

began in 1911, as well as those which resulted from the use of Libyan territory as "battle ground" by the European Powers during World War II, in addition to the damages caused by that war. Finally, it would also make an assessment of the continuous losses deriving from the lack of removing the war's residues.

In order to carry out this survey an *Ad hoc* "Committee for the studies of compensation for damages caused by colonialism in the Libyan Territory" was established.

The *Ad hoc* Committee faced many difficulties in determining the facts, in estimating the size of the losses, and in establishing a legal basis for the claims. It was pointed out that "the majority of the damages had been caused during different historical periods, and that the reporting of cases of death or of physical injuries or of destruction of properties—and the factual documentation pertaining to them — had not been done either during the Italian colonial period or during the Anglo-French occupation or during the past regime".<sup>20</sup> The *Ad hoc* Committee prepared a very detailed questionnaire seeking frank information from the Libyan people regarding all kinds of damages suffered by them. It also issued guidelines for the persons deputed to collect such information.

At the first stage, the survey covered 100,000 families in various municipalities of the Jamahiriya. There was some lack of response because of shortage of public information. In addition, not much information was available regarding those who were killed or had emigrated. The Committee published *Preliminary Results* of its survey in October 1989.

The *Ad hoc* Committee's second stage of survey would cover about 5,00,000 Libyan families. It is hoped that on the basis of this survey it would be possible to make a good assessment of human and material damage suffered by the Libyan people.<sup>21</sup>

(b) *Symposium on the material remnants of the Second World War in general and in Libya in particular*

This symposium was organised jointly by the United Nations Institute for Training and Research (UNITAR) and the Libyan Institute of Diplomatic Studies. It was held in Geneva from 28 April to 1 May 1981. The purposes of the symposium were :

- (1) to discuss in an objective manner, the historical, economic, technical, legal and humanitarian aspects posed by material remnants of war; and
- (2) to explore ways and means for solving the problem in an international context.

<sup>20</sup> *Preliminary Results* published by the Libyan Studies Centre, October 1989, page 11.

<sup>21</sup> *Ibid*, page 9.

The symposium was chaired by a well known Swiss, Dr. Victor Umbricht, a member of UNITAR's Board of Trustees, and was attended by more than 70 experts from all parts of the world. The participants held extensive discussions on various issues which were summed up by the Chairman as follows :

1. Most participants felt that the Symposium proved useful and timely, in terms of the extensive documentation submitted as well as of the exchange of views which was conducted on a scientific and sober basis.
2. In accordance with the objectives of the Symposium, participants did indeed explore ways and means for solving the problem of material remnants of war, particularly mines. However, the views on the legal ground for solutions differed substantially.
3. The gravity of the situation posed by material war remnants for the countries concerned was recognized, particularly in the field of human and economic losses. Technical assistance, information, financial resources and time were needed to tackle the problem effectively. It was recommended that a start should be made without delay and in appropriate form, preferably in the context of further UN action.
4. Specialized personnel, equipment and know-how in the field of mine clearing do exist and could be made available.
5. International co-operation between the States concerned, both at the bilateral and the multilateral levels, was desirable to carry out the efforts of members of the international community to put an end to the remnants of war. In this context, various suggestions intended to help advance practical and concrete solutions were considered, mainly within the framework of the UN.
6. Some measures envisaged might be taken by the United Nations, under General Assembly Resolution 35/71 of 5 December 1980, especially under paragraph 4.
7. Proposals in this regard were manifold, including designation of an expert study group, setting up of appropriate machinery for the provision of international and technical assistance, creation of an international fund, etc.
8. There was a useful exchange of views on the type of machinery suited for dealing with remnants of war. Suggestions under this heading included the establishment of a task force, a UN subsidiary *ad hoc* organ of the General Assembly or a special body within the UN. It was felt, however, that the choice of the most suitable machinery required further study.
9. In the light of the importance and urgency of the problem of remnants of war in general and in Libya in particular, participants

in the Symposium urged that the Chairman should inform the Executive Director of UNITAR, at an early opportunity, of the discussions in the Symposium and convey its wish that the Executive Director of UNITAR should bring the views expressed and the various suggestions made both in the documents and in the course of the debates to the attention of the Secretary-General of the United Nations".<sup>22</sup>

(c) *International Seminar on Libyan Exiles Deported to Italy*

The Libyan Government organised an International Seminar on Libyan Exiles deported to Italy. This Seminar was held in Tripoli from 25 to 27 October 1989. The topics for discussion at the Seminar included :

- Issue of the Libyan exiles—facts and dimensions;
- Deportation of man from his homeland is a crime against the human race;
- Role of the public opinion and international organisations in facing this crime and the need to adopt an international rule to punish the colonising powers in order to maintain security and peace.<sup>23</sup>

The participants declared that the elimination of the vestiges of the Italian colonialism in Libya is an international issue which does not concern only the relations between Libya and Italy but also the whole international community.

They expressed their full support to the demands of the Libyan Arab people and urged the Italian Government to respond to these just demands :

- “1. To provide information about the Libyan exiles who did not return to their homeland;
2. To provide information about the circumstances in which the deportation took place and the treatment they were met with as well as to hand over all documents related to the issue to the Libyan authorities.
3. To compensate those Libyan exiles who are still alive and the families of those who died for the moral and material losses they suffered from.
4. To provide information about the circumstances of their death and place of their burial and to return their sacred remnants to their homeland.

<sup>22</sup> *The Material Remnants of the Second World War in general and in Libya in particular*, published jointly by UNITAR and the Libyan Institute for International Relations, New York, 15 August, 1983, pp. 89-90.

<sup>23</sup> Press Release issued by Libyan People's Bureau, New Delhi, 25 October 1989.

5. Commitment by the Italian Government to pay compensation for the crimes committed by the Italian colonialism against the Libyan Arab people.”

The participants issued the following recommendations :

- “1. To declare 25th October of every year an International Day for Solidarity with the deported Libyan Arabs.
2. In the context of considering colonialism as international crime the participants call to form an international tribunal to prosecute this crime and to remove its effects.
3. To call upon the world organizations, universities, research centres and human rights committees to organise an international conference on adoption of the principles of compensation for the effects of colonialism. It will be useful that such conference issues a recommendation to establish an institute of comparative studies of various forms of colonialism.
4. To move to hold a special session of the UN General Assembly on the principle of removing the effects of colonialism and compensation to the colonised peoples.
5. To form a follow-up Committee in order to continue the efforts to implement the recommendations made by this Seminar.”

## Part - II

### *Survey of Legal Developments related to the Issues referred to in the Memorandum of the Libyan Government*

Among the items set out in the Memorandum submitted by the Government of the Libyan Arab Jamahiriya, the issues concerning freezing of assets of the developing countries have been examined at some length by the AALCC in the context of its work on Jurisdictional Immunities of States and their Property. Further, an item “Deportation of Palestinians in violation of International Law, particularly the Geneva Convention of 1949” has been on the agenda since the Twenty-seventh Session held in Singapore in March 1988. The studies prepared by the Secretariat on both these items have examined the related legal issues.

Against this background, the examination of legal issues concerning the reference made by the Libyan Government is essentially restricted to issues concerning remnants of war and the Libyan exiles. A brief reference is also made to the obligation concerning restitution of manuscripts, documents and archaeological objects. As for the responsibility of States, a review of the work of the International Law Commission in that respect is included in this survey.

(i) *Applicability of the Laws of War*

The Laws of War, like most other branches of international law, had their origin in custom. There is ample evidence to show that in ancient times the conduct of wars was much more organised than in the modern times. Since the Middle Ages the religious and theological dictates had their distinct influence on these developments. In the second-half of the eighteenth century, the process of replacing the customary practice into conventional norms commenced, particularly, in the matters concerning the method and instruments of war. The first such attempt in regard to land warfare was the conclusion of the *Geneva Convention on August 22, 1864 concerning the amelioration of the condition of soldiers wounded in armies in the field*. It was followed by the *Declaration of St. Petersburg in 1868* which forbids the use of explosive bullets. As regards the warfare on sea, the *Declaration of Paris of April 16, 1856* was the first achievement. Subsequently, the *Brussels Declaration of 1874* and the *Convention relating to the Laws and Customs of War on Land adopted by the Hague Conference in 1899* were other two major developments. The real breakthrough, however, came in 1907 when as many as 13 international conventions were adopted by the *Second Hague Peace Conference*.<sup>24</sup> Subsequently, the four Geneva Conventions concluded in 1949 and its two protocols of 1977 further elaborated and updated many of these provisions in the light of new developments.<sup>25</sup>

(a) *The Laying of Mines*

(i) *The Hague Regulations and 1977 Protocol*

One of the fundamental principles recognised in the Hague Regulations of 1907 was that the right of parties engaged in an armed conflict to adopt means of injuring the enemy is not unlimited.<sup>26</sup> This has been reaffirmed in Article 35 of the 1977 Protocol which lays down the three basic rules namely :

- “1. In any armed conflict, the right of the parties to the conflict to choose methods or means of warfare is not unlimited.
2. It is prohibited to employ weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.

24 Oppenheim L. *“International Law—A Treatise”* Edited by H. Lauterpacht, Seventh Edition, 1955, Volume II, pages 226-231.

25 Detailed comments on the 1949 four Geneva Conventions and its Additional Protocols of 1977 are made in the *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, published by the International Committee of the Red Cross, Geneva, 1987.

26 Article 22 of the Hague Regulations of 1907.

3. It is prohibited to employ methods or means of warfare which are intended or may be expected, to cause widespread, long-term and severe damage to the natural environment.”

The Hague Convention Relative to the Laying of Automatic Submarine Contact Mines, No. 5 of 1907, laid down the rules and precautions for employing unanchored automatic contact mines. It prohibited laying of automatic contact mines off the coasts and ports of the enemy with the sole object of intercepting commercial shipping.<sup>27</sup> At the close of the war, the States responsible for laying the mines, were obliged to remove these mines without delay and notify their position to the affected States.

(ii) *Convention on Prohibition or Restrictions on the Use of certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, New York, 10 April 1981*

This Convention was adopted at the United Nations Conference on Prohibition or Restrictions on the use of certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects held in Geneva from 10 to 28 September 1979 and from 15 September to 10 October 1980.

The Convention, among other things, reaffirms the two principles of international law namely, that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited and the employment in armed conflicts of weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering is prohibited.

The Convention and the Protocols annexed to it prohibit the use of any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays (Protocol I). Further, it prohibits the use of booby-traps, intended to cause superfluous injury or unnecessary suffering, as well as any booby-traps that are placed perfidiously (Protocol II). The Protocol on Prohibitions or Restrictions on the use of Mines, Booby-traps and other devices, including mines laid to interdict beaches, waterways crossings or river crossings. However, it does not apply to the use of ship mines at sea or in inland waterways. They continue to be governed under the Hague Convention of 1907. It restricts laying of mines in the populated areas and provides for precise recording of mined and booby-trapped areas and publication of such information as soon as the hostilities cease. It envisages international co-operation regarding the removal of minefields, mines and booby-traps, exchange of technical information and material assistance and joint operation in appropriate circumstances.<sup>28</sup>

27 Articles 1, 2 and 5 of the Convention.

28 The text of the Convention is reproduced in *Status of Multilateral Arms Regulation and Disarmament Agreements*, United Nations, New York, Second Edition, 1982, pages 153-164.

(b) *Information Concerning Missing and Dead Persons*

The Hague Regulations respecting the Laws and Customs of War on Land annexed to the Hague Convention II of 29 July 1899, and the Hague Convention IV of 18 October 1907, (Article 14 and 19) and the Geneva Convention of 6 July 1906, (Articles 3) dealt with the matters concerning missing and dead persons. Articles 32 to 35 of the 1977 Protocol I further elaborate these general principles. Article 32 recognises the right of families to know the fate of their relatives. Article 33 provides for collection and transmission of information concerning missing persons. Article 34 is concerned with the remains of the deceased. It lays down provisions concerning respect for remains and gravesites and in that respect contemplates conclusion of bilateral agreements for access to and maintenance of gravesites and return of the remains.

(c) *Protection of Civilian Population and Civilian Objects*

The Annex to the IV Hague Convention of 1907 deals with the matters concerning military occupation. The territory is considered occupied when it is actually placed under the authority of the hostile army. However, the occupying forces are obliged to follow certain rules concerning maintenance of public order, protection of the lives of the population and respect for the laws of the occupied country (Article 43). The 1949 Geneva Convention for the Protection of the Civilian Population in Time of War further elaborates the protection enjoyed by the civilian population. Article 27 of the Convention provides that persons on occupied territory have the right to enjoy respect for their person, family rights and religious connections, and the occupying powers must always treat the civilian population humanely and protect them against any acts of violence, intimidation and insults. Moreover, Article 31 provides that "no physical or moral coercion should be exercised against the population of an occupied territory, in particular in order to obtain any kind of information from them. Article 49 prohibits forcible transfer and deportation of persons regardless of motives from occupied territories to the territory of any other States.

Protocol I of 1977 reaffirms the provisions concerning the protection of victims of armed conflicts and supplements measures intended to reinforce their application. Further, it stresses that "the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the parties to the Convention."<sup>29</sup>

(d) *Claims for Compensation for the Losses Caused by War*

In general, the conquest and annexation of territory do not entail any legal obligation to compensate for the damages caused by war. However, there are several precedents and judicial decisions where such claims for compensation have been awarded. As early as 1871, Great Britain and the United States agreed to appoint a Commission to deal with claims for war losses sustained by subjects or citizens of the respective parties during the civil war. Similarly, a Commission was established for dealing with claims by citizens of France and United States.<sup>30</sup> Although, most of these cases dealt with the claims made by the neutrals and the foreigners residing in the enemy territory, such examples did set certain guidelines and precedents.

Article 3 of the Hague Convention IV stipulates that "A belligerent party which violates the provisions of the said (Hague) Regulations shall, if the case demands, be liable to make compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

In addition to this Hague rule, Treaties of Peace concluded after both First and Second World Wars provided for indemnities and reparations. For example, the Treaty of Peace with Germany in 1919 provided for compensation for part of the loss and damage inflicted by her and her allies during the First World War. Under Article 231 of the Peace Treaty, Germany was held responsible to pay compensation for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.<sup>31</sup> Further, Germany was also held responsible "to make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency of each as an Allied or Associated Power against Germany, by such aggression by land, by sea and from the air, and in general all damages as defined in Annex I". An Inter-Allied Commission known as 'Reparation Commission' was established by the Treaty to determine the amount of compensation payable and to supervise the payment.<sup>32</sup>

Another example in this context is the Treaty of Peace with Italy of 1947. The Allied Powers—except Soviet Union, established their claims to general reparations to the proceeds of the Italian property retained in their territories. Italy, as stipulated in Article 75 of the Treaty also accepted the principles of the United Nations Declaration of 5 January 1943, relating to property looted by the Axis Powers and agreed to return property removed from the territory of any of the United Nations.

<sup>30</sup> See *Giles V. The Republic of France*, Pitt Cobet. *Cases and Opinions on International Law*, 1913, p. 259.

<sup>31</sup> Oppenheim L., *op. cit.*, pp. 592-95.

<sup>32</sup> *Ibid.*

<sup>29</sup> Preamble of the 1977 Protocol I.

(e) *War Crimes*

(i) *The Nuremberg Tribunal*

During the Second World War, the atrocities, massacres, executions and killings of hostages and the civilian population in the occupied territories were of such a high magnitude as had never been seen in the history of human civilization. The Allied Governments took a joint decision to punish the war criminals. First, it was announced in their Moscow Declaration of 30 October 1943 and subsequently an Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers was concluded on 8 August 1945.<sup>33</sup> Pursuant to this Agreement an International Military Tribunal was established in Nuremberg. The jurisdiction and other functional details were set out in the Charter annexed to this Agreement.

Article 6 of the Charter, defining the jurisdiction of the Tribunal, stated that :

"The following acts, or any of them are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility :

- (a) *Crimes against peace* : namely, planning, preparation, initiation, or waging of a war of aggression, or of a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- (b) *War crimes* : namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;
- (c) *Crimes against humanity* : namely, murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."<sup>34</sup>

This Agreement, although initially was concluded among the four States, namely, the United States, the United Kingdom, France and the Soviet Russia, nineteen more States adhered to the Agreement.<sup>35</sup> Subsequently, the

<sup>33</sup> *Ibid.*, p. 578.

<sup>34</sup> *Ibid.*, pages 578-579.

<sup>35</sup> These included : Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland,

General Assembly by its resolution 95(1) in December 1946 "reaffirmed the principles of international law recognised by the Charter of the Nuremberg Tribunal and the Judgement of the Tribunal and directed the formulation of these principles with a view to their subsequent codification in the context of a general codification of offences against the peace and security of mankind or in an international criminal code."<sup>36</sup>

(ii) *Codification by the International Law Commission*

*Principles of International Law recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal*

The General Assembly, by its Resolution 177(II) of 21 November 1947, requested the International Law Commission to formulate the Principles of International Law recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal. The Commission took up this topic for consideration at its First Session and completed the work at its Second Session in 1950. The text of the formulations was later submitted to the General Assembly. The General Assembly decided to send the text to the Member Governments for their comments and requested the Commission, in preparing the draft Code of Offences against the Peace and Security of Mankind, to take into account the observations of the Governments on these formulations.<sup>37</sup>

The formulations laid down seven principles. Although directed to individuals, States do incur certain obligations in respect of the acts of commission or omission of their officials. Principle VI sets out the list of crimes which are punishable under international law. One of them is war crimes dealing with the violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purposes of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war, of persons on the sea, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity. Further, Principle VI provides the list of crimes against humanity which include : murder, extermination, enslavement, deportation and other inhumane acts done against any civilian population, or persecution on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.<sup>38</sup>

Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay and Paraguay.

<sup>36</sup> *Oppenheim, op. cit.*, page 582.

<sup>37</sup> See *The Work of The International Law Commission*, United Nations, New York, 1980, pp. 24-25.

<sup>38</sup> *Ibid.*, pp. 116-117.