might think that these national laws related to actions of individual, their effect was the imposition of sanctions against states. He stressed that "this is so if one looks at the substance rather than the form of Acts" He pointed out that these extra-territorial national laws were contrary to international law as they usurped the role entrusted to the UN Security Council for the imposition of sanctions against states. He continued that these laws were unilateral, they affected the principles of sovereignty and sovereign equality of states. They also sinned against the principles of noninterference in the affairs of other states, and non-intervention. Indeed, he elaborated, they were against several instruments and declarations of the UN and other international organisations.

He also shared the view that this new development affected not only domestic economics of developing countries but also South-South Co-operation and economic relations between themselves and the developed world. He concluded by saying that as AALCC it was "our duty to present a unified position which would demonstrate our rejection of such practices."

The Delegate of Egypt thanked the AALCC Secretariat and the Assistant Secretary General Mr.Asghar Dastmalchi for preparation and introduction of the topic,respectively. Reiterating the stand taken by another delegate,he said extra-territorial application of national legislation infringes the sovereign right of states,violates the principles of non-intervention and affects the economic and political relations amongst states. Further elaborating that these sanctions will disturb the North-South (International economic order)relations,he called upon AALCC states to voice their protest. He also pointed out the need for the Secretariat to take up a detailed study on the topic.

The Delegate of Myanmar expressed his government's appreciation to the AALCC Secretariat for a thought provoking and well prepared background note. Recalling the UN Friendly Relations Declaration he stated that extra-territorial application of national laws has no moral,legal or political basis in international relations. He further pointed out that the principles of mutual respect,peaceful coexistence,non-use of force,non-intervention in internal affairs of a state,enunciated in this Declaration,can be said to be a part of the

customary law amongst nations. He further pointed out that one newspaper had reported that a particular country had imposed around 61 multilateral sanctions against 35 countries in a span of 4 years. His concluding remark was the quotation of his Foreign Minister's address to the 51st Session of the General Assembly wherein he had stated "we find unacceptable the threat or use of economic sanctions and extra-territorial application of domestic laws to influence policies in developing countries. It is also a flagrant violation of the UN Charter"

The Delegate of Indonesia conveyed its appreciation to the AALCC Secretariat for having prepared an excellent background work. Expressing deep concern to the extra-territorial application of national legislations,he was of the view that such laws would affect international trade, which would need disputes to be settled amicably or be brought before WTO or other judicial bodies. He further recalled the "Agreement Establishing the WTO," a treaty ratified by many AALCC Member States, which asks states to cooperate to solve problems consistent with the spirit of international free trade. He also supported the idea put forward by the Government of the Islamic Republic of Iran to carry out a comprehensive study on this item.

The Delegate of Japan appreciated the excellent work done by the AALCC Secretariat and thanked the Assistant Secretary General Mr.Asghar Dastmalchi for his presentation of the topic. The Delegate expressed the view that in a changing world scenario, with increasing globalization and liberalization of international trade, especially interdependence would be affected by extra-territorial sanctions. He felt countries "should bear this in mind, while dealing with the topic of sanctions.

The Delegate of Senegal questioned the utility of the discussion when most or nearly all states consider the extra-territorial application of national laws as illegal.

The Delegate of China appreciated the work done by the AALCC Secretariat. While pointing out that extra-territorial application of national legislation is not a new phenomenon, he traced its origin to the colonial era. Referring to his country's experience, he further added,

that before 1949, China had suffered these laws as many other Asian countries. He stated that the founding of the United Nations and the onset of the decolonization process, had dissipated these laws, but they had now reappeared in different form viz.long arm Jurisdiction. Referring to the mandate of the AALCC as a legal body, he said "we can study legal issues, though we cannot deliberate upon the political fallout of these laws." While reiterating acceptance of the UN System of sanctions under Articles 39-42 of the UN Charter, he objected to unilateral application of sanctions against third parties. He expressed the desire that AALCC Member States should frame their opinion on the subject and the Secretariat should conduct a comprehensive study on the topic.

The Delegate of India thanked the AALCC Secretariat for preparing an excellent background paper on the topic and the Assistant Secretary General, Mr Dastmalchi for having introduced the topic. He stated that the referral made by the Islamic Republic of Iran to study the 'Extra-territorial Application of National Legislation: Sanctions Imposed against Third Parties, though an important item is also highly complicated. It involved a combined study of private and public international law aspects.

He further added that his delegation would not shirk from responsibility if the Committee decides to conduct a detailed study of the topic. However, he was of the view that AALCC as a legal consultative body should be concerned with the legal aspects of sanctions. Elaborating on the subject matter of extra-territoriality he said its origins were in criminal jurisdiction. He further added that these legislations were territorial in nature, though they had extra-territorial application.

The support base of these legislations lay in the US domestic application. He felt it is this aspect which his country, and the Member States should be worried about. He called for a strict legal study of the topic, bearing in mind that the ILC was studying the topic counter measures under the rubric of State Responsibility.

The President felt that this item was a very complex legal topic that required careful examination and study. Referring to the legal aspects and the fact that we live in an interdependent world he called for a consensus to study only the legal elements of the topic.

(ii) Decision on the "Extra-Territorial Application of National Legislation: Sanctions Imposed against Third Parties"

(Adopted on 7.5.1997)

The Asian-African Legal Consultative Committee At Its Thirty-Sixth session

Taking Note of the reference made by the Government of the Islamic Republic of Iran;

Appreciative of the Note of the Secretary General on the subject as set out in Doc. No. AALCC\XXXVI\Tehran\97\S. 8;

Having heard the statement of the Assistant Secretary General as well as the interventions of the delegates of Member States and representatives of Observer States

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

Recalling the appeal of the Secretary General in his report on the Organizational Administrative and Financial matters on the question of the proposed activities, in particular the Seminars proposed to be organized during the year;

1. *Requests* the Secretariat to monitor and study developments in regard to the Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties;

2. *Urges* Member States to share such information and materials that may facilitate the work of the Secretariat;

3. *Requests* the Secretary General to convene a seminar or meeting of experts on the above mentioned subject and, to ensure a scholarly and in-depth discussion, to invite a cross-section of professionals thereto;

4. *Further requests* the Secretary General to table a report of the seminar or meeting of experts on the subject at the next session of the Committee; and

5. *Decides* to inscribe the item "Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties" on the agenda of the thirty-seventh Session of the Committee.

(iii) Secretariat Study

Extra - Territorial Application of National Legislation: Sanctions Imposed Against Third Parties.

The Secretariat in its study having referred to the Memorandom of the Islamic Republic of Iran on the fundamental Principles of International Law, supremacy of International Law over Muncipal Law and limits of Extra-Territorial jurisdiction and possible infringement upon the right to development and violation of principles of international Law reviewed the subject by considering the doctrine and practice, limits of the extra-territoriality , response of the International community and some observations

I EXTRA-TERRITORIALITY: DOCTRINE AND PRACTICE

In common understanding jurisdiction in matters of public law character is territorial in nature. However, some States are known to give extra-territorial effect to their municipal legislation which as in the past resulted in a conflict of jurisdiction and resentment on the part of other States.[1]

Civil Law countries jurisdiction over, their nationals for offenses committed even while they were abroad. In recent years Germany is known to have asserted extra-territorial Jurisdiction especially in connection with competition regulations. Among the common law system, United Kingdom law allows such Jurisdiction in select cases : treason,

[1] National Legislation is given extraterritorial effects in such context as (a) to exercise jurisdiction over nationals wherever they may be; (b) to protect a State against treason, terrorism, drug trafficking and other offenses affecting its power and security; (c) to protect and regulate activities affecting its wealth, resources and other economic activities; and (d) to secure the rights of persons

homicide, bigamy, perjury and breaches under the Officials Secret Act. The United States of America has historically asserted far broader extra-territorial jurisdiction than have most other countries. It exercises jurisdiction in a wide variety of cases banking,drug enforcement[2] securities regulations, export and trade control, international aviation[3]; shipping[4], taxation, transnational communications, treason, unauthorized attempts to influence a foreign government, violation of US laws on restrictive trade practices; and failure to answer subpoenas issued to attend a court as a witness for offences committed outside the territorial sea on the high sea[5]

It has been suggested that the exercise of such extra-territorial jurisdiction is deemed desirable and, indeed, inevitable because of (i) the interdependence of the international community necessitating the extension of State's legislative jurisdiction beyond its borders to regulate transnational activities which have profound effect on, or are of concern to the State; (ii) the desirability to avoid safe havens for criminals; (iii) the need to regulate and control activities of entities with agencies spread in different parts of the world but connected or linked to a common source or headquarters crisscrossing several jurisdictions with no single jurisdiction being effective to control the enterprise; (iv) the imperatives of international cooperation to give full effect to bilateral or multilateral obligations.

Claims and counter-claims as to the acceptability or reasonableness of exercise of extra-territorial jurisdiction are often centered around (i) the nature of jurisdiction, civil or criminal ; and (ii) the type of jurisdiction: legislative, adjudicatory or enforcement. As regards the nature of jurisdiction some publicists do not believe that there exists any real distinction between civil and criminal jurisdiction. Others, however, distinguish the elementary cases of direct physical

[2] United States vs. Bank of Nova Scotia, 691 F 2d

[3] Laker Airways Ltd. v. Sabena Belgian World Airlines 731 F.2d. 909. Laker Airways Ltd. v. Pan American World Airways Inc. 604 F. Supp. 280. Also see British Airways board v.Laker Airways Ltd. 1985 Appeal Case 58.

[4] United States v. Atlantic Container Line

[5] M.L. Nash: "Contemporary Practice of the United States Relating to International Law" 74 (1980) p 134

injury from other cases where only an element of alleged remote consequential damage is involved and have argued from that premise that while in the former case, extra-territorial exercise of criminal jurisdiction is permissible, in the latter event to apply the formula of "effects" would be "to enter upon a slippery slope, virtually endorsing unlimited extra-territorial jurisdiction of a State." There is also a divergence of view as to the type of jurisdiction. While some writers discard *in toto* any kind of distinction, others have discussed the problems of extra-territoriality by treating the three different types of jurisdiction separately.

Conflicts have often arisen in the context of economic issues when States have sought to apply their laws outside their territory. In the claims and counter claims, that have arisen with respect to the exercise of extra-territorial jurisdiction the following seven principles have been invoked viz. (i) principles concerning jurisdiction;(ii) sovereignty in particular economic sovereignty and non-interference; (iii) genuine or substantial link between the State and the activity sought to be regulated;(iv) public policy, national interest;(v) lack of agreed prohibitions restricting States right to extend its jurisdiction;(vi) reciprocity and revaliation, and (vii) promotion of respect for law. Notwithstanding the national interests of the enacting State, grave concern has been expressed on the promulgation and application of municipal legislation whose extra-territorial aspects affect the sovereignty of other States. It has been stated in this regard that "any promulgation of provisions intended to pressure other States, particularly developing States, or attempts to apply rules of domestic law extra-territorially is not only incompatible with international law, but is also part of the new generation of unilateral actions that is one of the most disturbing trends on the world stage today. Such actions are guided by domestic political interests and therefore introduce elements that are incompatible with the overall purpose of achieving a more constructive framework for relations among States."[6] While universal jurisdiction may be invoked in order to prosecute such offenses as; piracy, slave trade, genocide; war crimes,

[6] See the statement of the delegate of Colombia, Mrs. Ramirez, made at the Fifty-first session of the General Assembly Official Records of the General Assembly, Fifty-first session A/51/PV.57p8

and attacks on or hijacking of civil aircraft ; are recognized by the community of States as being of universal concern consideration needs to be given to the limits within which a State can exercise its jurisdiction over conduct outside its territory. It may be stated in this regard that in *United States v Aluminium Co. of America*[7] the Court had *inter alia* declared that:

> "any State may impose liabilities, even upon persons not within its allegiances, for conduct outside its borders that has consequences within its borders which the..state..reprehends"

A corollary to that question is the question of the limits for exercise of jurisdiction on the basis of the principles of "effects"[8] "passive personality"[9] nationality principle"[10] Yet another question which may require consideration is whether self-help" by a State, or its officials, or its agents, can be justified in enforcing national law and policies in the face of opposition, lack of cooperation, or lack of expeditious response from foreign States.

The Supreme Court of the United States of America has observed that "Extra-territoriality is essentially, and in common sense, a jurisdictional concept concerning the authority of a nation to adjudicate the rights of particular parties and to establish the norms of conduct applicable to events or persons outside its borders."[11] More specifically,

---

[7] 148 F 2d 416 (1945)

[8] The principle of "effects" is invoked by some States to extend the reach of their laws over activities affecting interests, including those of their nationals.

[9] The passive personality principle allows States to "assume jurisdiction for offenses committed against its nationals. For details see the decision of the Permanent Court of International Justice in *The S.S. Lotus Case* PCIJ Series A

[10] Under the nationality principle a state may prescribe laws governing the conduct of its citizens irrespective of where they reside.

[11] See Environment Defense Fund, Inc., v Walter E. Massey. Reported in *International Legal Materials* (1993) p.505.

the extra-territoriality principle provides that "(r)ules of the United States statutory law, whether prescribed by federal or state authority, apply only to conduct occurring within, or having effect within, the territory of the United States"[12]

An early example of the application of the extra-territoriality principle is American Banana Co. v. United States Fruit Co.[13] In that case, the plaintiff alleged that the defendant, a US corporation, had violated United States antitrust laws by inducing a foreign government to take actions within its own territory which were adverse to the plaintiffs business. The Supreme Court refused, in the absence of a clear statement of extra-territorial scope, to infer congressional intent to apply the federal statute to the conduct of a foreign government because enforcement would have interfered with the exercise of foreign sovereignty.

Similarly, in Foley Bros. V. Filardo,[14] the Supreme Court declined to give extra-territorial effect to a labor statute applying to "(e)very contract made to which the United States ... is a party." The Court recognized that extra-territorial application of the statute would have " extend(ed) its coverage beyond places over which the United States has sovereignty or has some measure of legislative control," and therefore held that the intention "to regulate labor conditions, which are the primary concern of a foreign country, should not be attributed to Congress in the absence of a clearly expressed purpose".

The United States' Supreme Court has observed that there are at least three general categories of cases for which the presumption against the extra-territorial application of statutes clearly does not apply. First, the presumption will not apply where there is an "affirmative intention of the Congress clearly expressed to extend the scope of the statute to conduct occurring within other sovereign nations."[15] It may, however, be mentioned in this regard that Judge King of the United

---

[12] See the - *Restatement (Third) of Foreign Relations Law of the United States. 403 Com. (g) 1987*

[13] 213 US 347(1909)

[14] 336 US 281 at 282

[15] *See Environmental Defense Fund v. Massey supra*

States Court of Appeal in her dissenting opinion in *Bourselan v ARAMCO* observed that Congressional intent to exercise extra-territorial jurisdiction must be explicit only when such an exercise of jurisdiction would violate international law. Where there is no conflict with international law, no explicit congressional authorization is needed. Evidence of expressed 'contrary intent' of Congress must be gleaned from statutory construction and may be sufficient to overcome the presumption[16]

Second, the presumption is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States. Two prime examples of this exception are the Shennan Anti-Trust Act, and the Lanham Trade-Mark Act, which have both been applied extra-territorially where the failure to extend the statute's reach would have negative economic consequences within the United States. As Bowett observes, "in the celebrated *Alcoa* case the U.S. Supreme Court was quite clear that it was dealing with conduct outside its borders that has consequences within its borders'...."[17]

Finally, the presumption against extra-territoriality is inapplicable when the conduct regulated by the government occurs within the United States. By definition an extra-territorial application of a statute involves the regulation of conduct beyond U.S. borders. Even where the significant effects of the regulated conduct are felt outside U.S. borders, the statute itself does not present a problem of extra-territoriality, so long as the conduct which Congress seeks to regulate occurs largely within the United States.

---

[16] See Bourselan Aramco 857 F 2d. 1014 Reported by M.S. Gallozzi in 89 AJIL (1989) p.375

[17] D.W. Bowett "Jurisdiction" changing patterns of Authority over Activities And Resources." *British* Year book of International Law Vol. LIII (1982) pl at 7. It will be recalled that in *U.S v Aluminium Co* impose liabilities even upon persons not i has consequences within its borders which the state reprehends."

II EXTRA-TERRITORIALITY AND LIMITS IMPOSED BY INTERNATIONAL LAW

Notwithstanding the above mentioned presumptions against extra-trerritoriality, in words of Justice Blackmun of the United States Supreme Court, "generally -worded laws covering varying subject matters are routinely applied extra-territorially"[18] Thus in Hellenic Lines Ltd. Vs. Rhoditis the Jones Act was applied extra-territorially as recently as in 1970. Earlier in 1927 the US Supreme Court had applied the National Prohibition Act to the high seas despite its silence on issue of extra-territoriality. Other instances include the extra-territorial application of the treason statute and the Lanham Act.

In recent times the Helms-Burton Act to impose new restrictions on foreign persons who traffic in property confiscated by Cuba[19] the D'Amato Act to cut off trade with Iran and Libya and punish companies incorporated in the United States that continue to trade with Iran, and other measures related to Iraq and Libya have raised several questions related to the extra-territorial application of national laws as well as the question of economic countermeasures[20]

It may be stated that the provisions of the Helms-Burton Act authorizing lawsuits by US nationals against foreign firms that "traffic" in property expropriated Cuba has caused much controversy. While American international Lawyers are divided in their opinion as to whether

---

[18] See the dissenting opinion of Justice Blackmun in Slae, *Acting Commissioner, Immigration and Naturalization Service, et al vs. Haitian Centers Council, Inc. et al. Reported in 32 International Legal Materials (1993) p. 1039.*

[19] Public Law 104-114. For the text of the Act see 35 *International Legal Materials (1996) p 357*

[20] The Preamble to "Iran and Libya Sanctions Act of 1996 Act reads "An Act to impose sanctions on persons making certain investments directly and significantly contributing to the enhancement of the ability of Iran or Libya to develop its petroleum resources, and on persons exporting certain items that enhance Libya's weapons or aviation capabilities or enhance Libya's ability to develop its petroleum resources, and for other purposes." Public Law 104-172. For the text of the Act see *35-International Legal Materials* (1996) p. 1273.

the provisions of the Act violate International Law, there is general agreement among foreign governments that they do so. Such actions and contractions will strain the common commitent to the rule of law. The Helms-Burton Act, it has been observed, "establishes sanctions" of various types against countries that trade with and/or invest in Cuba. In all fairness, this attempt by a State to compel citizens of a third State to obey the legislation of another state is in complete violation of the principles and norms of international Law and what it stands for [21]

Unilateral countermeasures are, of course, distinct from collective countermeasures—otherwise referred to as sanctions. A major distinction vests in the fact that whilst the latter viz. sanctions are decided upon by an international organ, the Security Council, and their implementation is mandatory for all members of the United Nations, unilateral measures are the discretion of each State and are accordingly not mandatory. Yet another distinction lies in the fact that the feasibility of applying economic sanctions is circumscribed by the scope of the provisions of Article 39 of the Charter of the United Nations which requires the existence of a threat to the peace, a breach of the peace or an act of aggression. In contrast a broad interpretation of this requirement may make room for individual countermeasures to come into play. Besides, countermeasures can be adopted for a variety of purposes - political economic or environmental.

In the opinion of the Inter- American Juridical Committee (the juridical body of the Organization of American States), all States are subject to international law in their relations and no State may "take measures that are not in conformity with international law without incurring responsibility." The Juridical Committee observed that while all States have the freedom to exercise jurisdiction , however, such exercise must "respect the limits imposed by international law. To the extent that such exercise does not comply with these limits, the exercising

[21] See the statement of the delegate of the United Republic of Tanzania, Mr. Mwakawago, made at the 57th plenary meeting of the Fifty-first Session of the General Assembly. Official Records of the General Assembly Fifty-first session. 57th Plenary Meeting A/5 IIPV.57 p 10

State will incur responsibility." It was reiterated that the basic premise under international law for establishing legislative and judicial jurisdiction is rooted in the principle of territoriality and that a State may not exercise its power in any form in the territory of another State except where a norm of international law permits." It observed that a State may justify the application of the laws of its territory only insofar as an act occurring outside its territory has "a direct, substantial and foreseeable effect within its territory and the exercise of such jurisdiction is reasonable"

Finally, it found that a State may exceptionally exercise jurisdiction on a basis other than territoriality only where there exists a substantial and significant connection between the matter in question and the State's sovereign authority, such as in the event of the exercise of jurisdiction over acts performed abroad by its nationals and in certain specific cases of the protections objectively necessary to safeguard its essential sovereign interests. The Inter-American Juridical Committee on examination of "the legislation , whose effect is similar to that of the Helms-Burton Act" and the provisions of which establish the exercise of jurisdiction on bases other than those of territoriality concluded that the exercise of jurisdiction over acts of "trafficking in confiscated property" did not conform with the norms established by international law for the exercise of jurisdiction[22]

It may be stated that the Opinion of the Inter-American Juridical Committee merits careful reading in as much as, in the words of Professor Seymour Rubin, it contains much that supports the doctrinal basis for fair treatment and protection of private foreign investment - which is essential for today's interdependent economies. (and) condemns the application of provisions which, in Helms-Burton, are questionable under international law.[23]

[22] for details see opinion of the Inter American JuridicalCommittee in Response to Resolution AG/Doc.33 75/96 of the General Assembly of the Organization entitled Freedom of Trade and Investment in the Hemisphere" Doc. CJI/SO/IFdoc 67196 rev.5-of 23 August 1996

[23] Seymour J Rubin , Introductory Note on "Organization of American States: Inter American Juridical Committee Opinion Examining the U.S. Helms-Burton Act" 35 *International Legal Materials* (1996) p 1322 at 1324