiction, either by a general declaration concerning all the disputes with States which equally accepted the courts jurisdiction or by a special agreement. The decisions of the ICJ are mandatory and must be executed. Though they are binding only between the parties and in respect of that particular case,[22] they are considered to express customary international law. [23]

[22] Article 59 of the Statute of the ICJ provides that "the decision of the Court has no binding force except between the parties of that particular case".

[23] Article 38 (1) paragraph (d) of the Statute of the International Court of Justice reads "subject to the provisions of Article 59, judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

Recent environmental agreements allow parties to accept the compulsory jurisdiction of the ICJ at the time of signature, ratification or accession or anytime thereafter. For example, the Vienna Convention 1985, Basel Convention 1989, UNFCC, 1992, Convention on Biological Diversity, 1992 make such provisions.

The ICJ and its predecessor the PCIJ, it may be submitted, have not been seized of a *proprio* environmental dispute. But there have been a number of decisions wherein the World Court had opportunity to give judgments establishing important general principles concerning environmental law. The PCIJ in the *Diversion of the Waters of the River Meuse*[24] had occasion to deal with the issue of equitable sharing of waters. The ICJ in the *Corfu Channel Case*[25] affirmed the principle of *sic utero tuo ut alienam non laedas*, wherein it held that 'every state has an obligation not to knowingly allow its territory to be used for acts contrary to rights of other states'. Similarly, the *Icelandic Fisheries Case*[26] established certain customary principles which would govern the preservation of shared natural resources.

At this point, it may be worthwhile to recall that the AALCC Legal Advisers Meeting held at the United Nations Headquarters, on 23 October 1992 had among other things, reviewed the outcome of UNCED and considered the role of the ICJ in the peaceful settlement of environmental disputes. A study prepared by the Secretariat had suggested that Member States should consider making use of the Chambers procedures of the ICJ, by *compromis* which was in conformity with an earlier study of the Secretariat on the wider acceptance of the World Court. The ICJ, it may be recalled in July 1993, established separate chambers to deal with environmental disputes. This chamber is currently composed of President S.

[24] *PCIJ Ser . A/.B.No. 170 (U.K. v. Albania).*

[25] *ICJ Reports, 1949,* p.4.

[26] *(U.K.V. Iceland) Merits ICJ Reports 1974,*p.31.

M. Schwebel, Vice-President C.G. Weeramantary, and Judges M. Bedjouai, R. Ranjeva, G. Herczegh, K. Fleischhauer and F. Rezak.

Dispute Settlement Mechanisms under other International Bodies

A. UNCLOS 1982 Dispute Settlement Mechanism

The UNCLOS provides in Part XV for the creation of a dispute settlement body. It offers one of the most developed dispute settlement mechanisms. There are a wide range of methods available wherein a party can choose either negotiation, conciliation or other informal means (Article 283). Parties can by either agreement or binding compulsory settlement choose from a wide range of binding or compulsory jurisdiction. These include recourse to ICJ, the International Tribunal for the Law of the Sea; arbitration and special arbitration (Article 289). The International Tribunal for the Law of the Sea (ITLOS) created in 1996 by States Parties has elected 21 Judges who possess special competence in the field of law representing the major regional groupings and principal legal systems of the world. The dispute settlement structure apart from ILTOS, consists of the Standing Chambers on Fisheries and Marine Environmental Disputes and the already existing special sea-bed dispute chamber.

B. European Court of Justice (ECJ)

ECJ is the judicial organ of the European Community responsible for interpretation and application of EEC Treaty, 1957. The ECJ has jurisdiction (Article 227) to hear actions brought by one member against another alleging failure to fulfill an obligation under the treaty. The ECJ has held the ground of domestic circumstances or lacuna in the internal legal system as insufficient reasons to justify a failure to comply with an environmental obligation. The ECJ has had occasion to deal with a number of environmental issues brought before it under the preliminary reference procedure (New Article 234).

VII. Conclusions

The existing normative framework of international environmental law is presently characterized by an abundance of multilateral conventions and other international instruments. As rightly articulated by Ambassador Chusei Yamada, Member of the ILC, "the sector by sector approach which has been adopted so far in the conclusion of various multilateral conventions, often dictated by the need to respond to urgent and specific requirements runs the risk of not addressing the need for an integrated approach to the prevention of pollution and continuing deterioration of the global environment".[27] The uncertainty over the normative framework is equally relevant in the study of effective means of implementation, enforcement and dispute settlement in international environmental law. Certain aspects of this incongruity between the traditional approaches premised on sovereign equality of territorial states and the broader concern to preserve the global environment, in the sphere of implementation and enforcement has been briefly outlined in this background note. Besides, such conceptual difficulty, issues concerning implementation in developing countries is lack of resources, technology and absence of trained personnel.

While the task of evolving fair and workable legal principles towards conserving the global environment is equally important, yet if the existing patch-work of environmental regimes are to be consolidated, the AALCC needs to consider the specific infrastructural and legal impediments facing implementation and enforcement in the Afro-Asian region. It is hoped that this Background Note would provide the backdrop for the AALCC Member States to deliberate on country specific issues encountered in the process of implementation, enforcement and dispute settlement.

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[27] See ILC document ILC (L) INFORMAL/22 entitled "*Long term Programme of Work: Feasibility study of the law of environment*".

X. LEGAL PROTECTION OF MIGRANT WORKERS

(i) Introduction

The item "Legal Protection of Migrant Workers" was taken up by the AALCC at its 35th Session held in Manila (1996) following upon a reference made by the Government of the Philippines. In its reference, the Government of Philippines had invited attention to the plight of migrant workers and the denial and abuse of their basic human rights. A preliminary study prepared by the Secretariat for the 35th Session had outlined some basic issues concerning migrant workers in Asia and Africa. Reference was also made to the available legal framework within the UN system and initiatives taken therein. At its Manila Session, the AALCC after exchange of views, urged member States to transmit their views to the Secretariat as to how legal protection to migrant workers could be effectively implemented. The study prepared for the 36th Session held in Tehran focussed on some international trends in migration, the proposal for an International Tribunal and the UN Convention on the Protection of Migrant Workers.

The Assistant Secretary General Dr. Ahmad Al-Gaatri while introducing the item at that Session stated that Mr. Fidel V. Ramos, President of the Republic of Philippines, while calling for a 'more sensitive approach by governments of their host countries' in order to facilitate a comprehensive programme of implemen-tation and adherence to the international conventions and standards, had proposed the following: (a) survey of laws and mechanisms in receiving countries to protect migrant workers with a view to harmonizing them at a later stage; (b) bilateral arrangements; (c) system of legal assistance to migrant workers; and (d) constitution of an impartial international or regional tribunal with petitioning mechanism and procedures specific means by

which an aggrieved migrant worker may seek redress of his grievances.

These proposals he stated, could be deliberated upon, so that a general consensus emerged among AALCC Member States, and a suitable mechanism or mechanisms brought to existence for offering, willing and effective legal assistance and protection to migrant workers, by both sending and receiving countries. These proposals he felt, had an important key to reorienting policies both to make international migration more manageable and to promote efficiency in the world economy.

He observed that as a first step, Member States of the AALCC may consider the possibility of ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990). The proposed basic rights tribunal, on the other hand, needed thorough consideration. As pointed out by the delegation of the Philippines during the 35th Session of the AALCC, it would be worthwhile to examine laws and mechanisms in receiving countries with a view to harmonization at a later stage.

He further stated that the AALCC may wish to consider giving the Secretariat an appropriate mandate to draft a model legislation among AALCC member countries so as to protect the rights of migrant workers, if not more, at least within the framework of the existing conventions and recommendations. This would go a long way in facilitating the movement of the migrant workers, more particularly in the countries of the Asian-African region.

At the 36th Session held in Tehran, the Secretariat was mandated to study the utility of drafting a model legislation aiming at the protection of the rights of migrant workers within the framework of International Labour Conventions[1] and

[1] Some noteworthy International Conventions open for ratification by Member State are (i) Convention (No. 97 concerning migration for employment (revised 1949); (ii) Convention (No. 143) concerning Migrations in Abusive Conditions and the Promotion Equality of

recom-mendations,[2] of the relevant UN General Assembly Resolutions[3] and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. At the same time the Secretariat was cautioned that there should be no duplication of work. In pursuance of the mandate the Secretariat had urged member States to transmit to the AALCC Secretariat their comments and relevant national legislation on the protection of migrant workers.

Responses of Member States Received by The Secretariat after The Tehran Session

The Secretariat expressed its gratitude to the five Member States i.e. People's Republic of China, Kuwait, Philippines, Qatar and Sri Lanka who had responded by sending their relevant national legislation and comments to the AALCC Secretariat and had appreciated the idea of a model legislation to protect migrant workers.

The Government of China while appreciating the work of the AALCC in the sphere of promotion and protection of the legitimate rights of migrant workers, supported the AALCC in its work of collecting comments of Member States in respect to the protection of migrant workers. In furtherance of this objective the Government of the People's Republic of China has

Opportunity and Treatment of Migrant Workers, 1975; (iii) Convention (N. 118) Concerning the Equality of Treatment (Social Security), 1962.

[2] Some important International Labour Recommendations which are non binding guidelines but which may guide National Policy and practice are: (i) Recommendation (No.86) concerning Migration for Employment, (revised 1949) (ii) Recommendation (No. 151 Concerning Migrant workers, 1975; (iii) Recommendation (No. 167) Concerning the Maintenance of Social Security rights, 1983; (iv) Recommendation (No. 100) concerning the protection of Migrant Workers in Underdeveloped Countries, 1955.

[3] GA Resolutions 51/85 and 51/65 dated 12 December 1996.

sent to the AALCC's Secretariat, the "labour law" and "the rules for the Administration of Employment of Foreigners in China".

The State of Kuwait had sent in the "labour law no 28 of the year 1969 (oil sector); labour law no 38 of the year 1964 (private sector); Ministerial Ordinance no. 617 of the year 1992 regarding the rules and regulation of employment offices; law no 40 of the year 1992 regarding the regularisation of the work of the employment offices and Ministerial Ordinance no 115 of the year 1996 regarding the organizing of the private employment offices.

The Government of Philippines had reiterated the positive utility for Member States to have a draft model legislation aiming at the protection of migrant workers in consonance of international instruments, because upholding the rights of these workers could maximize their economic contributions to the host countries and minimize sources of friction and discord among the sending and receiving states. The Secretariat received the "Republic Act 8042 entitled "Migrant Workers ad Overseas Filipinos Act" as well as pertinent provisions of the Philippine labour code and Immigration Act on the employment of alien workers.

The State of Qatar in a note on the "Situation of Foreign and Migrant Workers in the State of Qatar" had stated that the policy with regard to migrant workers in Qatar is based on principles aiming to diversify the sources of national income through expanding industrial and agricultural production bases. Apart from these projects, Qatar is among the major leading oil producing nations. The State has been opening the corridors for large number of migrant workers from different origins and of numerous categories, in recognition of man powers' importance to the process of building the nation, and as an important factor in implementing the states' plans. It had sent to the AALCC Secretariat "Law no 14 of 1992' concerning foreigners coming to work for other employers. Immigration laws; "law no 15 of 1997" by virtue of which foreigners working in Qatar can bring in their families, and "labour law no (3) of 1962 which regulates the rights and duties in any contractual

relationship existing between an employer and workman in the State of Qatar.

In view of the Government of the Democratic Republic of Sri Lanka drafting of Model Legislation aimed at the protection of the rights of migrant workers, would help them to gain recognition of their rights and considerable alleviate hardships that migrant workers are undergoing at present. Sri Lanka has acceded to the UN Convention on the Protection of Migrant Workers. Further the drafting of a Model Legislation will help formulate a framework for their protection in the labour and recipient countries.

Thirty-eighth Session : Discussion

The *Assistant Secretary General Dr. Ahmed Al-Gaatri* while introducing the Secretariat Report on the topic stated that the item had been included on the agenda of the 35th (Manila) Session of the AALCC in response to a reference made by the Government of Philippines. Further, during the 36th Session held in Tehran, the Secretariat was mandated to study the utility of drafting a model legislation aimed at the protection of the rights of migrant worker within the frame work of the UN Convention and the relevant General Assembly resolutions. He stated that, a preliminary framework of a model legislation drawn up by the Secretariat was presented at the 37th Session held in New Delhi. Deliberations at that session revealed that as the topic was under consideration at other international fora care should be taken that there was no duplication of work on the subject hence Resolution 37/7 adopted at that session directed the Secretariat to seek written comments from Governments on (i) the utility of drafting a model legislation for protection of migrant workers; and (ii) the constitution of an open ended working group for an in-depth consideration of the issue.

He informed the meeting that in pursuance to that mandate the Secretariat sought comments from Member Governments, and response was received from seven countries namely Republic of Iraq, Islamic Republic of Iran, Nepal,

Cyprus, Turkey, Jordan and Singapore. Among these the first five are agreeable on the establishment of an open-ended Working Group for an in-depth examination of the issue. In view of the Government of Cyprus ratification of existing instruments by the member States of AALCC would minimize the need, either for drafting a model legislation or the constitution of an open ended working group and Singapore has asked for a through study on various issues before a final decision is made by member states whether model legislation should be drafted and whether a working Group should be convened to study the issue. Referring to the inaugural address at the present Session made by the President of Ghana, Flt. Lt. J.J. Rawlings, he stated that the President observed that it was necessary to protect the Human Rights and dignity of migrant workers in their countries of temporary residence. Furthermore, humanitarian participles should be employed to ensure that they are not exploited. Flt. Lt. J.J. Rawlings has called on Member States to come out with concrete suggestions and legislation to deal effectively with the issue. At the same time it was necessary that the rights of these workers are protected and they be given the same treatment as is accorded to nationals. He urged Member States to ratify the UN Convention relating to protection of migrant workers and their families.

The *Delegate of Indonesia* noted that the Indonesia Government was considering harmonization of its domestic laws and regulations on the matter before ratifying the UN Convention on the protection of migrant workers and their families. He urged other Member States of the AALCC to do so.

The *Delegate of India* was of the view that the flow of migrant workers within Asia and Africa had certain unique features. Within Asia, she said there were Countries which send a large number of migrant workers to their neighbouring countries. Because of the close proximity of the sending and receiving countries, such movement of labour is regulated through available framework at bilateral level. In this context the AALCC proposal to outline model legislation should be examined.

The proposed model legislation should be able to fill the gaps left in the UN Convention. Hence, it is crucial to study and survey the laws and mechanisms in receiving countries to protect migrant workers, with a view to harmonizing the same at a later stage. She further stated that deliberations undertaken by the Working Group constituted by the UN General Assembly to finalize the UN Convention, could immensely help in assessing the position and problems faced by various Countries.

(ii) Decision on "the Legal Protection of Migrant Workers"

(Adopted on 23.4.1999)

The Asian African Legal Consultative Committee at its Thirty-eight Session,

Having considered Doc. No. AALCC/XXXVIII/ Accra/99/S4 on "The Legal Protection of Migrant Workers";

Having heard the comprehensive statement of the Assistant Secretary General;

Mindful of the difficulties faced by the migrant workers;

Mindful also of the crucial issue of the protection of basic human rights of migrant workers;

1. *Requests* the Secretary General to convene an "Open Ended Working Group" for an in depth consideration of issues related to Migrant Workers.

2. *Decides* to place the item "Legal Protection of Migrant Workers" on the agenda of its Thirty-ninth Session.

(iii) Secretariat Study: Legal Protection of Migrant Works

During the 37th Session of the AALCC held in New Delhi, one of the initiatives put forward by the Secretariat was the constitution of an "Open Ended Working Group", the basic objective of which would be to examine the proposed Secretariat Draft Structure of the Model Legislation on the Legal Protection of Migrant Workers in detail.

The New Delhi Session had mandated the Secretariat to seek written comments from Member States on (i) the utility of drafting a Model Legislation on the Protection of Migrant Workers; and (ii) The constitution of an "Open Ended Working Group" for an in-depth examination of the issue. In pursuance of that mandate the Secretariat had urged member-States to transmit to the AALCC Secretariat their comments on the constitution of the Open Ended Working Group and the utility of drafting the model legislation on the Protection of Migrant Workers.

Summaries of the replies received since the 37th Session held in New Delhi, 1998.

At the very outset, the Secretariat is grateful to the seven member States I i.e. Republic of Iraq; Islamic Republic of Iran; Nepal; Cyprus; Turkey; Jordan and Singapore who have responded to the Secretariat request by sending their comments.

The Government of the Republic of Iraq has supported the utility of drafting a Model Legislation on the Protection of Migrant Workers as well as the constitution of an "Open Ended Working Group", for an in-depth examination of the issues. Further, they have sent to the AALCC Secretariat, the Iraqi labour law No. 71 of 1987 along with law No. 39 of 1971 concerning Migrant Workers.

The Islamic Republic of Iran has informed the Secretariat that it supports the establishment of an Open

Ended Working Group for comprehensive examination of the subject and is of the view that the utility of drafting a model legislation could be discussed in the Working Group.

The State of Nepal has informed the Secretariat that it does not have any specific legislation on the subject of protection of Migrant Workers. Nevertheless it approves the decision of the AALCC to constitute an Open Ended Working Group to study the matter in greater detail for formulating suitable legislation to deal with the issue of the Protection of Migrant Workers.

The Republic of Cyprus in its communication to the Secretariat, has supported the idea that states should ratify the international instruments for the protection of migrant workers, (i) The ILO Migration for Employment (Revised) Convention, 1949, No 97; (ii) The ILO Migrant workers (Supplementary Provision) Convention, 1975, No. 143 and (iii) The ILO Discrimination (Employment and Occupation) Convention, 1958, No. 111. In their view the ratification of the above instruments by Member States of the AALCC, would be in their own best interest and would also minimize the need, for the Committee, for either drafting a model legislation on the Protection of Migrant Workers, or the constitution of an Open Ended Working Group for an in-depth examination of this subject.

The Republic of Turkey in its communication, informed the Secretariat that, the texts of the "European Social Charter" of 1961 and "International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families" should constitute the basis for drafting the Model Legislation. Furthermore a note on Turkish Migration Policies was also received by the Secretariat.

The Government of the Hashemite Kingdom of Jordan proposes the establishment of a working group, to study and follow up all the comments received from various Governments and to find out a standard model text, "which will be able to protect the migrant workers in the receiving countries.

Further, the term of reference of this working group should not be limited by a period and it should be given all the necessary time and mandate to find solutions of any problems which may arise after implementing this "standard model text".

The Government of Singapore in its communication to the Secretariat has stated that as the topic is already being discussed at other fora, a model legislation on the protection of migrant workers by the AALCC may confuse rather than clarify or confirm the principles behind the proposal. The creation of a new international instrument to deal substantively with the same topic may not be appropriate at this time, because only twelve countries have so far ratified or acceded to the UN Convention, on the Protection of the rights of All Migrant Workers and Members of their Families, the existing mechanism has, therefore, not had the opportunity of qualitative analysis.

Singapore has proposed that a detailed analysis be first conducted on the existing national legislation of Member States to determine common trends, both in imposing burdens, privileges and protective mechanisms for workers, both migrant and indigenous. From the analysis and supporting documentation of national laws, the Secretariat may proceed, if Member States deem it appropriate, to propose a draft model law for evaluation and discussion. The note further states that there should be no duplication of work on the issues, but if member States determine that discussion on this topic should resume, a Working Group may need to be convened to analyze national legislation and to discuss and propose the appropriate language for the model legislation.

It is suggested that the membership of the Working Group should reflect the diverse legal systems of AALCC Member States (civil law, common law and social law) and should have equitable representation from both labour importing and exporting countries. The Working Group if established should also have a definite span co-relating with the conclusion of work of the Model Legislation, it could initially collect and analyse the various national laws and

mechanisms of Member States relating to the employment and protection of migrant and indigenous workers.

Consideration of the Item During the 38th (Accra, 1999) Session

Pursuant to the Resolution adopted at the New Delhi Session, the Secretariat by its two letters dated 25th April and 29th September 1998 had sought written comments from Member States on (i) the utility of drafting a model legislation on the item and (ii) constitution of an open ended Working Group for an in depth examination of the issue.

The Secretariat received comments from seven Member States, namely, Republic of Iraq; the Islamic Republic of Iran; Nepal; Cyprus; turkey; Jordan and Singapore. Among the replies received the member States of the Republic of Iraq, the Islamic Republic of Iran, Nepal, Turkey and Jordan are agreeable on the establishment of the open ended Working Group for an in-depth examination of the issue. Cyprus does not agree and Singapore has asked for a thorough study on many issues before, and if at all a Working Group has to be established.

In view of the responses received, the Secretariat would like to seek direction from the Member States on how to further proceed with the topic and an appropriate mandate in this regard.

XI. INTERNATIONAL TRADE LAW

A. Seminar Relating to Certain Aspects of the Functioning of the WTO Dispute Settlement Mechanism and Other Allied Matters, New Delhi, 17-18 November 1998

(i) Introduction

At the Thirty-fourth Session (Doha, 1995), the Committee considered a Secretariat study on the then recently concluded Marrakesh Arrangement, entitled, "The New GATT Accord: An Overview with Special Reference to World Trade Organization (WTO), Trade-Related Investments Measures (TRIMS) and Trade-Related Aspects of Intellectual Property Rights (TRIPS)". At the Thirty-fifth Session (Manila, 1996), the Secretariat presented comprehensive brief of documents on "WTO as a Framework Agreement and Code of Conduct for the World Trade". At the Thirty-sixth Session (Tehran, 1997), the Secretariat brief reported the outcome of the WTO's First Ministerial Meeting held at Singapore between 9-13 December 1996. The Committee taking note of these developments reiterated the importance and complexity of the issues raised in the Secretariat study for the Member States and decided to focus its work on specific aspects of the WTO trade regime. Accordingly it directed the Secretariat "to continue to monitor the developments related to the code of conduct for the world trade, particularly the relevant legal aspects of dispute settlement machinery".

The Secretariat study presented to the Thirty-seventh Session (New Delhi, 1998) provided a comprehensive overview of the 'Understanding on Rules and Procedures Governing the Settlement of Dispute' as reflected in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations. This document entitled "World Trade Organization: Dispute Settlement Mechanism" dealt with the substantive and procedural aspects of the WTO dispute

resolution mechanism, in the light of the experience gained by the Dispute Settlement Body (DSB), since its establishment. Besides analyzing the comparative merits of the WTO mechanism vis-a-vis the GATT dispute resolution system, particular emphasis was laid on the Special Procedures involving the Least Developed Countries (Paragraph 24 of the Understanding).

At that session, the Member States spoke of their experience with the WTO's dispute settlement mechanism. The discussion revolved around the difficulties faced by developing countries, primarily that arise from the technicalities and high costs of the dispute settlement procedure; lack of adequate logistical and financial capacities for some countries; and the ambiguities inherent in certain provisions of the WTO Understanding. In line with the wishes expressed by the delegates during the deliberations, the Committee in its resolution on this subject, directed the Secretary General to "convene an inter-sessional meeting of the AALCC with a view to enable an in-depth study of the matters arising out of the establishment and the functioning of the World Trade Organization".

It is in fulfilment of this mandate that the AALCC in co-operation with the Government of India convened a two-day seminar on 'Certain Aspects of the Functioning of the WTO Dispute Settlement Mechanism and Other Allied Matters" at New Delhi (India) on 17 and 18 November 1998. A detailed Printed Report of the Seminar has been brought out by the AALCC Secretariat separately and circulated recently.

Thirty-eighth Session: Discussion

The *Deputy Secretary General* Ambassador Dr. W.Z. Kamil introduced the Secretariat document on this subject. While providing an overview of the developments since the 37th Session (New Delhi) he recalled the Declaration adopted by the Second WTO Ministerial Conference held in May 1998. Inviting attention to the Third Ministerial Conference scheduled to be held at the United States of America, in

November - December 1999, he said that this Conference, besides reviewing the status of implementation of the commitments under various WTO Agreements, would also take note of the progress made in the three Working Groups on Trade and Investment, Transparency in Government Procurement and Interaction between Trade and Competition Policy. He also invited attention to the ongoing review process on the dispute settlement mechanism within the WTO, scheduled to be completed by the end of July, 1999. In the light of the potential implications of these developments for the AALCC Member States, he said that the Committee may wish to consider directing the Secretariat to report to it on these aspects at the next Session.

At the AALCC New Delhi Seminar on WTO, views were expressed to the effect that the lack of national legislation in the field of intellectual property rights and the resulting legal uncertainty was a potential source of trade dispute within WTO. In this connection the Deputy Secretary General referred to the "Joint Initiative" launched by the WTO and WIPO to assist developing countries meet the commitment on intellectual property. The forms of technical co-operation under this initiative includes: assistance in preparing legislation, training, institution building, and modernizing intellectual property systems and enforcement. Ambassador Kamil suggested that the Committee consider mandating the Secretariat to convene a Seminar/Wsorkshop, in co-operation with the WTO and WIPO to promote exchange of views between AALCC Member States and other organizations associated with intellectual property rights.

The *Delegate of the People's Republic of China* examined the relative merits of the GATT and WTO dispute settlement system. He felt that the WTO's Dispute Settlement Understanding was more automatic and enforceable. It gave the Panel and the Appellate Body more powers thus making it extremely difficult to block the adoption of panel report. Yet, the WTO system, in his view, contained loopholes that allow for sophisticated non-tariff barriers. The inclusion of trade in services within the WTO framework through the General

Agreement on Trade in Services (GATTS) has raised conceptual uncertainties exacerbated by the inherent differences between trade in goods and trade in services. Against this background, he called for formulating substantive rules so as to render the dispute settlement system more predictable, transparent and reliable.

The *Delegate of Pakistan* complimented the Secretariat for the excellent report on the New Delhi seminar, which highlighted the issues of concern for Member States. Urging the Secretariat to monitor further development on the subject, he extended support to the suggestion of the Deputy Secretary General on publishing panel reports of the WTO Dispute Settlement Body.

The President in his closing remarks declared that the Secretariat: (i) monitor and report on the outcome of the Third WTO Ministerial Conference, to the next session; and (ii) explore the possibility of convening a Seminar/Workshop on the topic of intellectual property rights.

B. "Progress Report covering the Legislative Activities of the United Nations and other international organizations concerned with International Trade Law".

The *Assistant Secretary General* Dr. Ahmad J. Al-Gaatri invited attention to the brief of documents prepared by the Secretariat that provided a broad overview of the activities within the institutional framework of UNCITRAL, UNCTAD, UNIDO and UNDROIT. Stating that the work of the UNCTAD and UNICITRAL span a wide spectrum of trade issues, the Assistant Secretary General opined that it would be beneficial for the Committee to identify a host of issues that could be studied within a time-bound framework. Accordingly, he invited attention to the growing importance of global electronic commerce in contemporary trade transaction and its relevance for developing countries. While referring to the ongoing work in some countries to suitably accommodate electronic commerce within their domestic legal framework, he recommended that the Committee could consider the convening of a

seminar/workshop, with the co-operation the UNCTAD and other interested organization with the twin objectives of promoting the understanding of the role of global electronic commerce and assist AALCC Member States in drafting domestic legislation on the subject.

The *Delegate of the Arab Republic of Egypt* acknowledging the significance of global electronic commerce for the Asian African States, stressed the need for countries in the region to equip themselves to meet the rapid changes resulting from the use of technological innovations to trade transactions. He extended his full support for holding of training courses and seminar/workshops with the co-operation of competent bodies in the field.

The *Delegate of the Islamic Republic of Iran* stressing the need to harmonize and update national legislation on trade aspects, said that such measures would help induce foreign investments into the host country. He informed that the 1998 UNCITRAL session was primarily devoted to drafting a Legislative guide on Privately Finance Infrastructure Projects. The objective of such projects, he said, was to strike a balance between the interest of the host government and those of private investors. The draft chapters for legislative guide is scheduled to be finalized at the 1999 session of the Commission. He also drew attention to the commemoration of the 40th Anniversary of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards and accomplishment within the Working Groups on: (i) Assignment in Receivable Financing and (ii) Uniform Rules on Electronic Signatures and Certification Authorities.

The *Delegate of Sri Lanka* in his presentation recognized the relevance of formulating more legal principles to govern transactions through electronic means, as an alternative to paper-based transactions. Complimenting the AALCC for its proposal to convene a seminar/workshop to discuss the legal aspect of global electronic commerce, he suggested that if feasible, the proposed seminar could be held in two parts - one for Asian and the other for the African region.

The *President* in his summation, stated that the Secretariat would continue to monitor the legislative activities in the field of trade. He also directed the Secretariat to explore the possibilities, subject to availability of funds, of convening a seminar/workshop on global electronic commerce.

(ii) Decision on the "Progress Report Covering the Legislative Activities of the United Nations and other International Organizations concerned with International Trade Law"

(Adopted on 23.04.1999)

The Asian-African Legal Consultative Committee at its Thirty-eighth 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/XXXVIII/Accra/ 99/S.10;

Having heard the comprehensive statement of the Assistant Secretary General;

Acknowledging the growing importance of global electronic commerce in contemporary international trade and the expertise developed within UNCITRAL and UNCTAD on this subject;

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. *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 co-operation will be intensified in future;

3. *Expresses appreciation* on the substantial progress achieved in the Working Group on Assignments in Receivable Financing and hopes that the UNCITRAL would be in a position to adopt the same by the year 2000;

4. *Urges* Member States to consider adopting, ratifying or acceding to the instruments prepared by the United Nations Commission on International Trade Law (UNCITRAL);

5. *Requests* the Secretary-General to explore the possibilities of convening a seminar or workshop in 1999, with the co-operation of UNCITRAL and UNCTAD, and such other relevant organizations, with a view to promoting the understanding of specific legal issues in global electronic commerce among AALCC Member States;

6. *Directs* the Secretariat to continue to monitor the developments in the area of international trade law and present a report thereon at its Thirty-ninth session.

7. *Decides* to place the item on the agenda of its Thirty-ninth Session.

Decision on the "World Trade Organization"

(Adopted on 23.04.1999)

The Asian-African Legal Consultative Committee at its Thirty-eighth Session

Having taken note of the Secretariat Report on the "Seminar relating to Certain Aspects of the Functioning of the WTO Dispute Settlement Mechanisms and other Allied Matters" contained in Doc. No. AALCC/XXXVIII/Accra/99/S 11;

Having heard the comprehensive statement of the Deputy Secretary-General;

Having taken note with interest the Joint Initiative launched by the World Trade Organization (WTO) an the World Intellectual Property Organization (WIPO), to assist developing country members of WTO meet their TRIPS commitments:

1. *Expresses its appreciation* to the Government of India for co-sponsoring the seminar relating to Certain Aspects of the Functioning of the WTO Dispute Settlement Mechanisms and other Allied Matters;

2. *Welcomes* the participation of the WTO in the New Delhi seminar and expresses hope that the co-operation between AALCC and WTO would be intensified in the future;

3. *Directs* the Secretariat to continue to monitor the developments related to the working of the WTO dispute settlement mechanisms, with particular attention to the special requirements of developing countries and report to the Thirty-ninth session on the outcome of the review process concerning the WTO Dispute Settlement Understanding;

4. *Directs* the Secretariat to monitor the developments relating to the Third WTO Ministerial Conference, scheduled to be held in November - December 1999 and report on the outcome at the Thirty-eighth Session of the Committee;

5. *Requests* the Secretary -General, within the limits of financial resources and logistics available, to explore the prospects of convening a seminar on intellectual property rights, with the co-operation of the WTO and WIPO, and other relevant organizations; and

6. *Decides* to place the item on the agenda of its thirty-ninth session.

(ii) Secretariat Studies:

A. Seminar Relating to Certain Aspects of the Functioning of the WTO Dispute Settlement Mechanism and other Allied Matters 17-18 November 1998, New Delhi: An Overview

The two-day seminar convened by the AALCC in collaboration with the Ministries of Commerce and External Affairs of the Government of India, at New Delhi in November 1998 was attended by senior government officials, academics and international lawyers from 28 Member States of the AALCC;[1] 19 Observer States;[2] and representatives of three international organizations viz.: The World Trade Organization (WTO), the European Commission, and the United Nations Conference on Trade and Development (UNCTAD). The AALCC Regional Centre for Arbitration, Kuala Lumpur was also represented.

The discussion during the six substantive Sessions of the Seminar revolved largely around the presentations made by a group of experts. These had included Mr. K.M. Chandrashekar, Joint Secretary, Ministry of Commerce, Government of India; Dr. P.S. Rao, Joint Secretary, Ministry of External Affairs, Government of India; Dr. M. Gandhi, Legal Officer, Ministry of External Affairs, Government of India; Professor Bhattacharya, Dean, Indian Institute of Foreign Trade; Dr. B.S. Chimni, Associate Professor, Jawaharlal Nehru University, New Delhi; Dr. V.G. Hegde, Legal Officer, Ministry of External Affairs of the Government of India; Professor (Ms.) S.K. Verma, Director, Indian Law Institute; Mr. D.William

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[1] Arab Republic of Egypt, Bangladesh, China, Cyprus, Ghana, India, Indonesia, Islamic Republic of Iran, Japan, Jordan, Kenya, Kuwait, Malaysia, Mongolia, Myanmar, Oman, Palestine, Philippines, Qatar, Saudi Arabia, Senegal, Singapore, Sudan, Syria, Thailand, Turkey, Uganda and the United Arab Emirates.

[2] Angola, Australia, Brazil, Cambodia, Canada, Chile, Germany, Malta, Morocco, New Zealand, Panama, Russia, South Africa, Sweden, Switzerland, Ukraine, United Kingdom, United States of America and Venezuela.

Davey, Director, Legal Affairs, WTO; Dr. (Ms) Veena Jha, Consultant, UNCTAD; Mr. Hervey Jouan Jean, Director, European Commission; Dr. Phillip Cullet, Research Fellow, Swiss Agency for Development and Cooperation; Mr. Krishnan Venugopal and Mr. Akash Chitranshi, Advocates at the Supreme Court of India.

The Seminar took note of the two discussion papers on the Review of the Dispute Settlement Understanding submitted by the Government of India and the European Communities. the Commonwealth Secretariat had also submitted a paper on "The World Trade Organization: Dispute Settlement Mechanism". The debate in the course of the Seminar was informal in nature, wherein all the participants spoke in their individual capacities, and no formal conclusions or resolutions were adopted.

A. Inaugural Session

The *President* of the Committee, *Dr. P.S. Rao*, in his opening statement, recalled the significant role played by the AALCC in the fields of the Law of the Sea and Law of Treaties and expressed the hope that the AALCC could serve as a forum for Member States to forge common positions on matters relating to international trade law. He said that the objective of the Seminar was to promote a free and frank exchange of views on the subject.

The *Secretary General, Mr. Tang Chengyuan*, while recalling the pioneering work done by the Committee in the field of formulating Model Investment Agreements and establishing Regional Arbitration Centres in the Asian-African region for settlement of disputes relating to commercial transactions, underscored the involvement of the AALCC on matters relating to international trade law. Consistent with the mandate of the 37th session of AALCC, he said that this seminar would besides considering matters relating to trade and environment; and the legality of unilateral trade sanctions would primarily aim at addressing issues relating to the functioning of the WTO's dispute settlement process. It was his

view that the discussions at the seminar acquire significance, both in its timing and content, as it coincides with the review process of the dispute settlement system, currently underway within the framework of the World Trade Organization.

The Seminar was inaugurated by Dr. Mrs. Najma Heptullah, the Deputy Chairperson of the Rajya Sabha. In her inaugural address, *Dr. Heptullah* while referring to the valuable contribution made by the AALCC since its inception, said India was proud to host the headquarters of the Committee at New Delhi. She characterized the AALCC as a shining example of South-South co-operation. Articulating the expectations of the developing countries, she said that the WTO regime should take into account the historical deficit they have suffered due to prolonged colonization and stunted economy. In this context, the importance of incorporating the prevailing socio-economic realities in the developing countries while formulating the provision for settlement of disputes was emphasized.

Terming the initial indications of the functioning of the WTO's dispute settlement process as 'encouraging', she drew attention to the increasing use of the dispute settlement process by developing countries. Elaborating on the experience of the developing countries, she said that the process of dispute settlement was prohibitingly expensive. To allay any apprehensions that the process may be used by the rich countries to coerce the smaller countries she suggested that a levy may be imposed on the country using this mechanism. In case the final settlement goes against the concerned developed country, the legal cost should be charged on that country. Besides this, she called for reflecting the spirit of differential treatment for developing countries in the dispute settlement process and special endeavours to organize training schedules for imparting requisite expertise in developing countries.

Ambassador Dr. W.Z. Kamil, Deputy Secretary General (AALCC) provided a broad overview of the issues that were proposed to be addressed by the Seminar. He characterized the conclusion of the Uruguay Round of Multilateral Trade

Negotiations and the establishment of the world Trade Organization as a defining moment in the field of consensual policy making. The fact that both developed and developing countries could shed the hostile prejudices of a North-South divide and jointly work towards the creation of a rule-based multilateral trading system was, in his view, reflective of the shifting priorities and changing dynamics of the post-cold war scenario. The primary focus of this Seminar, he said, was to study the functioning of the WTO's dispute settlement mechanism. Outlining the merits of the WTO dispute settlement procedures over GATT practice, he said that the first session of this seminar on the overview of the WTO system could provide the setting for AALCC Member States to present their country positions and acquaint oneself with the common problems that arise in the functioning of the WTO's dispute settlement mechanism.

The second and third sessions focusing on the "Relevance of National Legislations in the Implementation of Obligations arising under WTO Agreements" involves important questions about the relationship of international rules and institutions to national governments, and about the appropriate roles of each in such matters as regulating economic behaviour that transcends national borders. In his view the seminar could consider addressing the issue of formulating mediating principles on the standard of review, with a view to ensuring the credible functioning of the WTO adjudicatory system and also preserve the autonomy of domestic institutions for good governance.

The fourth session pertaining to the legality of unilateral sanctions affecting international trade acquires significance as 'unilateral sanctions' have a potential bearing on the efficient functioning of the multilateral trading system. Recalling the suggestions made at the AALCC Seminar on "Extra-Territorial Application of National Legislation: Sanctions imposed against Third Parties", held at Tehran in January 1998, which called for a study on the impact of unilateral sanctions on trade relations between States and the procedures offered by the WTO group of agreements in this regard, he felt that this

seminar could address the scope of GATT exceptions which are usually invoked by States to defend such unilateral acts.

Stating that the fifth session intended to consider measures to effectively implement the special and differential treatment for developing countries he pointed out that of a total of 27 articles, the WTO Dispute Settlement Understanding contains 7 articles according special treatment to developing and least developed countries. The concern of developing countries has basically centered on the high costs involved in the participation of panel proceedings and the increasing need for legal and technical assistance for developing countries to effectively prepare and present their case. In his view, the Seminar could study the utility and application of the special and differential procedures for developing countries and identify means for improving their efficiency.

Finally, the sixth session of the seminar concerned an important and newly emerging conception of the interlinkages between trade and environment. In view of the concerns expressed by developing countries that the use of trade measures to promote environmental objectives could lead to re-introducing projectionist measures and damaging the autonomy of existing multilateral environmental agreements, he stated that the Seminar could address the broader question of the role of trade policies in enforcing environmental objectives. Towards this end, he suggested that the ongoing work in the WTO Committee on Trade and Environment may also be taken into account.

Mr. William Davey, Director of Legal Affairs, WTO in his statement outlined the working of the WTO's dispute settlement body over the past three-and-a-half years. About 150 requests for consultations had been received by the DSB and nearly one-fourth of such cases have been resolved at the consultation stage itself. The DSB had so far established 40 panels to adjudicate on the disputes, of which 6 cases have been already settled. As regards implementation of panel

decisions, he said all 3 instances which required implementation were complied with by the concerned parties.

Yet another remarkable feature of the WTO's dispute settlement process, in his view, was the increased and active participation of developing countries. Of the first 8 panels constituted, 6 were the result of complaints brought by developing countries (3 against US and 2 against EU). Besides US and the EU, he identified Brazil, Canada, Japan and India as active users of the dispute settlement mechanism. Referring to the ongoing review process of the WTO's dispute settlement procedures, he said the developing countries have articulated their concerns as regards the high costs of litigation and the need for legal and technical assistance in presenting their case before the DSB.

Mr. M. Moosavi, Ambassador of the Islamic Republic of Iran to India proposed a vote of thanks. Recalling the suggestion made at the AALCC Seminar on Extra-territorial Application of National Legislation held at Tehran in January 1998, he said that this Seminar provided the opportunity to study the impact of unilateral sanctions on trade relations between States and the procedures offered by the WTO agreements in this regard.

B. Session I - WTO Dispute Settlement Mechanism: Issues for Consideration

The session was chaired by *Mr. N.N. Khanna*, Special Secretary, Ministry of Commerce, Govt. of India. Mr. Khanna, in his opening statement, made a reference to the increasing number of disputes placed before the DSB and said that the practice of the past four years was indicative of:- (i) the perceived necessity of States to have recourse to the WTO's dispute settlement process and (ii) the nature and subject matter of the dispute, are often, sensitive and contentious. Acknowledging the importance of a focused discussion of the legal aspects pertaining to the DSB, he said that the seminar could consider whether the DSB could discharge the functions of an advisory body to the WTO. Alluding to the practice of

advisory opinions rendered by the International Court of Justice (ICJ) he said that such an advisory role for the DSB could give more flexibility to WTO Members in fulfilling their obligations under various WTO Agreements.

Presentations were made by Mr. K.M.Chandrashekar, Joint Secretary, Ministry of Commerce, Govt. of India and Dr. B.S. Chimni, School of International Studies, Jawaharlal Nehru University, New Delhi.

Mr. K.M. Chandrashekar, in his presentation identified certain aspects of the WTO's dispute settlement process which could be considered at the on-going DSU review process. though he extensively cited the different positions adopted by some other countries, the thrust of the presentation was in spelling out the position of India on these issues. Following are, briefly the salient points of the presentation:-

(i) Consultation Process:- While all countries recognize that consultation is an integral part of the WTO's dispute settlement process, the EU was of the view that the correspondence and country positions of the disputing parties during the consultations should be formally made a part of the record. As regards participation of third parties, many countries feel that efforts should be made to allow a greater role for third parties, both at the informal and formal levels of consultation.

(ii) Establishment of Panel Proceedings:-

(a) India had been consistently arguing that all legal claims including the specific provisions which are alleged to have been violated should be clearly set out by the complainant party even at the time of requesting the establishment of a panel. Japan goes a step ahead and calls for the complainant party to provide a detailed set of arguments as regards specific violations of WTO Agreements.

(b) As regards selection of panelists, the need for transparency was emphasized. Both EC and Pakistan stressed

the need to maintain a standing panel or pool of legal experts on WTO. Notwithstanding the existing practice, wherein either government officials or career diplomats handle trade disputes of the WTO Members, the importance of involving legal and trade experts in this process is rapidly gaining prominence. Against this backdrop, developing countries to acquire special expertise in dealing with such matters. The role of the WTO Secretariat in assisting this process would be very crucial.

(c) Subsequent to the establishment of panels, written submissions are made by both parties to the disputes, in two stages. At the second stage both parties are required to present their written submissions on the same day. India is of the view that such an arrangement is disadvantageous to the respondent party, and hence calls for adequate time interval between the submissions of both parties. Korea contends that no new evidence must be adduced at the second stage of the written submissions.

(d) While there have been some discussion on civil society participation in the WTO's dispute settlement process (e.g. participation of non-governmental organizations), Japan and Pakistan are of the view that the WTO process on dispute settlement must be strictly confidential. India views the dispute settlement process as legalistic in character, and hence any move to admit non-governmental bodies would lead to more controversies and undermine the legal character of the dispute settlement process.

(e) At a more general level, there is a broad agreement that developing countries must be given longer time-periods during the panel proceedings. As regards multiple complaints, Guatemala, India and Pakistan are of the view that third parties to disputes should be granted equal standing as that of the principal disputants.

(iii) Appellate Stage: - Views to the effect that longer periods for enabling parties to study the implications of panel decisions and decide on whether to proceed on appeal has been raised from all quarters. More specifically EC, Japan and

Pakistan have underscored the need to authorize the Appellate Body to rule on factual aspects decided upon at the panel stage and also to remand cases back to the panels. In the light of certain controversial interpretations adopted by the Appellate Body, India considers it fit that there should exist a negotiating forum/mechanism to resolve the complexities arising out of such interpretative difficulties.

(iv) Implementation stage:- While the normal time limit for developing countries to comply with panel decisions is 15 months, India is of the view that the duration needs to be extended to 30 months. Pakistan, on the other hand, is of the opinion that the determination of this time-period must rest with the panel.

(v) Compensation and Suspension of Concessions:- Retaliation or suspension of concessions could not be a advantageous remedy for developing countries as against developed country parties to the WTO. To address this weakness, India proposes that wherein a dispute involved a developing country and a developed country party, and the developed country party fails to comply with the panel decision, then 'joint action' by all members of the WTO should be considered against the developed country.

He also outlined the difficulties faced by developing countries on account of the high costs involved in the dispute settlement process and also the lack of trained experts in assisting governments. to assist these countries, he said India has proposed a levy on the disputes coming before the DSB, the proceeds of which could be utilized to establish a Trust Fund. The Trust Fund could help subsidize the cost of developing country participants in dispute settlement proceedings. Attention was also drawn to study the special and differential treatment provisions of the DSU and the need to transform them into specific guidelines capable of being implemented.

Dr. B.S. Chmni in his presentation on "What should be India's Approach to the WTO Dispute Settlement System:

Follow the Agreement on Anti-Dumping and the GATT National Security Exception Clause", sought to present the case that a rule-oriented system in the WTO is of uncertain value for the underdeveloped world. The presentation was based on the premise that while a "rule -oriented dispute settlement system" has some intrinsic value, it is mistaken to believe that it automatically translates into justice in the international trading system. In his view, the substantive rules of WTO essentially codified the interests of the dominant sectors in international trade and hence a rule-oriented system only contributes to the rigid enforcement of the embodied inequities. He pointed out that the rule-oriented WTO dispute settlement system has been so constructed as to leave open vast interpretative spaces in which these states can seek safe haven to protect their critical interests.

In support of the above said position, he discussed Article 17.6 of the Agreement on Anti-Dumping which stipulates on how far WTO panels should show deference to determinations arrived at by national agencies and authorities. Art 17.6 (ii) provides that, "...Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall fine the authorities' measure to be in conformity with the Agreement if it relays upon one of those permissible interpretations". Characterizing the use of the term 'permissible' as opposed to 'reasonable' as unusual, he said that this provision imposes serious constraints on the power of a panel to question national determinations.

He argued that, while the other Agreements of the WTO regime exhibited a tendency to confine the scope of national determinations because allowing divergent national interpretations could undermine the WTO dispute settlement system and prove counterproductive, the wider scope for national determinations in the Anti-Dumping Agreement was paradoxical and runs counter to the spirit of a rule-oriented system. Against this backdrop, he suggested that to standardize the scope of national determinations, developing countries could seek to introduce the "permissible

interpretation criteria" to cover other WTO group of Agreements.

Secondly, he drew attention to Art. XXI of the GATT which deals with national security exception.[3] Analyzing the terms of this provision he concluded that Art. XXI employs a very vague concept of 'national security' which has a broad potential for abuse. Citing GATT practice, he contended that States are generally unwilling to have a GATT panel or any other body review their invocation of national security exception clause. Such unilateral and subjective terms of national determinations of the national security exception clause, posed a threat to the delicate system of WTO/GATT rules.

Following the above two presentations the floor was open for discussions. A number of queries were raised by the participants. A brief summary of the discussions that ensued is reported below.

Mr. William Davey, made some observations in his personal capacity on the presentations and specific queries raised by the participants.

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[3] The relevant parts of Article XXI states:-

Nothing in this agreement shall be considered

(a) .....

(b) to prevent any party from taking any action which it considers necessary for the protection of essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to traffic in arms, ammunition and implements of war and to such traffic in other good and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations.

* On the suggestion for a advisory role for the WTO's DSB he felt that it was unlikely to happen because, under the WTO regime it was the Member States who had the exclusive right to interpret the Agreements and hence the question of an authoritative pronouncement by an advisory DSB does not arise.

* On the proposal to make the consultation process more formal, it was his view that such a course needed consideration as it may restrict the scope for mutual settlement between parties and could also pose more difficulties for developing country parties to the WTO.

* As concerns the proposal for joint retaliation against a developed country party, he doubted if the US and EU would be willing to accept such a proposal. Moreover, he felt that joint retaliation had the potential to generalize trade disputes, thus endangering the settled balance of the WTO system.

* Responding to a query as to what extent Article 5 of DSU on conciliation and mediation has been effective in the resolution of disputes, he said that, there has been no instance, so far, of any party resorting to this process.

* As regards the views expressed on Article 17.6 of the Anti-Dumping Agreement, though he acknowledged that there is a general view that the Agreement makes little economic sense, yet issues concerning dumping constituted a relatively small area of international trade. With respect to the larger scope for deference to national determinations on this matter, he did not find it unusual. Such judicial deference to factual determination of administrative authorities was a well established practice in domestic legal jurisprudence. Commenting on the potential for abuse of Art. XXI on 'national security exceptions', he said that such difficulties are inherent in any system of international adjudication among sovereign States. Yet, the occasions for resorting to Article XXI by States are not frequent, and if such an occasion arises the panels will decide objectively on the issue.

Dr. Chimni, while responding to the above said observations said that, while the wide scope of judicial deference to executive determinations was acceptable in domestic law practice, he wondered if the same could hold true in international law. Extending these principles to international law, he maintained was unusual. Secondly, while agreeing that invocation of national security clause exceptions are rarely done, he said only in such critical situations where States feel that the stakes are high and resort to Art. XXI, the need for the issue to be 'justifiable' acquires more importance. Though the need for 'justifiability' is recognized, its scope is circumscribed by the vague formulation of Art. XXI.

Dr. P.S.Rao, in his comments drew attention to the similarities between the WTO's dispute settlement procedure and other similar dispute resolution mechanisms under the UN Charter and the Statute of the ICJ. More specifically, in the light of Mr. Davey's observations that the WTO members are the exclusive interpreters of the WTO Agreements, he said that the same position prevailed as regards maters brought before the ICJ. Such powers of auto-interpretation have not, in his opinion, been a limiting factor for the ICJ to develop its own jurisprudence on many areas of international law.

C. Session II - Special and Differential Treatment for Developing Countries: Effective Means for Implementation

The session was chaired by Hon'ble Justice A.M. Ahmadi, former Chief Justice of India. Presentations were made by Dr. Phillip Cullet, International Environmental Law Research Centre, Geneva and Dr. V.G. Hegde, Legal Officer, Ministry of External Affairs, Govt. of India. Mr. Soli Sorabjee, the Attorney General of India was also present on the occasion.

Hon'ble Justice A.M. Ahmadi, speaking on economic and infrasturctural disparities among countries, strongly underlined the need for a special and differential treatment.

Mr.Soli Sorabjee, the Attorney General of India, in his brief statement characterized the concept of special and differential treatment as one of necessity and not one of favour.

Dr. Phillip Cullet in his presentation on the concept of differentiation' traced the evolution and the functional utility of this principle. He defined "differentiation" as an exception or departure from the principle of 'reciprocity of obligations' (as exemplified by 'most favoured nation[' treatment) with a view to foster substantive equality among countries at different levels of economic development. the notion of 'substantive equality' should be distinguished from 'formal equality' - as formal equality is one which pervades the international law norm of sovereign equality of States. The rationale for such differentiation, in his view, could be attributed to: - (a) the principle of distributive justice, which is based on the recognition of the varying needs of countries; (b) principle of international solidarity; (c) reasons of historicity, e.g. impact of colonization; and (d) the different levels of economic development of States. This departure from reciprocity manifests in various forms, viz. (i) different levels of commitments/binding obligations for developing countries; (ii) longer implementation periods; (iii) in case, where all parties are bound to the same obligations, special financial mechanism are created to effectuate the 'differential' principle e.g. Global Environmental Facility.

At the practical level, the application of such differential treatment has assumed different dimensions since the 1950's. Describing this development, he recalled Article XXXVI of GATT wherein developed countries agreed not to expect reciprocal commitments from developing countries. the scheme for the Generalized System of Preferences (GSP) in 1970s was yet another step in carrying forward the differentiation principle. the call for a New International Economic Order (NIEO), the adoption by the UN General Assembly of Principles concerning the Permanent Sovereignty over Natural Resources and the Charter of Economic Rights and Duties of States; and the establishment of the Common Fund for Commodities (CFC) were manifestations of the efforts by developing countries to

institutionalize the concept of differentiation. While assessing the impact of the aforesaid instances, Dr. Cullet observed that the tangible benefits that ensued from these efforts were not matched by the strident rhetoric that animated the ongoing debate on this subject. Though preferences were granted under the GSP or Article XXXVI of GATT, such concessions did not necessarily prove beneficial to the developing countries. The shaping of a New International Economic Order, couched in the form of demands from an impoverished South to a reluctant North, was not very successful in developing legal principles or binding norms on differential treatment for developing countries. The late 1980s and 1990s - marked a change in the attitude of States, wherein the importance of interdependence among States came to be increasingly recognized.

Against this backdrop, he offered the following suggestions for enabling effective implementation of the differentiation principle:

(i) As against the vague and non-binding formulations of the NIEO framework, the obligations for differential treatment needs to be crafted in the form of specific and binding legal language.

(ii) The present practice of categorizing States for purpose of differential treatment, as 'developing' and 'least developed' countries, should be replaced by an individualistic country-by-country assessment.

(iii) The broad consensus as regards addressing issues of international environment illustrates that "convergence of State interests" could be a potential factor in including States to address global but common problems in an integrated fashion. If such a 'convergence of interests' could be replicated in the domain of international trade, the implementation of "differential treatment" would be effectively served.

Dr. V.G. Hegde in his presentation examined the comparative formulations of the special and differential

treatment provisions under the GATT and WTO framework. As regards the GATT regime, he drew attention to Part IV and more specifically to Article XVI of the GATT and also the Tokyo Rond Understanding which provides for special and differential treatment for developing countries. In comparison with the WTO framework, the S&D provisions in GATT were worded in more explicit and clearly identifiable language. The shift in the pattern from GATT to WTO was, in his view, attributable to the scope and coverage of these instruments. While GATT exclusively dealt with aspects relating to trade in goods, the WTO Agreements cover a larger area - including trade in services and intellectual property rights. In this context he cited the example of Art. 8(1) of Agreement on TRIPS[4] and Art. 12(4) of the Agreement on Technical barriers to Trade.[5] The WTO Agreements thus stipulates the scope and broad contours for special and differential treatment, but it is for the national governments to give content and choose the modalities for making it operational.

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[4] Art 8(1) of the TRIPS Agreements reads as follows:

Members may, in formulating or a mending their national laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

[5] Art 12(4) of the TBT Agreement provides:

Members recognize that, although international standards, guides or recommendations may exist, in their particularly technological and socio-economic conditions, developing country Members adopt certain technical regulations, standards or conformity assessment procedures aimed at preserving indigenous technology and production methods and process compatible with their development needs. Members therefore recognize that developing country Members should not be expected to use international standards as a basis for their technical regulations or standards, including test methods, which are not appropriate to their development, financial and trade needs.

As regards the S&D measures in the WTO's dispute settlement provisions, he stated that the obligations were cast more in the form of "best endeavour clauses" rather than specifications of a definite character. Stressing the important role that panels would play in sharing the jurisprudence of the dispute settlement process, he argued for a more fair representation of developing country experts in WTO panels.

Mr. William Davey, offered the following observations on the above two presentations. As regards the suggestion for a individual case-by-case assessment of counties for differential treatment, he felt that such a proposal could upset the inherent advantages of the "most favoured nation" clause (MFN). while the economic rationale of the MFN clause has been to eliminate non-economic considerations in trade matters, individual assessment process could reverse this trend. Moreover, at a political level, States would resent such discrimination and 'differentiation' could become a more controversial issue. Besides, within the WTO framework, the determination of a country's status as a developing country was a matter based on the declaration by the State party itself, and hence there could be no room for individual assessment. In connection with the proposal for a fair representation for developing countries in WTO panels, he informed that almost 85% of the panels constituted so far, even in disputes where both parties were developed countries, had a developing country expert as a panelist.

Dr. Chimni, charged that the movement from GATT to WTO, on the question of special and differential treatment was a retrogressive step. Distinguishing between 'substantive' and 'procedural' S&D Agreement, he argued that introduction of new areas like TRIPS, TRIMS and services were not in the interest of developing countries. Inviting attention to the provisions concerning use of quantitative restrictions, he said that the WTO regime had made it more difficult for developing countries to invoke the 'balance-of-payment' exception in this regard. Moreover, even the minimal S&D benefits available for developing countries under GATT has been whittled down by the graduation principle. the 'graduation principle' provides for

the movement of States in the scale of development from the status of least developed to a developing country. The WTO provisions could thus only benefit the least developed countries. As regards provisions concerning "procedural S&D", he expressed dissatisfaction on the count that though provisions exist for transitional periods for developing countries, the tangible benefit accuring from such arrangements were uncertain. Citing the example of Agreement on Textiles, he said the integration of Multi Fibre Agreement (MFA) has to await a ten year period to yield substantive gains for developing countries. Similarly, notwithstanding the transitional periods under TRIPS Agreement, the developing countries are obliged to grant 'exclusive marketing rights' and such other onerous obligations, thus rendering the S&D principle ineffective. Against this backdrop, he concluded that special and differential treatment would benefit the developing countries only if it addressed substantive norms of the differentiation principle.

Hon'ble Justice A.M. Ahmadi in his concluding observations stated that the imbalance among developing countries could still remain, even after the end of the transitional periods provided for in the WTO Agreements. This gap could be exacerbated due to lack of financial and technological resources for the developing countries, and hence ways need to be devised to address this problem.

D. Session III- Deference to National Laws

The session was chaired by Hon'ble Justice A.M. Ahmadi, former Chief Justice of India.

Mr. Krishnan Venugopal, Advocate, Supreme Court of India, examined the WTO panel decision relating to a dispute between India and the United States concerning Patent protection for Pharmaceutical and Agricultural chemical Products. Though the general proposition involved here is that the panels should show defence to the determinations made by national authorities, the instant case witnessed the WTO panel decline to accept the conclusions of national authorities as

regards whether a particular action was consistent with Indian laws. The facts of this case can be briefly stated as follows. Article 70.8 and 70.9 of the TRIPS Agreement provides for certain actions to be taken by WTO Members during the transitional period. Thus, developing countries have a 10 year transitional period that extends upto the year 2005. During this interregnum, WTO Members are obliged to establish a process for mailbox application, to grant product patents. Under such process, applications from prospective patent holders could be received with a view to examining them by 2005, for grant of product patents. It may be stated here, that most developing countries including India, have hitherto been grant in only process patents. to fulfill this obligation, the Government of India issued an ordinance in 1994. In 1995, a bill was tabled before the Indian Parliament, containing suitable amendments to the Indian Patents Act. Due to lack of consensus among apolitical parties the bill was not passed. Meanwhile, the 1994 Ordinance also lapsed. So, the Government of India by an executive order directed the Controller General of Patents to continue to receive applications for product patents.

The US in its submission to the panel stated that:

(a) India had failed to fulfill its obligations under Articles 70.8 and 70.9 as regards the establishment of a mailbox process. The argument centered around the lack of predictability for prospective patent-holders, as it was possible that Indian courts could have struck down the mailbox process as being on consistent with Article 12 of the Indian Patents Act. Article 12 requires a patent application to be sent to an examiner within a prescribed period for determining the grant of patent rights.

(b) The measures adopted by India, in fulfillment of its obligations on transitional arrangement does not meet the requirements of 'transparency' as set out in Article 63 of the TRIPS Agreement. The WTO panel held that India had violated its obligations under the TRPS Agreement. The appellate Body

while upholding the first contention, rejected the arguments of US on the issue of transparency.

Analyzing the ruling of the Appellate Body, Mr. Krishnan said that the issue of transparency (Art.63) was not raised by US at the consultation stage, but yet formed part of its submissions at a later stage. This Appellate Body was thus correct in dismissing the finding of the panel of this issue. India had submitted before the Appellate Body that the issue underlying obligations under Article 70.8 of TRIPS was whether a WTO Member can impugn the validity of a measure taken by another Member County, on the ground that it is invalid under that country's internal laws. Strangely the ruling of the Appellate Body was silent on this issue. India had thus contended that the WTO panel was not the competent body to interpret national laws or determine their internal validity. Attention was drawn to GATT rulings where US and Canada have been given the benefit of doubt as regards the interpretation of national laws. Yet the Appellate Body upheld the panel's ruling on India's failure to fulfill its obligations under Art. 70.8 and 70.9 of the TRIPS Agreement. Mr. Krishnan while broadly in agreement with the final decision of the Appellate Body, expressed concern over the implications of this decision on the internal validity of an action by the WTO Members. This could in the future lead to increased challenges to actions of national authorities within the WTO. It was his view that the panel or the Appellate Body could have come to the same decision solely on the ground that the executive orders of Indian government to the Patents Office was not published in the Official Gazette, and hence a source of unpredictability.

Dr. P.S.Rao, observed that perhaps a communication gap exists between developed and developing countries as to the interpretation on the scope and modalities for implementing their obligations under the WTO. He highlighted the rationale of formulating transitional arrangements as one of enabling developing countries to progressively reform their domestic economic structures towards eventually fulfilling the new obligations undertaken under the WTO Agreements. These

obligations for the transition period are doubtelessly onerous, and hence the specific modalities of implementation should be left for the concerned country to decide. A rigid and formal interpretation which challenges the actions of national authorities would, in his view, undermine the purpose and utility of the transitional arrangements. Secondly, as regards the instant case under discussion, he felt that the right accrues only after 10 years i.e. completion of the transitional period and hence any claim to injury before that period can only by hypothetical. Moreover, he said the penals were not legal bodies and so could have shown more flexibility, perhaps by making recommendations or laying out options that could be satisfactory to both the parties. Given the current efforts in many developing countries towards consensus-building on WTO issues, he said that the WTO panels need to appreciate the subtleties of such political processes while dealing with trade disputes.

Mr. William Davey, commenting on the Patent case, remarked that the outcome of the panel and Appellate Body reports was perhaps based on the uncertainty of the status of Indian law and the unpredictability it may have for prospective patent holders.

E. Session IV- Legality of Unilateral Sanctions Affecting International Trade

The session was chaired by Mr. S.T. Devare, Secretary, Ministry of External Affairs, Government of India. Presentations on this subject were made by Mr. Harvey Jouane Jean, Director, European Commission; Dr. P.S. Rao, Joint Secretary, Ministry of External Affairs, Government of India; and Prof. (Ms) S.K. Verma, Director, Indian Law Institute.

Mr. S.T. Devare in his introductory remarks pointed out that in the present era of economic interdependence, developing countries aspiring to integrate with the global economy, have to ensure that emerging multilateral trends in world trade and commerce do not contradict their economic developmental initiatives. In this context, he hoped that this

Seminar could facilitate a comprehensive understanding of the nuances involved in multilateral commercial diplomacy. While special and differential treatment provisions were inbuilt into WTO Agreements to ensure parity for the developing countries, he was of the view that implementation of these provisions continues to be deliberately resisted by developed countries. Such negative practices by the developed countries assumes varied forms - refusal to grant market access to goods and services from the South; resort to arbitrary anti-dumping and anti-subsidy oriented measures against exports of developing countries; and protectionism perpetrated in the guise of adherence to various labour, environmental and social standards. Referring to the prohibition under international law on unilateral acts which undermine the political independence and territorial sovereignty of States, he stated that the above cited measures by developed countries were in utter violation of the stipulated provisions and spirit of the WTO Agreements. He identified 'multilateralised unilaterailsim' practised by the developed world against the developing countries as the core problem. All other areas like dispute settlement, special and differential treatment, market access, etc. are only incidental to this unfortunate trend.

Mr. Harvey Jouane Jean, in his presentation termed the WTO's dispute settlement process as the cornerstone of the multilateral trade regime. From the EU's point of view, he said that the DSB had been so far functioning quite well. Yet, in matters relating to interlinkages between trade and environment, more work was required within the WTO framework. The focus of his presentation was, however, on the dispute relating to the United State's Helms-Burton/Kennedy-D'Amato Acts and the Banana's Case. The Helms-Burton Act as enacted by the US Congress envisaged certain measures against companies trading with Cuba. The EU refused to recognize this Act, as it was unilateral and extraterritorial-more so it violated the WTO provisions. Mr. Harvey asserted that such actions were neither justified on grounds of 'national security exceptions' of GATT or GATS. Concerned with the potential implications of the Helms-Burton Act on European companies, the EU invoked the WTO's dispute settlement

process and was also preparing to submit its case to the panel. Meanwhile a political agreement was reached, whereby the proceedings before the WTO were suspended and efforts undertaken to find a negotiated solution to the problem. Mr. Harvey stated that the existence of an effective dispute settlement mechanism proved helpful in demonstrating that unilateral measures as contemplated by the US was not possible. He also informed that the EU had made it clear that if Cuba were to seek a panel on this issue against US and if the US were to invoke Article XXI on 'national security exception' then the EU would not become involved in the debate. He justified the EU's stand on the ground that, it considered the invocation of Article XXI in a bilateral dispute as a matter of sovereign right of a State, and the State could decide on how it would interpret Article XXI. He also drew support for this position from the earlier GATT jurisprudence on 'national security exception' clause.

In the Banana's case, the panel and the Appellate Body of WTO had held that certain provisions pertaining to the EU importation regime on bananas was not consistent with its WTO obligations. Mr. Harvey said that the EU had certain commitments vis-a-vis the ACP country partners. EU grants preferential access to banana's originating from ACP partners. For some ACP countries, exportation of bananas is the only viable source of revenue, and thus involves issues relating to economic development. On the other hand, the Latin American countries were strong competitors operating through multinational corporations situated in US with a capacity to match the entire demand for bananas in EU markets. Mr. Harvey informed that the EU has implemented a new regime for importation of bananas-which accords with the recommendations of the WTO's DSB. The US and five other Latin American countries feel that these implementation measures are inadequate. In the face of the US contemplating unilateral action for effective implementation, Mr. Harvey asserted that the EU would seek to initiate action within the WTO's dispute settlement process in this regard. While expressing concerns over some of EU partners' attempt to

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obtain unilateral remedies, he reiterated EU's commitment to adhere to the WTO's procedures for dispute settlement.

Prof. (Ms.) S.K. Verma, in her presentation drew attention to various instance of such unilateral actions:-

(i) Under Sec. 301 of US Omnibus Act, the US has been in the practice of naming certain countries on its priority watch list. It may be recalled that the Trade Representative of US had in 1994 observed that measures not covered by the WTO Agreements will continue to be attracted by Section 301. This procedure involves a time-bound series of measures - within a six month period after naming the concerned country is required to enter into negotiations; within a one year period the negotiations shall end; and a three year period is stipulated for the country named to either withdraw or alter its impugned practices. Failing this, the US could impose sanctions on the recalcitrant State. While the *per se* naming of a country in the US watch list, does not amount to any violation of law, the imposition of sanctions that follows is questionable. Similarly Section 337 of the US Tariff Act usually employed to stop imports at the borders without affording exporters a reasonable opportunity of being heard would be violative of Art. III of GATT '(national treatment requirement).

(ii) As regards the Helms-Burton Act of US, she charged the legislation as a tool of economic coercion whose potential as a threat to the existence of a country in the economic sense was very real.

(iii) Recourse to implementing environmental objectives and labour standards serve as measures of disguised protectionism.

(iv) In 1994 the Dole Bill presented before the US Congress proposed a Commission of Federal Judges to review the panel reports as adopted by the WTO's Dispute Settlement Body. Where the Commission finds a panel recommendation to be inappropriate with the US laws, it could send a report to the US Congress. Any member of the Congress can thereafter

introduce a resolution seeking authorization for the President to re-negotiate with the DSB. Where three such findings by the Commission are recorded in a five year period, the Congress could introduce a resolution that the US withdraw from the WTO.

The WTO Agreements, postulate a negation-cum-adjudicative framework for resolution of trade disputes. The existence of such a self-contained regime, in her view, precluded States from resorting to unilateral acts as a means of seeking resolution of their disputes. At a more general level, she said that the special and differential treatment envisaged for developing countries were, inadequate and vague. The developed countries after having induced the developing countries to submit to substantive commitments, were seemingly more reluctant in reciprocating this gesture.

Dr. P.S.Rao, in his presentation examined the status of unilateral sanctions under international law. Sanctions by States are usually employed in response to a wrongful action by another State, resulting in injury to the sanction-enforcing State. though sanctions may take many forms, they generally have a coercive character and in extreme situations could involve use of force. In the decentralized state of the international legal order, exemplified by the period proceeding the establishment of the United Nations, States resorted either to unilateral measures or used coercion in a co-ordinated manner as against the wrong-doer State. These were largely measures of 'self-help' whose legitimacy, he said, was highly questionable for the following reasons: (i) The injury allegedly giving raise to an unilateral act is not based on an impartial determination of the wrongful act and its attribution to the wrong -doer State; (ii) Auto-interpretation of perceived injury and reliance of power coupled with lack of accountability as to exercise of sanctions make unilateral actions highly suspect. With the establishment of the United Nations, the role of unilateral acts/sanctions involving use of force is prohibited, barring the valid exception for purposes of self-defence. In this context he drew attention to Articles 2(4) and 33 of the UN Charter. Though there were differing views on whether the

prohibition as embodied in the UN Charter extended to coercion not involving the use of force, Dr. Rao said, sanctions even if justified should confirm to dictates of international law and other higher consideration of public policy of world order.

He questioned the validity of unilateral acts in the light of the legality of actions taken beyond the scope of a self-contained regime. Self-contained regimes, he stated, were characterized by the fact that the substantive obligations they set forth are accompanied by special rules concerning the consequences of their violation. International practice reveals the existence of such rules, more particularly in constitutive instruments of international organizations. Citing the views of ICJ as regards the role of self-contained regimes in the field of human rights (Nicaragua case) and diplomatic law (Hostages case), he observed that the question whether the WTO regime was a self-contained regime and if so, any action that impinges upon trade relations should be subjected to the regime or alternatively, whether Parties could profess to undertake an independent use of extra-legal measures outside the scope of such a regime, is an issue for examination.

As regards the justifiability of the 'national security exception clause' (Art. XXI), Dr. Rao sought to distinguish the following two aspects:

(i) the legality of certain actions/measures deemed 'necessary' by a State;

(ii) the nexus of such measures to an 'essential security interest'.

In his view, the first issue (i) was a difficult proposition as all States were endowed with requisite freedom to determine what measures matched the threshold of 'necessity' under Article XXI, thus restricting the scope for a judicial determination. As regards the second issue (ii) the requirement of a nexus for such measures to relate to an 'essential security interest' was mandatory, and hence could be reviewed by a WTO panel.

Mr. William Davey responding to a query from the representative of Jordan as to the mandate of a WTO panel and whether a panel could recommend 'compensation' for the failure of a party to adhere to its WTO commitments, made the following observation. The mandate of the panel is determined by the 'terms of reference' to panels, as agreed by the disputing parties. The panel usually makes recommendations to the effect that the defaulting State undertake certain measures or alter its laws so as to be in conformity with WTO obligations. The WTO Agreements do not contain any provision for 'compensation' at the panel stage. The failure to implement the recommendations of the panel, brings into play the remedy of - compensation or retaliation. Mr. Davey viewed 'retaliation' as not the desired outcome in WTO disputes. In fact, retaliation was invoked only once in the long history of GATT and as of now, there had been no occasion for the compensation-retaliation remedies in WTO, as all DSB reports have been implemented by the defaulting States. Commenting on the criticism against use of Sec. 301 by the United States, he said mere naming of a country did not violate any WTO provision. He informed that such a procedure exists even in EU, Canada and Japan-all indicting the United States.

Reacting to the political settlement between US and EU on the Helms-Burton Act, *Prof. (Ms.) S.K. Verma* said that the economically strong position of EU was a crucial factor in reaching an understanding. In a similar situation, she said the economically weak developing countries would not be able to do so. With reference to 'retaliation' as an option in case of non-implementation by a defaulting State, she said this was not a viable alternative for developing countries. Retaliation by developing countries would be prejudicial to their own economic interests, restricting the scope for their exports.

A view was expressed by one of the participants, that the opposition to unilateral acts has already been raised in many regional and international forums, viz., UN, EU, G-77, OIC and AALCC. It was argued that this political consensus requires to be translated into legal prescriptions, and AALCC could seek to mobilize opinion towards this end. As part of this exercise, it was suggested that the UN General Assembly could

request an advisory opinion on the issue of unilateral measures/sanctions.

F. Session V- Relevance of National Legislations in the Implementation of Obligations Arising under WTO Agreements.

The session was chaired by Dr. Hossein Ghazizadeh, Head of the Department of International Trade Law, Islamic Republic of Iran.

A presentation on the implementation efforts within India as concerns its commitments under the Agreement on TRIPS was provided by *Mr. Akash Chitranshi,* Advocate, Supreme Court of India. He informed that India had signed the following four Conventions relating to intellectual property rights - the Berne Convention, the Washington Convention on Integrated Circuits, Universal Copy Rights Convention and the Paris Convention. National Legislations are already in force as regards patents, copy rights, industrial designs and trade marks. Though the standards of protection as guaranteed by the national law is on par with international standards, he identified three areas wherein the Indian position has come under criticism in recent years:-

(i) Lack of product patentability of pharmaceuticals and food production

(ii) Shorter duration of patents; and

(iii) Dissatisfaction over the functioning of the Patent Registry.

Mr. Chitranshi analyzed the pronouncements by Indian judiciary to demonstrate the role of judge-made laws in affording protection to IPRs and thus bridging the hiatus between international obligations and national implementation measures. Attention was drawn to the rulings of the Indian courts, which adopted a progressive stance in recognizing and protecting well known trade marks. In doing so, the courts have displayed a more liberal disposition, which travels beyond

the stipulation of Article 6 of the Paris Convention a treaty to which India was then not a signatory party. Similarly the Courts have issued guidelines on licensing procedures as regards matters related to trade marks. In the domain of copyrights, Mr. Chitranshi asserted that India had one of the strong and comprehensive frameworks to afford protection for software and entertainment industries. The guarantee of protection afforded by Indian courts to copyrights is testified by the fact that a host of multinational corporations originating in developed countries compete to invest in India, rather than their home State. In the realm of broadcasting, the Indian government has submitted a legislative draft in the form of Information Technology Bill, 1998 for consideration. Thus, for various reasons India may not have in place a legislation governing every conceivable situation, yet the openness and protection for IPRs afforded under Indian legal system is universally recognized. Against this backdrop, Mr. Chitranshi contended that the lack of national Legislations could not be used as a pretext by developed countries for imposing sanctions.

Mr. William Davey stated that the TRIPS Agreement lays down the minimum standards of protection for IPRs. The content and interpretation of these standards are issues within the realm of national governments. He was of the view that the courts alone would not be a sufficient means for harmonizing the standards of protection. In this context, he recalled that a similar practice of relying on courts to implement TRIPs obligations was evidenced among EU members with the US being critical about it.

Dr. P.S. Rao in his intervention, said that decisions by national courts could not be a substitute for implementing international obligations. Recounting experience of India, he said that a UN body while reviewing the periodic reports submitted by India on human rights, had stated that the right to compensation for violation of human rights as enforced by judicial pronouncements would not be an effective substitute, unless such right is incorporated in national legislation.

Dr. V.G.Hegde, was of the view that Indian judicial rulings are confined to procedural aspects and do not refer to definitional or protection standards for IPRs. Speaking on the formulation of national Legislations on IPRs, he cited the experience of Latin American countries and said that efforts to explore special and differential treatment and other exceptions for developing countries (Article 8 of the TRIPs) need to be undertaken. This would help developing countries enact a balanced national legislation that accommodates the conflicting developmental priorities in these economies.

Prof. (Ms.) S.K. Verma observed that courts may at best derive persuasive strength from international Conventions, and therefore the need for comprehensive national Legislations are a *sine qua non* for greater predictability.

Mr. Chitranshi clarified that though the requirement for national Legislations could not be wished away, the role of judicial pronouncements in supplying the deficiency of inadequate laws or lack of national legislation are equally important. Stating that legislating within a democratic policy is a time consuming process, he argued that he courts could take the lead in filling up the gaps.

G. Session VI: Trade and Environment

The session was chaired by H.E. Mr. Gehrad R. Madi, Ambassador of the Arab Republic of Egypt in India. Presentations were made by Dr. (Ms.) Veena Jha, Consultant, UNCTAD; Dr. M. Gandhi, Legal Officer, Ministry of External Affairs, Government of India and Prof. B. Bhattacharya, Dean, Indian Institute of Foreign Trade.

Ambassador Madi in his opening statement identified the references to environmental issues in the preamble of the Marrakesh Agreements establishing the WTO; the Ministerial Decision in Marrakesh; and the Report of the Committee on Trade and Environment (CTE) to the Singapore WTO Ministerial Conference (1996) - as fundamental to the ongoing debating on the relationship between trade and environment

within WTO. Amb. Madi articulated the available options on shaping a consensual framework on this issue.

(i) Whether the Committee on Trade and Environment should continue its work as a debating forum, as opposed to a negotiating forum, with a view to arrive at a consensus for future negotiations.

(ii) To situate the environment debate outside the WTO framework

(iii) Conclude a comprehensive and balanced side agreement within WTO.

While recognizing that these options require and in-depth examination of their relative merits, he underscored the reality that WTO as a trade agreement primarily needs to address only trade issues. Pretensions of addressing wider issues not directly related to trade on the ground that WTO does not operate in a vacuum could be risky venture. Seeking to regulate trade measures for reasons of environmental concern, may in the future be replaced by concerns of social obligations or a policy of good governance. Ultimately this process could end up introducing more contentious issues, thus undermining the multilateral trade framework of WTO.

Mr. (Ms.) Veena Jha in her presentation succinctly captured the emerging trends on the debate relating to trade-environment interlinkages within WTO.

(a) Proposal for amendment to Art. XX of GATT:- One of the suggestions, strongly backed by the EU, relates to amending both the chapeau and the exceptions to Art. XX of the GATT so as to render trade measures pursuant to an multilateral environmental agreement (MEA), consistent with WTO rules. Secondly, another proposal to invoke the 'side agreements mechanism' using the waiver provisions in WTO has also been considered. But these proposals are still at the level of general discussion in the CTE with no immediate prospects of a consensus on this issue. Interestingly, the progressive trends

discernible within the WTO's dispute settlement body in dealing with trade-environment interface reveals the possibility of the DSB emerging more successful than the CTE, in articulating the mutual competencies of trade and environment.

(b) Resort to process and production Methods (PPM) to distinguish Products: In addition to placing environmental trade measures on products, State may also concern themselves with how a product is produced, manufactured, or obtained - commonly referred to as process and production methods (PPMs). Some PPMs are directly related to the characteristics of the products concerned e.g. pesticides used on food crops produce residues in food products. Such PPMs are covered by the Agreement on Technical Barriers to Trade and the Sanitary and Phyto Sanitary Agreement. Other PPMs, that generally do not affect the product produced, fall outside the existing trade agreements, e.g.: practice of catching tuna by setting fishing nets on schools of dolphins without requiring precautions to spare the dolphins. When the US banned the import of tuna caught with nets unfriendly to dolphins, two GATT panels declared this action inconsistent with GATT norms, since it discriminated between "like" products. Thus a State cannot adopt different treatment for two products with the same physical characteristics on the basis of how the products were produced. Environmentalists regard this as a setback and argue for using 'non-product characteristics as a criteria for distinguishing products. Obviously, there has been no progress on the issue as it is enmeshed with other sensitive matters like labour standards and human rights.

(c) Domestically Prohibited Goods: - Domestically prohibited goods (DPG) are products whose sale and use are restricted in a national's domestic market on the ground that they present a danger to human, animal or plant life, health, or the environment. Clearly, a nation may bar imports of a product that is banned for domestic sale or consumption. Can exports of such products also be restricted? Within the CTE the only aspect considered on this issue is that of 'transparency'. Transparency requirements include notification by States to the WTO and publication of all laws, regulation and decisions relating to the product concerned. There have been suggestions to the effect that a Prior Informed Consent PIC) regime be established, so that States could consult among themselves before exporting such goods. Meanwhile the UNEP

and FAO have issued a draft treaty that would establish a PIC regime for banned chemical products that may cause health or environmental problems. Under this proposal, the international shipment of these products would be barred without the prior notice and explicit consent of a designated national authority in the country of destination. The 1989 Basel Convention on the Control of Transboundary movements of Hazardous Wastes and Their Disposal also provides for PICs. Though the possibility of overlapping between WTO and MEA cannot be overruled, the PIC regime seems to hold the key for future developments in this field.

Other proposals at the CTE include elimination of certain trade distortive measures, viz. agricultural, energy and product subsidies; tariff peaks; and providing increased market access facilities, with a view to benefit the environment of both exporting and importing parties. Suggestions calling for an amendment or innovative interpretations of TRPS Agreement to encourage flow of environmentally sound technologies have also been made, but has not received enthusiastic support. Though many considered the TRIPs Agreement to be adequate for meeting these concerns, there is a distinct possibility that the review process forming part of the built-in-agenda could address this issue.

Dr. M. Gandhi examined the evolving jurisprudence on trade-environment interface within the WTO's dispute settlement mechanism. While reference to environment is conspicuously absent in GATT, the WTO group of Agreements (more particularly, the agreements on Agriculture, Services, TRIPS, TBT and SPSM) contain provisions, with varied degree of explicitness, relating to environmental objectives. In his view, these WTO related environmental provisions reflect the underlying policy objective enshrined in Principle 12 of the 1992 Rio Declaration on Environment and Development.[6]

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[6] Principle 12: - States should cooperate to promote a supportive and open international economic system that lead to economic growth and sustainable development in all counties, to better address the problems of environmental degradation. Trade policy measures for environmental proposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing

Notwithstanding the stipulations contained in Principle 12, Dr. Gandhi asserted that the decisions of the WTO's DSB shows that developed countries have unilaterally invoked the exceptions under Article XX of the GATT to justify projectionist measures, which are not sustainable under WTO. The States affected have challenge such measures as discriminatory and not transparent.

GATT/WTO jurisprudence so far does not reveal a single adjudicated dispute that addresses the conformity of any MEA trade restrictions with GATT rules. However, to a limit extent, the consistency of certain trade measures enacted pursuant to environmental concerns have been the subjects for dispute resolution in GATT and WTO. Dr. Gandhi briefly described the facts and outcomes of these disputes - the Tuna-Dolphin Cases I and II; Shrimp-Turtle Case and the US Gasoline Case. All these disputes involved US and the panels had ruled against the administration of certain trade measures as being inconsistent with Article XX of GATT.[7] He was of the view that, the rulings of the panels indicate that the prime focus of Art. XX was to a question of legality, but an examination as to whether any other alternative measures that are less trade-restrictive other than impugned measures could have been employed. The enquiry by the panel is often limited to the examination of the means employed to meet the objectives states in Art. XX. In other words, consistency of national trade

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transboundary or global environmental problems should, as far as possible, be based on an international consensus.

7 The relevant portions of Article XX is as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, noting in this Agreement shall be constructed to present the adoption or enforcement by any contracting party of measures:

.....

(b) necessary to protect human, animal or plant life or health;

.....

(g) relating to the conservation of exhaustible natural resources of such measures are made effective in conjunction with restrictions on domestic production or consumption.

measures are decided on the basis of the "least trade restrictive" test.

He was of the view that the issue of determining the respective spheres of operation (as regards trade ad environment) cannot, in the long run, be deferred. Given an increasing number of MEAs which involves curbs of trade measures, the need to articulate a mutually supportive trade-environment framework to promote sustainable development, becomes imminent. While recognizing the utility of such a framework, Dr. Gandhi said that it should be done in a way consistent with the letter and spirit of Principle 12 of the Rio Declaration. Arguing that States must eschew unilateral and extraterritorial trade measures to enforce environmental objectives, he stressed the need to resolve trade -environment disputes within the dispute settlement framework as existing under the MEAs. Multilateral enforcement with an emphasis on dispute avoidance would, in his view, pave the way for a mutually supportive environment and trade compatible regime.

Prof. Bhattacharya examined, from a economic perspective, the rationale of resorting to trade restrictions as a means of implementing environmental goals. Two arguments are put forth by environmentalists in this regard. Firstly, environmentalists envisage a negative relationship between trade liberalization and environmental protection. Put differently, trade liberalization leading to increase in trade output and incomes would necessarily result from over-use of the world's resources, thus paving the way for environmental degradation. Prof. Bharracharya conceded that though this may be true at the initial stage, but when a threshold level is attained, the demand for a clear environment' (as a matter of 'public policy) would restore a fair balance between trade liberalization and environmental concerns. Secondly, it is argued that the tendency for potentially environmentally hazardous industries to relocate to countries with lower environmental standards may affect the competitiveness of eco-friendly industries in other parts of the world. Prof. Bharracharya refuted this as there was no empirical evidence supporting such a conclusion.

Questioning the validity of the hypothesis suggesting a negative relationship between trade liberalization and environment, Prof. Bhattarcharya pointed out that "environment" is only one of the many factors/variables that influence the outcome of trade relations. An undue emphasis on regulating 'environment' without fine tuning other allied factors would to necessarily enhance global welfare. Moreover, contemporary mainstream economic theory provides no guidance to study the impact and function of trade restrictive measures to protect and preserve the environment.

Hence, he argued that, trade policies are not the optional tools to address environmental problems. The limited scope for trade measures in addressing the 'root causes' of environmental problems, in his view, rendered 'trade polices' inappropriate to regulate environmental matters. Attributing environmental degradation to 'over-consumption' by developed countries and 'poverty' in developing countries, he said that the trade-environment debate could make a meaningful progress by remedying the root causes of environmental degradation. At the level of concrete actions, he suggested the establishment of a financial mechanism to aid developing countries procure environmentally-sound technologies.

Two other specific aspects, which in his view, needs to be addressed in the ongoing debate were:

(i) Danger of domestic producers and environmentalists joining hands to force governments adopt unilateral restrictions on trade;

(ii) Status of non-signatories vis-a-vis signatories to multilateral environmental agreements, require closer examination within the framework of trade instruments.

Mr. William Davey, while generally agreeing with the presentations by panelists, examined the WTO Appellate Body view in the Shrimps-Turtle Case (India, Pakistan, Malaysia and Thailand were complainants against USA). Mr. Davey said the pronouncements of the Appellate Body which quoted

extensively from environmental agreements was the first case within the WTO dispute settlement framework wherein concerns for environmental protection received extensive coverage. The Appellate Body indicted US measures as being flawed in its application on two grounds:

(i) The failure of US to negotiate and discuss technical assistance for implementing the exclusive fishing devices with the complainant States, though such a process was initiated with some other States-amounted to discrimination.

(ii) The most conspicuous flaw, in the view of the Appellate Body, was that Sec. 609 of the US Act had a coercive effect, both intended and actual, on the policy-making by foreign governments and hence in effect amounted to an economic embargo.

Notwithstanding the concerns towards environment, he said, the Appellate Body's view does not clarify the ambiguity involving a situation of direct conflict between trade-environment obligations. More particularly no guidance is available on the interpretation of Article XX of GATT and the status of non-signatories to a MEA.

The observations of the Appellate Body on protection of environment has been perceived by some WTO Members as an act of transgression by a judicial body into the political domain of negotiations by parties. However, Mr. Davey was of the view that the decisions of DSB could provide the needed impetus to break the stalemate within the CTE and facilitate further progress in the trade-environment debate.

Dr. B.S. Chimni said that the review of the GATT/WTO jurisprudence reveals that the dispute settlement procedure has progressively moved towards legitimizing legality of trade measures undertaken pursuant to an environmental objective. This initiative emanating from the DSB would, in his view, constrain the negotiating space for WTO Members to agree on a future framework on the interlinkages between trade - environment.

Dr. Veena Jha in her intervention stated that instances of a lead role being taken by a dispute settlement body on substantive policy issues was not new in the context of the trade-environment debate, as such a process was earlier seen in the field of anti-dumping and other similar issues. Responding to the concerns that the DSB could impede the developments in other negotiating forums, she stressed the need to distinguish between a 'rule' and the 'interpretation' of a rule. while the inherent powers to negotiate binding rules were vested with WTO Members, the role of the dispute settlement mechanism was confined to interpreting these rules.

Mr. Atul Kaushik, an official from the Ministry of Commerce, Government of India reiterated the need to address 'root causes' of environmental degradation, as a necessary component of the international efforts to protect and preserve the world environment. Agreeing with the issue raised by Dr. Chimni, Mr. Kaushik said that the WTO panels could, if they find that there are grey areas relating to trade-environment interface, recommend the WTO Members to codify the requisite guidelines for practical application in WTO disputes. In this context he cited the precedent offered by a GATT panel in a dispute that involved Nicaragua and USA, wherein the panel requested GATT Contracting Parties to negotiate devise the criteria for interpreting the phrase "essential security interest" as found in Article XXI of GATT.

H. Closing Session

The closing session was chaired by Dr. P.S. Rao, the President of AALCC. *Dr. W.Z. Kamil*, Deputy Secretary General, AALCC, briefly reported on the general line of discussion in the two days' Seminar. He stated that the AALCC Secretariat would prepare a summary report of the proceedings at the Seminar, which could be subsequently distributed to AALCC Member States. The Secretariat could also undertake publishing a comprehensive report of the Seminar, provided financial support for this venture was available.

Mr. William Davey, Director, Legal Affairs, WTO stated that his participation at the Seminar was beneficial in gaining useful insights as to the views of the Asian-African States on the functioning of the WTO. *H.E. Gehard Mady*, Ambassador of Egypt to India, expressed his appreciation 'for the AALCC's timely initiative in organizing this Seminar and termed the deliberations as 'comprehensive and educative'.

Mr. Tang Chengyuan, Secretary General of AALCC thanked the President, Dr. P.S. Rao and the Government of India for the successful conduct of this Seminar. He also expressed his gratitude to Mr. William Davey, other panelists and participants for their active involvement in the deliberations. A report on the proceedings of the Seminar would be presented to the thirty-eighth session of the AALCC scheduled to be held at Ghana in 1999. While the subject of WTO could continue to be considered by the Committee, the Secretary General sought the President's good offices towards ensuring adequate financial support, to facilitate the publication of the verbatim records of the Seminar.

The *President, Dr. P.S. Rao* in his closing remarks stated that the discussion at the Seminar had helped focus attention on certain important issues that are of concern to the Asian-African region. He expressed his gratitude to Amb. Narayanan, Permanent Representative of India to WTO for his guidance and co-operation in organizing the Seminar. thanking Mr. William Davey, Director, Legal Affairs, WTO for his participation and valuable contribution towards the successful conduct of this event, he hoped that this Seminar could lead to more intense cooperation between the AALCC and WTO. He also expressed his gratitude to all panelists, participants and the AALCC Secretariat. He expressed the hope that the Secretariat would at the earliest prepare a comprehensive report on the proceedings of the Seminar.

III. Future Work - Programme

In the view of the AALCC Secretariat, the Seminar provided an opportunity for a focused consideration of specific

issues on the functioning of the WTO's dispute settlement mechanism. While the Thirty-seventh Session of the Committee (New Delhi, 1998) was a preliminary step in studying the general functioning of the WTO dispute settlement mechanism, this Seminar could be regarded as one that seeks to consolidate and enhance the understanding of the dispute settlement process, with a view to address the specific concerns of the developing States from the Asian - African region.

It may be recalled that the Seminar had coincided with the start of the review process of the dispute settlement system within WTO. The WTO General Council had at its meeting in December 1998 decided to continue and complete the review process by the end of July 1999.[8] Hence the Committee may wish to consider the outcome of the review process to decide upon its future course of work on this topic.

Besides this, at the institutional level, the Second WTO Ministerial Conference met at Geneva in May 1998. The Conference accepted an offer from the Government of the United States to host the Third Session of WTO Ministers, and invited the General Council to determine the date and duration of that session. The Ministerial Declaration adopted thereat, also outlined the agenda for the Third Ministerial Conference. Emphasizing the importance of full and faithful implementation of the WTO Agreement and Ministerial Decisions in maintaining the momentum for expanding global trade, and raising standards of living in all parts of the world, the Declaration states that the Third Ministerial Conference would further pursue its evaluation of the implementation of individual agreements and the realization of their objectives. Such evaluation, *inter alia*, seeks to cover the consequent impact on the trade and development prospects of Members.[9]

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8 See General Assembly, Annual report (1998) WT/GC/15, at p.29.

9 For more details, see "Second WTO Ministerial Conference Focuses on Global Electronic Commerce", *AALCC Bulletin*, vol.22, Issues No. 1, June 1998 at p.73-75.

The General Council has agreed on the dates of 30 November - 3 December 1999 for the Third Ministerial Conference. The preparatory process for the Ministerial Meeting is currently underway. The substantive agenda of the Ministerial Conference is slikely to cover important issues relating to trade and environment; work Programme on electronic commerce; trade and development; assessment of the functioning of the Working Group on Trade and Investment; Trade and Competition Policy and Transparency in Government Procurement etc. The Committee may wish to take note of the significance of this process, and provide suitable directions to the Secretariat as to its future Programme of work.

B. Report on the Legislative Activities of the United Nations and Other Organisations Concerned with International Trade Law

I. Work Done by the United Nations Commission on International Trade Law at its thirty-first Session

The General Assembly of the United Nations, by its resolution 2205 (XXI) established the United Nations Commission on International Trade Law (hereinafter referred to as 'UNCITRAL' or 'Commission') as the primary organ of the United Nations system to harmonise and develop progressive rules in the area of international trade law. A substantial part of the Commission's work is carried out at meetings of the Working Groups, while the Commission meets annually to review and adopt such recommendations towards guiding the progress of work on the various topics on its agenda. The Commission is also mandated to submit an annual report to the General Assembly, as to the tasks accomplished at its yearly sessions.

The thirty-first session of UNCITRAL was held in New York from 1 to 12 June 1998. It had on its agenda, *inter alia*, the following four substantive topics for consideration:

(i) Privately financed infrastructure projects;

(ii) Electronic commerce;

(iii) Receivables financing: assignment of receivables; and

(iv) Monitoring implementation of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

On the topic 'Privately financed infrastructure projects' the Commission had at its 29th Session in 1996 decided to prepare a legislative guide on build-operate-transfer (BOT) and

related topics of projects. Accordingly, the UNCITRAL Secretariat was directed to review issues suitable for being dealt with in a legislative guide and to prepare draft materials for consideration by the Commission. In accordance with the line-of-work that was subsequently approved by the Commission at its 30th Session (1997), the Secretariat at the 31st session presented the drafts of the introductory chapter and four other chapters (Chapters I, II, III and IV). Drafts of Chapters V-XI presently under preparation by the Secretariat are intended to be submitted to the Commission in 1999. The Commission, taking note of the Secretariat work, expressed satisfaction at the commencement of work towards the preparation of a legislative guide on the subject. It also generally approved the proposed structure of the draft legislative guide and the selection of issues suggested to be discussed therein.

On the subject of 'Electronic Commerce' the Commission had before it the Report of the Working Group on the work of its thirty-second session (A/CN.9/446). It may be recalled that the Commission, at its 30th Session (1997), entrusted the Working Group on Electronic Commerce with the preparation of uniform rules on the legal issues of digital signatures and certification authorities. While taking note of the manifest difficulties faced by the Working Group in reaching a common understanding of the new legal issues associated with the use of digital and other electronic signatures, the Commission was of the view that the progress realised so far indicated that the draft Uniform Rules on Electronic Signatures were progressively being shaped into a workable structure. While examining a proposal made at the thirty-second session of the Working Group, that preliminary consideration might be given to undertaking the preparation of an international convention based on the provisions of the Model Law[10] and of the draft Uniform Rules, the Commission

[10] For an overview of the Commission's Model Law on Electronic Commerce, see Report and Selected Documents of the Thirty-sixth Session of AALCC, Tehran, 3-7 May, 1997, pp.329-38.

deemed it to be a premature exercise. Moreover, it was generally felt that the Working Group should not be distracted from this current task of preparing Uniform Rules.

On the subject of "Assignment in Receivables Financing", the Commission considered the reports of the twenty-seventh and twenty-eighth sessions of the Working Group on International Contract Practices, whose mandate is to prepare uniform law on assignment in receivables financing. The Commission noted that the Working Group had made substantial progress on a number of matters including the validity of assignments of future receivables and of receivables not identified individually (bulk assignments), as well as of assignments concluded, despite an anti-assignment clause contained in the contract under which the assigned receivables arose and the debtor protection issues. At the same time, it was noted that a number of issues were yet to be resolved, including: those relating to the scope of the draft Convention, public policy issues arising in the context of the protection of the debtor, conflicts of priority among several claimants and private international law issues. While expressing appreciation for the work accomplished, the Commission requested the Working Group to proceed expeditiously with its work so as to complete it in the year 1999 and to submit the draft Convention for adoption by the Commission at its thirty-third session (2000).

While considering the item 'Monitoring of Implementation of 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards', the Commission reviewed the progress made in monitoring the legislative implementation of the Convention and called upon States Parties to the Convention that had not yet replied to the questionnaire of the Secretariat, to do so. It may be noted that the Commission during the current session held a special commemorative "New York Convention Day" on 10 June 1998, to celebrate the Fortieth Anniversary of the 1958 New York Convention. The Commission resolved to engage in a

consideration of possible future work in the area of arbitration at its 32nd Session (1999) and towards this end directed the Secretariat to prepare a note that would serve as a basis, for the consideration of the Commission. In this task, the Secretariat was to take account of the deliberations at the 'New York Convention Day'.

Privately-Financed Infrastructure Projects; Preparation of a Draft Legislative Guide

Privately-Financed Infrastructure Projects; Preparation of a Draft Legislative Guide

In the case of privately financed infrastructure projects, the government engages a private entity to develop, maintain and operate an infrastructural facility in exchange for the right to charge a price, whether to the public or to the government, for the use of the facility or the services or goods it generated. Such projects are considered to be significantly advantageous in two ways: (i) They would enable States to achiever substantial savings in public expenditure and to reallocate the resources that otherwise would have been invested in infrastructure in order to meet more pressing social needs; (ii) Since these projects are built and, during the concession period, operated by the project company, the State benefits from private sector expertise in operating and managing the relevant infrastructural facility.

As any successful implementation of privately-financed infrastructural projects requires a favourable legal framework that fostered the confidence of potential investors, while protecting public interest. It is against this backdrop that the Commission mandated the Secretariat to review issues suitable for being dealt with in a legislative guide.

B. Background of earlier work:

Following the review of recommendations made by many States and a report by the Secretary-General containing

information on work being undertaken by other organisations, the Commission at its 29th Session (1996), decided to prepare a 'Legislative Guide' on build-operate-transfer)BOT) and related topics of projects. Accordingly, the Secretariat was requested to review issues for being dealt with in a legislative guide and to prepare draft materials to enable the Commission to make an informed decision on the proposed structure of the draft legislative guide and its contents.

At its 30th Session (1997), the Commission had before it a task of contents setting out the topics proposed to be covered by the legislative guide, which were followed by annotations concerning the issues suggested to be discussed therein. Further, the Commission had before it initial drafts of three chapters. The Commission exchanged views on the nature of the issues to be discussed in the draft legislative guide and possible methods of addressing them and considered a number of specific suggestions.[11] The Commission generally approved the line of work proposed by the Secretariat and requested the Secretariat to seek the assistance of outside experts, as required, in the preparation of future chapters.

At that session, pursuant to a recommendation by the Secretariat, the Commission decided to henceforth use the words "privately-financed infrastructure projects" to refer to its work in this field, rather than the words "build-operate-transfer" (BOT) which had thus far been used.

C. Consideration by the Commission at the Current Session

At the 31st Session, the Commission had before it drafts of the introductory chapter, entitled "Introduction and background information on privately financed infrastructure projects" and

[11] For an account of the Commission's work at its 30th Session, see AALCC's Notes and Comments on Selected Items before the fifty-second Session of the General Assembly of the United Nations (Doc. No. AALCC/UNGA/LII/97/1) at pp.28-32.

of Chapter I, "General Legislative Considerations", Chapter II on "Sector Structure and Regulation", Chapter III on "Selection of the Concessionaire" and Chapter IV on "Conclusion and General Terms of the Project Agreement".[12] These were prepared by the Secretariat with the assistance of outside experts and in consultation with other international organisations. On this basis, the Commission considered the following two aspects:

(i) Draft Chapters of the legislative guide;

(ii) Structure and contents of the draft legislative guide.

(i) Draft Chapters

Given the fact that the Commission's work is in its formative stage, following paragraphs are limited to providing an overview of the broad trends as they emerge in the review of the Secretariat's work by the Commission.

(a) Introduction and background information on privately financed infrastructure projects

The introductory Chapter as currently presented to the Commission, consists of two sections on: (i) Purpose and Scope of the Guide; and (ii) Background Information on Infrastructure Projects. While elaborating on the purpose and scope of the guide, the Secretariat draft seeks to exclude "privatisation transactions" that did not relate to infrastructure development and operation. Such exclusion is in line with the decision of the Commission at its 30th Session, that the guide should not deal with transactions for the 'privatisation' of State property by means of sale of the privatisation gives rise to legislative issues that were different from legislative issues pertaining to privately financed infrastructure projects.

The section on background information of infrastructure projects discusses basic issues of privately financed infrastructure projects, such as private sector participation in

[12] A/CN.9/444/Add.1-5.

public infrastructure and the concept of project finance. Besides enumerating the forms of private sector participation, it further identified the main parties involved in those projects and their respective interests, and briefly discussed the evolution and phases of execution of a privately-financed infrastructure project.

(b) General Legislative Considerations (Chapter I)

At the 30th Session of the Commission it had been suggested that the Chapter dealing with general legislative considerations should elaborate on the different legal regimes governing the infrastructure in questions, as well on the services provided by the project company – issues in which there were significant differences among legal systems. It had been further suggested that attention should be given to constitutional issues relating to privately financed infrastructure projects.

Accordingly, the Secretariat draft of Chapter I (A/CN.9/444/Add.2) discussed the following three aspects:

(i) The opening section discusses two issues concerning the general legal framework for privately financed infrastructure projects, viz. the legislative authorisation for the host Government to undertake such projects; and the legal regime to which such projects were subject.

(ii) The second section considered the possible impact of other areas of legislation on the successful implementation of those projects. Such collateral areas of legislation include: laws relating to investment protection, property, expropriation, intellectual property, security, company law, contracts, insolvency, tax law, environmental protection and settlement of disputes.

(iii) The concluding section discusses the possible relevance of international agreements entered into by the host

country for domestic legislation governing privately financed infrastructure projects.

(c) **Sector Structure and Regulation (Chapter II)**

The Commission at its 30th Session had noted that issues pertaining to privately financed infrastructure projects also involved issues of market structure and market regulation and that consideration of those issues was important for the treatment of a number of individual topics proposed to be covered by the legislative guide. Accordingly, the draft chapter as presented by the Secretariat to the current session contains references to the following aspects:

(i) Market structure and competition;

(ii) Restructuring infrastructure sectors;

(iii) Controlling residual monopolies;

(iv) Conditions for award of licences and concessions;

(v) Price and profit regulation, subsidies, performance standards; and

(vi) Regulatory bodies – Powers, Composition and Autonomy.

The Commission engaged in a general exchange of views regarding the scope and purpose of the chapter. While it was broadly agreed that the draft chapter contained useful background information that might assist national legislators to consider the various options available, a view was expressed that the discussion of policy issues were excessively detailed and might convey the impression that the guide advocated certain specific policies. It was pointed out that the issues of sector structure were essentially matters of national economic policy which should not figure prominently in the guide. Secondly, it was pointed out that in various legal systems a

distinction was made between regulated sectors, such as electricity and telecommunications, in which the operators were authorised to provide services under a licence issued by the competent authorities, and other sectors in which the operators were awarded concessions through contractual arrangements entered into with the competent public entity. The Commission was urged to revise the draft chapter with a view to ensuring that it adequately reflected those distinctions.

The Commission requested the Secretariat to rearrange the substance of the draft chapter on the following lines, taking into account the views expressed during the discussion. Thus, the sections on 'Competition and sector structure'; and 'legislative measures to implement sector reform' 'regulation of infrastructure services' could be incorporated in a future chapter dealing with the operational phase.

On issues of abolition of legal barriers and the restructuring of infrastructure sectors, it was felt that the legitimate interests of developing countries and the varying levels of economic and technological development of countries should be taken note of in the preparation of the legislative guide.

(d) Selection of the Concessionaire (Chapter III)

One significant practical obstacle to the execution of privately financed infrastructure projects was the considerable length of time invested in negotiations between the public authorities of the host country and potential investors. By devising appropriate procedures for the award of privately financed infrastructure projects that were aimed at achieving efficiency and economy, while ensuring transparency and fairness in the selection procedures, the proposed legislative guide could become a helpful tool for the public authorities of host countries.

Thus, the draft chapter submitted to the Commission at the current session (A/CN.9/444/Add.4) includes: general

objectives of selection procedures, appropriate selection method, preparations for selection proceedings, pre-qualification of project consortia, procedures for requesting proposals, direct negotiations, review procedures; and of selection proceedings.

With regard to the preference expressed in the Chapter for the use of competitive methods to select the concessionaire, interventions were made by participating delegations to the effect that the guide should more clearly recognise, that in accordance with the legal tradition of the country concerned, other methods might also be used.

The distinct and special features of selection procedures for privately financed infrastructure projects was highlighted by the delegates, who called for a clear distinction between selection procedures for privately financed infrastructure projects and other procurement contracts. In this context, it was pointed out that in the legal tradition of some countries, privately financed infrastructure projects invited the delegation by the appropriate public entity of the right and authority to provide a public service. As such, from the regime that applied generally to the award of public interests for the purchase of goods, construction or services. Secondly, another prominent difference was with the method of payment of the infrastructure operator, as distinct from the payment of a supplier or a works contractor. Thus, generally the payment for performance of a public contract was made in the form of a price paid by the governmental agency to the supplier or contractor. However, in the case of privately financed infrastructure projects the remuneration was spread out over a number of years and derived from the operation of the infrastructure, generally in the form of fees charged to the user.

In the light of these considerations, it was suggested that the chapter should elaborate further on the fact that competitive procedures typically used for the procurement of goods,

construction or services were not entirely suitable for privately financed infrastructure projects. The Commission noted that though the selection procedures described in the Chapter differed from the procurement methods provided in the UNCITRAL Model Law on Procurement of Goods, Construction and Services, the need to avoid using certain technologies which in some legal systems was normally used in connection with procurement methods of goods, construction and services, required due attention.

(e) Conclusion and general terms of the project agreement (Chapter IV)

The Commission noted that the draft chapter IV (A/CN.9/444/Add.5) as presented by the Secretariat, in its opening section dealt with general considerations concerning the project agreement, discussing in particular, the different approaches taken by national legislation concerning the project agreement. The remaining sections dealt with rights and obligations of the project company that, in addition to being dealt with in the project agreement, might usefully be addressed in the legislation, as they might affect the interests of third parties.

The Commission was of the view that the guide should stress the need for clarity as to the persons or governmental agencies that had the authority to enter into commitments on behalf of the Government at different stages of negotiations and to sign the project agreement. Due regard was to be given to the fact that different levels of government (federal, provincial or municipal) might be involved in a given privately financed infrastructure project.

As regards 'assignment of the concession' it was considered desirable for legislation to allow the parties to agree on "step-in" rights, i.e. the rights to have the concession transferred to the lenders or to another entity appointed by them if the Project Company was in default of its obligations.

In that context, it was stated that, where the Government was to be given the right to withhold approval of the assignment of a concession, that right should be subject to the reservation that consent must not be unreasonably withheld.

Statements were made to the effect that, in practice, lenders expected to obtain the widest possible security over the assets of the project company, including the intangible asses. In many instances the assets managed by the Project Company remained in the ownership of the State, and therefore it is not possible to use those asses as security. To the extent it was possible to create a security interest in the shares of the project company, it was felt desirable to clarify whether, in case of a "step-in" by creditors in event of default, the obligations of the host Government and of the previous project sponsors was in any way affected.

It was considered that legislation should not establish a maximum number of years for which concessions might be granted, as in practice it was an obstacle to agreeing to commercially reasonable solutions. The right of the Government to purchase the concession from the concessionaire, was cited as another reason for flexibility in the duration of the concession.

(ii) Structure of the draft legislative guide and issues to be covered

The Commission noted and generally approved the proposed structure of the draft legislative guide and the selection of issues suggested to be discussed therein as set out in document A/CN.9/444. The Commission engaged in a general discussion concerning the presentation of the guide and the desirability of formulating legislative recommendations in the form of sample provisions for the purpose of illustrating possible legislative solutions for the issues dealt in the legislative guide, as had been suggested at its 30th session. A view was expressed that legislative recommendations should

be supplemented with sample model legislative provisions, possibly with alternative solutions. After considering the different views expressed, the Commission requested the Secretariat to draft the legislative recommendations in the form of concise legislative principles and, where deemed feasible and appropriate, formulate sample provisions for illustrative purposes for consideration by the Commission.

The Commission exchanged views on the nature of the issues to be discussed in the draft legislative guide and possible methods of addressing them. It was noted that, in dealing with individual topics, the draft legislative guide should distinguish among the following categories of issues: general legal issues under the laws of the host country; issues relating to legislation specific to privately financed infrastructure projects issues that might be dealt with at the regulatory level; and issues of a contractual nature.

The Commission was informed that the initial drafts of chapter V to XI was currently being prepared by the Secretariat for consideration by the Commission at its thirty-second session in 1999.

Electronic Commerce: Draft Uniform Rules on Electronic Signatures

A. Background

The Commission at its 30th Session (1997) had entrusted the Working Group on Electronic Commerce with the preparation of uniform rules on the legal issues of digital signatures and certification authorities. Though it was agreed that it was too early to take any decision on the exact scope and form of such uniform rules, it was felt that the Working Group might focus its attention on the issues of digital signatures, in view of the important role played by public-key cryptography in the emerging electronic-commerce practice. The proposed uniform rules, it was agreed, should not discourage the use of other authentication techniques. In

dealing with public-key cryptography, the uniform rules was to accommodate various levels of security and to recognise the various legal effects and levels of liability corresponding to the various types of services provided in the context of digital signatures. With respect to certification authorities, while the value of market-driven standards was recognised by the Commission, it was widely felt that the Working Group might appropriately envisage the establishment of a minimum set of standards to be met by certification authorities, particularly where cross-border certification was sought.

B. Consideration by the Commission at its current session:

At the current session, the Commission had before it report of the Working Group on the work of its thirty-second session (A/CN.9/446). While taking cognisance of the manifest difficulties experienced by the Working Group in reaching a common understanding of the new legal issues associated with the increased use of digital and other electronic signatures, the Commission noted with satisfaction that the Working Group had become recognised as a particularly important international forum for the exchange of views regarding the legal issues of electronic commerce and for the preparation of solutions to those issues. Following are the two issues that engaged the deliberations of the Commission at the current session:

(i) Proposal to formulate an international convention based on the provisions of the Model Law on Electronic Commerce and of the draft Uniform Rules;

(ii) Issue of Incorporation by Reference.

(i) Formulation of an International Convention

The Commission noted that, at the close of the thirty-second session of the Working Group, a proposal[13] had been

[13] A/CN/WG.IV/WP.77.

made that the Workig Group might wisht to give preliminary consideration to undertaking the preparation of an international convention based on provisions of the Model Law and of the draft Unifrom Rules. The Commission witnessed divergent views beign expressed in this regard. One view expressed was that a Convention based on the provisions of the Model Law was necessary, since the UNCITRAL Model Law on Electronic Commerce might not suffice to establish a universal legal framework for electronic commerce. The oppostie view was that, owing to the rapidly changing technical background of electronic commerce, the matter did not lend itself to the rigid approach suggested by an itnernational convention.

The prevailing view at the Commission, however was that, it would be premature to undertake the preparations of the suggested convention. Concern was expressed that the preparation of an international convention might adversely affect the widespread implementation of the Model Law on Electronic Commerce, which only two years after its adoption was already beign followed in a significant number of countries. The discussions at the Commission broadly favoured the position adopted by the Working Group. It was felt that the Working Group should not be distracted from its current task of preparing draft Uniform Rules on Electronic Signatures. Upon concluding that task, the Working Group in the context of its general advisory function with respect to issues of electronic commerce, could make proposals to the Commission for future work in that area.

(ii) Incorporation by Reference:

At various stages in the preparation of the Model Law, it had been suggested that the text should contain a provision aimed at ensuring that certain terms and conditions that might be incorporated in a data message by means of a mere reference would be recognised as having the same degree of legal effectiveness as if they had been fully related in the list of

Group that the text being prepared should take the form of a Convention. In view of the divergences in existing legal systems, a convention would provide the appropriate degree of unification, introducing the certainty and predictability needed for credit to be made available on the basis of receivables.

As to the scope of application, it was felt that it should be limited to contractual receivables assigned for the purpose of obtaining financing. Such an approach, it was felt, would be in line with the overall purpose of the project to facilitate receivables financing and thus to increase the availability of lower-cost credit. Besides, this approach has the merit of being accepted by many States, which were prepared to introduce specific legislation to address the needs of modern financing transactions, but not to make an overhaul of their assignment law. Other aspects of the topic discussed by the Commission includes: public policy concerns, prior conflicts and private international law provisions.

While generally acknowledging the progress of work, the Commission noted that a number of issues remained to be resolved, including those relating to the scope of the draft Convention, public policy issues arising in the context of the protection of the debtor, conflicts of priority among several claimants and private international law issues. Expressing appreciation for the work accomplished, the Working Group was requested to proceed expeditiously with its work so as to complete it in 1999 and to submit the draft Convention for adoption by the Commission at its thirty-third session (2000).

V. Secretariat Comments

With the changes ushered by the ongoing process of liberalisation, the economies hitherto marginalised find themselves drawn into the mainstream of international trade. The establishment of the World Trade Organisation has obligated these countries to legislate or review their domestic laws on a whole range of spheres including intellectual

property rights, services sector and investments. On the other hand, the increasing resort to new technologies for data transmission necessitates the formulation of new legal concepts to facilitate commercial transactions. In such a scenario, efforts at development of international trade law while striving to keep pace with the changes required by the evolving technologies, need to strike a balance between adopting the optimum threshold limits so as not to place unduly heavy burdens on developing countries. It is in this context, that the role of UNCITRAL as a focal point for facing the challenges outlined above assumes significance. As with the case of electronic commerce, the Commission in future would be treading on uncharted territories of law-making. In such *de novo* exercises, the Commission besides adopting a cautious and minimalist approach could do well to consult experts from a wide range of legal systems to ensure uniformity and universality in the working of its legal texts.

More specifically, in dealing with such new topics the Commission should guard against the temptation of formulating international conventions. A point in case is the restraint exhibited by the Commission in its work on electronic commerce. The compilation of a legislative guide or model law could serve as a starting point to acquainting States with the legal conceptions involved in the working of any commercial/legal mechanism. The restraint advocated against premature adoption of international conventions is two folds. Firstly, even if a rudimentary legal framework is available in the domestic sphere, the divergent practices among countries may not lend itself to the criteria of uniformity required for an international convention. Secondly, a hasty move to formulate a convention could end in opening up settled issues or upset the fragile consensus evolved by State practice.

The Secretariat welcomes the progress of work achieved by the Commission on the subjects of privately financed infrastructure projects, electronic commerce and assignments in receivables financing. Given the nascent stage of work in these areas, the Secretariat would comment on specific aspects

of the Commission's work, at a future stage when the work has progressed substantially.

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 co-operation 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. Nine Conferences have been held so far: Geneva (1964), New Delhi (1968), Santiago (1972), Nairobi (1976), Manila (1979), Belgrade (1983), Geneva (1987), Cartagena de Indias, Colombia (1992) and Midrand (1996).

It might be recalled that the Ninth session of the United Nations Conference on Trade and Development (UNCTAD IX) was held at Midrand (South Africa) in 1996. The Conference reiterated the comparative advantages of UNCTAD as a focal point for tackling trade-related development issues, viz., trade, finance, technology, investment and sustainable development. Towards this end, it was agreed that UNCTAD should continue to facilitate the integration of developing countries and countries in transition with the international trading system. Its work should be action-oriented and provide guidance on national policies, with special focus on LDCs. Outlining the priorities for UNCTAD, until the next session, the Conference decided to pay more attention in its analytical and deliberative work on the following areas:

Globalisation and development

- International trade in goods and services, and commodity issues
- Investment, enterprise development and technology
- Services infrastructure for development and trade efficiency.

In the process of restructuring and streamlining the organisation, UNCTAD-IX established the following subsidiary bodies of the Trade and Development Board: (I) the Commission on Trade in Goods and Services, and Commodities; (ii) the Commission on Investment, Technology and Related Financial Issues; and (iii) the Commission on Enterprise, Business Facilitation and Development. These Commissions adopt an integrated approach in their respective areas of competence and meet once a year, unless otherwise decided by the Board. The emphasis of UNCTAD following its Midrand Session is mostly in terms of analysing the impact of the Uruguay Round Agreements on development and working out modalities for enhancing capacities of developing countries for participation in the multilateral trading system.

II. An overview of the Work of the Commissions

This part seeks to provide an overview of the activities of the three Commissions.

A. Commission on Trade in Goods and Services, and Commodities:

It may be recalled that the second session of the Commission held in November 1997, had endorsed recommendations to the effect that three expert level meetings on the following topics be convened in 1998:

(i) Examination of the effectiveness and usefulness for commodity dependent countries of new tools in commodity markets: risk management and collateralised finance;

(ii) Strengthening the capacity for expanding the tourism sector in developing countries, with particular focus on tour operators, travel agencies and other suppliers; and

(iii) Strengthening capacities in developing countries to develop their environmental services sector.

Accordingly, the *Expert Meeting to Examine the Effectiveness and Usefulness for Commodity-dependent Countries of New Tools in Commodity Markets: Risk Management and Collateralised Finance,*[16] was held at Geneva from 4-6 May, 1998. The experts agreed that there was a clear link between exposure to price risk on the one hand, and lower investment and growth, and more income inequality on the other while liberalisation of the commodity sector was considered to be a positive experience, the withdrawal of the government had led to some gaps in the services provided to producers. In this respect, the Expert Meeting recognised the usefulness of commodity price risk management and warehouse receipt finance; the possibilities for structuring medium and longer-term finance around commodity collateral; importance of controls on misuse of price risk management instruments etc. While the Experts Meeting agreed on a comprehensive approach to enhance the use of commodity price risk management and collateralised finance, it stressed the need for co-ordination not only among international organisations but also with the private sector.

An *Expert Meeting on Strengthening the Capacity for Expanding the Tourism Sector in Developing Counties, with Particular Focus on Tour Operators, Travel Agencies and other*

[16] TD/B/COM.1/EM.5/L.1.

Suppliers was convened from 8 to 10 June 1998 at Geneva. The experts, *inter alia* reached the following conclusions and recommendations.[17]

Addressed to the international community

- An International agreed definition of the tourism sector shall be universally applied. This would facilitate the acceptance of a uniform system of tourism accounting measures, thus providing a clear measurement of the role of the tourism sector in economic development and trade.

- International organisations and donor countries should increase their efforts in training and capacity building in the field of tourism in developing countries, including the effective use of computer reservation systems, global distribution systems and the Internet to maximise their earnings from tourism and to meet international standards.

- Problems of air access of developing countries, particularly the least developed countries (LDCs) should be addressed.

The Experts further recommended that UNCTAD, with the assistance of appropriate international organisations should conduct a study on the feasibility of alternative modalities for including air transport services in plurilateral or multilateral negotiations on services (including a possible revision of the GATS Annex on Air Transport Services). Given the importance of air transport services for tourism, and taking into account the provisions of Article V of the GATS Annex on Air Transport Services, the Expert Group recommended the Commission should consider convening an expert meeting on air transport services.

The third session of the Commission was held at Geneva in September 1998. Besides taking note of the recommendations by the two above said expert meetings, the

[17] TD/B/COM.1/17 and TD/B/COM.1/EM.6/3.

Commission, *inter alia* adopted certain conclusions and recommendations on the following items:

(i) Ways and means of Enhancing the Utilisation of Trade Preferences by Developing Countries, in particular LDCs, as well as Further Ways of Expanding Preferences.

(ii) Scope of Expanding Exports of Developing Countries in Specific Services Sectors through All GATS Modes of Supply, Taking Into Account Their Interrelationship, The Role of Information Technology and of New Business Practices.[18]

B. Commission on Investment, Technology and Related Financial Issues:

The Second session of the Commission which met in September-October 1997 recommended the convening of expert group meeting in 1998 on the following aspects:

(i) Examination and review of existing regional and multilateral investment agreements and their development dimensions;

(ii) Environmental accounting;

(iii) Competition law and policy;

(iv) The Growth of domestic capital markets, particularly in developing countries, and its relationship with foreign portfolio investment.

The *Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting*[19] met at its fifteenth session from 11 to 13 February 1998. The Group, in

[18] TD/B/COM.1/L.9.

[19] TD/B/COM.2/10 and TD/B/COM.2/ISAR/3

its report on the meeting, states that accounting and reporting for the environment has become increasingly relevant to enterprises because, how an enterprise's environmental performance affects its financial health is of increasing concern to investors, creditors, governments and the general public. Some users of financial statements want to know the extent of a company's environmental exposure and how the company is managing its environmental costs and liabilities. In order to improve the quality of accounting and reporting for environmental costs and liabilities. Policy makers and national standard setters need to give more guidance on how the traditional financial accounting framework could be used to produce useful information on environmental transactions and performance. A technical position paper endorsed by the Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting (ISAR) has been forwarded for the consideration of Governments, enterprises and other interested parties, in order to contribute to both the quality of environmental accounting and reporting and its harmonisation.

The *Experts on Existing Regional and Multilateral Investment Agreements and their Development Dimensions*[20] met at Geneva from 1 to 3 April 1998. The Expert Meeting reviewed regional and multilateral investment agreements and discussed the advantages and disadvantages for development of broad and narrow definitions of "investment". While agreeing that these provisions raise questions that are both difficult and complex, the Expert Meeting recognised the importance of developing a "knowledge base" concerning countries' experience with different types of definitions and recommended that the UNCTAD Secretariat should prepare an analysis of such provisions in international investment agreements. It was felt that further work could be undertaken to elucidate development dimensions that need to be taken into

[20] TD/B/COM.2/11 and TD/B/COM.2/EM.3/3.

consideration when formulating international investment agreements.

The *Intergovernmental Group of Experts on Competition Law and Policy*[21] met from 29 to 31 July 1998 at Geneva. Keeping in view that the Fourth Review Conference is scheduled to be held in the year 2000, the Group invited the Secretary General of UNCTAD to prepare a preliminary assessment of the operation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices since the Third Review Conference. It also recommended that the next meeting of the Intergovernmental Group of Experts in 1999 should focus on the following topics:

(a) The relationship between the competition authority and relevant regulatory agencies, especially in respect of the privatisation and demonopolisation processes;

(b) International merger controls, in particular where they have effects in developing countries; and

(c) The creation of a culture of competition.

Besides this, the meeting would also consider a preliminary report, to be prepared by the UNCTAD Secretariat, on how competition policy addresses the exercise of intellectual property rights.

The reports of these experts group meetings were forwarded to the third session of the Commission held in September 1998.

[21] TD/B/COM.2/CLP/L.2.

C. Commission on Enterprise, Business Facilitation and Development:

Pursuant to the recommendations of the second session of the Commission (December 1997) the following expert level meetings were held:

An *Expert Group Meeting on the Impact of Government Policy and Government/Private Action in Stimulating Inter-Firm Partnerships Regarding Technology, Production and Marketing, with particular emphasis on North-South and South-South Linkages in Promoting Technology Transfers and Trade for SME Development*[22] was convened in April 1998. Inter-firm agreements cover a variety of arrangements between small, medium and large enterprises, including licensing and sub-contracting relationships, technology, marketing and other forms of strategic partnering. While inter-firm co-operation is relatively widespread in developed economies, developing countries and economies in transition face certain obstacles in participating in such arrangements. The experts discussed the main conditions for successful partnering. These include the identification of the right partner, the need for a common vision, trust and strong motivation, clarity of organisational structures and a thorough preparation based on adequate information.

The discussion resulted in specific recommendations in terms of policy options and guidelines for different actions involved in the process for governments and national organisations in terms of setting the general policy framework and infrastructure, and in terms of providing direct services to SMEs at the local level; for the international community in terms of building bilateral or multilateral technical co-operation programmes fostering inter-firm co-operation.

[22] TD/B/COM.3/12 and TD/B/COM.3/EM.4/3.

The *Expert Meeting on Capacity Building in the area of Electronic Commerce: Human Resource Development*[23] held from 29 June to 1 July 1998, stressed that the UNCTAD has a comparative advantage in its ability to combine an analytical and an operational approach to the issues related to electronic commerce. The experts emphasised that enhanced knowledge, experience and awareness on electronic commerce will contribute to increasing the level of interest and the quality of participation of developing countries in international discussions relevant to electronic commerce and the establishment of a framework for global electronic commerce. While recommending UNCTAD to pursue its technical co-operation activities in the area of human resource development for electronic commerce, the Expert Meeting called upon UNCTAD to:

"Organise regional seminars to raise the level of awareness of Member States about the current state of specific debates (proposals for a global framework for electronic commerce), international negotiations and discussions being held in various institutions".

The experts welcomed the holding of Partners for Development Meeting in Lyon, France (9 to 12 January 1998) as an opportunity to building partnerships with civil society to offer proper training tools in the area of electronic commerce.

An *Expert Meeting on Clustering and Networking for SME Development*[24] was held in September 1998. The experts noted that 'clustering' is a phenomenon in industrial development and thus over time the number of firms in a given branch and location may restructure and grow. An emerging cluster attracts additional firms since inputs, machinery and qualified workers are easily available. Within a cluster of co-operative firms SMEs have more opportunity to become internationally

[23] TD/B/COM.3/13 and TD/B/COM.3/EM.6/3.
[24] TD/B/COM.3/14 and TD/B/COM.3/EM.5/3.

competitive and to penetrate the global market. The experts noted that such clusters are rarely found in developing countries and economics in transition.

Considering the deep economic crisis facing most African countries and taking into account the key importance of SMEs in Africa, the Expert Meeting recommended that special attention and assistance be accorded by local, national and international actors to the promotion and development of SMEs for ensuring the sustainable development of the Continent.

The reports adopted by the expert meetings stated above, were forwarded to the third session of the Commission held in November 1998. As regards the item on 'Electronic Commerce', the Commission endorsed the recommendation of the expert meeting and requested UNCTAD to organise regional electronic commerce workshops.[25] Such workshops, in the Commission's view, should aim at stimulating exchanges of experiences among enterprises having a practical knowledge of electronic commerce.

III. Partners for Development – An UNCTAD Initiative

On the initiative of UNCTAD, a Conference on Partners for Development's was convened at Lyons, France from 9 to 12 November 1998. The Conference which brought together the business community, governments, consumer associations, academia, intergovernmental and non-governmental organisations was aimed at achieving closer involvement of civil society and business in the work of the United Nations.

The programme was scheduled on two tracks: (I) Global Electronic Trade – UN Partnership; (ii) Profit and Development. The subjects covered under these two tracks included: global infrastructure, role of local communities in global competition, Internet for global trade, predictable legal environment for

[25] TD/B/COm.3/L.11.

electronic commerce, investment, micro-finance, bio-trade, commodity risk management, etc The Conference was marked by presentations, panel discussions and conclusion of partnership agreements in the above described areas.

This initiative by UNCTAD is a pragmatic approach to multilateral support for development and constitutes a concrete step towards fulfilling the mandate on 'A Partnership for Growth and Development' as adopted at Midrand (UNCTAD-IX) in 1996. Moreover, the analytical work within the UNCTAD on aspects relating to investments, competition, electronic commerce, etc. could serve as valuable feedbacks in shaping the future course of work within the framework of the World Trade Organisation.

IV. Diplomatic Conference on Arrest of Sea-Going Ships

The Joint UNCTAD/IMO Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects, had completed the preparation of the draft articles for a convention on arrest of ships at its ninth session in December 1996. The Board's recommendation to proposal to the UN General Assembly for convening a diplomatic conference to consider and adopt a convention on arrest of ships on the basis of the work done by the Joint Group, was endorsed by both UNCTAD and IMO.

The General Assembly, by its resolution 52/182 in 1997 endorsed this proposal, but did not specify the arrangements for the diplomatic conference. Consequently, the sixteenth executive session of UNCTAD's Trade and Development Bored (February 1998).[26] approved the following arrangements for the Diplomatic Conference:

(i) The Conference would be held in Geneva for a period of two weeks from 1 to 12 March 1999

[26] TD/B/EX (16)/5.

(ii) The Conference would establish one main Committee to consider the entire substantive work of the Conference.

V. Secretariat Comments

While the work of the UNCTAD spans a wide spectrum of trade aspects that concerns developing countries, the AALCC could benefit in framework. A preliminary check-list of such issues could include: the development dimensions of investment regimes; legal and structural reforms in domestic arena to meet the emerging trends in services sector and intellectual property rights; increasing the understanding on global electronic commerce, etc.

Against this backdrop, it is suggested that the Committee may wish to consider the convening of a seminar/workshop on global electronic commerce. The past few years have witnessed a revolution in electronic interchange (FDI), electronic mail and the Internet are radically affecting the way trade transactions are being conducted. Traders from developing countries are under pressure to adopt the new trading patterns. A recent study prepared by the UNCTAD Secretariat[27] cautions that unless appropriate legislative measures to accommodate electronic commerce are taken, the developing countries run the risk of being excluded from participation in international trade in the future.

The Committee may wish to take note of the proposal within UNCTAD for organising regional seminars to raise the level of awareness of States about the current work on global electronic commerce (paragraphs 20 and 24). The AALCC in co-operation with UNCTAD and such other interested organisations, could seek to organise a seminar/workshop on this subject. This exercise besides promoting the understanding of the importance of global electronic commerce, may also help acquaint the AALCC Member States

[27] See, *Electronic Commerce: Legal Considerations,* Study prepared by the UNCTAD Secretariat, UNCTAD/SDTE/BFB/1

on specific legal issues involved in drafting domestic legislation on this subject.

VI. United Nations Industrial Development Organisation (UNIDO)

Pursuant to resolution (2152-XXI) of the UN General Assembly, the United Nations Industrial Development Organisation (UNIDO) was established as its subsidiary body in 1966. Subsequently in 1979, it became an autonomous organisation and started functioning as a specialised agency from August 1985. The primary objective of UNIDO is the 'promotion and acceleration of the industrial development in the developing countries with a view to assisting in the establishment of anew international economic order.

The work programme of UNIDO in the area of international trade law appears to be focused on the preparation of guidelines, manuals and checklists of contractual clauses so as to assist parties from the developing countries in concluding industrial contracts. These may be enumerated as below:

(1) Guidelines on the purchase, maintenance and operation of basic insurance coverage for processing plants in developing countries;

(2) UNIDO model form of agreement for the licensing of patents and know-how in the petrochemical industry, including annexes, an integrated commentary and alternative texts of some clauses;

(3) Items which could be included in contractual arrangements for the setting up of a turnkey plant for the production of bulk drugs (pharmaceutical chemicals) or intermediaries included in the UNIDO list;

(4) UNIDO model form of licensing and engineering services agreement for the construction of a fertiliser plant;

(5) UNIDO Model form of turnkey lump-sum contract for the construction of a fertiliser plant;

(6) UNIDO Model form of semi-turnkey contract for the construction of a fertiliser plant;

(7) UNIDO Model form of cost-reimbursable contract for the construction of a fertiliser plant;

(8) Guidelines for Infrastructure through Build-Operate-Transfer Projects: The BOT Guidelines prepared by UNIDO cover the entire spectrum of financial and legal issues faced by government authorities and project managers in the development of BOT projects, while offering developing countries the basic orientation needed to design effective BOT strategies. The Guidelines *inter alia* contain chapters on the following aspects: introduction to the BOT concepts; the government's role in providing for successful BOT projects; transfer of technology and capability building; procurement issues and selection of sponsors; financial structuring of BOT project; and standard forms of agreements relating to construction, operation and maintenance.

(9) The UNIDO Manual on Technology Transfer Negotiations: This Manual, is primarily intended to serve the purpose of a teaching tool for technology transfer negotiation courses for enhancing the negotiation skills of the developing countries.

IV. International Institute for the Unification of Private Law (UNIDROIT)

The 77th Session of the Governing Council of the UNIDROIT met at the seat of the Institute from 16th to 20th February 1998. In recent years the Governing Council had embarked upon an exercise of pruning the Work Programme so as to reduce it to manageable proportions commensurate with the resources of the Institute.

The Work Programme as approved by the Governing Council for the 1999-2001 triennial period is as follows:

Preparation of Uniform Law Instruments

A. Priority Items

1. International interests in mobile equipment;
2. The Unidroit Principles of International Commercial Contracts.

B. Other items under consideration, subject to the identification of external funding.

1. Model Law on disclosure (Franchising);
2. Model Law on Leasing;
3. Transnational rules of civil procedure;
4. Uniform rules applicable to (road) transport.

C. Items placed on a reserve list pending further work.

1. Secured transaction in general;
2. Civil liability in connection with the carrying out of dangerous activities;
3. Contracts for services.

This part of the Report would, however provide an overview of the developments relating to the following aspects:

i. Draft convention on international interests in mobile equipment;

ii. Unidroit Principles on International Commercial Contracts;

iii. Franchising: Model Law on Disclosure; and

iv. Model Law on Leasing.

(i) Draft Convention on International interests in mobile equipment

The purpose of the Convention is to establish an international legal regime for security and related interests in equipment of a kind normally moving from one State to another in the normal course of business – for example, aircraft and railway rolling stock, satellites and other space objects. This ambitious project resulted from a proposal by Mr. T.B. Smith QC, the Canadian Member of the Governing Council of UNIDROIT, in 1988. An exploratory working group convened by UNIDROIT in 1992 concluded that the legal uncertainty resulting from the application of the *lex rei sitae* rule tended to deter banks and financial institutions from extending secured financing facilities in respect of the aforementioned high-value mobile equipment.

Against this backdrop, the Governing Council UNIDROIT at its 71st Session (1992) authorised the President to convene a study group for the preparation of uniform rules on certain international aspects of security interests in mobile equipment. The Study Group held four sessions in Rome (1993, 1996, January 1997 and November 1997 respectively). Distinct Working Groups representative of the aviation, rail and space industries, furthermore provided vital input regarding the likely impact of the Study Group's work in relation to aircraft equipment (the Aviation Working Group), railway rolling stock (the Rail Working Group) and space property (the Space Working Group) respectively. At the conclusion of its fourth session, the Study Group adopted the text of a preliminary draft Unidroit Convention on International Interests in Mobile Equipment.

As work on the Convention progressed it became clear that it would be impossible to devise rules that would be equally suitable for all types of equipment. At the Third Session of the Study Group, the International Air Transport Association (I.A.T.A.) and the Aviation Working Group

suggested that the proposed Convention be split into a framework Convention and separate Protocols. The framework Convention was to contain the rules applicable to all the different categories of equipment covered by its sphere of application, and separate Protocols for each such category, setting forth such additional equipment – specific rules as deemed necessary. The Study Group accepted this proposal and invited Mr. J. Wool, Co-ordinator of the Aviation Working Group to organise a working group to prepare a preliminary draft Protocol on mattes specific to aircraft equipment. Accordingly, in November 1997, the Aircraft Protocol Group adopted the preliminary draft Protocol on Mattes Specific to Aircraft Equipment.

The aforementioned texts of the preliminary draft Unidroit Convention and preliminary draft Protocol were presented to the Unidroit Governing Council at its 77th Session (1998), for advice on further course of action to be adopted. The Council noted with appreciation the accomplishments of the Study Group and the Aircraft Protocol Group, and decided that the texts needed to be further refined by a Steering and Revisions Committee, before they could be transmitted to governmental experts.

Following are, in brief, the salient features of the draft Unidroit Convention on International Interests in Mobile Equipment*:-

(i) The draft Convention embodies a number of innovative techniques in treaty making . The most striking is the concept of a 'framework convention' supplemented by a series of equipment-specific protocols. The equipment-specific protocol would contain provisions specific to

* For more details on the draft convention, see Roy Goode, "Transcending the Boundaries of Earth and Space: the Preliminary Draft UNIDROIT Convention on International Interests in Mobile Equipment", *Uniform Law Review*, 1998-I, pp.52-74.

that type of equipment, which would add to or vary the generic provisions of the Convention.

(ii) The draft Convention has four primary objectives:

(a) to give international protection to security interests in high-value, uniquely identifiable mobile equipment;

(b) to provide the holders of such interests with a basic range of default remedies that can be expeditiously exercised;

(c) to provide a regime by which those interests can be perfected by registration, thereby enabling third parties to discover their existence; and

(d) to lay down rules for the recognition and priority of those interests, both within and outside the debtor's bankruptcy.

(iii) The sphere of application of the convention is determined by reference to four key factors;-

(a) The Convention is focussed on consensual interests within one of three categories: that granted by the charger under a security agreement; that vested in a person who is the seller under a conditional sale agreement; and that vested in a person who is the owner under a leasing agreement.

(b) The Convention will be restricted to mobile equipment of a uniquely identifiable kind and of high unit-value.

(c) The Convention will be confined to equipment in existence at the time of the security agreement.

(d) There will need to be an appropriate connection to a Contracting State.

(iv) Central to the Convention are the provisions for the creation of autonomous international interests in mobile equipment, an interest constituted by the Convention itself

and not derived from or dependent on national law. This interest, when created in accordance with the requisite formalities prescribed by the Convention, will be enforceable against the debtor, whether or to the interest has been registered.

(v) Central to the operation of the Convention is the "International Registry" in which it would be recorded international interests and prospective international interests and assignments. There would be established and overseen, and each Registrar would be designated, by an Intergovernmental Regulator and would be administered by the Registrar and operated by a duly appointed operator.

(vi) As regards the ordering of priorities of competing security interests, the draft Convention stipulates that a 'registered interest' has priority over any other interest subsequently registered and over an unregistered interest. In order to avoid factual disputes, this priority is given even where the 'registered interest' was acquired or registered with actual knowledge of an earlier unregistered interest.

Other issues dealt by the draft Convention include: bankruptcy of the debtor; jurisdiction; assignments and rights of subrogation; non-consensual rights and interests; and the relationship of the draft Convention with other existing Conventions.

In accordance with the decision of the 77th Session of the Governing Council, the Steering and Revisions Committee met in Rome in June 1998 to finalise the texts of the draft Convention. The preliminary draft Unidroit Convention on International Interests in Mobile Equipment and the preliminary aircraft Equipment will be considered at a first session of governmental experts, to be convened jointly by UNIDROIT and ICAO in Rome, in February 1999.

(ii) **Unidroit Principle of International Commercial Contracts**

The work on this project was completed in 1994 with the adoption of the final text of the Unidroit Principles of International Commercial Contracts. The Principles consists of a preamble and 119 articles divided into seven chapters (General Provisions; Formation; Validity; Interpretation; Content; Performance; and Non-performance). Each article is accompanied by a commentary, including illustrations, which form an integral part of the Principles. As such, the Principles constitute system of rules of contract law specifically adapted to the special requirements of modern commercial practice. The Principles have been published in the five official languages of UNIDROIT (English, French, German, Italian and Spanish). At the same time, the institute has authorised the preparation by leading scholars of translations of the Principles into other language versions such as Arabic, Bulgarian, Chinese, Japanese, Dutch, Russian, Hungarian, Portuguese, Serbian and Slovakian.

To enable wider dissemination of these Principles, at the 75th Session (1996) the General Council of the Institute requested the Secretariat to conduct an inquiry as to the use of the Principles in actual practice and prepare a paper containing proposals for new topics to be dealt in the second enlarged edition. As a follow-up to this request, the Secretariat prepared a questionnaire which was circulated to around 1000 individuals who had shown a keen interest in the Unidroit Principles. The questionnaire met with an overwhelming response as 226 replies were received from forty countries of the world in a short period of time.

Appreciating the good response received, the Governing Council at its 76th Session (1997), decided that work be resumed towards the publication of a second enlarged edition of the Principles on a priority basis; and that a Working Group

be convened and a smaller drafting committee be appointed to prepare the preliminary draft.

The Working Group met for the first time in Rome from 16 to 19 March 1998. Discussion centred on the revision of the text of the Principles, the new topics to be dealt with in the second enlarged edition, as well as the working methods. The Working Group decided to give priority to the following topics: agency, limitation of action (extinctive prescription), assignment of contractual rights and duties, contracts for the benefit of a third party, set-off and waiver. The Working Group will meet again in February 1999.

(iii) Franchising: Model Law on Disclosure:-

The subject has been on the agenda of the Institute since the 65th Session (1986) of the Governing Council. At its 72nd Session in June 1993, the Governing Council decided to set up a Study Group on Franchising to examine the different aspects of franchising and in particular disclosure of information between the parties before and after a franchise contract has been concluded and the effect of a master franchise agreement on sub-franchise agreements.

The Study Group, recommended to the Governing Council that a 'legal guide' to international franchising, with particular reference to master franchise arrangements, be prepared. The recommendations were endorsed by the Governing Council at its 74th Session (1975).

Following the successful completion of the work on the Guide to International Master Franchise Arrangements, the Governing Council of the 77th Session (1998) authorised the publication of the Guide. Accordingly, the English version was published in September 1998, and the French version is to be published in early 1999.

At this session, the Governing Council examined a proposal by the Unidroit Secretariat to proceed with the preparation of a Model Law on Franchising. Owing to the feeling that a number of franchise laws that have recently been adopted demonstrate a certain lack of understanding of the franchise process, a model law prepared by Unidroit would reflect and set forth internationally recognised standards and also serve as the basis for adoption of national legislations.

In consideration of these advantages, the Governing Council decided to endorse the proposal put forward by the Secretariat and authorised the Study Group on Franchising to proceed with the preparation of a model law on franchising.

iv) Model Law on Leasing

The Unidroit Convention on International Financial Leasing is now in force as between five States – France, Hungary, Italy, Nigeria and Panama. It is understood that the United States and Russia propose to shortly ratify and accede to the Convention respectively. This, in the view of UNIDROIT has given a major fillip to the implementation process in a considerable number of countries.

Over the past one year the UNIDROIT Secretariat has observed that many law reform efforts concerning leasing are commissioned in countries in transition and developing economies, by both universal and regional development. It is significant in this context to note the importance increasingly attached by universal and regional development banks to the use of law reform as a tool for the enhancement of investment opportunities, and in particular the role recognised to leasing in this respect.

Based on the aforementioned developments, it was felt that there exists ample scope for the rationalisation of the diverse efforts currently being attempted as regards law reform. Hence the Governing Council gave favourable

consideration to this proposal for the preparation of a model law, founded on the principles of the UNIDROIT Convention. This, is expected to encourage further acceptance of that Convention and to avoid the potential for duplication of effort implicit in the various domestic law reform efforts referred to above.