(iii) Draft Code of Crimes against the Peace and Security of Mankind

The International Law Commission took up the preparation of a draft Code of Offences against the Peace and Security of Mankind in 1947 and completed its work in 1951. The Draft Code was subsequently modified in 1954.[39]

The revised Draft Code, like the Nuremberg principles, contemplated the responsibility of individuals for any offence against the Peace and Security of Mankind. Article 2, paragraph 11, enumerated the acts or offences against the Peace and Security of Mankind, which among others include : "inhumane acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities."[40]

Thereafter the General Assembly at its Thirty-second Session in 1977, decided to consider an item entitled "Draft Code of Offences against the Peace and Security of Mankind"[41] as a separate item. The General Assembly by its resolution 36/106 invited the Commission to resume its work with a view to elaborating the Draft Code of Offences against the Peace and Security of Mankind.[42] By resolution 42/151 of 7 December 1987, the General Assembly, on the recommendation of the Commission amended the title of the topic to read "Draft Code of Crimes against the Peace and Security of Mankind".

At its Thirty-fourth Session in 1982, the Commission appointed Mr. Doudou Thiam as Special Rapporteur, who submitted his six successive reports from 1983 to 1988. Until this stage of its work, the Commission adopted provisionally the following articles and commentaries there on :

1. Definitions; 2. Characterization; 3. Responsibility and Punishment; 4. Obligation to punish or extradite; 5. Non-applicability of statutory limitations; 6. Judicial guarantee; 7. *Non-bis in idem;* 8. Non-retroactivity; 9. Responsibility of the Superior; 10. Official position and criminal responsibility; and 11. Aggression[43]

During the Forty-first Session of the Commission in 1989, the Special Rapporteur submitted his Seventh Report on this topic, which among other things proposed recast of the draft articles on war crimes and crimes against humanity (Article 13 : War Crimes and Article 14 : Crimes against Humanity).[44]

39 *Ibid*, pp. 31-32.

40 *Ibid*, pp. 117-119.

41 Official Records of the General Assembly, Thirty-second Session.

42 General Assembly resolution 36/106 adopted on 10 December, 1981.

43 *Report of the International Law Commission on the work of its Forty-first Session, 1989*, General Assembly Official Records, Forty-fourth Session Supplement No. 10(A/44/10), pages 130-131.

44 *Ibid*, page 131.

As to the crimes against humanity, Article 14 listed the following crimes : Genocide; *Apartheid*; Slavery and other forms of forced labour; expulsion of population, their forcible transfer, other inhuman acts committed against any population or against individuals on social, political, racial, religious or cultural grounds, including murder, deportation, extermination, persecution and the mass destruction of property; attack against assets of vital importance including the human environment.

During its Forty-second Session in 1990, the Commission considered the Eighth Report of the Special Rapporteur. That report was set out in three parts. Part I and II dealt with complicity, conspiracy (complot) and attempt; and illicit traffic in narcotic drugs. Part III contained a "questionnaire report" on the Statute of an International Criminal Court.[45]

(d) Non-Applicability of Statutory Limitations to Crimes against Peace and Security of Mankind

It has been observed that "in international law, the application of statutory limitations is not recognised in the writings of jurists. One would also seek it in vain in the Conventions and declarations that appeared before or after the Second World War".[46] As for the international law, it would be pertinent to quote the recommendation of the Council of Europe which invited member governments "to take immediately appropriate measures for the purpose of preventing that, by the application of the statutory limitation or any other means, crimes committed for political, racial and religious motives before and during the Second World War, and more generally crimes against humanity, remain unpunished."[47] On the similar lines, the United Nations adopted an international convention on 26 November 1968.

The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity came into force on 11 November 1970.[48] In its preamble, the Convention recognised that none of the solemn declarations, instruments or conventions relating to the prosecution and punishment of war crimes and crimes against humanity made provisions for a period of limitation. Article 1, while reaffirming this principle stipulates that no statutory limitation would apply to the following crimes, irrespective of the date of their commission :

(a) War crimes as they are defined in the Charter of the International Military Tribunal, Nuremberg, of 8 August 1945 and confirmed by resolutions 3(I) of 13 February 1946 and 95(I) of 11 December 1946 of the General Assembly of the United Nations, particularly

45 For detailed analysis *See* Document No. AALCC/XXX/Cairo/1991/1, pp. 49-65.

46 *See Yearbook of International Law Commission, 1986 Volume II, Part One*, page 72.

47 *Ibid.*

48 Full text of the Convention is reproduced in *United Nations Treaty Series*, Vol. 754, 1970.

the "grave breaches" enumerated in the Geneva Convention of 12 August 1949[49] for the protection of war victims;

(b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nuremberg, of 8 August 1945 and confirmed by resolutions 3(I) of 13 February 1946 and 95(I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhumane acts resulting from the policy of *apartheid*, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,[50] even if such acts do not constitute a violation of the domestic law of the country in which they were committed.

Under Article IV of the Convention, the State parties to the Convention are obliged to undertake to adopt, in accordance with their respective constitutional process, any legislative or other measures necessary to ensure that statutory or other limitations would not apply to the prosecution and punishment of these crimes and that, where they exist, such limitations should be abolished.

(e) Obligation concerning Restitution of Manuscripts, Documents and Archaeological Objects

It may be recalled that the General Assembly at its Twenty-eighth Session, at the request of Zaire had considered this matter. While affirming that "the prompt restitution to a country of its objects of art, monuments, museum pieces, manuscripts and documents by another country, without charge is calculated to strengthen international cooperation, it also recognised "the special obligation in this connection of these countries which had access to such valuable objects only as a result of colonial or foreign occupation."[51]

It may also be mentioned that earlier in 1970, the UNESCO had adopted an International Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property".[52] Following the adoption of the Convention, the UNESCO constituted a "Committee of Experts to study the Question of Restitution of Works of Art which subsequently was named as the Inter-governmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation." The Inter-governmental Committee formulated a set of recommendations which *inter alia* envisaged

49 *United Nations Treaty Series*, Vol. 75, p. 2.

50 *United Nations Treaty Series*, Vol 78, p. 277.

51 General Assembly Resolution 3187 (XXVIII) of 18 Dec. 1973.

52 This Convention was adopted at the Sixteenth Session of UNESCO in 1970.

promotion of bilateral and multilateral cooperation and negotiations for the restitution of works of art.

(f) State Responsibility

(i) Historical aspect

Legal issues concerning State responsibility are beset with many complexities. It is a vast subject covering several aspects of international law and controversial in the sense that it involves issues where there still exists great divergence of views among the international jurists. Furthermore, decisions of the Permanent Court of Justice and its successor, the International Court of International Justice, and the awards of Arbitral Tribunals do not provide a clear-cut position on many of these issues.

To begin with, in the traditional sense, State responsibility was considered main'y in respect of "injuries to aliens" and certain legal principles developed under the rubric "duty to make reparation" for the injury caused. For example, the Committee of Experts for the Progressive Codification of International Law, which was constituted by the League Assembly by its resolution of 22 September 1924, had State responsibility as one of the topics for codification. The Committee was asked to examine, among other things, "whether, and in what cases, a State may be liable for injury caused on its territory to the person or property of foreigners".[53] The famous judgement of the Permanent Court of International Justice in the *Chorzow Factory* case expanded the doctrine that "it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form".[54] As observed : "No distinction was drawn between *civil* responsibility and *criminal* responsibility (the idea of reparation proper and the idea of punishment), because, strictly speaking, they were an integral part of one and the same rule, namely, "the duty to make reparation" for the injury occasioned.[55] Furthermore, as pointed out, although in the historical context, that "The history of the development of international law on the responsibility of States for injuries to aliens is (thus) an aspect of the history of "imperialism, or dollar diplomacy".[56]

The end of the Second World War brought many profound changes in the development of international law. The criminal responsibility of individuals as elaborated in war crimes trials and the recognition of human rights of individuals had distinct influence over the development of international law of State responsibility.

53 See International Responsibility—*Report by F.C. Garcia-Amador*, Special Rapporteur, A/CN-4/96, 20 January 1956, page 9.

54 *Ibid*, page 20.

55 *Ibid*, page 25.

56 *Ibid*, page 29.

(ii) Work of International Law Commission

Pursuant to the General Assembly Resolution 799 (VIII), the International Law Commission, at its Seventh Session in 1955, decided to take up for codification the item entitled "Principles of International Law governing State Responsibility." The Commission appointed F.C. Garcia-Amador as Special Rapporteur.

The Special Rapporteur submitted his first report in 1956. At the outset, he observed that :

> "the subject of responsibility has always been one of the most vast and complex topics of international law; it would be difficult to find a topic beset with greater confusion and uncertainty. The cause lies not so much in the dominant part played by political factors in the shaping and developing of this branch of international law, as in the glaring inconsistencies of traditional doctrine and practice. Perhaps because of the existence and influence of extraneous factors which are not always compatible with the law, artificial legal concepts and principles have been evolved which often appear markedly incongruent."[57]

The Special Rapporteur traced the history of past efforts to codify the topic under the auspices of the League of Nations, Inter-American bodies and various private bodies.[58] He submitted a detailed analysis of the legal content and function of international responsibility. In his view, international responsibility in the traditional sense and practice was regarded as a consequence of the breach or non-performance of an international obligation, the State being then under a "duty to make reparation" for the injury occasioned. And, "in this sense, the term responsibility was identified with the "liability" of municipal law". Further, he observed :

> "Contemporary international law, however, similar in this respect to municipal law, considers that the notion of responsibility covers not only the duty to make reparation for damage or injury, but also the other possible legal consequences of the breach or non-performance of certain international obligations; the obligations in question are those the breach of which is punishable. In the event of the breach of obligations of this type, the immediate consequence is criminal responsibility, which carries with it the punishment of the offender; upon proof of criminal responsibility, in the proper manner and form, the next consequence is reparation of the injury caused to the victim or to his successors in interest.[59]

In other words, in the present stage of development of international law, the term "responsibility" can include "both civil and criminal responsibility, according to the nature of the obligation the breach or non-performance of which gives rise to the responsibility."[60]

While pointing out the emerging trend of recognition given to the 'individuals' as the subjects of international law, especially in the field of human rights, the Special Rapporteur emphasised that the individuals themselves must be recognised as having the right to bring international claims with a view to obtaining reparation for injuries sustained.

The conclusion of the Special Rapporteur was submitted in the form of "bases of discussion". Among other things, he suggested that the work of codification on this topic should initially be limited to one aspect of the topic, namely, the "responsibility of States for damage caused to the person or property of aliens."

During the consideration of the Special Rapporteur's report by the Commission, divergent views were expressed. Some members suggested that the question of international criminal responsibility should not be considered. The majority did not approve the idea that individuals could be regarded as the possessor of international subjective rights and should have direct recourse for their claims. Some members had reservations regarding the possibility of taking the violation of a fundamental human right as a criterion in establishing international responsibility for injuries to aliens. Some members recognised the need to consider whether international responsibility was an objective responsibility or a responsibility by reason of fault.

At the ninth session, the Special Rapporteur submitted his second report which dealt with the matters concerning responsibility of the State for injuries caused in its territory to the person or property of aliens. The report contained a preliminary set of draft articles which set out in Chapter II "Acts and omissions of organs and officials of the State." Chapter III dealt with the violation of Fundamental Human Rights.[61]

During the consideration of the Second Report by the Commission, once again divergent views were expressed. The Special Rapporteur submitted his third, fourth, fifth and sixth reports at the successive sessions elaborating the basic theme of his approach. The Commission, however, could not devote more time for the discussion on these reports.

In pursuance of the General Assembly resolution 168(XVI) of 18 December 1961, the Commission at its fourteenth session in 1962, discussed the matters concerning its future work programme on the topic of State responsibility.

The Commission established a Sub-Committee with a view to prepare a preliminary report on the scope and approach of the future study. The Preliminary Report was considered by the Commission at its fifteenth session in 1963. It was agreed that (i) Priority should be given to the definitions

57 *Ibid*, page 3.
58 *Ibid*, pages 8-18.
59 *Ibid*, page 19.
60 *Ibid*.
61 See A/CN 4/106.

of the general rules governing the international responsibility of the State; and (ii) in defining these general rules, the experience and material gathered in certain special sectors, especially that of responsibility for injuries caused to the person or property of aliens, should not be overlooked and that careful attention should be paid to the possible repurcussions which developments in international law may have had on State responsibility. The Commission also approved the suggestion of the Sub-Committee that the study of the responsibility of other subjects of international law, such as international organisations should be shelved. The Commission appointed Robert Ago as Special Rapporteur.[62]

The Special Rapporteur presented his first report at the Twenty-first Session of the Commission in 1969, which contained a review of previous work on codification of the international responsibility of States, including the progress made by the Commission.

The Commission examined the report of the Special Rapporteur and requested him to prepare another report containing a first set of draft articles on the topic, the aim being "to establish an initial part of the proposed draft articles, that conditions under which an act which is internationally illicit and which, as such, generates an international responsibility, can be imputed to a State."[63] It also laid down the criteria for the future work which were summarised as follows :

"(a) The Commission intended to confine its study of international responsibility, for the time being, to the responsibility of States;

(b) The Commission would first examine the question of the responsibility of States for internationally wrongful acts. The question of responsibility arising from certain lawful acts, such as space and nuclear activities, would be examined as soon as the Commission's programme of work permitted;

(c) The Commission agreed to concentrate its study on the determination of the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and that of defining the rules that place obligations on States, the violation of which may generate responsibility;

(d) The study of the international responsibility of States would comprise two broad separate phases, the first covering the origin of international responsibility and the second the content of that responsibility. The first task was to determine what facts and circumstances must be established in order to be able to impute to a State the existence of an internationally wrongful act, which as such, is a source of international responsibility. The second task was to determine the consequences attached by international law to an internationally wrongful act in different cases, in order to arrive, on this basis, at a definition of the content, form and degree of responsibility. Once these tasks have been accomplished, the Commission would be able to decide whether a third phase should be added in the same context, covering the examination of certain problems relating to what has been termed the "implementation" of the international responsibility of States and questions concerning the settlement of disputes with regard to the application of the rules on responsibility."[64]

From 1973 to 1979 the Special Rapporteur presented his third to eighth reports which also contained a set of draft articles. At its thirty-second session, the Commission completed the first reading of 35 draft articles. Part I of the draft dealt with "the origin of international responsibility" and Part II with "the content, form and degree of State responsibility."[65]

In the meantime, the Commission appointed Mr. Willem Riphagen as Special Rapporteur. From 1980 to 1985, the Special Rapporteur submitted his first to sixth reports which mainly were concerned with draft articles related to Part II. The Seventh Report, submitted at the thirty-eighth session in 1986, formed Part III dealing with "the settlement of disputes and the implementation of international responsibility". The Report also examined the relationship between the three parts of the draft articles, including the inter-relationship between : (i) the source and content of primary rules; (ii) the "secondary" rules of State responsibility; (iii) the machinery for implementation; and (iv) the actual "force" of the machinery as elements of one system of law.[66]

At its thirty-ninth session, the Commission appointed Mr. Gaetano Arangio Ruiz as a new Special Rapporteur. At the fortieth session, the Special Rapporteur submitted his preliminary report.[67] However, due to lack of time, the Commission could not consider the report.

At the forty-first session in 1989, the Commission took up for consideration the preliminary report of the Special Rapporteur and deferred consideration of his second report.

During its forty-second session in 1990, the Commission focussed its deliberations on the second report. The second report consisted of five parts and dealt with issues such as (i) Moral injury to the State and the distinction between satisfaction and compensation; (ii) Reparation by

62 *The Work of International Law Commission*, United Nations, New York, Third edition, 1980, pp. 80-81.

63 *Ibid, pp. 81-82.*

64 *Ibid*, page 82.

65 *Yearbook of the International Law Commission*, 1980, Vol. II (Part Two), pp. 26-63, Document A/35/10.

66 *Yearbook of the International Law Commission*, 1986, Vol. II (Part One), Document A/CN-4/397 and Add 1.

67 Document A/CN-4/416 and Add 1.

equivalent; (iii) Satisfaction (and punitive damages); (iv) Guarantee of non-repetition of the wrongful act; and (v) the forms and degrees of reparation and the impact of fault.[68]

It is evident from the foregoing brief survey of the legal developments during the last hundred years that there exists some legal foundation upon which it can be possible to build up a framework concerning the duty and obligations of the former colonial powers. One cannot, however, be oblivious of the fact that the laws and practice of States during the colonial era were not consistent and well-defined especially in the areas such as rights and duties of occupying powers and the status of the colonial people. The Hague Regulations, the 1949 Geneva Conventions and its Protocols have to a great extent codified the humanitarian law and set out the rules of international law applicable in the case of war and armed conflict.

As regards the law governing State responsibility, the initial attempt was to restrict its foundation and thereby the rule itself. The International Law Commission has been engaged in the codification of this topic for nearly four decades. One common thread which runs through the deliberations in the Commission over these long years is that because of the complexity of the subject, it requires a thorough examination. In the context of the reference made by the Libyan Government, it is encouraging to note that among the draft articles on State responsibility, Article 19 in Part I concerning the origin of international responsibility specifically deals with international crimes and international delicts. Paragraph 1 of Article 19 stipulates that "An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached". Further, in paragraph 2, it is stated that :

> "An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognised as a crime by that community as a whole constitutes an international crime."

Finally, as laid down in paragraph 3(b), an international crime may result *inter alia*, from "a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination."

68 For a detailed report on the consideration of this topic during the Forty-second Session, see Doc. No. AALCC/XXX/Cairo/91/1, pp. 89-103.

Part - III

General Observations

A study of the history of colonialism would reveal that the then colonial powers had many things in common. First, in the wake of Industrial Revolution in the West, there was a race among them to grab the territories and bring them within their colonial jurisdiction and control. Secondly, ingeneous ways were devised to govern these territories and exploit their valuable natural resources primarily for the colonial powers' benefit. Thirdly, perhaps the most important one, a clear distinction was drawn and perpetuated between their own people and the people under the colonial domination as civilized and uncivilized ones. It is, therefore, natural, that the development of international law during the colonial era had the distinct bearings of the attitude of colonial powers. It would be a stupenduous task to examine the vast material available covering a period of over hundred years. Indeed, it would amount to restatement of development of international law from a different angle.

Issues concerning responsibility and accountability of former colonial powers are of many and varied nature. In order to establish the basis of their legal obligation, it would be necessary to go into the history of the development of international law during the colonial period. The United Nations, since its inception, has been instrumental in ending the era of colonialism. The scores of international conventions, declarations and resolutions adopted by the United Nations and its agencies have brought cheers and hope among the peoples who had been under the colonial rule for long years.[69] While a good deal of success has been achieved towards the implementation of these international instruments, much remains to be done to put nails to the coffin of colonialism and eradicate its last traces.

The problem of remnants of war is one such issue which continues to haunt many a developing countries for obvious reasons. The laws and customs of war developed over the past one hundred years set out the broad framework to establish the legal obligations and duties of States in this respect. However, the loopholes and lacunae have resulted in defiance by certain States to fulfil their obligations and carry out their duties in a responsible manner.

69 See the Declaration on the granting of Independence to colonial countries and peoples (G.A. res 1514(XV) of 14 Dec. 1960; Convention on Prevention and Punishment of the Crime of Genocide (G.A. res 260(III) of 9 Dec. 1948; Universal Declaration of Human Rights (G.A. res. 217(III)A of 10 December 1948; International Convention on the Elimination of All Forms of Racial Discrimination, (G.A. res 2106 (XX) of 21 Dec. 1965; Convention against Torture and other Cruel Inhumane or Degrading Treatment or Punishment (G.A. res 39/46) of 10 Dec. 1984, and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, (G.A. res. 2625(XXV) of 24 Oct. 1970.

It would be seen that the consideration of the issues concerning remnants of war by the United Nations has a chequered history. Immediately after the end of the Second World War, it was considered within the general framework of assistance to newly independent countries for economic reconstruction purposes. Since the 1970, when the environmental issues came to the fore, the problem of remnants of war has been discussed in that context. Because of the consistent demands from countries like Libya and growing support from a large number of developing countries, especially those who were at one time under the colonial regime, the United Nations and the UNEP have made some efforts at least to identify the basic issues.

Today, the problem related to remnants of war is an international problem. Its nature and dimension have been changing in accordance with the methods and the weapons used in the wars. It has both immediate and long-term impacts. As regards the long-term impact, not much attention has been paid by the international community in general and the United Nations and its Agencies in particular.

There are some developing countries whose economy and national development plans have been crippled by the continued existence of the war remnants, especially the left-over mines.

The colonial powers should not evade their accountability to tackle these problems. It is their duty to co-operate with the concerned States and assume the responsibility to provide technical and financial assistance.

Any bilateral approach is the best means to initiate negotiations to arrive at any viable solution. Under an Agreement between Libya and Italy signed at the People's Foreign Liasion Bureau, Italy has agreed to provide comprehensive information and documentation on the fate of the Libyans exiled during the colonial era, whether they are dead or still alive and places of their graves.[70] It would be in the fitness of things that a similar understanding could be reached to deal with the problems relating to removal of mines. In this context, it may be mentioned that the Agreement between the United States of America and the Government of the Democratic Republic of Vietnam on ending the war and restoring peace in Vietnam concluded in Paris on January 27, 1973 is an interesting example to solve the problem of left-over mines at the bilateral level. Under the Agreement a separate Protocol dealt with the issues concerning the removal, permanent deactivation, or destruction of mines in the territorial waters, ports, harbours and waterways of the Democratic Republic of Vietnam. Accordingly, the United States undertook the obligation to clear all the mines it had placed in the territory of Vietnam. The Protocol set out a detailed mechanism to consult and exchange information, including maps of the minefields and joint participation of both the countries.[71]

70 See *The Great Jamahiriya*, September 1, 1985, page 15.

71 Full text of the Agreement is reproduced in *International Legal Materials*, Volume XII, 1973, pp. 91-93.

In the absence of any positive response from the States responsible, it would be desirable to raise the issue at the international fora and build up an international consensus.

There is a good deal of evidence to establish and support the claim of the States seeking financial and technical assistance and their demand for compensation from the States responsible for removing the material remnants of war, particularly mines. These claims are based on the existing principles of international law, both customary and developed through various bilateral and international instruments.

There is a growing demand from the countries which had remained under the colonial regime for long years and suffered human loss and material damage for the payment of compensation by the colonial powers. The illegal deportation of their nationals and the collateral damages arising therefrom has been an impediment in their human resource development plans.

The delay in making such claims may be questioned by the colonial powers, but the legitimacy of such claims has to be examined in the context of the contribution to their present prosperity made in the past by the colonized countries and the causes of today's poverty and underdevelopment of the then colonized countries.

V. THE LAW OF INTERNATIONAL RIVERS

(i) INTRODUCTION

1. The subject "The Law of International Rivers" was taken up by the AALCC through the reference made by the Governments of Iraq and Pakistan under Article 3(b) of the AALCC Statutes,[1] during its eighth session held in Bangkok in 1966.

2. At the ninth session of the AALCC, held in New Delhi in December 1967, the Delegates of Iraq and Pakistan in their introductory statements indicated the topics and issues which they wished the AALCC to consider. Iraq's primary interest was concerned with two basic questions, namely :

(i) Definition of the term "International Rivers"; and

(ii) Rules relating to utilization of waters of international rivers by the States concerned for agricultural, industrial and other purposes not connected with navigation.

Pakistan's main concern was in connection with the uses of waters of international rivers, and more particularly, the rights of lower riparians.

3. After a preliminary exchange of views at the New Delhi Session, the AALCC directed the Secretariat to collect the relevant background material on the issues indicated in the statements made by the delegations and to prepare a preliminary study for the consideration of the AALCC. One of the major issues which arose in the course of discussions at that session was how far the rules developed and practised by the European nations would be applicable to the issues which arose in the Asian-African region in view of the different geophysical characteristics of the rivers and the needs of the people for different uses of the waters.

4. At the tenth session, held in Karachi in January 1969, the AALCC took up the subject of International Rivers for further consideration. It took note of the views and opinions expressed from time to time by jurists and experts on the subject, the decisions of the Permanent Court of International Justice, national courts and arbitral tribunals as well as the work already done by institutions and bodies including the International Law Association and the Institute of International Law. The AALCC also considered the relevant provisions of treaties and conventions with regard to international rivers in Asia, Africa, Europe and the Americas which had been reflected in the study prepared by the AALCC Secretariat. A Sub-Committee composed of the representatives of all Member Governments was thereafter appointed to prepare a draft of articles on the law of international rivers, "particularly

1 Article 4(c) of the revised Statutes.

in the light of experience of the countries of Asia and Africa and reflecting the high moral and juristic concepts inherent in their own civilizations and legal systems" for consideration of the AALCC at its next session.

5. The Sub-Committee appointed at the Karachi Session met in New Delhi in December 1969 under the Chairmanship of Hon'ble Syed Sharifuddin Pirzada, the then President of the AALCC. The representatives of the Governments of Ghana, India, Indonesia, Iraq, Japan, Jordan, Pakistan, Sierra Leone and Sri Lanka participated. At this meeting the Delegation of Pakistan placed a set of ten draft articles for consideration of the Sub-Committee. The Delegation of Iraq also placed before the Sub-Committee a set of draft principles consisting of 21 articles. The Delegates of Iraq and Pakistan suggested that the Sub-Committee should proceed to discuss the subject on the basis of the draft formulations presented by them, but the Delegation of India suggested that the Sub-Committee should take the Helsinki Rules drawn up by the International Law Association as the basis for discussion. As no consensus could be reached on the procedure to be followed, it was decided that the matter should be referred to the AALCC at its eleventh session. Nevertheless, the Sub-Committee held general exchange of views on the various issues and questions suggested by Member Governments, including the definition of an international river; the general principles of municipal water rights existing between owners of adjacent land under different municipal systems; the principles that could be deduced from the decisions of courts and arbitral tribunals on disputes relating to water rights between independent States and constituent States of a federation; the general principles governing the responsibility of States and the doctrine of abuse of rights; river pollution; rights of riparians regarding the uses of waters of international river basins; and settlement of river water disputes.

6. During the eleventh session of the AALCC, held in Accra in January 1970, the Delegations of Iraq and Pakistan submitted a joint draft consisting of 10 articles which they requested the AALCC to take up as the basis for discussion. The Delegate from India also submitted a proposal that the Helsinki Rules should be the basis of the AALCC's study. He suggested that the first eight articles of those rules should be taken up. No progress could be made at the Accra Session on the subject since the discussion centred around procedural issues. It was, however, agreed that both sets of proposals should be referred to the Member Governments for their comments and the subject be taken up at the twelfth session of the AALCC.

7. At the twelfth session held in Colombo in January 1971, a Sub-Committee on the subject was appointed. It was mandated to prepare a working paper which would form the basis for further discussions on the subject. It would take into account the proposals contained in the joint paper of Pakistan and Iraq and the proposal of India concerning the Helsinki Rules. The Sub-Committee was composed of the representative of Sri Lanka acting as Chairman, the representative of Japan as the Rapporteur and the representatives of Egypt, Ghana, India, Indonesia, Iran, Iraq, Jordan, Nigeria and Pakistan as members. The Rapporteur of the Sub-Committee

submitted his working paper containing ten (I to X) draft propositions which were accepted by the Sub-Committee as the basis for discussion. Due to lack of time, the Sub-Committee was able to consider only draft propositions I to V and it recommended consideration of the remaining propositions at an inter-sessional meeting to be convoked prior to the thirteenth session of the AALCC. The Sub-Committee subsequently met in Colombo in September 1971 when it completed its consideration of the draft propositions contained in the Rapporteur's Report.

8. During the thirteenth session, held in Lagos in January 1972, the subject was taken up for further consideration by a Sub-Committee as reconstituted with the representative of Japan as the Chairman and the representative of Egypt as the Rapporteur. The other members of the Sub-Committee were the representatives of Ghana, India, Iran, Iraq, Kenya, Nepal, Nigeria and Pakistan. During the meetings of the Sub-Committee, it was observed that the draft propositions which had been considered by the Sub-Committee appointed at the Colombo Session, did not cover all aspects of the law of international rivers and that they had not addressed themselves to the rules relating to navigational uses of such rivers. The Sub-Committee, accordingly, decided to take up various other aspects of the subject including the questions of navigation, pollution, timber floating and the right of land-locked countries to access to the sea through international rivers, at its future meetings. It was further agreed that a new set of draft proposals together with commentaries should be prepared by the new Rapporteur (Dr. Ibrahim F. Shihata) and circulated through the Secretariat to the members of the Sub-Committee before the next session.

9. During the fourteenth session of the AALCC, held in New Delhi in January 1973, the subject was once again taken up by the Sub-Committee. The revised draft formulations presented by Dr. Shihata as the Rapporteur appointed at the Lagos Session was discussed. The Sub-Committee was, however, not in a position to come to any conclusions and, consequently recommended that the subject be taken up for further consideration at one of the future sessions of the AALCC. The subject, however, was not taken up at any of the subsequent sessions due to the heavy work load connected with the preparations on the Law of the Sea and matters relating to economic cooperation. It was also felt that it would be more fruitful for the AALCC to take up the matter after substantial progress had been made on the subject by the International Law Commission which was also seized with the item.

10. At the suggestion of the Government of Bangladesh, the subject was placed again on the agenda of the twenty-third session of the AALCC held in Tokyo in May 1983. The issue at the Tokyo Session was whether the topic should be taken up for further study, and, if so, what should be the scope of its work taking into account the progress made by the International Law Commission. During the course of the discussion, the Delegate of Bangladesh suggested that the AALCC should resume its active consideration of the subject which would not in any way hamper the progress of work

in the International Law Commission or in any other forum. The Delegate of Nepal proposed that the AALCC might prepare some guidelines for regional system agreement which could be discussed at the AALCC's next session. The Delegate of Turkey suggested that the AALCC should only resume consideration of the subject, if it was possible to do so, without creating any complication in regard to the study by the International Law Commission. The Delegate of Iran was of the view that since the subject was under consideration of the Commission, it would be more appropriate to await the final results of the work of that body. The Delegate of India was also of the view that duplication of work should be avoided, but at the same time the AALCC should keep itself fully informed about the developments in the International Law Commission on the subject. It was finally agreed that a preliminary study should be prepared by the Secretatriat for further consideration of the programme of work at the next session. It was indicated that the preliminary study should be undertaken with a view (i) to identify the areas which were not likely to be covered by the work of the International Law Commission and where it was deemed desirable that the AALCC should undertake a study; (ii) to examine the provisions of the articles provisionally adopted by the Commission, and (iii) to submit a tentative programme of work for consideration of the AALCC.

11. At its twenty-fourth sesssion, held in Kathmandu (Nepal) in February 1985, the AALCC considered the 'Preliminary Report and an Outline on Tentative Programme of Work[2] prepared by Secretariat. The Report had indicated the areas not covered by the work of the International Law Commission and, *inter alia*, listed five areas wherein work might be undertaken by the AALCC i.e.,

(i) An examination of the draft articles after they were adopted by the ILC and to furnish comments thereon for consideration of the Sixth Committee and possibly by a diplomatic conference;

(ii) Development of norms and guidelines for the legal appraisal of the validity or otherwise of any objection that may be raised by one watercourse State in relation/regard to projects sought to be undertaken by another watercourse State;

(iii) Study the matter relating to navigational uses of and timber floating in international watercourses;

(iv) Study of other uses of international rivers such as agricultural uses, economic and commercial uses and domestic and social uses; and

(v) Study of State practice in the region of user agreements and examining the modalities employed in sharing the waters of such watercourses as the Gambia, Indus, Mekong, Niger and Senegal.

2 See Document AALCC/XXIV/19.

12. The Delegate of Nepal was of the view that the AALCC should decide its course of work on the subject keeping in view the work of the International Law Commission. The Delegate of the Islamic Republic of Iran expressed the view that the rules relating to navigational uses of international watercourses were already established and recognised. He proposed that the Secretariat should render its assistance to the ILC to complete its study in the near future. The Delegate of Pakistan expressed the view that a study on the subject should be based on certain principles including *inter alia* the equitable apportionment of waters; prohibition against activities causing appreciable harm to other reparians; environmental protection; and pacific settlement of disputes. The Delegate of Bangladesh also called for the preparation of a set of well agreed principles to be followed by all countries having common use of international watercourses. The Delegate of India suggested that a study be made of the State practice in the region of user agreements and modalities employed in the sharing of international watercourses in Africa and Asia. The Delegate of Turkey expressed the view that the AALCC should take up the matter only after the ILC had concluded its work on the draft articles on the subject.

13. No decision, however, was arrived at as to the future work that may be undertaken by the AALCC. Pending a final decision on the future work on the subject in the AALCC, the Secretariat presented a brief[3] for the twenty-fifth session held in Arusha in February 1986 which was restricted to monitoring the progress of work in the ILC.

14. During the subsequent sessions of the AALCC held in Bangkok (1987), Singapore (1988), Nairobi (1989) and Beijing (1990), the report of the Secretariat examined the draft articles thus far adopted by the ILC and furnished the comments thereon for consideration of the Sixth Committee as well as of the sessions of the AALCC. Since its twenty-sixth session (1987) the AALCC has been discussing the topic under the item "Report of the International Law Commission". During the twenty-ninth session held in Beijing in 1990, the Delegation of Bangladesh proposed that the item should be inscribed on the agenda for a full discussion. No objection was raised to that suggestion. During the 222nd Meeting of the Liaison Officers held on 22 November, 1990, however, an objection was raised by the representative of India to place this item on the agenda for the thirtieth session.

15. The Secretariat reported the progress of work in the International Law Commission to the AALCC's thirtieth session held in Cairo in 1991. It further observed that after the ILC had completed the first reading of the draft articles during its forty-third session in 1991, the States would be required to send their comments and observations to the Commission for its second reading. To assist the Member Governments in this regard, it was proposed that the item should be placed as a separate agenda item in

3 See Document AALCC/XXV/10.