

introducing any matter—solid, liquid or gaseous which could result in a change of the environment. Similarly it is the duty of every State to take remedial steps towards the reversal of damage to the environment already caused so as to prevent climate change. It is imperative that a delicate and fragile matter of "common concern of mankind" be governed by rules of strict and absolute liability and not be left to amorphous norms of moral obligation. As the World Commission on Environment and Development observed, "It is not that there is one set of villains and another of victims. All would be better off if each person took into account the effect of his or her acts upon others. But each is unwilling to assume that others will behave in this socially desirable fashion, and hence all continue to pursue narrow self-interest. Communities or governments can compensate for this isolation through laws, education, taxes, subsidies, and other methods. Well-enforced laws and strict liability legislation can control harmful side effects".

The industrialized world is primarily responsible for the production of greenhouse gases. The industrialized countries of the Northern Hemisphere are presently responsible for about 70% of the global production of carbon dioxide and nearly all chlorofluorocarbon production, while having only 25% of the world's population. Although rapid population growth in developing countries will lead to large increases in energy use, this disparity in per capita production of greenhouse gases is likely to persist for a long time.

Unlike the distribution of responsibility for greenhouse gases, the distribution of impacts from greenhouse warming will be global in extent and delayed in time. Among the victims of climatic change will be those nations, and generations, least responsible for the production of greenhouse gases, least able to either adapt to or mitigate the changes, and with little international economic or political clout. Developing countries are particularly vulnerable to disruptions in the availability and quality of freshwater resources, changes in agricultural productivity and trade, and sea-level rise.

There is thus a need to forge develop and strengthen international cooperation to protect global climate as it involves all States. The developed countries, in particular, cannot wish or shy away their obligations to render assistance to the developing countries in the safeguarding and prevention of climate change. The developed countries have both a moral and a legal obligation to render such assistance as transfer of clean technologies at affordable prices to the developing countries because none can deny that the roots of the

current concern lie in the industrial technologies and current practices of the developed States. The concept of "common concern of mankind" in the words of Judge Manfred Lachs is "linked with essential values which are protected by law and hence the violations of the rights protected by it". The concept confers on "every and all States the right to seek remedy, to resort to legal measures in order to put an end to this violation" and call for a possible compensation.

The development of international cooperation and the rendering of assistance to the developing countries by the industrialized States as an obligation derives also from the obligation of the international community to assist. The developed countries must assist developing countries not only in preventing irreversible changes to global climate but also in adopting and taking remedial measures including the identification and enforcement of legal principles.

(iv) *Development of Legal Principles on Environmentally Sound and Sustainable Development*

The World Commission on Environment and Development, it will be recalled, had defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs". That Commission had also pointed out that sustainability requires the enforcement of wider responsibilities for the impacts of decisions. This requires changes in the legal and institutional frameworks that will enforce the common interest. Some necessary changes in the legal framework start from the proposition that an environment adequate for health and well-being is essential for all human beings—including future generations. Such a view places the right to use public and private resources in its proper social context and provides a goal for more specific measures.

The need to draft, adopt and enforce laws—both at the municipal and international plane—to achieve an environmentally sound and sustainable development cannot be over-emphasized on space earth where one State's energy policy is another's acid rain and where the refrigerant/coolant of one industry means a rise in the sea level. Rising sea-level due to both thermal expansion of the oceans and melting of glaciers and land ice will have severe direct effects on coastal nations. While the rise in sea-level will most likely be incremental, the damages caused by this rise will occur during extreme events such as storm surges, hurricanes, and typhoons.

Some observations can be made about the differences in vulnerability to sea-level rise of developing and developed countries.

Most major cities in both developed and developing countries will be protected from sea-level rise, but at great expense. In developing countries, however, sea-level rise will be most severely felt by exposed coastal populations and by agricultural developments in deltaic areas. Three highly populated developing countries viz. India, Bangladesh and Egypt, are thought to be especially vulnerable because their low-lying coastal plains are already extremely vulnerable to storms. Since 1960, India and Bangladesh have been struck by at least eight tropical cyclones that each killed more than 10,000 people.

The development of legal principles on environmentally sound and sustainable development is in effect identifying the issues that may be required to be addressed if climate change is to be arrested. The need of the hour is both the adoption of an integrated plan for resource management and sustainable development as well as legal principles and norms which explicitly aimed at ensuring that development should be environmentally sound and would not effect a change in the climate.

The emphasis in recent years on sustainable development and the mounting scientific evidence of climate change has resurrected the sentiment/opinion that the world is a global village and has underscored that such natural resources as land, soil, waterways, lakes and rivers, air and seas etc. are not finite resources and not inexhaustible. Judge Manfred Lachs is of the opinion that protection of the climate should be viewed as implying obligations *erga omnes*.

(v) *Holding of Seminars and Convening of Meetings*

In the course of deliberations on the subject matter of Climate Change and the Progress of Work of the UN Conference on Environment & Development several Legal Advisers had proposed that it would be useful to hold a workshop on the matter. Also such a workshop would be particularly useful after the Intergovernmental Panel on Climate Change has drawn up a draft Convention on the subject. The Legal Experts could meet and deliberate upon such draft convention prior to its finalization. The experts could also exchange views before the meeting of Working Group III (Legal) of the Preparatory Committee of the United Nations Conference on Environmental and Development commences its substantive work. This could be followed up by an inter-sessional meeting at the Ministerial Level before the 1992 Conference.

The Committee at its Cairo Session may wish to consider holding a ministerial level Session if an invitation to host such a meeting

were to be forthcoming from one of the member States. That meeting could be held sometime after Working Group III has commenced its work. Such an inter-sessional meeting, at the ministerial level, to review the work of the Preparatory Committee of the UNCED and prior to the opening of the UN Conference on Environment and Development would *inter alia* afford an opportunity for the Committee to contribute to the progressive development and codification of international law by adopting a common concerted stand on the protection of the climate, while not irrevocably prejudicing their right to sustainable development.

(iv) Secretariat Studies

(a) Secretariat Study on "Control of Transboundary Movement of Hazardous Wastes, and Their Disposal" Not of the Secretary-General

Pursuant to the recommendation of the Legal Advisers of member States the Committee at its twenty-ninth Session was invited to determine the future work of the Secretariat and to that end the Committee was requested to give consideration to the following issues and conclusions :

- (i) The Basel Convention aims at the preservation and protection of the environment through the minimization of the generation and traffic of hazardous and other wastes and the establishment of legal framework for prior informed consent before transboundary transportation of such wastes so as to ensure environmentally sound management and disposal of such wastes. Although riddled with a number of infirmities and deficiencies the Convention is to be viewed as a blue print for future control of transboundary movement and disposal of hazardous and other wastes. The member States should therefore positively consider the ratification or accession to the Convention.
- (ii) The Conference of Parties to be convened not later than one year after the entry into force of the Convention as envisaged⁸, could be an appropriate forum for reducing the number of the shortcomings and drawbacks of the Convention. The proposed Conference of Parties could also monitor and review the

8. See Article 15 of the Basel Convention.

functioning of the mechanisms proposed to be established. It is therefore strategically important to become parties to the Convention so as to be able to influence outcome of the Conference of Parties and provide better functioning of the Convention.

- (iii) The Conference of Parties would also be the only appropriate forum for prohibiting all transboundary movement and disposal of hazardous and other wastes when such disposal cannot be achieved in an environmentally sound manner. The Conference will also be in a position to review the efficiency of the measures adopted by State parties to prevent and punish illegal traffic in hazardous wastes.⁹
- (iv) The AALCC could play a useful role in the development of elements which might be included in the protocol on liability and compensation for damages arising out of the transboundary movement and disposal of hazardous and other wastes.
- (v) The AALCC could assist in the formulation of regional or sub-regional agreements effecting a total ban on imports of hazardous wastes into their territories which is provided for in article 11(2) of the Convention.

The Committee's attention was also invited to a view expressed in the Trade Law Sub-Committee at the Twenty-eighth Session of the Committee that the matter of transboundary movement and dumping of toxic wastes should also be considered by the Trade Law Sub-Committee in connection with the questions of the carriage of hazardous goods by road, rail and inland navigational vessels.

The Secretariat study had also proposed that the AALCC, could perhaps work in tandem with such other international organisations as the IMO, UNEP and the OAU to develop elements which might be included in the protocol on liability and compensation for damages arising out of transboundary movement and disposal of hazardous and other wastes.

With respect to the draft African Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal the Secretariat's report pointed out that :

1. The African Convention does not signify the rejection of the Basel Convention. Rather it manifests an instance of multilateral, regional agreement and arrangements which Article 15 of the Basel

9. *Ibid*, Paragraph 5.

Convention envisages and provides for. The OAU Convention may therefore be seen as an outline for planning similar international instruments by such other regional organisations as the ACP, ASEAN, Gulf Cooperative Council, SAARC, South Pacific Forum and others.

2. The draft Convention most clearly complements and supplements the Basel Convention which is instrumental in the opinion of the AALCC Secretariat should continue to be viewed as a useful instrument in the endeavours to control the consequences of transboundary movement and disposal of hazardous wastes.

3. The conclusion, adoption and ratification of the African Convention, or such other regional instruments as may be drawn and ratified would not preclude the ratification of the global Convention. The ratifications of the two Conventions—global and regional—must be seen as complementary for they are sub-systems of the larger universal system of environmental protection and preservation.

The Secretariat study observed that the AALCC's representation at the meeting of the OAU Legal and Technical Experts to draw up an African Convention is a manifestation of the role that the AALCC can play in the formulation of regional or sub-regional agreements effecting a total ban on import of hazardous wastes into their territories.¹⁰ It is a matter of considerable satisfaction that the draft OAU Convention has taken cognisance of the analytical study on the Basel Convention prepared by the Secretariat and that the Expert Group has removed the many omissions and infirmities of the Basel Convention which the Secretariat's brief had identified.

Finally, the Secretariat had proposed the convening of a meeting of an Expert Group jointly organised by the AALCC, the OAU, IMO and UNEP.

Whilst introducing the subject at the Beijing Session the Secretary-General, *inter alia*, said that in view of General Assembly Resolution 44/228 which had called for the convening of United Nations Conference on Environment and Development in Brazil 1992 the Committee may wish to direct the Secretariat to be actively involved in future work on the subject in the preparation for the proposed conference in view of the direct and continuing concern on environment and development.

The Committee at its twenty-ninth Session held at Beijing in 1990 *inter alia* urged the Secretariat to cooperate in the formulation of

10. See Doc. No. AALCC/XXIX/90/2 at p. vi.

regional and sub-regional conventions on banning the dumping of toxic and other wastes. The Committee also urged the Secretariat to make a study on cooperation between the Asian and African countries to ban the dumping of toxic and other wastes into their countries and decided to inscribe the item on the agenda of its thirtieth Session.

As regards the matter of cooperation in the formulation of regional and sub-regional conventions on banning the dumping of hazardous and other wastes it should be pointed out that the Secretary-General participated in the second meeting of the OAU Group of Legal and Technical Environmental Experts to draw up an African Convention on the ban on the importation into Africa of all forms of Hazardous Wastes and Their Disposal held at Addis Ababa in May 1990. At its Second meeting the Expert Legal and Technical Environmental Experts commenced the second reading of the draft text of the African Convention on the ban of importation of hazardous wastes to Africa.

During the second reading of the draft text of the Convention, the Group of Legal and Technical Environmental Experts agreed that the text met the goals and objectives of the proposed Convention in conformity with the request contained in the relevant OAU resolutions. The Group of Experts, however, felt the need to improve upon the language and substance of the provisions of some of the draft articles so as to give the proposed Convention the desired vigour on effective ban. Significant amendments were therefore made to the text of draft articles 1, 2, 4, 6, 10 and 14. A new preambulatory paragraph recognising the sovereignty of States to ban the importation into, and the transit through their territory of hazardous wastes was also incorporated.¹¹

In draft article 1 enumerating the 'definitions' of terms employed in the draft Convention, the concept of "clean production methods" was included. Paragraph 4 of draft article 1 defines the term "clean production methods" thus :

"Clean production methods means any industrial systems which avoid, or eliminate the generation of hazardous wastes and hazardous products in conformity with the provision of Article 4 of this Convention."

This provision read with the provisions of draft article 4 stipulating the 'General Obligations' would indubitably encourage the use of pollution minimizing methods and could go a long way towards ensuring that polluting technologies are not dumped into Africa. It is noteworthy

11. See OAU Doc. OM/1621 (II) and Annex I. Also TMIIW/Draft/CON.(I) Rev. 2.

that draft article 10 on Inter-African Cooperation *inter alia* stipulates that the parties to the Convention shall "cooperate, subject to their national laws, regulations and policies, in the development and implementation of new environmentally sound clean production technologies."

These provisions are in consonance of preambulatory paragraph 15 which recognises the need to promote the development of clean production methods including technology for the sound management of hazardous wastes produced in Africa.

The scope of the proposed Convention, dealt with by draft article 2, has been enlarged and expanded so as to include those hazardous wastes which have been banned for use in the country of manufacture for environmental and human health reasons. Though these substances are deemed to be hazardous wastes, if disposed of in the country of manufacture, nonetheless they are often permitted to be exported to other countries under the pretext that the importing countries could not afford their substitutes. The new paragraph 1(d) of draft article 2 therefore stipulates as banned :-

"Hazardous substances which have been banned, cancelled or refused registration by government regulatory action or voluntarily withdrawn from registration in the country of manufacture for human health and environmental reasons".

With respect to draft article 4 on General Obligations the draft Convention spells out four major general obligations relating to :

- (i) Hazardous Waste Import Ban;
- (ii) Ban on Dumping of Hazardous Wastes at Sea;
- (iii) Wastes Generated in Africa; and
- (iv) Obligations on the Transboundary Movement of Hazardous Wastes.

Of these, the obligation relating to wastes generated in Africa requires further comments. The Group of Legal and Technical Environmental Experts having affirmed the need to promote the development of clean production methods including technology for the sound management of hazardous wastes produced in Africa have elaborated the concept of clean production methods as a necessary component of a precautionary approach to production process that minimize the generation of hazardous wastes. To this end substantive amendments have been effected in Section 3.2 of draft article 4 dealing with Precautionary Measures. A new subparagraph 2 of section

3 of draft article 4 (General Obligations) requires the Parties (to the Convention) to promote :

- raw material selection, extraction and processing;
- product conceptualisation, design, manufacture and assemblage;
- materials transport during all phases;
- industrial and household usage;
- reintroduction of the product into industrial systems or nature when it no longer serves a useful function.

Clean production shall not include "end-of-pipe" pollution controls such as filters, scrubbers or chemical, physical or biological treatment. Measures which purport to reduce the volume of waste by incineration or concentration, mask the hazard by dilution, or transfer pollutants from one environmental medium to another, are also excluded.

To ensure strict control and monitoring of the movement of hazardous wastes between contracting parties the concept of general notification provided for in article 6 of Basel Convention relating to transboundary movement between Parties has been replaced by Shipment Specific Notification. The new provision reads as under :

"The State of Export shall, subject to the written consent of the State concerned allow the generator exporter to use only the shipment notification. Each shipment shall have the physical and chemical characteristics of the waste involved and identification of point of entry and exit of the shipment. Where transit is involved the same information shall be provided to the transit State."

This stipulation of draft article 6 of the OAU Convention requiring a specific notification of each shipment is decidedly a marked improvement on the former provision under which a general notification would have sufficed and which notification could thus lend itself to misuse or even abuse.

In order to improve upon the effective implementation of the proposed Convention the Group of Legal and Technical Environmental Experts considered the need to harmonise legislation on the generation of hazardous wastes in Africa. It was agreed, however, that although this was worth realising it was a task which the Secretariat of the Conference of parties could best carry out. The Group of Experts expanded the scope and dimension of the Inter-African Cooperation, dealt with in draft article 10, to include the exchange

and dissemination of information on the movement of hazardous wastes in conformity with Article 13 of the draft Convention (Transmission of Information).

Finally, with regard to draft article 14 stipulating the Financial Aspects of the Conference of Parties and the Secretariat thereof the Expert Group proposed the inclusion of a paragraph to provide for contribution by the Contracting Parties for the purpose particularly of the functioning of the Conference Secretariat. Paragraph 3 of draft article 13 reads as follows :

"Parties shall at the first meeting of the Conference of the Parties, agree on a scale of contributions to the recurrent budget of the Secretariat."

(1) *The Objective of the Proposed African Convention*

Many of the developing countries including the member States of the OAU and the AALCC have expressed the view that the Basel Convention should have aimed at banning the movement of hazardous wastes and to have such wastes disposed within the countries of origin, i.e., close to the source of generation. The draft African Convention in its preamble *inter alia* addresses itself to the "increasing mobilization in Africa for the prohibition of transboundary movements of hazardous wastes, and their disposal in African countries."¹² The draft Convention aims at banning all import of hazardous wastes into Africa and to that end draft Article 4 on "General Obligations" stipulates that "All Parties shall take appropriate legal, administrative and other measures within the area of their jurisdiction to prohibit the import of all hazardous wastes for any reason into Africa from non-contracting Parties. Such import shall be deemed to be illegal and a criminal act."

Another explicit objective of the draft African Convention is that of the prohibition of dumping of hazardous wastes at sea including ocean incineration and disposal of hazardous wastes at sea. Paragraph 2 of draft Article 4 *inter alia* obligates Parties, in the exercise of their jurisdiction within their internal waters, territorial seas, exclusive economic zones and continental shelf, to control all carriers from Non-parties and prohibit the dumping at sea including ocean incineration and disposal of hazardous wastes therein. It further stipulates that any dumping at sea whether in territorial or exclusive

12. Para 8 of the Preamble. See TMHW/Draft/CON.(I) Rev. 2.

economic zone or international water of hazardous wastes shall be deemed to be illegal¹³

The Draft African Convention also addressed itself to the question of waste generated in the African continent itself. The Parties to the proposed Convention are required to commit themselves to the adoption and implementation of the preventive, precautionary approach to pollution and, pursuant thereto, to prevent the release into the environment of hazardous wastes by employing clean production methods.¹⁴ Parties to the proposed international instrument are also required to ensure that transboundary movement of wastes within Africa are reduced to the minimum.

(ii) *Scope of Application*

The scope of the proposed Convention is clearly far wider than that of the Basel Convention, 1989. It may be recalled that at Basel, it had been argued that the movement of hazardous wastes across the marine spaces whether through the territorial waters, or the Exclusive Economic Zone are matters dealt with by the United Nations Convention on the Law of the Sea, 1982 and that such traffic is governed by the principles of innocent passage and freedoms of the high seas. It had also been argued that marine dumping is dealt with by the London Dumping Convention, 1972. The exclusion of these marine expanses from the purview and scope of the Basel Convention caused a lot of anxiety among developing countries. As already stated the proposed African Convention¹⁵ fills that lacunae by seeking to ban dumping at sea.

While the Basel Convention had expressly excluded "radiological wastes" from the scope of its application, draft article 2 paragraph 2 of the draft OAU Convention stipulates that "wastes which, as a result of being radioactive are subject to any international instruments, applying specifically to radioactive materials are included in the scope of this Convention".

The scope of the proposed OAU Convention is clearly much wider than that of the Basel Convention. In addition to "hazardous wastes", "other wastes" and "wastes which derive from the normal operations of ships" are also included.

(iii) *General Obligations and State Responsibility*

13. See Article 4 paragraph 2(b) of the Draft Convention.

14. See *Ibid.*, Article 4 paragraph 3.

15. *Ibid.*

An overview of the draft African Convention would be incomplete without a reference to the obligations of the States Parties. The draft African Convention spells out four major general obligations relating to :

Hazardous Waste Import Ban; Ban on Dumping of Hazardous Wastes at Sea; Wastes Generated in Africa; and Transboundary Movement of Hazardous Wastes Between Parties. These obligations are spelt out in draft Article 4 the provisions of which, by and large, are similar to the stipulations of Article 4 of the Basel Convention. Reference must, however, be made to some provisions which break fresh ground and constitute a modification and substantial improvement of the Basel Convention.

Among these may be listed the obligation of the adoption and implementation of the preventive, precautionary approach to pollution problem which entails preventing the release into the environment of substances which may cause harm to humans or the environment without waiting for scientific proof regarding harm. The Parties to the proposed Convention are required to cooperate with each other in taking appropriate measures to implement the precautionary approach to pollution prevention (rather than an assimilative capacity approach to pollution control) and to accord priority to the issue of preventing the transfer of polluting technology to the territories of the parties to the Convention.¹⁶

The draft of the OAU Convention envisages that the States Parties thereto will commit themselves to the imposition of *strict as well as joint and severe liability on hazardous wastes generators in Africa*. In this the draft OAU Convention has opened a new chapter not only in the law relating to environmental protection and preservation but has also incorporated a new section in the matter of international liability for injurious consequences arising out of acts not prohibited by international law. While *lex lata* does not prevent generation of hazardous wastes *do lege ferende* would require that it does so. The OAU Convention seeks to fill that lacunae.

The OAU Convention seeks to include in its scope of application four categories of wastes viz: (i) hazardous wastes; (ii) other wastes; (iii) radioactive wastes; and (iv) wastes which derive from the normal operation of a ship. However, while the Basel Convention envisages the adoption of a protocol listing liabilities for compensation and damages resulting from the transboundary movement and disposal of

16. *Ibid.*, Article 4 paragraph 5.