ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

THIRTY-FIRST SESSION

ISLAMABAD, 25 JANUARY TO 1 FEBRUARY 1992

PROCEEDINGS AND WORKING PAPERS

THE AALCC SECRETARIAT

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PREFACE

The Thirty-first Annual Session of the Asian-African Legal Consultative Committee (AALCC) was held in Islamabad (Pakistan) from 25 January to 1 February 1992. It was attended by high-level delegations from 35 of the Member States of the AALCC and observer delegations from 12 non-Member States. In addition thereto, the United Nations, the International Court of Justice, the International Law Commission, Office of the United Nations High Commissioner for Refugees, the International Institute for the Unification of Private Law (Unidroit), Saudi Fund for Development and International Ocean Institute were also represented.

The substantive items on the agenda of the Islamabad Session were : (i) Work of the International Law Commission; (ii) Status and Treatment of Refugees; (iii) the Law of International Rivers; (iv) Law of the Sea; (v) Deportation of Palestinians in Violation of International Law; (vi) Responsibility and Accountability of former Colonial Powers; (vii) Preparations for the United Nations Conference on Environment and Development (UNCED) in June 1992; (viii) Debt Burden of Developing Countries; and (ix) Trade Law Matters. The 'Trade Law Matters' included : (i) Legislative Activities of the United Nations and other International Organisations concerned with International Trade Law; (ii) Legal Aspects of Privatization; (iii) Establishment of a Data Collection Unit as an integral part of the AALCC Secretariat; and (iv) Progress Report on the AALCC's Regional Centres for Arbitration. The item 'Preparations for the UNCED' was the subject-matter of a two-day Special Meeting on Environment and Development convened during the Islamabad Session.

Although all the agenda items, with the exception of the one relating to the Debt Burden of Developing Countries, were discussed at the Islamabad Session, this publication covers the proceedings and the working papers presented by the Secretariat only on the following topics : (i) United Nations Decade of International Law; (ii) Status and Treatment of Refugees; (iii) Deportation of Palestinians in violation of International Law; (iv) Responsibility and Accountability of former Colonial Powers; (v) The Law of International Rivers; (vi) Debt Burden of Developing Countries; (vii) Legal Aspects of Privatization; (viii) Establishment of a Data Collection Unit within the AALCC Secretariat; and (ix) Environment and Development. The items relating to the Work of the International Law Commission (ILC) and the Law of the Sea have not been included in the publication because the role of the AALCC is at the moment confined to monitoring the work of the ILC and the PREPCOM for the International Sea-bed Authority and Tritbunal for Law of the Sea. On the other hand, although the topic of Debt Burden of Developing Countries was not discussed at Islamabad, it is covered in the publication on account of its importance for the developing countries.

on the proceedings and decisions taken at the annual sessions. The research papers and studies prepared by the Secretariat which served as the bases of discussions at the annual sessions were seldom included. The circulation of these research materials had hitherto been restricted to governments and organizations participating in the annual sessions. Of late, criticism was noticed to be growing amidst the legal and academic community in the Afro-Asian region at their being deprived of any access to the research work done by the Secretariat which was an important source of evidence of the Afro-Asian State practice in the field of International Law. This is particularly important during the U.N. Decade on International Law.

It is with a view to meeting this criticism, that the present publication shifts the focus to the research briefs and studies presented by the Secretariat to the Islamabad Session on the basis of which the various topics on the agenda of that session were discussed and debated. In the future, it is intended to follow this pattern. It is believed that this innovation would be welcomed not only in the legal and academic circles in the Afro-Asian region but also by the Member Governments of the AALCC.

New Delhi

1st August, 1992

Frank X. Njenga

Secretary-General, AALCC

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(i) INTRODUCTION

1. The General Assembly of the United Nations by its resolution 44/23 adopted on 17 November 1989 declared the decade of the nineties as the United Nations Decade of International Law for the realisation of the following objectives :

- To promote acceptance of and respect for the principles of international law;
- To promote means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the International Court of Justice;
- To encourage the progressive development of international law and its codification; and
- To encourage the teaching, study, dissemination and wider appreciation of international law.

2. In order to invite specific proposals for a programme on the Decade and appropriate action to be taken, the Secretary-General of the United Nations was requested to seek the views of the member States, appropriate inter-governmental and non-governmental organisations and to submit a report thereon to the forty-fifth session of the General Assembly.

3. Since the Asian-African Legal Consultative Committee (AALCC) whose very *raison d'etre* is the progressive development and codification of international law, had also been invited to submit its views and observations towards finalizing a programme for the Decade and the action to be taken in that regard, including the possibility of holding of a Third International Peace Conference at the end of the Decade, it decided to address itself and respond to the substance of the General Assembly Resolution 44/23.

4. The matter was, therefore, included in the agenda of the twenty-ninth session of the AALCC held in Beijing in March 1989 and discussed there on the basis of a preliminary note presented by the Secretariat. The preliminary note spelt out the role which the AALCC could possibly play during the decinneum towards realising the objectives set for the Decade. The Beijing Session mandated the Secretariat to prepare a comprehensive study. After the Beijing Session, the Secretariat prepared and forwarded to the Office of the UN Legal Counsel its observations and views on the matter which were reproduced in the Report on the UN Secretary-General on the United Nations Decade of International Law. (Doc. No. A/45/430 of 12 September 1990). This report served as the basis of discussions in the meetings of the

Working Group on the United Nations Decade of International Law constituted during the forty-fifth session of the General Assembly to prepare generally acceptable recommendations for the Decade. On the basis of the recommendations made by the Working Group, the General Assembly at its forty-fifth session adopted a programme of activities to be commenced during the first term (1990-92) of the Decade and requested the Working Group to continue its work during the forty-sixth session in accordance with its mandate.

5. At the thirtieth session of the AALCC held in Cairo (April 1991), the Secretariat presented a further study (AALCC/XXX/Cairo/91/4). This study, *inter alia*, enumerated the initiatives which the Secretariat had undertaken in the fulfilment of the mandate entrusted to them. The study also included the observations and views which the Secretariat had prepared and forwarded to the Office of the UN Legal Counsel, reproduced in Doc. No. A/C.6/45/WG/CRP.2 of 26 October 1990. At the Cairo Session, the AALCC, while directing the Secretariat to continue its efforts at making contributions to the success of the Decade, decided to place the item on the agenda of its next session.

Discussions and Decisions taken at the Islamabad Session

6. The thirty-first annual session of the AALCC was held in Islamabad (Pakistan) in January-February 1992. At this session, the item was further discussed in the light of a Report on the UN Decade of International Law presented by the Secretary-General (Doc. No. AALCC/XXXI/Islamabad/92/6). The Report, *inter alia*, outlined the initiatives undertaken by the Secretariat since the last session of the AALCC held in Cairo.

7. The *Assistant Secretary-General* (Mr. Mostafa Foroutan) introducing the Secretary-General's Report briefly explained the developments that had taken place during the last one year. He listed the matters of common concern for the developing countries which included, *inter alia*, the sustainable development, human rights violations, sharing of burdens on the basis of equity, technology transfer and the settlement of disputes including institutional developments. He suggested that the UN agencies, regional organisations and States should organise seminars, symposia, training courses, lectures and meetings and undertake studies on various aspects of international law. He also referred to the area of the resolution of international economic problems, particularly those involving developing countries.

8. *The Chairman of the Working Group on the United Nations Decade of International Law (Mr. Justice Aftab Farrukh)*, in the course of his address, reported on the progress made in the Working Group during the forty-sixth session of the UN General Assembly towards the realisation of the primary objectives set for the Decade.

On the first objective of promoting acceptance of and respect for the principles of international law, he pointed out that the Working Group was apprised of the different modalities used in different countries regarding the publication of the lists and the texts of multilateral treaties to which they were parties. In response to the request that the United Nations bring out a compendium of the multilateral treaties deposited with it indicating the participation of each State in those treaties so as to assist the States, particularly the developing countries, in making their own decisions on whether to become parties to those Conventions, the Secretariat informed the Working Group that the data relating to the status of the multilateral treaties deposited with the United Nations would be transferred from the word processor currently used to modern software for on-line access by all in the coming biennium. The Working Group was also informed that the data in the UN Treaty Series was under a verification process for accuracy and completeness and was expected to be completed by the end of 1993. That data would also be made available for on-line access by delegations, public entities as well as private individuals.

On the second objective of peaceful settlement of disputes between States, several suggestions were made in the Working Group regarding enhancement of the role of the International Court of Justice, particularly concerning the acceptance of its compulsory jurisdiction. On the proposal that the Secretary-General of the United Nations be authorised to request the advisory opinion of the Court, there was a divergence of views. With regard to the question of publication of the judgements and advisory opinions of the Court for wider circulation, the Working Group was informed by the UN Secretariat that it would soon bring out the summaries of the judgements and advisory opinions from 1949 to 1990 in all the official languages of the United Nations and keep on updating them in subsequent years.

As for the third objective of progressive development of international law and its codification, the Working Group expressed its satisfaction with the detailed information received from the international organisations on their activities relevant to this aspect.

On the fourth and final objective of encouraging the teaching, study, dissemination and wider appreciation of international law, it was proposed that the United Nations system of organisations, regional organisations including the AALCC and States should consider organising seminars, symposia, training courses, lectures and meetings and undertake studies of various aspects of international law. Students, professors, judges and lawyers of international law and personnel from the Ministry of Foreign Affairs should be given scholarships in international law in various universities.

The world political situation, in his view, had never been so conducive for the promotion of greater respect for the principles and the enhancement of the role of international law. However, matters of concern for the developing countries that needed immediate attention, according to him, included : (i) common concern of mankind in areas beyond the limits of national jurisdiction; sustainable development with special reference to the special needs of developing countries and environmental protection; (ii) global commerce and sharing the burden on the basis of equity, international cooperation and technology transfer; (iii) human rights and environmental protection including the right

to a healthy environment; and (iv) institutional arrangements with regard to the establishment of an international criminal jurisdiction.

Finally, he urged the AALCC to strive for the resolution of international economic problems, particularly of developing countries through measures such as a reduction in interest rates, increase in development assistance, curbs on protectionist policies and trade barriers, technology transfer to developing countries and stabilisation of commodity prices.

9. The *Delegate of China* underlined the importance of international law in the current transition period in international relations, especially for those peoples all over the world who had suffered oppression and slavery under imperialism and colonialism. He emphasized that the new international order should be established on the basis of the principles of international law and the generally recognised norms governing international relations. For realizing this goal, the Delegate said, the activities being undertaken during the Decade of International Law would be of immense help.

Referring to the measures taken by the Chinese Government in that regard, he stated that those included the organisation of two symposia, one related to 'Environmental Law' and the other to 'Third World Countries and International Law'. The first symposium was held in Beijing during August 1991 in cooperation with UNCED. He felt that the increasing involvement in the activities of the Programme would help the countries of Asia and Africa to expound their points of view.

10. The *Delegate of Japan*, appreciating the excellent preparatory work done by the AALCC Secretariat on this topic, referred to the Organisation of the Workshop on International Refugee and Humanitarian Law in the Asian-African Region jointly organised by the AALCC and UNHCR in New Delhi in October 1991 and felt that this was particularly useful and consonant with the goals aimed at during the UN Decade of International Law. He expressed the hope that the AALCC as a forum for Asian and African legal experts would assist in realising the objectives of the Decade. He also briefly dealt with the role of international law in establishing a peaceful international community. He laid stress on the importance of international law for the peaceful settlement of disputes between States. He pointed out that the Government of Japan had made a contribution of US $ 55,000 in July 1991 towards the Trust Fund for assisting the States in the settlement of disputes through the International Court of Justice. Finally, he stated that his country intended to do its utmost for the success of the UN Decade of International Law.

11. The *Delegate of Iran* commended the Secretariat for its study on the topic and observed that the objectives to be realised during the Decade should be :

(a) acceptance of and respect for the principles of international law;

(b) use of peaceful ways and means for the settlement of international disputes;

(c) gradual preparation and development of international law; and

(d) promoting respect for international law.

He noted that developing countries had been unable to make significant contribution towards the attainment of these objectives. He, however, appreciated the role of the AALCC in helping member States to take an active part in the international legal process. He referred to the efforts under way in the United Nations in this regard and proposed that the AALCC Secretariat should submit a report on the initiatives taken by it on this item to the next session of the UN General Assembly. He further proposed that the AALCC Secretariat should prepare a study formulating programmes for the remaining part of the Decade which should be circulated amongst the member States of the AALCC.

12. The *Observer for Sweden* observed that though two years of the Decade had now passed, the work was still at a preliminary stage. He noted that the contributions to the programme for the Decade from member States of the United Nations were fairly limited. He outlined the proposed measures for involving member States actively. He referred to the basic idea of making the International Court of Justice widely acceptable and urged the Member States to take the required measures to realise this goal. He then mentioned the measures and activities undertaken by Sweden and other Nordic countries.

He drew attention of the AALCC to the complexities involved in a codification exercise, but felt that the idea of a new Peace Conference towards the end of the Decade seemed to be widely supported. He dealt briefly with the infrastructural problems in implementing the programme and activities of the Decade. In this context, the Observer referred to the growing cooperation among the legal advisers of the Ministry of Foreign Affairs of the Member States of the United Nations and the initiatives taken by the legal advisers in that regard.

Finally, dealing with the future programmes, the Observer outlined the difficult tasks which could be refugees, environment, economic development, overpopulation and many other problems. In that context he observed that "we should do everything possible within the framework of our responsibilities as lawyers". He also referred to the newly constituted legal advisers' forum for informal consultations about the Decade and the offer of Sweden to assist in financing similar gatherings in the various parts of Asia and Africa.

13. At the end of the deliberations, the AALCC unanimously adopted the following resolution :

"UNITED NATIONS DECADE OF INTERNATIONAL LAW

The Asian-African Legal Consultative Committee, having taken note at its thirty-first session of the Report of the Secretary-General on the United Nations Decade of International Law (Doc. No. AALCC/XXXI/ Islamabad/92/6) and having heard the Chairman of the Working Group on

the United Nations Decade of International Law and member and observer delegations during the session

Reaffirms the importance of strict adherence to the principles of International Law as in the Charter of the United Nations;

Affirms that many of the political, economic and social problems between Member States can be settled on the basis of the law;

Decides that the item be given serious attention and steps be taken to place the same on the agenda of the meeting of the Legal Advisers of the Member States of the AALCC to be convened at the United Nations Office in New York during the forty-seventh session of the General Assembly;

Welcomes the various initiatives taken by the Member States of the AALCC in the implementation and observance of the Decade;

Requests the Secretary-General to apprise the Secretary-General of the United Nations of the initiatives taken by the AALCC in this regard;

Urges the Member States to continue to give serious attention to the observance and implementation of the Decade;

Directs the Secretariat to continue its efforts towards the success of the United Nations Decade of International Law; and

Decides to place the item 'the United Nations Decade of International Law' on the agenda of its thirty-second session."

1. The Asian-African Legal Consultative Committee (hereinafter referred to as the Committee) at its Thirtieth session held in Cairo in April 1991 took note on the Report of the Secretary-General of the Committee. Professor Budislav Vukas, the Chairman of the *Ad Hoc* Working Group on the United Nations Decade of International Law established during the Forty-fifth Session of the Assembly, gave a comprehensive report on the work of the Working Group. The Committee expressed its gratitude to Professor Budislav Vukas, the Chairman of the Working group, and requested the Secretary-General of the Committee to report to the Secretary-General of the United Nations on the initiatives taken by the Committee in that regard.

2. The Committee also directed the Secretariat of the Committee to continue its efforts towards its contribution to the success of the United Nations Decade of International Law and that the item be given serious attention and be placed on the agenda of the meeting of the Legal Advisers of the Committee to be convened at the United Nations offices during the forthcoming Session of the General Assembly.

3. In partial fulfilment of that mandate the Secretariat of the Asian-African Legal Consultative Committee has prepared the present report which *inter alia* incorporates some of the views expressed by delegates of member States in the Thirtieth Session of the Committee on the objectives of the United Nations Decade of International Law as defined in General Assembly Resolution 44/23.

4. The adoption by the 44th Session of the General Assembly of the United Nations of the 1990s as the UN Decade of International Law was considered as a welcome idea and must be embraced by all. The development and proliferation of highly sophisticated weapons of mass destruction and the grave consequences this poses for mankind, the increasing tensions in international relations and all such negative developments, as well as the need for mankind to enjoy in peace the fruits of its vast labour and the benefits of the immense technological advances made during this century, make it imperative that nations, both big and small, weak and strong, learn to live in peace with each other. The view was expressed that States should learn to settle their differences in peace and harmony and international relations should be governed by accepted principles of international law, and not by Machievellian doctrines, which hitherto have dominated powers of the world for the past 400 years or more.

5. One delegate proposed the following subjects for further study within the framework of the Decade of International Law, viz.

(1) Developing Countries and International Law;

(2) Declaration on Principles of International Law concerning Peace and Development; and

(3) Developing Countries and International Environmental Law.

6. It was *inter alia* stated that while it is desirable to accomplish the programme proposed by the AALCC Secretariat as a workable and tangible way of attaining the ideals of the Decade, much more needed to be done. Several detailed studies should be undertaken at various fora along the line outlined by the Chairman of the Working Group on the Decade. At the end of it, all States should strive to genuinely and strictly implement the various UN Resolutions and Multilateral and Bilateral Treaties to which they are parties. Without this, the Decade may will come to a close having achieved little in practical terms. What is required during the Decade is peace and amity. This can only be achieved through adherence to norms of international law and practice.

A. Acceptance of and Respect for the Principles of International Law

7. The view was expressed that the significance of the Decade of International Law is tied up with the Rule of Law hardly needed to be emphasized. However, the concept was nebulous and it was not patently clear as to what exactly the concept entailed in practice. The adoption and implementation of a meaningful programme over the period could involve the acceptance of and respect for the principles of international law in practical terms.

8. One delegate urged that member States of the AALCC should, during the Decade, strive with great zeal and determination to ratify most of multilateral conventions. This, it was stated, would go a long way towards the attainment of one of the objectives, of both the AALCC as well as the Decade, of developing international law. The recommendation of the Secretariat of the Committee that member States who had not already done so ratify such coventions as the United Nations Convention on the Law of the Sea, 1982; the Basel Convention on the Transboundary Movement of Hazardous Substances and Their Disposal, 1989; and the Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement of Hazardous Wastes within Africa, 1991 etc. was appreciated and well received.

B. Peaceful Settlement of Disputes

9. Recourse to the International Court of Justice as the principal mechanism for dispute settlement should form an integral part of an international initiative on peaceful settlement of disputes.

10. The view was expressed that the current international political environment demanded that the focus of the initiative of the Decade of International Law should be on the promotion of peaceful settlement of disputes between States. The need expressed in the General Assembly for the formulation of an international convention on peaceful settlement of disputes had assumed increased importance in the current political environment. It is believed that the formulation of specific legal obligations on peaceful settlement of disputes and interim measures for their containment would contribute to preventing the escalation into major international conflicts of disputes as well as disputes of a local character amenable to peaceful settlement through negotiation and compromise. The nucleus of a proposed convention on the subject is already contained in the Manila Declaration on the Peaceful Settlement of International Disputes. Consideration needs to be given whether the early formulation and adoption of a Convention on the Peaceful Settlement of Disputes would enhance international peace and security and ensure security and stability of smaller States who are most vulnerable when international peace and security is threatened.

11. One delegation saw merit in the proposal of the Working Group of the United Nations, on the use of the chamber procedure of the ICJ, resort to the Court for advisory opinions as well as the proposal to empower the Secretary-General of the United Nations to request the advisory opinion of the International Court of Justice in respect of legal issues on which the good offices of the Secretary-General (of the United Nations) are sought.

12. The view was expressed that the International Court of Justice has a pivotal role to play in the changing nature of international relations and that the members of the international society must take advantage of the growing confidence reposed in the Court by the international community to strengthen its position, widen the scope of its jurisdiction and give binding effect to its decisions.

13. The suggestion that the Special Committee on the Charter of the United Nations or an *Ad Hoc* Committee be entrusted with the task of drawing up an international convention on the peaceful settlement of disputes was endorsed. The proposed international instrument should embody the full range of legal obligations from conflict prevention, negotiation, reporting to the UN organs and third party adjudication and binding decisions.

14. Consideration also needs to be given to the establishment of more regional institutions in Africa and Asia for the settlement of disputes. The OAU was commended for its strenuous efforts to have disputes between its member States settled regionally.

15. One delegate expressed the view that the suggestions and efforts would be an exercise in futility if they failed to achieve the following objectives :

(a) a widespread and universal acceptance of the principle of sovereign equality before the law in international relations. This vital principle is being persistently flouted by the stronger nations of the world to the detriment of world peace and stability, and should be vigorously upheld;

(b) with the bitter experiences of the colonial past fresh in the minds of most of the members of the Committee, they must endeavour to set an example for others to follow; States must learn to treat each other with respect and consideration and to settle their differences in peace;

(c) they should put aside ideas of racial superiority and such practices as racial discrimination and intolerance, which create animosity and tensions between peoples and different racial groups and nations;

(d) an endeavour should be made to revise some of the false, unethical and outmoded ideas which have governed the actions of nations in their relations with each other for many centuries, and brought so much suffering, destruction, enmity and confusion into the world. Some of the ideas include :

(i) that politics of every kind have nothing to do with morality;

(ii) that the supreme art of government in the international sphere is for a nation to have no permanent friends, but permanent interests; and

(iii) that the rich and strong can only thrive and survive at the expense of the weak and poor.

16. It was stated that these false and outmoded ideas have made the world so dangerous to live in. There is no doubt that most of States want a new world order based on the rule of law, which would propel the world towards this new international order of peace, fairness, friendliness and stability. This is a new concept of government not based on the priority of self-interest, but mainly on the concern for the common good and the peace and survival of mankind as a whole.

17. The AALCC member States believed that the principle of peaceful settlement of international disputes, including judicial settlement of legal disputes, is a matter of great significance in the international community today, and that the efforts of the ICJ to facilitate solution to such disputes are becoming all the more important.

18. With respect to the promotion of the means and methods for the peaceful settlement of disputes between States, which is one of the important pillars of the Decade of International Law, appreciation was expressed for the initiative undertaken by the Secretary-General of the United Nations in establishing the Trust Fund to assist States in the settlement of disputes through the International Court of Justice. One delegate informed the Committee that his Government had appropriated the amount of 55,000 US Dollars as its contribution to the fund in its national budget for fiscal year 1991. The Trust Fund, it was felt, will become a useful instrument to provide the needy States with means of overcoming financial difficulties in resorting to judicial settlement of legal disputes by the ICJ.

19. Finally, on the question of strengthening the role of the International Court of Justice it was proposed that :

(i) the role of ICJ should be strengthened within the framework of ICJ's Statutes and Rules and their potentialities should be fully worked out;

(ii) serious study should be given to accept in various forms the jurisdiction of ICJ, including compulsory jurisdiction under Para 2 of the Article 36 of the Statute. At the same time, it should be kept in mind that the consent of the State constitutes the basis for ICJ's jurisdiction;

(iii) States should be encouraged to accept ICJ's jurisdiction through 'Special Agreement' or dispute settlement clauses in Conventions;

(iv) wider resort to ICJ for advisory jurisdiction should be encouraged;

(v) appropriate use of the *ad hoc* chamber by the Court should be encouraged as an institutional form for trial cases; and

(vi) States may, individually or collectively, take feasible steps to submit international disputes more frequently to international judicial settlement.

C. Progressive Development and Codification of International Law

20. At the Cairo Session of the Committee the view was expressed that the Decade of International Law has provided the Third World countries an opportunity to strive once again for the realization of their aspirations and demands. It was stated in this regard that the AALCC can play a significant role. It was pointed out that the Committee's contribution to the codification and progressive development of international law has been considerable and that its recommendations on various aspects of law-making have been duly reflected in the United Nations. Note was taken in this regard of references to AALCC in the Programme for the activities to be commenced during the first term (1990-92) of the United Nations Decade of International Law as contained in the Report of the Working Group on the UN Decade of International Law.

21. The view was also expressed that the proposals put forth by the Secretariat of the Committee in regard to the work programme for the Decade are not only sound and logical but also pragmatic and that it was gratifying to learn that the proposals advanced by the AALCC had been accepted as an important contribution.

22. With respect to codification and progressive development of international law, the view was also expressed that the Third World States did not press for radical changes in the law but they merely sought its re-examination and codification with their participation. The developing countries had, hitherto, influenced the codification and progressive development of international law only in a few instances. Their efforts to change certain aspects of international law or to promote their interests had not yet met with success even though in some respects the role of the Third World had been determinative. Reference was made in this respect to the principle of self-determination which following rapid decolonization had come to be incorporated in several international instruments.

23. It was stated that one of the manifold roles of the Committee was to make known the views of the developing countries in order to strike a balance in the process of progressive development and codification of international law. It was further stated that formulation of the principles and norms cannot be segregated. The process of formulation of principles and norms must go hand in hand with the process of implementation of those rules—if the rule of law were to prevail.

D. To Encourage the Teaching, Study, Dissemination and Wider Appreciation of International Law

24. To promote appreciation of international law by the general public at a higher level, it may be useful to arrange the international rules systematically by making a list of principal treaties in each of the major fields. One idea would be to designate each year of the decade to focus on a particular field. For example, one year could be devoted to promoting the Charter of the United Nations, another to promoting law on human rights and another on the Law of the Sea, etc. By according priority to a specific area each year, the work of systematizing the arrangement of international law and programme for their dissemination can be advanced.

25. One delegation lent support to the AALCC Secretariat proposal that the member States should endeavour to institute international law fellowships as part of the programme for technical co-operation among developing nations. It was pointed out in this regard that most of the existing fellowships provided by member States as well as the UN and such bodies as UNITAR, International Law Commission, the Hague Academy of International Law, etc. are not widely known in many countries. Accordingly, it was proposed that the Secretariat should find some means of bringing such information to the notice of member States. The AALCC Secretariat suggestion for the provision of in-house training for junior and middle ranking officials in Legal and Treaties Division of the various Ministries of Foreign Affairs and of Justice of member States of the Committee was received well. The constant divergence of views held by the developed and developing countries on various aspects of International Law due to their conflicting interests necessitated that opportunities be provided for bringing these two groups together as often as possible to narrow their differences, and agree on acceptable formulation of International Law. The organisation of seminars and workshops either by the Committee or in conjunction with various international organisations like UNHCR, UNEP, UNCITRAL, OAU, Pacem in Maribus and IMO etc. would be vigorously pursued. Such moves will not only encourage the progressive development of International Law and its codification, but would also promote acceptance of and respect for the principles of International Law.

26. The view was expressed that numerous principles of international law in a range of fields are playing a very important role in present-day international society. In promoting wider public appreciation of international law, it might be helpful to select those laws which are most fundamental

whose existence, purpose and outline should be understood by the general public and to focus on enhancing that understanding. Reference was made to the Charter of the United Nations which contains the most fundamental international principles governing international society. The significance of the Charter is further increasing as a new world order evolves and it deserves to be widely appreciated by all those who will be the constituents of the international society in the twenty-first century.

27. There was, therefore, the need to strengthen public awareness and understanding of the Charter of the United Nations. Toward this end, it was suggested that the United Nations should consider upgrading its public information services and preparing, if possible, new materials. It was also proposed that the UN should consider producing a manual on fundamental points of international law, including a brief commentary on such basic conventions as the Charter of the United Nations as well as on basic issues of general international law. In doing so, the United Nations should take into account the age of the manual's targeted readership as well as regional differences, to ensure that it will be given to conducting surveys at the beginning of the Decade as well as at its conclusion, to ascertain the level of public understanding of international law.

Initiatives taken by the Secretariat since the Cairo Session

28. In the attainment of the objectives of the United Nations Decade of International Law and to make its modest contribution to those objectives an item entitled the "United Nations Decade of International Law" was included in the agenda of the meeting of the Legal Advisers of member States of the Asian-African Legal Consultative Committee held at the United Nations Office in New York in November 1991. The Legal Advisers of twenty-six (26) member States and twelve (12) non-member States participated in that meeting. The President of the International Court of Justice, Sir Robert Jennings, and the Registrar of Court, H.E. Mr. Eduardo Valencia Ospina represented the World Court. H.E. Mr. Carl August Fleischhauer, the Legal Counsel to the United Nations, Ambassador Abdul Koroma, the Chairman of the International Law Commission, Ambassador P.C. Afonso, the Chairman of the Sixth Committee and Mr. Lee Roy, Principal Legal Officer at the United Nations Secretariat also attended.

29. The afore-mentioned meeting of the Legal Advisers also addressed itself to the Peaceful Settlement of Disputes. A detailed report of that meeting prepared for the Thirty-First Session may be found in brief No. AALCC/XXXI/Islamabad/92/18.

30. It will be recalled that at the Thirtieth Session held in Cairo, the Committee, *inter alia*, requested the Secretary-General to continue to monitor the progress of work of the United Nations and its Specialised Agencies as well as the PREPCOM of the United Nations Conference on Environment and Development (UNCED) and to cooperate with them. Pursuant to the mandate given at the Thirtieth Session, the Secretariat of the Committee

has actively followed the progress of work at the Third Session of the PREPCOM of the UNCED held at Geneva from 12th August to 4th September 1991. The AALCC Secretariat was represented by the Assistant Secretary-General, Mr. Huang Huikang, and the Permanent Observer of the AALCC to the United Nations, Mr. Bhagwat Singh.

31. The Secretariat has also been monitoring the progress of work of Inter-governmental Negotiating Committee for a Convention on Bio-Diversity. Mr. D.S. Mohil, Principal Legal Officer at the Secretariat of the Committee attended the Fourth Session of Inter-governmental Negotiating Committee held in Nairobi from 23 September to October 2, 1991.

32. The Secretariat of the AALCC was also represented at two sessions of Inter-governmental Negotiating Committee for a Framework Convention on Climate Change. At the Second Session of the Inter-governmental Negotiating Committee for a Framework Convention on Climate Change (hereinafter called the INC) held at Geneva in June 1991, the Secretariat was represented by the Secretary-General, the Director, Mr. P.K. Jha and Ms. Allison Powell.

33. The Secretary-General and Mr. P.K. Jha also attended the Third Session of the INC held in Nairobi, Kenya, in September 1991. During the Third Session of the INC, the Secretary-General convened a meeting on matters related to the preparation of a Framework Convention on Climate Change. The meeting held on 11th September 1991 was attended by the representatives of twenty (20) member States and eleven (11) non-member States. The discussions at that meeting revolved around a note on the proposed Framework Convention on Climate Change prepared by the Secretariat. Subsequently the Secretary-General attended the fourth session of the INC held at Geneva in December 1991.

34. It may be stated that the Secretary-General participated in the Meeting of Senior Environmental Law Experts on the progress made on 1981 Montevideo Programme and Preparation for the second meeting on Development and Periodic Review of the Environmental Law convened by the UNEP in Geneva in July 1991. The two-fold objective of the meeting was to glean the views of the Senior Environmental Law Experts on the preparation for the *ad hoc* meeting of senior environmental law experts which was subsequently held at Rio de Janeiro from 30th October to 2 November 1991. The other purpose of the meeting was to review the progress made in the implementation of the 1981 Montevideo Programme and to formulate the programme for the development of environmental law over the next decade.

35. The Secretariat of the Asian-African Legal Consultative Committee organised in conjunction with the office of the UNHCR a three-day workshop on 'International Refugee and Humanitarian Law in the Asian-African Region'. The Workshop was held in New Delhi in October 1991 and a detailed report of that Workshop has since been published by the AALCC Secretariat.

II. STATUS AND TREATMENT OF REFUGEES

(i) INTRODUCTION

1. The above topic was initially referred to the AALCC by the Government of Egypt in 1963. In its Memorandum referring the topic, the Government of Egypt while indicating the legal issues for consideration stated that apart from humanitarian considerations, the status and rights of refugees raised several issues of mutual interest to the member States of the AALCC and that, therefore, the AALCC's views would be invaluable in understanding the refugee problem.

2. At the sixth session of the AALCC held in Cairo (1964), the topic was taken up for consideration on the basis of a preliminary note presented by the Secretariat and a Memorandum furnished by the Office of the UNHCR. Subsequently, at its eighth session held in Bangkok (1966), the AALCC adopted certain principles concerning the status and treatment of refugees, commonly known as 'The Bangkok Principles (1966)'. These principles have since been widely applied in the practice of States and were taken into consideration in formulating the basis for the United Nations Declaration on Territorial Asylum adopted in 1967.

3. Subsequently, at its eleventh session held in Accra (1970), the AALCC considered and adopted an 'Addendum to the Bangkok Principles'. This addendum contains an elaboration of the right to return of any person who because of foreign domination, external aggression or occupation has left his habitual place of residence. In its continued efforts to improve upon the Bangkok Principles, the AALCC at its twenty-sixth session held in Bangkok (1987) adopted the 'Burden Sharing Principles' as an additional set of principles to supplement the Bangkok Principles.

Rights and Duties of a Refugee in the First Country of Asylum – The Principle of Non-Refoulement

4. During the twenty-ninth session held in Beijing (1990) the AALCC directed the Secretariat to carry out a study of the rights and duties of refugees in the first country of asylum. Accordingly, the Secretariat prepared a study and presented it to the thirtieth session of the AALCC held in Cairo (1991). The study analysed in-depth the rights enjoyed by a refugee under the 1951 Convention relating to the Status of Refugees. Some specific rights such as the right of repatriation and the right to indemnification under the Bangkok Principles were also examined. In addition, the study also highlighted the obligations of the first country of asylum towards the refugees. On the question of duties of a refugee, the study underscored the fact that it was the duty of a refugee to refrain from participating in any political or subversive activities. It also highlighted that the country of asylum

should not encourage or sponsor any subversive activities against the country of origin or any other country to achieve limited political gains since this would be contrary to the purposes and principles of the Charter of the United Nations as well as the spirit of good neighbourly relations amongst States. However, the study did suggest an exception to this norm for the sake of national liberation movements and the right to self-determination of the oppressed peoples. The AALCC commended the Secretariat study and directed the Secretariat to prepare a further study on the rights and duties of a refugee in the first country of asylum with particular emphasis on the principle of *non-refoulement*.

5. The Secretariat, accordingly, prepared a study (reproduced in this publication evaluating the principle of *non-refoulement* under the 1951 Refugee Convention as well as the Bangkok Principles of 1966 and the OAU Convention governing the Specific Aspects of the Refugee Problem in Africa of 1969 and presented it before the thirty-first session of the AALCC held in Islamabad (Pakistan) in January-February 1992.

Establishment of a Safety Zone in the Country of Origin for the Displaced Persons

6. During the twenty-fourth session of the AALCC held in Kathmandu (1985), the Delegate of Thailand at the conclusion of the discussion on the question of 'Burden Sharing' proposed that the AALCC should initiate a study on a closely related aspect, namely the possible establishment of safety zones for refugees or displaced persons in their country of origin. The Thai Delegate reiterated his request at the twenty-fifth session held in Arusha (1986) and suggested that the establishment of safety zones for refugees or displaced persons in their country of origin would lessen the burden for the international community and to some extent might alleviate the refugee problem particularly if their safety in their country of origin was guaranteed and their well-being assured by the international community. He proposed that the study might focus attention in particular on the following issues :

(i) The circumstances under which safety zones could be established in the home country of refugees or displaced persons;

(ii) Whether neutral bodies like international organisations should be entrusted with the responsibility for management, food, medical care and security in the safety zones; and

(iii) The status of the safety zones.

7. At the twenty-sixth session of the AALCC held in Bangkok (1987), the Secretariat presented a preliminary note on this topic based on the guidelines provided by the Thai Delegate. At the twenty-seventh session of the AALCC held in Singapore (1988), a revised note was presented by the Secretariat reflecting therein the comments and observations made by other delegates at the Bangkok Session. At the Singapore Session, the Thai Delegate further elaborated on the proposal regarding the concept of safety zones.

He expressed the view that a safety zone for displaced persons in their country of origin was legally feasible as there was no reason for not according them the same international protection as that granted to the refugees as defined in the existing Convention.

8. However, the Observer for the UNHCR felt that the concept raised complex issues in the areas of human rights and refugee law as well as from the view-point of humanitarian law. He pointed out that although the proposal was conceptually similar to the neutralized zone envisaged by Article 15 of the Fourth Geneva Convention of 1949 as extended by Article 60 of its Protocol I, there were differences when it came to an individual refugee. According to him, any notion that an asylum seeker or groups thereof, fleeing persecution in the country of origin should be required to delay the asylum request and to remain in the country where they had genuine fear of persecution ran contrary to the basic provisions of human rights and refugee law which, apart from the Universal Declaration on Human Rights, were reflected in the AALCC's Bangkok Principles. He was of the view that the proposal had so far been presented as an asylum option which was contrary to the institution of asylum. Protection granted to a foreign national against the exercise of jurisdiction by his national State was the key provision in refugee law. According to him, another point of practical significance was that while the proposal assumed that safety zones were for refugees, this was not consistent with the refugee law. A refugee was traditionally understood to be outside the country of his nationality and unable or unwilling to avail himself of the protection of that country. Consequently, persons for whom safety zones were intended would not be 'refugees' in the usual sense as they would be within their country of origin. He, therefore, expressed the view that the legal regime of rights, duties and protection to be applied to persons in the safety zones would need to be different from that prescribed in the basic refugee instruments.

9. Several delegates spoke in favour of the concept but expressed doubts about its viability. At the end of the deliberations, the Secretariat was directed to prepare a further study on this topic.

10. Accordingly, a further study providing a concrete framework containing 13 principles to concretize the concept of safety zones was presented by the Secretariat to the twenty-eighth session of the AALCC held in Nairobi (1989). However, several delegates at that session expressed the view that since the question of safety zones involved many political issues, the item should be deferred to a future date, a decision was taken to that effect. However, during the thirtieth session held in Cairo (1991), the AALCC taking note of the current importance of the item decide to include the item once again on its work programme, and directed the Secretariat to prepare a study for submission at the next session.

11. Accordingly, at the thirty-first session of the AALCC held in Islamabad (Pakistan) in January-February 1992, the Secretariat presented a further study on this topic.

12. Introducing the topic, the *Deputy Secretary-General* stated that the Secretariat had prepared three studies on the subject : (i) Rights and duties of a refugee in the first country of asylum; principle of *non-refoulement;* (ii) The establishment of a Safety Zone in the country of origin for the displaced persons; and Report of the AALCC-UNHCR Workshop on International Refugee and Humanitarian Law in the Asian-African Region. The first study discussed the principle of *non-refoulement* both as a generally recognised principle of law and as State practice. The second study analyzed the status of the persons seeking asylum in the safety zones, the issue of domestic jurisdiction, the status of the safety zone and safety zones in practice. The third was a report covering the proceedings and outcome of the AALCC-UNHCR Workshop held in New Delhi in October 1991.

The Deputy Secretary-General drew attention of the AALCC to two of the recommendations made by the Workshop. The first one urged the member States of the AALCC to consider the possibility of preparation of model legislation in cooperation with the Office of the UNHCR with the objective of assisting member States in enacting appropriate national legislation on refugees. The second one urged the Asian-African States to move a step forward by considering adherence to the 1951 Convention relating to the Status of Refugees and/or the 1967 Protocol.

13. *The Representative of the United Nations High Commissioner for Refugees*, at the outset, expressed appreciation to the Secretary-General and the Secretariat of the AALCC for the very close cooperation between AALCC and UNHCR on behalf of Mrs. Sadako Ogata, the High Commissioner. He said that this had been exemplified by the New Delhi Workshop and by the facts that very important refugee questions were being considered at the Islamabad Session and that many AALCC member States gave generous asylum to a large number of refugees bearing the humanitarian burden as a result.

14. Commenting on the reports submitted by the Secretariat he pointed out that :

(i) The study on the Rights and Duties of a Refugee in the First Country of Asylum was a most comprehensive review of the question and had pertinent and succinct conclusions on *non-refoulement.*

(ii) The study on the Establishment of a Safety Zone in the country of origin for the Displaced Persons was a timely study of an issue that appeared to be gaining importance and relevance. Also being a difficult question, it was an issue in which a clear distinction between humanitarian and political aspects, and between State sovereignty and obligations, were not easy to delineate, as was recognised in the study. It would be helpful to distinguish three objectives : (1) preventive—such zones could help remove the need to flee; (2) such zones could increase safety during flight—orderly departure; and (3) they could facilitate voluntary return by helping remove causes of the flight.

(iii) In the context of prevention, not should be taken that while by definition such persons were not refugees, in October 1991 the Executive Committee of the UNHCR, which includes several AALCC members, not only recognised responsibilities of States to eliminate the causes of refugee outflows, but also called upon the High Commissioner to actively explore preventive strategies in that regard. Two important points were to be kept in mind : (i) it was difficult to consider safety zones in isolation of the humanitarian needs which the international community did not yet address properly of internally displaced persons, and (ii) whatever approach was adopted, it must not inhibit the right of persons to seek and enjoy asylum.

(iv) The Report of the New Delhi Workshop recommended the preparation of a model legislation. In this regard the UNHCR was ready to cooperate with the Secretariat in elaboration of such a model, whether as a text, principles to be considered in any such legislation, or a combination of both. UNHCR representatives in the capitals of member States would also be ready to assist directly.

15. The *Delegate of Egypt* drew attention to the recommendations made by the AALCC-UNHCR Workshop and proposed their adoption by the AALCC since they covered most aspects relating to refugees.

16. The *Delegate of Pakistan* recounted the practical experience of his country in dealing with the status and treatment of refugees. Pakistan was host to the single largest population of Afghan refugees numbering over three million who had been looked after very well. This fact had been endorsed by the international community. While Pakistan had given asylum to refugees, it consistently believed that asylum/refuge was a temporary phenomenon which could be addressed by voluntary repatriation of refugees to their country of origin. Efforts were being made to settle the issue at a political level in keeping with the five-point UN programme.

17. The *Delegate of Japan* commended the AALCC for organising the New Delhi Workshop and felt that this kind of activity was particularly useful and consonant with the goals set for all countries concerned with the solution of the refugee problem. There were over 7 million refugees from Afghanistan, Palestine, Indochina, Africa, Central America and elsewhere in the world. The refugee problem was basically a humanitarin issue, and therefore, extending a helping hand to the refugees who had escaped fighting or oppression and were deprived of basic human needs such as shelter, food and clothing, was an international obligation. He mentioned his country's financial contribution towards this end in detail and stated that Japan saw cooperation to help refugees as part of its 'cooperation for peace'.

He observed that his country, respecting fully the spirit and provisions of the 1951 Refugee Convention had enacted appropriate national legislation

on refugees, and that the principle of *non-refoulement* had also been incorporated into the legislation.

As for the establishment of safety zones for refugees or displaced persons in their country of origin, he observed that the proposal seemed interesting in that it would lessen the burden of the country which provided temporary shelter. However, he cautioned the AALCC to proceed with utmost prudence taking into account the difficulties that could arise from the creation of such zones which would be controlled and supervised by outside authorities in the territory of a sovereign State.

18. The *Delegate of Sudan*, narrating his country's experience with the refugee problem, stated that Sudan was surrounded by eight countries which were closely linked and it had given shelter to refugees from those States as those States had also given shelter to the Sudanese refugees. He observed that it was the policy of his Government to endeavour to reach a peaceful settlement with the countries of origin. He cited the example of fruitful cooperation between Sudan, Ethiopia and the UNHCR in repatriating refugees voluntarily. He urged the international community to bear responsibility for meeting the requisite needs of the refugees.

19. The *Delegate of the Republic of Korea* stressed the necessity of wider adherence to the 1951 Refugee Convention which he considered essential for solving the refugee problem. Referring to the deliberations of the AALCC-UNHCR Workshop held in New Delhi in October 1991, he stated that it would help in enhancing awareness of the participating countries about the refugee problem and expressed the hope that member States which had not yet acceded to the 1951 Convention and the 1967 Protocol would consider doing so. He urged the international community and the Asian and African countries to work towards a universal legal regime covering the whole gamut of the refugee problem, but felt that this ought to be done in a way which ensured balance between the need for protection of basic human rights and the territorial sovereignty of States. He seconded the Egyptian proposal for the formal adoption of the recommendations made by the New Delhi Workshop.

20. The *Delegate of Sri Lanka* expressing his views on the concept of safety zones stated that they could be established in keeping with the sovereignty and territorial integrity of the State of origin.

21. The *Delegate of Kuwait* pointed out that with the cooperation of the UNHCR, camps had been set up in the neighbouring countries giving shelter to refugees and that Saudi Arabia had also set up such camps following the crisis in the Gulf region. He stated that the State of Kuwait had contributed generously as it believed in the humanitarian role being played by agencies like UNRWA and ICRS with which Kuwait had concluded a headquarters agreement.

22. The *Delegate of Sierra Leone* directed a question to the representative of UNHCR as to how the refugee flows could be arrested in the countries causing such flows.

23. The *Representative of UNHCR* stated that arresting the flows of refugees was primarily a political question and the UNHCR was not directly concerned with it. However, it took action to alerting the political organs of the United Nations to specific problems and causes.

24. The *Delegate of Ghana* supported the formulation of model legislation on refugees by the AALCC Secretariat. He pointed out that his country in Section 14 of its legislation on refugees had provided for naturalization of refugees. He wanted the definition of 'refugee' as given in the 1951 Refugee Convention and the 1967 Protocol to be amended so as incorporate other qualifications such as those in the OAU Convention and the Cartagena Declaration on refugees.

25. The *Delegate of Uganda* considered the subject of refugees to be very important to the AALCC as most of its member States had suffered from colonisation and were saddled with the refugee problem. He urged the AALCC to address this problem seriously.

26. Following upon these deliberations, the AALCC adopted the following resolution unanimously :

"STATUS AND TREATMENT OF REFUGEES

The Asian-African Legal Consultative Committee

Taking note of the studies prepared by the Secretariat entitled "Rights and Duties of a Refugee in the First Country of Asylum : Principle of Non-Refoulement"; "A Note on the Establishment of a Safety Zone in the Country of Origin for the Displaced Persons" and "Report on the AALCC-UNHCR Workshop on International Refugee and Humanitarian Law held in New Delhi from 24 to 26 October 1991";

Also taking note with appreciation of the statement made by the Representative of the UNHCR;

Adopts the recommendations made by the AALCC-UNHCR Workshop on International Refugee and Humanitarian Law in the Asian-African Region, held in New Delhi from 24 to 26 October 1991;

Approves of the suggestion to prepare a model legislation in cooperation with the Office of the UNHCR with the objective of assisting Member States in enacting appropriate national legislation on refugees;

Expresses the hope that Member States of the AALCC would adhere to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol;

Decides to place the item entitled 'Safety Zones for Refugees or Displaced Persons' on the agenda of its thirty-second session; and

Directs the Secretariat to update the study including how to minimize and remove the causes of flows of refugees."

(B) SECRETARIAL STUDY ON RIGHTS AND DUTIES OF A REFUGEE IN THE FIRST COUNTRY OF ASYLUM : PRINCIPLE OF NON-REFOULEMENT

1. While the contemporary world is seriously concerned with man-made problems such as the environmental pollution and the green house effects, an equally serious m'an-made problem of humanitarian, economic and social concern is the "refugee problem". The challenge posed by the mass exodus of refugees is, however, not a new phenomenon. Since time immemorial people have felt intolerance, oppression, war and civil strife.

2. During the past four decades the entire Asian-African region has witnessed numerous refugee situations which account for the growing concern of nations for the well-being of those who are forced to leave their homeland. Millions of refugees have crossed borders and have entered neighbouring countries due to well-founded fear of being persecuted and in search of food, safety and security. Majority of them in the country of refuge or asylum have been welcomed as unwanted guests. Nevertheless, they have been provided with all possible assistance for resettlement and integration in the mainstream of population. However, there have been cases where unfortunate refugees have faced a climate where they have been pushed back or forcibly returned to the country of origin.

3. In most cases, however, though the refugees are considered as an unwanted guest or as a burden, the first country of asylum seldom forces a refugee to quit or forcibly return to the country of origin. This is mainly due to the well established and recognised 'principle of *non-refoulement*'.

ASYLUM AND NON-REFOULEMENT

4. The 1951 Geneva Convention does not regulate the right of admission but grants refugees protection against expulsion or return to a country in which they may fear persecution. Following are the two most important provisions of the 1951 Geneva Convention :

Article 32

Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself and to appeal to and be represented for the purpose before a competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during the peri[illegible] such internal measures as they may deem necessary.

Article 33

Prohibition of Expulsion or Return ("Refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

5. Similarly, the Universal Declaration of Human Rights expresses the principle that "everyone has the right to seek and enjoy in other countries asylum from persecution."[1] The United Nations Declaration on Territorial Asylum (1967) also specifies that persons entitled to invoke the Universal Declaration of Human Rights shall not be subjected to measures such as rejection at the frontier, return or expulsion which would compel them to return to or remain in a territory where they may be persecuted".[2]

6. Extradition is not expressly mentioned in any of these international instruments. The principle of non-extradition to the refugee's country of origin would, however, seem to be implicit in the general principle of asylum and has also been expressly stated in some more recent multilateral and bilateral extradition agreements.

7. It would be appropriate now to highlight the formal work provided under the Bangkok Principles (1966) and the OAU Convention (1969) on the question of asylum and *non-refoulement*, and any difference, if there be any, with the Geneva Convention (1951).

1 Article 14 of the Declaration.

2 Articles 1 and 3 of the Declaration on Territorial Asylum

Article III

Asylum to a Refugee

1. A State has the sovereign right to grant or refuse asylum in its territory to a refugee.

2. The exercise of the right to grant such asylum to a refugee shall be respected by all other States and shall not be regarded as an unfriendly act.

3. No one seeking asylum in accordance with these Principles should, except for over-riding reasons of national security or safeguarding the population, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well founded fear of persecution endangering his life, physical integrity or liberty in that territory.

4. In cases where a State decides to apply any of the above-mentioned measures to a person seeking asylum it should grant provisional asylum under such conditions as it may deem appropriate, to enable the person thus endangered to seek asylum in another country.

Article VIII

Expulsion and Deportation

1. Save in the national or public interest or on the ground of violation of the conditions of asylum the State shall not expel a refugee.

2. Before expelling a refugee, the State shall allow him a reasonable period within which to seek admission into another State. The State shall, however, have the right to apply during the period such internal measures as it may deem necessary.

3. A refugee shall not be deported or returned to a State or country where his life or liberty would be threatened for reasons of race, colour, religion, political belief or membership of a particular social group.

8. The provision of the OAU Convention Governing the Specific Aspects of Refugee Problelms in Africa (1969) provides :

Article II

Asylum

1. Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.

2. The grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State.

3. No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.

4. Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the Member State granting asylum.

5. Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph.

6. For reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin.

The Principle of Non-Refoulement : A Generally Recognised Principle of Law

9. The international law grants every sovereign State the power to expel unwanted aliens. However, exceptions have been made in favour of political refugees. As a rule, refugees are not expelled to countries where they would be persecuted or have the fear of being persecuted. It may be noted that the right of States to expel aliens from their territories has also been restricted to a greater extent by several multilateral treaties relating to them.

10. The rule of *non-refoulement* is an obligation on the part of the State to refrain from forcibly returning a refugee to a country where he is likely to suffer political persecution. This principle as a positive provision has been laid down in various multilateral treaties. Notable among them are as follows :

(a) Article 3(2) of the Convention relating to the International Status of Refugees of 28 October 1933;

(b) Article 5(3) (a) of the Convention concerning the Status of Refugees coming from Germany of 10 February 1938.

11. Article 33 of the 1951 Convention relating to the Status of Refugees which deals with the principle of *non-refoulement* is directly binding only on the State parties to the Refugee Convention. Moreover, its (direct) applicability is restricted to persons who are "refugees" as defined in Article 1 of the Refugee Convention and with respect to the parties thereto – persons covered by the terms of the Protocol relating to the Status of Refugees (1967).

12. It may be added that, the provision may only be invoked in respect of persons who are already present – lawfully or unlawfully – in the territory of a Contracting State. Article 33 only prohibits the expulsion or return (*refoulement*) of refugees to territories where they are likely to suffer persecution; it does not obligate the Contracting States to admit any person who has not already set foot on their respective territories.

13. The United Nations Conference on the Status of Stateless Persons (New York, 13 to 23 September, 1954) unanimously adopted the following Resolution, which was included as Part IV in the Final Act of the Conference, dated 28 September 1954 :

> "The Conference,
>
> Being of the opinion that Article 33 of the Convention Relating to the Status of Refugees of 1951 is an expression of the generally accepted principle that no State should expel or return a person, in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion,
>
> Has not found it necessary to include in the Convention Relating to the Status of Stateless Persons an article equivalent to Article 33 of the Convention Relating to the Status of Refugees of 1951."

14. Atle Grahl-Madsen in his book *The Status of Refugees in International Law* (Vol. II – Asylum, Entry and Sojourn)[3] has raised the following questions on the above-mentioned Resolution :

- What kind of principle is it that the Conference refers to ? Is it a principle considered binding under international law, or a moral principle ?
- Whatever its nature, has the principle really become generally accepted ?

3 See Pages 94-98.

- What is the authority on which the Conference has based its Resolution, and what authority does the Resolution itself possess ?

15. According to Atle Grahl-Madsen, "The available sources do not support a contention to the effect that prior to the debate at the 1954 Conference, the principle of *non-refoulement* was a 'generally accepted principle', whatever its nature (legal or non-legal). The 1933 and 1938 Conventions were only acceded to by a very small number of States and at the time when the 1954 Conference convened, the 1951 Convention had only been in force for a few months; it entered into force on 22 April 1954."

16. It is further noted that the provisions regarding the granting of asylum in the post World War II West European countries and the United States only sanctioned the withhold of deportation of any person who would be subject to physical persecution. But Madsen concludes that "there may have been similar legislations in a few more States and there were on record some court decisions pointing in the same direction. But this hardly constitutes a basis for contending that the principle of *non-refoulement* has become a 'generally accepted principle'.

17. One may not completely endorse the views of Madsen that the principle of *non-refoulement* has not become a "generally accepted principle". What was said in the context of the Convention relating to the Status of Stateless Persons (1954) may not be true in this contemporary period.

18. There is absolutely no doubt that the principle of *non-refoulement* has been recognised as a fundamental humanitarian and generally accepted (recognised) principle of law recognised by the States. Since 1951, the principle of *non-refoulement* has found expression in various international instruments adopted at the universal and regional levels. The following are the examples which would testify that the principle of *non-refoulement* is a generally recognised principle of law :

(a) Principles concerning treatment of refugees (Bangkok Principles) as adopted by the Asian-African Legal Consultative Committee in 1966. Article III of the Principles states that "No one seeking asylum should be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory."

(b) Resolution 14 (1967) on Asylum to persons in danger of persecution adopted by the Committee of Ministers of the Council of Europe on 29 June 1967. It recommended *inter alia* that "..... no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution for reasons of race, religion,

nationality, membership of particular social group or political opinion."

(c) UN Declaration on Territorial Asylum, as adopted by the General Assembly on 14 December 1967 (Resolution 2312 (XXII) in Article 3 states that "No person shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution."

(d) The Final Act of the International Conference on Human Rights held in Tehran in 1968 in its Part II relating to the co-operation with the United Nations High Commissioner for Refugees "Affirms the importance of the observance of the principle of *non-refoulement* embodied in the above-mentioned instruments and in the Declaration on Territorial Asylum adopted unanimously by the General Assembly in December 1967."

(e) The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa adopted in 1969 states in Article II "No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons....."

(f) Article 22 (8) of the American Human Rights Convention adopted in November 1969 (Pact of San Jose, Costa Rica) also provides that, "In no case may an alien be deported or returned to a country regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinion."

(g) Lastly, the Cartagena Declaration (1984) also provides in one of its Conclusions and Recommendations that "reiterate(s) the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a corner stone of the international protection of refugees. The principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*."

19. The above examples would certainly suffice that the principle of *non-refoulement* has become a generally recognised principle. Even the Executive Committee of the UNHCR at its 28th Session held in 1977 (No. 6 (XXVIII)) concluded that since the fundamental humanitarian principle of *non-refoulement* has found expression in various international instruments adopted at the universal and regional levels it is a generally accepted principle recognised by States. In addition to statements in the above international instruments adopted at the universal and regional levels, the principle of *non-refoulement* has also found expression in the constitutions and/or ordinary legislation of a number of States. Because of its wide

acceptance at universal level, it is being increasingly considered in jurisprudence and in the work of jurists as a generally recognised principle of international law.

EXCEPTIONS TO THE PRINCIPLE OF NON-REFOULEMENT

20. While the principle of *non-refoulement* is basic in character, it is recognized that there may be certain cases in which an exception to the principle can legitimately be made. Article 33(2) of the 1951 Geneva Convention provides that :

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

There are also similar exceptions in other instruments, whether universal or regional. In view of the serious consequences to a refugee of being returned to a country where he is in danger of persecution, the exception provided for in Article 33(2) should be applied with the greatest caution in exceptional cases only. It is necessary to take fully into account all the circumstances of the case and, where the refugee has been convicted of a serious criminal offence, any mitigating factors and the possibilities of, rehabilitation and reintegration within the society.

PRACTICE OF STATES IN REGARD TO NON-REFOULEMENT

21. The principle of *non-refoulement* constitutes one of the basic articles of the 1951 Geneva Convention to which no reservations are permitted. It is also an obligation under the 1967 Protocol by virtue of Article I(1) of that instrument. Unlike various other provisions in the Convention, its application is not dependent on the *lawful* residence of a refugee in the territory of a contracting State. The words "Where his life or freedom would be threatened" have been the subject of some discussion. It appears from the *travaux preparatoires* that they were not intended to lay down a stricter criterion than the words "well-founded fear of prosecution" figuring in the definition of the term "refugee" in Article 1A(2). The different wording was introduced for another reason, namely to make it clear that the principle of *non-refoulement* applies not only in respect of the country of origin but to any country where a person has reason to fear persecution. In evaluating the practice of States in regard to the principle of *non-refoulement*, it should be emphasized that the principle applies irrespective of whether or not the person concerned has been formally recognized as a refugee. In the case of persons who have been formally recognized as refugees under the 1951 Convention and/or the 1967 Protocol, the observance of the principle of *non-refoulement* as expressed in Article 33 should not normally give rise to any difficulty. Moreover, where a special procedure for the determination of refugee status under the 1951 Convention and the 1967 Protocol exists,

the applicant is almost invariably protected against return to his country of origin pending a determination of his refugee status.

22. There are, however, a number of situations in which the observance of the principle of *non-refoulement* is called for, but where its application may give rise to difficulties of a technical nature. Thus the person concerned may find himself in a State which is not a party to the 1951 Convention or the 1967 Protocol, or which, although a party to these instruments, has not established a formal procedure for determining refugee status. The authorities of the country of asylum may have allowed the refugee to reside there with a normal residence permit or may simply have tolerated his presence and not have found it necessary formally to document his recognition as a refugee. In other cases the person concerned may have omitted to make a formal request to be considered a refugee.

23. In situations of this kind it is essential that the principle of *non-refoulement* be scrupulously observed even though the person concerned has not or has not yet been formally documented as a refugee. It should be borne in mind that the recognition of a person as a refugee, whether under the Statute of UNHCR or under the 1951 Convention or the 1967 Protocol, is declaratory in nature.

OPINION OF THE JUDICIARY

The Supreme Court of the United States

(a) Immigration and Naturalization Service (INS) V. Stevic, 467 US 407 (1984)

24. The Refugee Act of 1980 established a new statutory procedure for granting asylum to refugees. The 1980 Act added a new section 208(a) to the Immigration and Naturalization Act of 1952 which left to the determination of the Attorney-General the eligibility for asylum for an alien who is a refugee. Prior to 1968, the Attorney-General had discretion whether to grant withholding of deportation to aliens under S. 243(h). In 1968, however, the United States agreed to comply with the substantive provisions of Article 2 thru 34 of the 1951 United Nations Convention Relating to the Status of Refugees. Article 33(1) of the said Convention is reflected in the S. 243(h) of the US Act which imposes a mandatory duty on Contracting States not to return an alien to a country where his "life or freedom would be threatened" on account of one of the enumerated reasons.

25. In Stevic, the Court dealt with the issue of withholding of deportation or *non-refoulement* under S. 243(h) which corresponds to Article 33(1) of the 1951 Convention. The Court held that significantly Article 33(1) does not extend this right to everyone who meets the definition of "refugee". Rather it provides that "no Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion,

nationality, membership in a particular social group or political opinion." Thus Article 33(1) requires that an applicant satisfy two burdens : first, that he or she be a 'refugee' i.e. prove at least "well-founded fear of persecution", second that the 'refugee' show that his or her life or freedom 'would be threatened' if deported. Section 243(h) of the US Acts' imposition of would be threatened requirement is entirely consistent with the United States' obligations under the Protocol.

(b) INS V. Cardoza-Fonseca, No. 85-782(1987)

26. The Immigration and Naturalization Services (INS) commenced a deportation proceeding against Cardoza-Fonseca, a Nicaraguan citizen. She conceded that she was in US illegally but requested withholding of deportation pursuant to S. 243(h) and asylum as a refugee pursuant to S. 208(a) of the US Immigration and Naturalization Act. To support her request under S. 243(h), she attempted to show that if she were returned to Nicaragua her "life or freedom would be threatened" on account of her political views. The Immigration Judge and the Board of Immigration Appeals (BIA) both decided against Cardoza-Fonseca. The BIA said that she had "failed to establish that she would suffer persecution within the meaning of Sections 208(a) or 243(h) of the Immigration and Naturalization Act".

27. In the Court of Apeals for the Ninth Circuit, she did not challenge the BIA's decision that she was not entitled to withholding of deportation under S. 243(h), but urged that she was eligible for consideration for asylum under S. 208(a) and contended that the Immigration Judge and BIA had erred in applying the "more likely than not" standard of proof from S. 243 (h) to her S. 208(a) asylum claim. The Court of Appeals agreed with her claim.

28. In this case the Supreme Court said "Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country. In enacting the Refugee Act of 1980 the Congress sought to 'give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world. Our holding today increases that flexibility by rejecting the Government's contention that the Attorney-General may not even consider granting asylum to one who fails to satisfy the strict S. 243(h) standard. Whether or not a 'refugee' is eventually granted asylum is a matter which Congress has left for the Attorney-General to decide. But it is clear that Congress did not intend to restrict eligibility for that relief to those who could prove that it is more likely than not that they will be persecuted if deported".

The House of Lords, U. K.

Regina V. The Secretary of State for the Home Department (Appellant) and Ex Parte Sivo Kumaran and Others (Respondent)

29. In the above case Lord Templeman expressed the view that "In order for a "fear" of persecution" to be "well-founded" there must exist a danger that if the claimant for refugee status is returned to his country of origin he will meet with persecution. The Convention does not enable the claimant to decide whether the danger of persecution exists. The Convention allows that decision to be taken by the country in which the claimant seeks asylum. Under the Immigration Act of 1971 applications for leave to enter the United Kingdom, including applications based on a claim to refugee status, are determined by the immigration authorities constituted by the Act. By the rules made under the Act the appropriate authority to determine whether a claimant is a refugee, is the Secretary of State. The task of the Secretary of State in the present proceedings was and is to determine in the case of each appellant whether the appellant will be in danger of persecution if he is sent back to Sri Lanka. Danger from persecution is obviously a matter of degree and judgement. The Secretary of State accepts that an applicant who fears persecution is entitled to asylum in this country unless the Secretary of State is satisfied that there is no real and substantial danger of persecution..... ."

30. In the same case Lord Goff of Chieveley opined that, "I am with all respect unable to agree with the view expressed by Sir John Donaldson M.R.[4] at p. 1051, that different tests are applicable under Article 1 and Article 33 of the Convention.

31. The Master of the Rolls suggested, at p. 1053 that, even if the Secretary of State decides that an applicant is a refugee as defined in Article 1, nevertheless he has then to decide whether Article 33, which involves an objective test, prohibits a return of the applicant to the relevant country. I am unable to accept this approach. It is I consider as plain as indeed was reinforced in argument by Mr. Plender[5] with reference to the *travaux preparatoires*, that the *non-refoulement* provision in Article 33 was intended to apply to all persons determined to be refugees under Article 1 of the Convention. I cannot help feeling, however, that the consistency between Articles 1 and 33 can be more easily accepted if the interpretation of "well-founded fear" in Article 1A(2) espoused by the Secretary of State is adopted, rather than that contended for by the High Commissioner."

4 One of the Judges of the Court of Appeal.

5 Counsel for the United Nations High Commissioner for Refugees.

STOWAWAY ASYLUM – SEEKERS AND THE PRINCIPLE OF NON- REFOULEMENT

32. The problem posed by stowaway asylum-seekers has been a recurring protection concern for the international community over the last decade in particular in the South-East Asian region. As with other asylum-seekers, the immediate task with respect to stowaway asylum-seekers consists in providing initial protection through their admission into the territory of a State where their refugee status can be determined.

33. Obtaining agreement by States as to where a stowaway asylum-seeker should disembark is, however, no simple task. A typical stowaway incident involving asylum-seekers will concern several States, including the State of embarkation, the flag State of the ship involved, the first and subsequent port States visited by the ship following discovery of the stowaway and any State where the individual may have significant contacts. Some States hold that flag States have the ultimate duty to accept responsibility for stowaway asylum-seekers; others contend that this duty lies with the State where the first port of call is situated; yet other States favour *ad hoc* solutions depending upon the particular circumstances of each incident. As a result of disagreement between States over which of them is responsible for admitting the stowaway asylum-seekers, so-called orbit situations are created. In several such situations, stowaway asylum-seekers have been confined for many weeks and even months on board ships travelling from one port to another.

34. International maritime law provides no definite principles governing the protection of stowaway asylum-seekers. Of relevance is the International Convention Relating to Stowaways which was adopted by the Diplomatic Conference of Maritime Law at its session in 1957.

35. Although not yet a source of legal obligation, the Convention is important nevertheless, as evidence of a measure of States' agreement on relevant principles. It only offers a detailed framework for allocating the responsibility for stowaways among States and recognizes expressly the special dangers faced by stowaways fleeing persecution.

36. The Convention expresses special concern for stowaways who are asylum-seekers. Paragraph 2 of Article 5 requires the ship's Master and authorities at the port of embarkation to "take into account the reasons which may be put forward by the stowaway for not being disembarked at, or returned to, those ports or States mentioned in this Convention". Paragraph 3 of the same Article further provides that,"The provisions of this Convention shall not in any way affect the power or obligation of a contracting State to grant political asylum".

37. Read together, these provisions acknowledge the particular situation of stowaways who are also asylum-seekers and they underline that, in relation to these persons, States have broader obligations including *non-refoulement* under general international law.

38. As stated earlier, the principle of *non-refoulement* is now a part of customary international law, binding upon all States independently of specific assent. Rejection at the frontier is increasingly recognized as constituting *refoulement* where it leads to expelling or returning persons to the frontiers of a territory where their life or freedom would be threatened.

39. If the flag State disclaims any responsibility for the stowaway and the ship's next port of call is in a State where his/her life or freedom would be threatened on account of race, religion, nationality, membership of a social group or political opinion, the practical effect of disclaiming responsibility and refusing admission is *refoulement*. The problem of *refoulement* will become increasingly acute when a flag State continues to disclaim responsibility for the stowaway asylum-seekers and refuse to allow disembarkation. Where disembarkation is the only alternative to *refoulement*, both port and flag States have an unequivocal duty to prevent the latter from occurring. How best this can be achieved will depend upon the circumstances, but more than not, it will be through disembarkation at the first port of call.

40. The Executive Committee of the UNHCR at its 39th Session held in 1988 (No. 53 (XXXIX), noted that "there are at present no general and internationally recognized rules dealing specifically with stowaway asylum-seekers and at the same time recognizing that asylum-seekers should be given the special consideration that their situation demands," recommended that States and UNHCR take into account the following guidelines when dealing with actual cases of stowaway asylum-seekers, *inter alia* that the stowaway asylum-seekers must be protected against forcible return to their country of origin"(*refoulement*).

BANGKOK PRINCIPLES AND PRINCIPLE OF NON-REFOULEMENT

41. The Bangkok Principles in its Article III, paragraph 3, provides that :

> "No one seeking asylum in accordance with these Principles should, except for overriding reasons of national security or safeguarding the population, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical intergrity or liberty in that territory."

42. The striking difference between the provision of the Bangkok Principles and the 1951 Geneva Convention is that the Bangkok Principles reiterates the phrase "well-founded fear of persecution" in a situation like *refoulement*. But on the other hand the Geneva Convention 1951 does not provide the scope for a refugee to substantiate its objective-cum-subjective "well-founded fear of persecution" at the time of expulsion.

43. That means to claim a refugee status a person has to provide substantial evidence that he or she possess "well-founded fear of persecution", under Article IA(2) of the Convention. But in the case of expulsion or

deportation under Article 33, a different standard has to be evolved to determine his state of life or freedom on account of his race, religion, nationality, membership of a particular social group or political opinion.

44. This dual standard of treatment has also been reflected in the US Immigration and Nationality Act, 1952. This fundamental difference was raised at the Supreme Court of the United States in the *INS* V. *Cardoza-Fonseca* case.

45. Section 243(h) of the US Act provides that the Attorney General can withhold deportation of an alien who demonstrates that his "life or freedom would be threatened" thereby on account of specified factors. The above-quoted phrase requires a showing that "it is more likely than not that the alien would be subject to persecution" in the country to which he would be returned. In contrast S. 208(a) of the same Act authorises the Attorney General in his discretion, to grant asylum to a "refugee" who, under S. 101(a) (42) (A) of the Act, is unable or unwilling to return to his own country because of persecution or "a well-founded fear" thereof on account of particular factors.

46. In the *INS V. Cardoza-Fonseca* deportation hearing the Immigration Judge applied S. 243(h) "more likely than not" proof standard to her S 208(a) asylum claim, holding that she had not established "a clear probability of persecution" and therefore was not entitled to relief. The Board of Immigration Appeals (BIA) affirmed, but the Court of Appeals for the Ninth Circuit reversed the decision. The Court of Appeals stated that S. 208(a)'s "well-founded fear" standard is more generous than the S. 243(h) standard in that it only requires asylum applicants to show either past persecution or "good reason" to fear future persecution.

47. The Supreme Court of the United States held in this case that there are two sets of standards for determination. The S. 243(h) "clear probability" standard of proof does not govern asylum applications under S. 208(a) of the US Act. The Court further stated that the plain meaning of the statutory language indicates a Congressional intent that the proof of standards under S. 208(a) and S. 243(h) should differ. S. 243(h)'s "would be threatened" standard has no subjective component, but in fact requires objective evidence that it is more likely than not that the alien will be subject to persecution upon deportation. In contrast S. 208(a)'s reference to "fear" makes the asylum eligibility determination turn to some extent on the alien's subjective mental state, and the fact that the fear must be "well-founded" does not transform the standard into a "more likely than not" one. Moreover, the different emphasis of the two standards is highlighted by the fact that, although Congress simultaneously drafted S. 208(a)'s new standard and amended S. 243(h), it left S. 243(h)'s old standard intact. Thus the legislative history demonstrates the congressional intent to provide different standards to be applied under S. 208(a) and S. 243(h) respectively.

48. Here it may be added that due to the drafting difference in Article 1A(2) and Article 33(2) of the 1951 Geneva Convention dual standard of

treatment has come into practice. The standard which may be applied in case of granting asylum or refugee status may not be the same while considering deportation of an "illegal alien".

49. On the other hand, as may be observed, the Bangkok Principles has maintained the consistency by incorporating the phrase "well-founded fear of persecution" in Article III while dealing with *non-refoulement*.

50. It may be observed that the Bangkok Principles use the phrase "should" in the text of the paragraph. On the use of the word "should" one of the member countries at the Eighth Session held in Bangkok (1966), stated that it connotes a moral obligation and not a legal obligation and added that a moral obligation or a moral compulsion will affect certainly the legal rights set out in Article III. However, the fact that there is ambiguity in regard to interpretation of the word "should" cannot be denied. It may be interesting to note that in the corresponding provisions contained in Article 33 of the 1951 Geneva Convention, Article 3 of the UN Declaration on Territorial Asylum (1967), paragraph 3 of Article II of the OAU Convention on Refugees, or paragraph 2 of the 1967 Resolution on Asylum to Persons in Danger of Persecution of the Council of Europe, the word used is "shall" which is unambiguously mandatory.

51. It may be added that at the Committee's Eleventh Session held in Accra (Ghana) in 1970, an amendment was mooted to make the provisions of paragraph 3 of Article III mandatory for the States, by substituting the word "shall" for the word "should", but it was not adopted by the Committee.

CONCLUSIONS

52. While the principle of *non-refoulement* is universally recognized, the danger of *refoulement* could be more readily avoided if the States concerned accepted a formal legal obligation defined in international instruments, such as the 1951 Geneva Convention and its 1967 Protocol. States that have not yet acceded to these instruments should nevertheless apply the principle of *non-refoulement* in view of its universal acceptance and fundamental humanitarian importance.

53. In the field of *non-refoulement*, particular regard should be given to the fact that a determination of refugee status is only of a declaratory nature. It should not, therefore, be assumed that merely because a person has not been formally recognized as a refugee, he/she does not possess the refugee status and, therefore, not protected by the principle of *non-refoulement*.

INTRODUCTION

1. The humanitarian problem of refugees has always had international dimensions since there is always the potential to endanger international peace and security. It is, therefore, desirable that any refugee problem should be tackled and solved by the international community at large. During the past four decades the entire Asian and African region has witnessed numerous refugee situations which account for the growing concern of nations for the well being of those who are forced to leave their homeland. Millions of refugees have crossed international borders for their security. In some cases the situations are so volatile that at any moment mass exodus might take place. Although there are numerous studies on the root cause of the refugee problem, the situation of mass exodus remains endemic. Many States are, therefore, forced to bear the brunt of the refugee problem of admitting thousands of them into their territory and granting them asylum.

2. The root causes of mass exodus or expulsions are several; it would be noticed that in some cases, people have sought refuge in other countries due to natural disasters like famines, droughts, floods, earthquakes and other economic reasons. However, in the vast majority of cases, whether it be in the Southern Africa, South-Asia, South-East Asia, Middle East or Central America, the causes leading to the mass exodus of populations have primarily been due to armed conflicts, foreign interventions, aggression, illegal occupation, policy of *apartheid*, civil wars or situation akin to civil war besides persecution of political opponents or ethnic or religious minorities by regimes in power or authority in the country of origin. In most of these situations, people have left their homeland out of desperation, often in isolation or in disorganized groups to avert imminent danger. Some had failed in the attempt, others have crossed the frontier only to be forcibly pushed back. The majority, however, have found refuge in a hospitable neighbouring land while others have been fortunate to be resettled in developed countries with favourable opportunities often far beyond their frontiers.

3. The refugee problem has come to assume such proportions that not only the host countries but also the international community has found itself over-strained to the utmost. While States have an international obligation to prevent the creation of an environment which would generate refugee situations, nevertheless the influx of refugees to neighbouring countries creates numerous socio-economic and political problems. While States have a duty not to create a situation within their territory which could harm other States, they also have responsibility for conditions in their territory which lead to the infliction of harm on other States.

4. Nevertheless in reality, the countries which happen to be geographically so situated as to have a common border within easy reach, either by land or by sea, from the countries where refugee situations are recurrent or a continuing factor, have had to bear a heavy burden due to the influx of

refugees. This poses for them a major social and economic burden in the case resettlement of an alien population. The sudden influx of refugees may indeed result in destabilization of the economy of the State of asylum. Often the socio-economic situation of the State of asylum is not much better than that of the State of origin of refugees. The individuals who seek asylum too, face many problems and hardships after entering a foreign and sometimes hostile territory. Due to differences of language, culture, religion, climate and habits, the refugees may be faced with unending difficulties in the State of asylum or in the State of resettlement.

THE CONCEPT OF SAFETY ZONES

5. The theme of the proposal on Safety Zone was that the State of origin, particularly where refugee situations are a constant and recurrent phenomenon due to foreign aggression, civil war or a situation akin to civil war and destabilization, might be called upon to designate a specific geographical area as a 'safety zone' of a temporary nature, so as to help in an orderly movement of persons intending to leave.

6. The concept of safety zone essentially has the following fundamental ingredients : it has to be with the consent of the State of origin and it should be of a temporary nature.

7. The main purpose behind the establishment of such zone is to have an orderly movement of persons intending to leave. It may even help to reduce the outflow because it is quite conceivable that the situation creating the flow would change in the meantime, and thus eliminate the cause of mass exodus. Moreover, the orderly movement would not only ensure that the refugees find a place for a safe refuge but it would also enable the neighbouring States as well as countries willing to grant them permanent asylum, to plan and process their reception in regulated stages and in a manner conducive to their well being.

8. It would, however, be difficult in the present state of international law to contemplate the creation of a 'safety zone' under the control or even supervision of an outside authority. The idea of creation of a safety zone, however, needs to be looked at as another possible avenue to tackle the issue. While there are weighty considerations to support the concept, norms have to be developed through international efforts whereby the establishment of safety zones should be accepted as much as a part of humanitarian principles as the rights and duties of the State of asylum are currently accepted. If the international community has been prepared to accept the rights and duties of a State of asylum, there should be no reason why the State of origin should not accept the establishment of a properly regulated safety zone on humanitarian basis. Such a zone should, however, be consensual and not imposed.

STATUS OF THE PERSON SEEKING ASYLUM IN THE SAFETY ZONE

9. Article 1A(2) of Convention relating to the Status of Refugees (1951), defines a person as a refugee who is "outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence...." If the safety zone is to be established within the country of origin and the asylum seekers are provided refuge therein, under the provisions of Article 1, the asylum seekers would not be "refugees". Thus the role of the UNHCR to provide material and other reliefs would not seem to be applicable. Such asylum seekers in the safety zones could only be 'displaced persons' over whom the UNHCR has somewhat restrictive and *ad hoc* mandate.

10. In practice when the situation warrants, as observed after the recent Gulf War when the Kurdish people's outflow started, the UNHCR has been very much present within Iraq to provide material relief to the Iraqi Kurds. Thus there should not be insurmountable difficulties for international organizations or UNHCR to grant the necessary relief in such situations.

THE ISSUE OF DOMESTIC JURISDICTION

11. It would be perhaps difficult in the present state of international law to contemplate the creation of a safety zone under the control or even supervision of outside authorities. Without the consent of the government in power, such an innovation might be tantamount to interference in the internal affairs of the State. Thus the AALCC has always emphasized that any safety zone has to be established with the consent of the State of origin. The exception to Article 2(7) of the Charter of the United Nations on non-interference in the domestic affairs of State authorises the United Nations to undertake enforcement measures under Chapter VII which deals with "Action with respect to threats to the peace, breaches of the peace and acts of aggression" (Articles 39-51).

12. Dealing with the history of the drafting of the U.N. Charter, Goodrich and Hambro expressed the following view "In the course of discussion at San Francisco it was amphasized that this (paragraph) is not a technical and legalistic formula. Whereas Article 15(8) of the League Covenant and pargraph 7 of Chapter VIII, Section A of the Dumbarton Oaks Proposals had included a reference to international law as the standard of interpretation, the substitute proposal of the sponsoring Governments at San Francisco contained no such reference. Proposals to include a reference to international law were resisted on the grounds that in any case the intention of the new paragraph was not to establish a legalistic formula but rather a general principle. On the other hand, it was agreed that the inclusion of a reference

to international law was unnecessary since the paragraph, being part of an international agreement, would be interpreted by reference to international law in any case.[1]

13. However, the flexibility of the provision and the assumption in practice that it does not override other potentially conflicting provisions have resulted in the erosion of the reservation of domestic jurisdiction though its draftsmen had intended its reinforcement.

14. Practice to date has evidenced a lack of general agreement on whether the principle of this paragraph is to be regarded primarily as a legal limitation or a political principle. Arguments with respect to the interpretation of the paragraph have very often been legalistic in content. In practice, however, the United Nations organs, particularly on the basis of Chapters IX and XI of the Charter and the provisions on human rights in Articles 55 and 56, have taken action on a wide range of topics dealing with the relations of governments with their own people.[2] Though the question of competence when raised before the organs of the United Nations has not as a rule been explicitly decided, the organs concerned have taken decisions which have clearly implied determinations of the preliminary question. The usual practice, however, has been to circumvent the issue rather than face it directly. Resolutions on breaches of human rights, the right of self-determination, *apartheid* and colonialism, and non-self-governing territories have been adopted regularly.

15. Brownlie is very specific with respect to paragraph 7 that "the domestic jurisdiction reservation does not apply if the United Nations agency is of the opinion that a breach of a specific legal obligation relating to human rights in the Charter itself has occurred".[3]

16. Article 2(7) has also been invoked during the consideration by organs of the United Nations on questions of human rights. In the case of South Africa the General Assembly appears to conclude that a matter relating to the treatment of nationals was not essentially within the domestic jurisdiction of a State if it impairs friendly relations between States and if there is a question of the violation of international obligations.[4]

Concluding their discussion on Article 2(7), Goodrich and Hambro observe that :

> "the Charter text, the discussions at San Francisco, and the practice of the United Nations to date do not give any very satisfactory indication of the exact meaning of Article 2(7) on the role it is going to play in the development of the Charter system. While on the one hand it has on a number of occasions been invoked in support of restrictive interpretation of the Charter and the functions and activities of the United Nations, it has not thus far proved to be a serious limitation upon the actual work of the United Nations as was feared by some in the beginning .... The practice of the United Nations makes it clear, as indeed does the phraseology of Article 2(7), that the word 'intervention' as used in the paragraph is not to be given a narrow technical interpretation .... In its advisory opinion, the PCIJ in the case of *Nationality Decrees in Tunis and Morocco* held that the rule of international law (provides) that a matter ceases to be within the domestic jurisdiction of a State if its substance is controlled by the provisions of international law, including international agreements. In a sense it could be argued that this is the only valid test."[5]

17. Thus it could be concluded that there is no justification on the part of the State of origin to invoke Article 2(7) particularly where there is a violation of human rights since such a situation may pose a threat to international peace and security.

18. It might be argued that the UNHCR, an organ of the United Nations, becomes directly involved wherever a refugee situation arises. Perhaps the UNHCR should get involved even at the pre-outflow stage of refugees, particularly when people start moving out due to internal situation.

THE CONCEPT OF SAFETY ZONE VIS-A-VIS THE RIGHT TO FREEDOM OF MOVEMENT AND RIGHT TO SEEK ASYLUM

19. The concept of safety zone as such could be detrimental to fundamental principles such as the right to seek and enjoy in other countries asylum from persecution, the right to leave and return to one's country or the right to freedom of movement as enshrined in the Universal Declaration of Human Rights.[6]

20. Article 13 of the Universal Declaration of Human Rights states :

(i) Every one has the right to freedom of movement and residence within the borders of each State.

(ii) Every one has the right to leave any country, including his own, and to return to his country.

21. Article 13, however, does not explicitly grant an individual the right to enter any other country. Thus under the freedom of movement provisions no individual can enjoy unrestricted right to enter any country, other than

1 L.M. Goodrich and E. Hambro. *Charter of the United Nations : Commentary and Documents* (Boston, 1949), p. 113.

2 Ian Brownlie—*Principles of Public International Law*, Third Edition (1979), p. 294.

3 *Ibid.*, p. 552-53.

4 UN General Assembly Resolution adopted — during the Second Part of its First Session ... Doc/A/64/Add. 1, p. 69.

5 Goodrich & Hambro, *op. cit.*, n. 4, p. 210.

6 Adopted and proclaimed by the UN General Assembly Resolution 217A (III) of 10 December 1948.

his own. There are established procedural formalities for seeking permission to enter a foreign country by an alien. Even the right to leave any country, particularly his own, often cannot be enjoyed absolutely. It is a fact that almost all countries have specific rules and procedures, such as requirement of passport, health documents etc. not to mention exit permits in many countries, which the individual must comply with.

22. The main purpose behind the establishment of a safety zone is to provide immediate relief such as protection, security, shelter, food and medicare, besides organizing orderly movement of persons intending to leave. If a safety zone is established within the State of origin, which would be temporary in nature, it would not necessarily infringe upon an individual's right to freedom of movement. An individual's uppermost concern in such situations would be to have safety and security, which a safety zone could provide, rather than exercising the right to freedom of movement which in the circumstances could be problematic. The rationale behind the creation of a safety zone need not be seen as the restriction of the right of freedom of movement of an individual, but rather to regulate such freedom so as to avoid possible fear of further persecution.

23. The fear has also been expressed that the concept of safety zone could possibly undermine the right to seek and enjoy in other countries asylum from persecution. Here it may be recalled that the right to seek asylum of an individual is neither absolute nor unrestrictive. It depends largely on the discretion of a sovereign State. This is borne out by the Universal Declaration of Human Rights particularly in Article 14 which provides :

(1) Everyone has the right to seek and enjoy in other countries asylum from persecution.

(2) This right may not be invoked in the case of prosecution genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

24. Further, the United Nations Declaration on Territorial Asylum of 14 December 1967 provides :

Article 1

(1) Asylum granted by a State in the exercise of its sovereignty, to persons entitled to invoke Article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism, shall be respected by all other States.

(2) The right to seek and to enjoy may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime

against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.

(3) It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum.

Article 3

(2) Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.

(3) Should a State decide in any case that exception to the principle stated in paragraph 1 of this Article would be justified, it shall consider the possibility of granting to the person concerned under such conditions as it may deem appropriate an opportunity, whether by way of provisional asylum or otherwise, of going to another State.

25. The Bangkok Principles (1966) adopted by the Asian-African Legal Consultative Committee further provide that :

Article III

Asylum to a Refugee

(1) A State has the sovereign right to grant or refuse asylum in its territory to a refugee.

(2) . . . . . .

(3) No one seeking asylum in accordance with these Principles should, except for overriding reasons of national security or safeguarding the population be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory.

26. The Universal Declaration of Human Rights thus states the right of an individual to seek and enjoy asylum with some exceptions. It may be observed that the Declaration does not provide it to be an absolute right of an individual. On the contrary the Declaration on Territorial Asylum and the Bangkok Principles provide that the grant or refusal of asylum is a sovereign act. Thus from the above analysis a conclusion may be drawn that an individual can exercise his right to seek and enjoy asylum with some limitations.

27. The purpose of a safety zone is to provide interim relief and the individuals residing within the safety zone always have the right to seek asylum in any country through orderly departure programme. They can also exercise the option to return to their original habitual place of residence when the situation permits. Thus the concept of safety zone does not necessarily amount to the curtailment of the right of an individual to seek and enjoy asylum.

THE STATUS OF THE SAFETY ZONE

28. The legal status of a safety zone depends directly on how it is established. What the scheme of this paper advocates is that such a zone should only be established with the consent of the State of origin. Such a safety zone should be treated *at par* or akin to a demilitarized or neutral zone, which shall be immune from all hostilities and hostile acts. Thus such a zone should be similar to a neutralized zone as envisaged in Article 15 of the Geneva Convention (1949) and expanded by Article 60 of its Protocol—I.

29. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 provides as follows :

Article 14

In time of peace, the High Contracting Parties and, after the outbreak of hostilities the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospitals and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven.

Upon the outbreak and during the course of hostilities the Parties concerned may conclude agreements on mutual recognition of the zones and localities they have created. They may for this purpose implement the provisions of the Draft Agreement annexed to the present Convention, with such amendments as they may consider necessary.

The Protecting Powers and the International Committee of the Red Cross are invited to lend their good offices in order to facilitate the institution and recognition of these hospitals and safety zones and localities.

Article 15

Any party to the conflict may, either directly or through a neutral State or some humanitarian organization, propose to the adverse party to establish in the regions where fighting is taking place, neutralized zones intended to shelter from the effects of war the following persons, without distinction :

(a) Wounded and sick combatants or non-combatants.

(b) Civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.

When the Parties concerned have agreed upon the geographical position, administration, food supply and supervision of the proposed neutralized zone, a written agreement shall be concluded and signed by the representatives of the Parties to the conflict. The agreement shall fix the beginning and duration of the neutralization of the zone.

30. The Protocol—I additional to the Geneva Convention of 1949 provides :

Article 60

Demilitarized Zones

1. It is prohibited for the Parties to the conflict to extend their military operations to zones on which they have conferred by agreement the status of demilitarized zone, if such extension is contrary to the terms of this agreement.

2. The agreement shall be an express agreement which may be concluded verbally or in writing, either directly or through a Protecting Power or any impartial humanitarian organization, and may consist of reciprocal and concordant declarations. The agreement may be concluded in peace time, as well as after the outbreak of hostilities, and should define and describe, as precisely as possible, the limits of the demilitarized zone and, if necessary, lay down the methods of supervision.

3. The subject of such an agreement shall normally be any zone which fulfils the following conditions :

   (a) all combatants, as well as mobile weapons and mobile military equipment, must have been evacuated;

   (b) no hostile use shall be made of fixed military installations or establishments;

   (c) no acts of hostility shall be committed by the authorities or by the population; and

   (d) any activity linked to the military effort must have ceased.

   The Parties to the conflict shall agree upon the interpretation to be given to the condition laid down in subparagraph (d) and upon persons to be admitted to the demilitarized zone other than those mentioned in paragraph 4.

4. The presence, in this zone, of persons specially protected under the Convention and this Protocol, and of police forces retained for the sole purpose of maintaining law and order is not contrary to the conditions laid down in paragraph 3.

5. The Party which is in control of such a zone shall mark it, so far as possible, by such signs as may be agreed upon, with the other Parties, which shall be displayed where they are clearly visible, especially on its perimeter and limits and on highways.

6. If the fighting draws near to a demilitarized zone, and if the Parties to the conflict have so agreed, none of them may use the zone for purposes related to the conduct of military operations or unilaterally revoke its status.

31. The above provisions of the Geneva Convention (1949) and its Protocol I envisage the creation of a safety zone during the course of armed conflicts. Thus such a safety zone may possibly be established during the peace time as done during the armed conflict. The above provisions of the Geneva Convention may not have a direct bearing on the concept of safety zone as proposed in the Committee's deliberations, but nevertheless they are relevant for determining the status of the safety zone as proposed by the Committee.

32. During the Twenty-eighth Session held in Nairobi in 1989[7] the Secretariat presented the following principles to conceptualize the framework and the status of the safety zone in the State of origin :

(i) A safety zone shall be established with the consent of the State of origin, through a resolution or recommendation of the United Nations.

(ii) The safety zone should be akin to a demilitarized zone or a neutral zone and immune from any type of hostile activities and may be demarcated by notification of a specified geographical area or areas.

(iii) The safety zone should be under the international supervision, control and management to provide among others international protection to the persons residing therein.

(iv) The United Nations may designate and authorise an international organization or agency for administration and supervision of the safety zone.

(v) The State of origin and its neighbouring States, who are likely to receive the mass exodus or any other States as may be decided by the United Nations, be associated with the designated international organization or agency in the supervision of the safety zone.

7 Doc. No. AALCC/XXVIII/89/3.

(vi) The designated international organization or agency shall be responsible for coordination and supervision of supply and distribution of food and other essential items and ensure other facilities like supply of drinking water, civic amenities and medical care. The cost of operation may be met through voluntary contribution by States, governmental and non-governmental humanitarian organizations.

(vii) The armed forces of the State of origin should withdraw from the designated safety zone and all government machineries whether civilian or military of the State of origin shall fully respect the special status of the zone so created.

(viii) The authority in control of the safety zone shall provide international protection to the individuals seeking asylum therein.

(ix) The United Nations may provide multinational security force for the purpose of maintaining law and order within the safety zone.

(x) The persons seeking asylum in the safety zone shall be disarmed and they will not be permitted directly or indirectly to participate in any type of military insurgency activities or guerilla warfare against any State and similarly the asylum seekers in the safety zone shall not be a military target of any State.

(xi) The individuals residing in the safety zone shall be provided with the facility to seek and enjoy asylum in any country.

(xii) If normalization is restored in the State of origin and the international organization or agency in-charge of the safety zone is satisfied that the conditions are favourable and conducive, the persons residing in such zones shall be provided with all facilities to return to their permanent place of residence.

(xiii) The safety zone, thus established under international supervision, shall be of temporary nature.

SAFETY ZONE IN PRACTICE

33. At the Twenty-eighth Session of the Committee held in Nairobi in 1989, the Representative of the UNHCR expressed strong reservation on the concept of safety zone and stated that the Thai proposal might lead to political complications. After lengthy discussion on the subject, the AALCC decided that the study on the question of "Establishment of a safety zone for the displaced perons" should be deferred to a future session.

34. It is, however, worth recalling that in 1989, a similar type of zone was experimented in Sri Lanka. The Madu Camps, set up in Sri Lanka with the active assistance and cooperation of the UNHCR, were for the internally displaced persons who might have become potential refugees.

35. In April 1990, a similar concept was tried with the Afghan refugees within Afghanistan. It was originally a United Nations Plan to create a

"Zone of Tranquillity" where Afghan refugees could be safely repatriated. The person in-charge of the U.N. Afghan Aid Programme, Prince Sadruddin Aga Khan, had set a modest goal for the repatriation efforts in 1990. His initial aim was to set up roughly half-a-dozen Tranquillity Zones and begin setting them with rural Afghans who took refuge in cities inside the country.[8] In fact, two such zones were established in the liberated areas of Afghanistan for the repatriated persons. The only major conceptual difference in it was that it was not established for the potential refugees within the country of origin, but was established for the refugees who opted for voluntary repatriation. The Sri Lankan experiment, however, was for the "internally displaced-cum-potential refugees" and this is similar to what the AALCC has been discussing concerning the safety zone concept. These camps were established with the consent of the country of origin. During discussion the AALCC Secretariat has emphasized that no safety zone should be established without the consent of the country of origin.

36. However, in 1991, soon after the war in Iraq, certain countries unilaterally established some zones within Iraq and called them as "Safe Haven"—an enclave for the Iraqi Kurdish people.

37. The Iraqi Kurds who had revolted against Baghdad feared persecution and left to neighbouring countries in Islamic Republic of Iran and Turkey. To curtail the outflow of the refugees, it was planned to establish some zones within Iraq where the internally displaced persons who were likely to become potential refugees and also a large number of Kurds who had already crossed over to Turkey, would be facilitated to come back to Iraq within such established zones where they would be provided protection and relief.

38. The "Safe Haven" or the "Enclave Plan" envisaged the creation of a U.N. protected enclave in the northern Iraq bordering Turkey. The Plan also envisaged a multi-national military force to protect the Kurds in the enclave. It was hoped that Iraq would accept the plan in which case the enclave could be managed by the U.N. civilian personnel only. The situation took a new turn when the United States agreed to implement the Plan.

39. The U.N. Secretary-General, however, was of the opinion that for such plans, firstly, Iraq's consent was absolutely mandatory and secondly, the mandate of the Security Council was needed for the lawful establishment of refugee camps in the Iraqi territory. Whether Security Council Resolution 688 and, in particular, paragraphs 3 and 6 granted unimpeded authority to member States concerned to establish such relief operations with the threat or use of force is still debatable. This resolution stated :

> "3. *Insists* that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operations;"

8 For details see : *News Week*, April 23, 1990, p. 35.

> "6. *Appeals* to all Member States and to all humanitarian organizations to contribute to these humanitarian relief efforts."

40. Nevertheless, the U.N. Security Council Resolution 688, mandated the Secretary-General *inter alia* to pursue humanitarian efforts in Iraq and to use all the resources at his disposal to address urgently the critical needs of the refugees and displaced Iraqi population. A Memorandum of Understanding regarding the Iraq's civilian population and the establishment of U.N. Sub-Offices and Humanitarian Centres (UNHUCs) in Iraq was signed on April 18, 1991. Further, the MOU's Annex regarding the deployment in Iraq of a U.N. Guards Contingent was signed on May 25, 1991.[9]

41. Whatever may be the purpose and goal of the "Safe Haven" or Safety Zone it would lose its credibility the moment it is implemented without the consent of the country concerned or with the threat of or use of force. The agreement of May 25, 1991 granted the U.N. the right to post United Nations Guards with bare minimum side-arms, to take over the security of the 'Safe Haven' established by the Allied forces.

42. The refugee camps which were established and now controlled by United Nations Sub-Offices and Humanitarian Centres (UNHUCs) are accordingly with the consent of Iraq and also through the U.N. initiative. These two fundamental aspects had been advocated by the AALCC in 1989 at its Twenty-eighth Session.

43. While considering the gravity of the refugee problem in modern age, the idea of creation of a safety zone should be looked at as another possible avenue to give further substance to the humanitarian aspects of the refugee law. Nevertheless one should be cautious that in future no safety zone or enclave plan is imposed upon any State thus violating the tenets of international law and the principles and purposes of the United Nations. The principles as proposed by the AALCC Secretariat during the Nairobi Session might be given serious consideration in respect to the establishment of safety zones in the future.

9 U.N. Documents S/22663, May 31, 1991.

III. DEPORTATION OF PALESTINIANS IN VIOLATION OF INTERNATIONAL LAW, PARTICULARLY THE GENEVA CONVENTION OF 1949 AND THE MASSIVE IMMIGRATION AND SETTLEMENT OF JEWS FROM SOVIET UNION IN THE OCCUPIED TERRITORIES

(i) INTRODUCTION

1. An item entitled the 'Deportation of Palestinians in Violation of International Law, particularly the Geneva Convention of 1949' was first taken up by the AALCC consequent upon a reference made by the Delegation of the Islamic Republic of Iran at the Twenty-seventh Session of the Committee, held in Singapore in March 1988. At that Session the Delegate of the Islamic Republic of Iran in his introductory statement pointed out that the Zionist entity (Israel) had deported a number of Palestinians from Palestine as a brutal response to the upheavel by the people in the occupied territory. The deportation, both in the past and in recent times, of people from the occupied territory constituted a severe violation of the principles of international law and also violated, in letter and spirit, the provisions of such international instruments and conventions as the Hague Conventions of 1899 and 1907, the Charter of the United Nations, 1945 and the Geneva Convention relative to Protection of Civilian Persons in Time of War, 1949, all of which either implicitly or explicitly prohibited deportation as a form of punishment or a deterrent factor especially in an occupied territory. The Islamic Republic of Iran's primary interest, at that stage, was related to two basic issues viz.

(i) the enunciation of the duties, commitments and obligations of occupying forces, in accordance with international law; and

(ii) their violation by the Zionist entity in Palestine.

It accordingly requested the Committee to consider the item. After a preliminary exchange of views at that Session[1] the AALCC called upon the Government of the Islamic Republic of Iran to furnish the Secretariat with a memorandum which it (the Secretariat) might take as a basis to conduct its study and accordingly directed the Secretariat to conduct a study of the matter.

2. The Islamic Republic of Iran accordingly submitted a memorandum to the AALCC Secretariat[2] whereby it called upon the Secretariat : (i) to

1 For details of the deliberation see the Verbatim Record of the Plenary Meeting of the Twenty-seventh Session of the AALCC held in Singapore, March 1988.

2 The full text of the Memorandum of the Government of the Islamic Republic of Iran drafted in the form of a Report entitled Deportation of the Residents of Occupied Territories from the standpoint of International Law may be found in AALCC Doc. No. AALCC/XXVIII/89/2.

study the fact that in accordance with international law, the deportation of the residents of the occupied territories is illegal and condemned; and (ii) requested the examination of the violations by the occupation regime which has not been recognised by many of the member States of the international community including Iran. The memorandum also requested the Secretariat to submit "an interim report to the member States before embarking on carrying out its comprehensive studies".[3]

3. A preliminary report prepared by the Secretariat was accordingly considered at the Twenty-eighth Session of the AALCC held at Nairobi in 1989. That report while finding that deportation of Palestinians from occupied territories was in flagrant violation of international law invited attention to the following :

(i) Contemporary international humanitarian law as codified in the four Geneva Conventions of August 1949 and the two additional protocols of 1977 thereto;

(ii) The corpus of *opinio juris* which has over the years underscored the applicability, in the Palestinian territories occupied by Israel, of the provisions of the Geneva Convention relative to Protection of Civilian Persons in Time of War, 1949; and

(iii) Consideration of the course of action for the future work of the Committee on the subject.

4. In the course of deliberations on the preliminary report the member States *inter alia* :

(i) Agreed that the Israeli authorities were acting in flagrant violation of international law in deporting Palestinians from the occupied territories; and

(ii) Affirmed the inalienable right of the Palestinian people to self-determination and the right to return to their land.

The Secretariat was also directed to forge cooperation between the AALCC and the PLO, the Organisation of Islamic Countries (OIC), the League of Arab States (LAS) and the Organisation of African Unity (OAU) in dealing with this plight, and to prepare an indepth study on legal aspects of the subject including the question of payment of compensation and to convene a meeting of Legal Advisors of Member States to examine and review the Report.[4]

5. While it had not been possible in the intervening period to convene an inter-sessional meeting of legal experts, the Secretariat pursuant to the decision of the AALCC at its Twenty-ninth Session, prepared a brief[5] which sought to establish that payment of compensation for deportation is both a matter of customary international law of State responsibility as well as an express stipulation of international humanitarian law as codified in the Hague Regulations of 1907, and the Fourth Geneva Convention of 1949.

6. In introducing the item, and the documents prepared by the Secretariat thereon, at the Twenty-ninth Session of the AALCC held at Beijing in March 1990, the Secretary-General expressed the view that the future work on the topic may require to be taken in progressive stages with regard to the undertaking of further studies as well as the examination of the relevant international instruments. Reference was also made to the massive immigration of Jews from the Soviet Union and their settlement in the Palestinian occupied territories.

7. In the debate that followed several delegates expressed the view that the Secretariat should focus on the legal aspects of Israel's immigration policy and the settlement of Soviet Jews in the occupied territories. At the closure of the debate on the matter it was decided that the Secretariat should make a comprehensive study taking into consideration all the legal aspects of the matter and the resettlement in violation of international law by the State of Israel of a large number of emigrants in Palestine. The AALCC also once again directed the Secretariat to convene an inter-sessional meeting on the inalienable rights of the Palestinian people, if financially feasible, or, if an invitation to this effect was forthcoming from a member State.

8. Introducing the item at the Thirtieth Session of the AALCC held in Cairo in April 1991, the Secretary-General noted that while it had not been possible to convene an inter-sessional meeting of legal experts, the Secretariat had prepared a brief which examined the Israeli settlement policy in occupied territories as well as the question of massive emigration of Jews to Israel. The brief prepared by the Secretariat also examined the question of the right of return of the Palestinian people to their home and hearth.[6]

9. The Secretary-General proposed that while considering the future work on the subject, the AALCC may, perhaps, wish to reiterate its decision to hold an inter-sessional meeting of Legal Advisers of Member States which may *inter alia* deliberate on such legal aspects of the problem on which the future work may require to be undertaken. The AALCC may also wish to direct the future work on the subject within the context of the preparation for the proposed International Peace Conference to be held at the end of the Decade of International Law, since the subject would be particularly pertinent for consideration at the proposed International Conference.

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3 *Ibid.*, paragraph 13 at pp. 47-48.

4 For details see the Verbatim Record of the Fourth Plenary Meeting of the Twenty-eighth Session of the Asian-African Legal Consultative Committee, Nairobi, Kenya, 13-18 February, 1989.

5 See AALCC/XXIX/90/10.

6 See Doc. No. AALCC/XXX/91/Cairo/11. Also included in that brief was an overview of United Nations Regional Seminar on the Inalienable Rights of the Palestinian People held in 1990.

10. The AALCC at its Thirtieth Session having taken note of the Secretariat study on "The Deportation of Palestinians in Violation of International Law, particularly the Geneva Convention of 1949 and the Massive Immigration and Settlement of Jews in the Occupied Territories" after due deliberation, expressed its concern at the continuing denial and deprivation of the inalienable human rights of the Palestinian people including the right of self-determination and right to return and the establishment of their independent State on their national soil. The AALCC requested the Secretary-General to continue to monitor the events and developments in the occupied territories of Palestine and decided to convene an inter-sessional meeting of the AALCC to consider Israel's policies of immigration and settlement, if financially feasible, or, if an invitation to host such a meeting was received from a Member State. The AALCC also decided to include the item in the agenda of its Thirty-first Session.

Discussions and Decisions Taken at the Islamabad Session

The Thirty-first Session of the AALCC was held in Islamabad (Pakistan) from 25th January to 1st of February 1992. At that session, the subject was taken up for further discussions on the basis of a study presented by the Secretariat contained in document No. AALCC/XXXI/92/Islamabad/11 which is reproduced in this publication.

11. The Secretary-General while introducing the Secretariat study entitled "Deportation of Palestinians in violation of International Law, particularly the Geneva Convention of 1949 and the Massive Immigration of Jews from the Soviet Union in the Occupied Territories" (Doc. No. AALCC/XXXI/Islamabad/92/11) recalled that this matter was placed on the work programme of the AALCC following upon a reference made by the Government of Islamic Republic of Iran, at the Twenty-seventh Session of the Committee held in Singapore in 1988. He briefly outlined the subsequent studies undertaken relating to this topic which *inter alia*, established that payment of compensation for deportation was both a matter of customary international law of State responsibility as well as an explicit stipulation of contemporary international law as codified in the Hague Convention of 1907, the Fourth Geneva Convention of 1949 as well as the 1977 Protocols thereto.

Referring to the discussion held during the Twenty-ninth Session in Beijing, relating to the massive immigration of Jews from the Soviet Union and the Israeli practice of settlement of the Jews in occupied Palestinian territories, the Secretary-General recalled the decision of the AALCC to convene an inter-sessional meeting of legal experts on this topic. He also referred to the decision of the AALCC at its Thirtieth Session, expressing concern at the continuing denial and deprivation of the inalienable human rights of the Palestinian people, to continue to monitor the events and developments in the occupied territories. He informed the Committee that though it had not been possible in the intervening period to convene an inter-sessional meeting to consider this item, the AALCC Secretariat had prepared the study presented during the current Session monitoring the

events and developments in the occupied territories of Palestine. He also pointed out that reference had also been made in the study to the Middle East Peace Conference held in October 1991 and the events preceding the Conference.

Referring to the future work programme on this topic, the Secaretary-General pointed out that the question of 'Deporation of Palestinians' needed to be studied in a wider perspective, with special emphasis on human rights. This aspect, according to him, should be considered and the AALCC Secretariat could be mandated to assist the Member States to prepare for the Middle East Peace Conference at which substantial question of the future of the State of Palestine would be considered.

12. The *Delegate of Palestine*, while making his preliminary statement, thanked the AALCC Secretariat and the Secreatary-General for the study prepared on this item. He described in great detail the sufferings of Palestinians inflicted by the oppressive Israeli regime. He made references to :

(i) the act of deportation of Palestinians in violation of all norms of international law;

(ii) confiscation of their property; and

(iii) settling of emigrating Russian Jews in the Occupied Territories.

This, he referred, as the 'core of the Palestinian tragedy'. He said that the manifestation of Zionism through the oppressive Israeli regime was too evident in its act of deporting and confiscation of properties, and was comparable to the crimes of Nazis.

He noted that in the last one year more than 1100 leaders of Palestinians had been detained in camps. Despite these oppressive measures the valiant battle of Palestinians, *Intifadah*, had entered its fifth year. The Delegate further stated that the Zionist occupation had been initiating measures to destroy the infrastructure of Palestinian economy and to transform the historical and cultural identities of the Palestinians.

These measures, the Delegate pointed out, were a proof of Israel's glaring violation of international law, as specified in the United Nations Security Council Resolution 726. He also referred to the violations as mentioned in the Geneva Convention of 1949. Article 4 of this Convention, he said, particularly obligated States "to protect inhabitants and not to deport them", even during an armed conflict.

He said that Israel had continued to confiscate the lands of Palestinians on the West Bank. More than one million Jews had settled there, more than 60,000 settlements had come up there to house nearly 7,50,000 Jews. He referred to the increasing atrocities, cutting of trees, burning of fields and houses by the occupied military. While referring to the emigration of Jews, he requested the AALCC to examine the question of Jews migrating to other countries, especially to Europe. He also referred to the aid and support extended by U.S.A. contradicting its own policy of peace in the

Middle East and violating UN Security Council Resolution 565. He said that any such unwarranted help would hamper the Middle East Peace Talks.

In December 1988, the United Nations Session in Geneva called for peace and the recognition of the cause of the Palestinians on the basis of various UN resolutions. The PLO, according to him, had accepted these initiatives and had been working towards its realisation. For the PLO the Middle East Talks were important, as it could provide them an opportunity to regain their political future. Unfortunately, the policy and the measures adopted by Israel had hindered the progress of the talks. While Madrid Peace Talks were on, Jews were continued to be settled in the Occupied Territories. Twelve Palestinians were deported. He also referred to the talks underway in Moscow and the right of the Palestinian delegation to decide whether to participate therein or not.

He said that the *Intifadah* would continue; and 'wave after wave' of Palestinians would participate in it. In conclusion, he made six observations for the consideration of the AALCC. These were :

(i) Motion of thanks to the Secretary-General and the AALCC Secretariat for the preparation of the study;

(ii) Request to the Secretary-General to follow up and expand this study so as to underline its negative consequences and to reach a just solution;

(iii) To table this item at the next session;

(iv) To study and consider the issue of deportation as a part of human rights;

(v) Convening of an inter-sessional meeting to discuss the question of continued deportation; and

(vi) Declaration by the AALCC affirming the legitimate cause and fight of the Palestinians and denouncing the oppressive policies of the Israeli regime.

13. The *Delegate of the Islamic Republic of Iran* expressed his delegation's gratitude to the AALCC Secretariat for the excellent study. Referring to the study he confirmed that the deportation of Palestinians from their homeland was in contravention of the Hague Convention of 1907, the Charter of the United Nations and the Geneva Convention relating to the Protection of Civilian Persons in Time of War, 1949, all of which prohibited deportation as a form of punishment, especially in an occupied territory. He stated that his delegation had brought to the notice of the member States of AALCC at the earlier session, the negative consequences of establishing Jewish settlements, particularly in the West Bank of Jordan River and Gaza Strip, as well as change in the demographic composition of Palestine. He said that this problem was serious and the UN General Assembly had taken note of this in the following resolutions : 45/73/E, 45/73/G, 45/74/A, 45/74/B, 45/74/E, 45/74/F. These resolutions deal with the legitimate rights of Palestinians.

The Delegate referred to the decisions adopted by other international and regional organisations, namely, the Organisation of African Unity (OAU), the Arab League and the Non-Aligned Movement. Referring to the recent expulsion of twelve Palestinians from their homeland, he said that the UN Security Council on 6th January 1992 adopted resolution 726, condemning this and demanded the occupying power to ensure the safe and immediate return of all those who were deported.

Stating his delegation's view on the deportation of Palestinians, mass immigration of Jews to the occupied territories, the establishment of settlements for them and the demographic alterations in these territories, he said that these were part of the same issue and needed a comprehensive study. He said this was not the only case of demographic alterations; he referred to Securtity Council Resolution 677 which was adopted on 28 November 1990, condemning such efforts to alter demographic compositions. These concerns, he noted, were gradually being accepted as a principle of international law, and requested the AALCC Secretariat to pay due attention to this matter. He also referred to the Conference on Palestine, held in Tehran in October 1991, with the participation of Palestine and the parliamentarians from various countries.

14. The *Delegate of Syria* appreciating the statements delivered by the Delegates of Palestine and Iran, condemned the policies of Israel, especially in the South of Lebanon. He requested Ruasia, in the changed international circumstances, to take steps to restrict the immigration of Russian Jews and termed this as against human rights. He insisted that all parties should be given their legitimate rights. Referring to the Middle East Peace Talks in Moscow, he said that Syria was not participating in the talks. The delegate pointed out that it would serve no purpose when those who matter did not attend the Moscow Talks.

15. The *Delegate of Sudan* agreed with the suggestions put forward by the Delegate of Palestine. He also referred to the hardships faced by the Palestinians and querried as to what could be the legal responsibility for all this.

16. The *Delegate of Libya*, thanking the AALCC Secretariat for the study, referred to the crimes of firing and burning committed with regard to the legal documents in the Courts of *"Holy Quds"*. He said that he would agree and second every suggestion made by the Delegation of Palestine.

17. The *Delegate of the People's Republic of China*, reiterating the contents and conclusions of the Secretariat's study, termed 'deportation of Palestiniant' as a violation of human rights. He hoped that the Middle East Peace Talks would herald an era of peace. He regretted that while peace talks were underway, the deportation of Palestinians and settlement in the occupied

territories had continued in violation of international law. He emphasized that the People's Republic of China consistently and resolutely supported the legitimate rights of the Palestinians.

18. The *Delegate of Egypt*, emphasising the importance of this item, stated that the credibility of the international legality was in question as regards the violations of international law in the occupied territories. He said that international legality was the tradition of the AALCC. He urged that this item should continue on the agenda and the study should be extended to cover interim measures, compensation etc.

19. The *Delegate of Pakistan* endorsed the views expressed by earlier speakers condemning the deportation of Palestinians in flagrant violation of international law and Geneva Convention of 1949. Supporting the establishment of an independent State of Palestine, the Delegate expressed his opposition to :

(a) Israel's policy of expansion and annexation of the occupied Arab territories including the Gaza Strip, the West Bank and the Golan Heights especially through the establishment of new Jewish settlements;

(b) the continued occupation of the southern territories of Lebanon;

(c) the repressive measures adopted against the population of the Arab occupied territories;

(d) the persistent violation by Israel of the Geneva Convention of 1949 and the Hague Regulations 1907.

(e) the desecration of holy places especially the exacavations adjacent to the Dome of the Rock which threatens the Holy Al-Aqusa Mosque; and

(f) forcible expulsion of Arabs from the occupied territories.

20. The *Delegate of Indonesia* condemned the deportation of Palestinians and urged the AALCC to study the legal aspects of Israel's oppressive policies. He extended support of his country's delegation for *Intifadah*.

21. The *Delegate of Iraq*, welcoming the consensus opposing the oppressive Israeli activities in the occupied territories, thanked the AALCC Secretariat for the study. He referred to the UN resolutions on this aspect and their consistent violation by the Zionist regime. He also referred to his country's sufferings, as it fought against the Zionist forces. He supported the suggestions put forward by the Palestine delegation.

22. The *Delegate of Yemen* supported the Secretariat's study and condemned the deportation of Palestinians in violation of international law. He also supported the six suggestions put forward by the Delegate of Palestine.

23. The *Delegate of India* termed the act of deportation as a political act and extended India's steadfast and unqualified support for the cause of

Palestinians. He said that the Middle East Peace Talks would not succeed without the Palestinian participation in it. He said that India was in constant touch with Palestine for the success of the Peace Talks. At the legal level, he contended that it was in violation of Geneva Conventions and also in violation of Human Rights.

24. The *Observer from Algeria* extended his country's support to the cause of Palestine and suggested that recommendations should be adopted for the homeland of the Palestinians.

25. The *Delegate of Uganda* referring to his country's consistent stand, extended support for the sovereign homeland of Palestinians.

26. The *Delegate of D.P.R. Korea* supported the proposals put forward by the Palestine Delegation. Further, he called for the implementation of the United Nations resolutions on this matter.

27. The *Delegate of Japan* deplored the deportation of Palestinians in violation of international law while the negotiations were going on. Such deportations, according to him, would not help in reaching any solution.

28. The *Observer from Russia*, referring to the matter of emigration of the Jews from Russia, stated that this issue had two aspects :

(i) the emigration of the Jewish population from Russia to Israel;

(ii) the question of settlement of these people upon their arrival in Israel.

He argued that emigration of Jews from Russia was in full conformity with the existing international law, especially that on the human rights – right of everyone to leave one's country. As to the second, he emphasized that the Russian Government issued exit visas to the Jewish population to move to Israel, but not to the occupied territories. The Russian Government, he pointed out, informed the emigrants about the non-recognition of the occupied territories by the international community and that it was illegal and dangerous to settle there.

29. The *Delegate of Sierra Leone* referred to the question of self-determination. He extended support to the legitimate rights of Palestinians. He agreed that the activities of Israel were a massive violation of the whole corpus of International Law. He concurred with the findings and the legal framework prepared by the Secretariat. Referring to the UN Resolution 181 for the creation of two States, Palestine and Israel, he insisted on the right of Palestinians to return to their homeland. Further, he requested the U.N. General Assembly to ask for the opinion of the World Court about the activities of Israel, and to ask the Security Council to implement the decision of the World Court.

30. The *Delegate of Sri Lanka* supported and associated with the sentiments expressed by the preceding speakers and requested the AALCC to update the study on this aspect.

31. The *Delegate of Ghana* called for the resolution of the political will to heal the injury inflicted on the Palestinians. He referred to U.N. resolutions especially 242 and 338, and insisted that these resolutions must be implemented.

32. The *Delegate of Jordan* appealed to the AALCC to support the suggestions put forward by the Delegation of Palestine and condemn the oppressive policy of Israel in the occupied territories.

33. The *Delegate of Sudan* referring to the statement made by the observer from Russia asked whether the right of the Russian Jews to emigrate and the right of the Palestinians not to be deported were contradictory. He requested the Secretariat to look into the legal implications of this question.

34. The *Delegate of Palestine* thanked all the speakers who had offered their support to the cause of the Palestinian people.

35. After further deliberations, the following resolution was adopted by the AALCC subject to reservations being made by the Delegation of Japan and the Observer for Russia in regard to specific parts of the resolution :

"Deportation of Palestinians in violation of International Law, particularly the Geneva Convention of 1949 and the Massive Immigration and Settlement of Jews in the occupied territories"[7]

The *Asian-African Legal Consultative Committee*, at its Thirty-first Session having taken note of the Secretariat study on "The Deportation of Palestinians in violation of International Law, particularly the Geneva Convention of 1949 and the Massive Immigration and Settlement of Jews in the Occupied Territories" (Doc. No. AALCC/XXXI/ Islamabad/92/11) as well as the United Nations Security Council Resolution of January 1992 adopted unanimously :

- *Expresses* its concern at the continuing denial and deprivation of the inalienable human rights of the Palestinian people including *inter alia* the right of self-determination and right to return and the establishment of their independent State on their national soil;

- *Expresses* its appreciation to the Secretary-General of the AALCC for the comprehensive study prepared for the Session;

- *Requests* the Secretary-General of the AALCC to continue to monitor the events and developments in the occupied territories of Palestine;

7 The Delegation of Japan expressed its reservation on paragraph 12 of this Decision on the issue saying "Urges ECOSOC to request the International Court of Justice to give an Advisory Opinion on the legality of the Israel's actions and policy of settlement in the occupied territories in violation of International Law and consequences of violation of the U.N. Security Council Resolutions No. 242 and 338 and legal obligations of member countries of the United Nations in this matter". The Japanese Delegation also expressed its view that Southern Lebanon could not be regarded as "Occupied territory".

- *Decides* to convene an inter-sessional meeting of the AALCC to consider Israel's policies of immigration and settlement, if financially feasible, or if an invitation to host such a meeting is received from a Member State;

- *Supports* the just cause of the Palestinian people and the national, political and inalienable human rights of the Palestinian people;

- *Condemns* the Israeli policy in the occupied territories and their deportation of Palestinians and annexation of the Palestinian lands against the rights of the Palestinian people;

- *Strongly condemns* Israel's policy of immigration and settlement of Jews in Palestinian and other Arab occupied territories and Southern Lebanon and Syrian Golan Heights in flagrant violation and contravention of human rights;

- *Demands* that Israel respect the principles of international law and all international conventions which have a bearing on the matter;

- *Condemns* also Israel's policy of appropriation and illegal exploitation of the natural resources of the occupied territories in contravention of the principles of permanent sovereignty over natural resources;

- *Requests* the Secretary-General to study the question of the forced changes in the demographic composition of the occupied territories including Jerusalem, the West Bank and the Gaza Strip;

- *Urges* ECOSOC to request the International Court of Justice to give an Advisory Opinion on the legality of the Israel's actions and policy of settlement in the occupied territories in violation of International Law and consequences of violations of the U.N. Security Council Resolutions No. 242 and 338 and legal obligations of member countries of the United Nations in this matter;

- *Requests* the Russian Government to take appropriate measures which the Russion Government deems just to discourage the settlement of the Russian Jewish immigrants in the occupied territories in violation of international law;[8] and

- *Decides* to include the item "Deportation of Palestinians in violation of International Law, particularly the Geneva Convention of 1949 and the Massive Immigration and Settlement of Jews in the Occupied Territory" in the agenda of its Thirty-second Session.

8 The Observer for Russia expressed his reservation on this paragraph as restricting emigration would be violative of human rights.

(ii) SECRETARIAT STUDY ON "DEPORTATION OF PALESTINIANS IN VIOLATION OF INTERNATIONAL LAW, PARTICULARLY THE GENEVA CONVENTION OF 1949 AND THE MASSIVE IMMIGRATION AND SETTLEMENT OF JEWS FROM THE SOVIET UNION IN THE OCCUPIED TERRITORIES

Policy of Establishment of Jewish Settlement

1. Israel first began establishing settlements in the occupied territories in 1967 as para-military *nahals*. A number of *nahals* over a period of time became civilian settlements as they became economically viable. Israel is known to have commenced the establishment of civilian settlements the following year i.e., 1968. Civilian settlements are supported by the Government and also by the non-governmental settlement movements affiliated with political parties. Most of the settlements are claimed to be built on public lands outside the boundaries of any municipality but many have in fact been built on private or municipal lands expropriated for the purpose. It should also be pointed out that in any case the public lands do not belong to Israel and in international law it has no claim to them which could justify the establishment of settlements thereon.

2. By 1978 some seventy-five Israeli settlements had been established in the occupied territories. These, however, excluded some of the military camps on the West Bank into which small groups of civilians had moved. By 1983 Israel had established 204 settlements in the occupied Arab territories and had publicaly stated its plan to increase that number. In 1987 it was announced that preparations were under way in Israel for the settlement of a further million and a half Jewish settlers in the occupied West Bank during the subsequent years and that settlement plans and projects were ready to be implemented in different areas of the occupied West Bank.[1] According to the West Bank Data Project (WBDP) approximately 67,700 Jewish settlers lived in the Israeli settlements in the West Bank and Gaza Strip in April 1987.

3. It should be pointed out that the ideal of "the ingathering of the exiles", the return of the Jews to Israel from the countries of their dispersion, is one of the basic tenets on which the State of Israel was founded. The Declaration of Independence provides that the "State of Israel will be open for Jewish immigration and for the ingathering of the exiles". In the years prior to the establishment of Israel, the majority came from Europe. Immediately following establishment, Israel's population doubled with the arrival of Holocaust survivors and Jews from Arab lands. Since then the *Olim* (immigrants) have continued to come from all over the world. In recent years thousands of new comers from the ancient Jewish community of Ethiopia have gone to Israel. In the wake of the recent far-reaching political changes in Eastern Europe, and relaxation of travel restrictions a new wave of Jewish immigrants began arriving, mainly from the Soviet Union with almost all of them choosing to live in Israel's large cities.

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1 Quoted from *News from Israel*, Vol. XXXVIII, No. 7 (Bombay, July 1990).

4. The Israeli policy of expropriation of Palestinian land in the occupied territories, construction of new settlements and improvement and 'thickening' of the existing ones continued, unabated, during the 1980s. The modes and techniques of acquiring land included the long established practice of confiscating land and declaring it "closed" for military training purposes, declaring Palestinian land as "State land", expropriating land for "public (Jewish) use" or confiscating it for nature preserves. The impact this policy has had on the Palestinians was summarised in a United States Department of State report thus :

> "The use of land by Israeli authorities for military purposes, roads, settlements, and other Israeli purposes which restrict access by Palestinians, discriminates against Palestinians and adversely affects their lives and economic activities. Approximately 2.5 per cent of the total area of the West Bank and East Jerusalem has been turned over to Israeli nationals for residential, agricultural, and industrial use by settlers. Palestinians do not participate in the Higher Planning Council, which plans land use in the territories and exercises certain powers transferred from local, municipal and village councils in 1971."[2]

5. These processes were accompanied by a noticeable growth in the settlements during the years 1984 to 1988. According to West Bank Data Project, 11 settlements were populated over this period in the West Bank. In the Gaza Strip, 6 settlements were added to the 12 already existing there. It should also be noted that one-third of the Gaza Strip land has been declared "State land" or confiscated for Jewish settlement by the occupation authorities. In the Gaza Strip, with its small territory with very high population density of approximately 3,754 per square mile with 85 per cent of the population being urban, the establishment of an Israeli settlement network presents a particularly serious problem for the Palestinians. In some cases, the settlements physically impinge on the Palestinian communities and refugee camps, blocking their expansion and development. The town of Khan Yunis, for example, was virtually enveloped by a cluster of Israeli settlements. Reports from the occupied territory clearly indicate that the Israeli authorities are making intensive efforts, within the framework of a new plan designed to increase the number of Jewish settlers in the occupied West Bank, to raise their number to the equivalent of 40 per cent of the total Arab population. This information was revealed by one of the Israeli Prime Minister's Advisers on December 3, 1987 and was later confirmed by the Chairman of the World Zionist Organisation's Settlement Department at a press conference where he said that "Israel's objective in the West Bank (was) to raise the population of Jews to 40 to 60 per cent of the

2 See *Country Reports on Human Rights Practices for 1988*. Reports submitted to the Committee for Foreign Relations (US Senate) and Committee on Foreign Affairs (US House of Representatives) by the Department of State, Feb. 1989, pp. 1385-1386

total population of the occupied West Bank by the end of the present century."[3]

Emigration of Soviet Jews to Israel

6. At the Twenty-ninth Session held in Beijing several delegates expressed concern at the massive emigration of Jews from the Soviet Union and their settlement in the occupied territories of Palestine. From the end of World War II to September 1978 a total of 168,000 Jews left the Soviet Union to reunite with their families. Exit visa was refused to only 2,249 persons or 1.6 per cent of the total; 98.4 per cent of requests for exit visa are said to have been granted.[4]

7. In recent years Jews wishing to emigrate from the Soviet Union find it far easier to do so and an increasing number are choosing to leave. In 1980 over 70,000 Jews left the Soviet Union[5]—the highest annual figure since the modern wave of emigration began 20 years ago. Of the 70,000 Jews who left the Soviet Union in 1989, at least 12,000 are known to have emigrated to Israel.

8. The open gates stance of the Soviet Union coupled with the American Government's decision to stop the near automatic granting of refugee status to all Soviet Jews wishing to emigrate there has meant that most Jews from Soviet Union have been heading for Israel and have created a wave of immigration not witnessed since the 1950s. Their dreams most often lie in America but the United States will admit only 50,000 Soviets in 1991.

9. Of the 300,000 Soviet Jews expected to emigrate this year (1991), 112,000 had already reportedly done so by September 1991. However, Israeli officials expect an additional one million Soviet Jews to resettle in Israel between 1991 and 1996. For a country of 4.8 million to plan to absorb such numbers represents a massive commitment to expansion. To meet the costs for the resettlement of these immigrants the Prime Minister Yitshak Shamir of Israel requested the United States of America to grant his country ten billion dollars in loan guarantees. The Secretary of State Mr. James Baker, on his part, however, made it clear that the USA did not intend to grant the loan to help accommodate an estimated one million Soviet emigrants. More significantly, he implied that the U.S. would not grant the Israelis any loan guarantees unless Israel agreed to freeze settlements in the occupied West Bank, Golan Heights and the Gaza Strip.

10. The economic factor may prove important because Israel's agricultural produce made in Kibbutzim will come in handy in the USSR. The existence

3 See Letter from the Permanent Representative of Jordan to the United Nations addressed to the Secretary-General, February 1989. A/43/118-S/19473.

4 See *The White Book* (Moscow), 1979 in Russian cited in Medovoy and Kukasov : *Human Rights and Freedoms in the USSR* (Progress Publishers, Moscow, 1981) at p. 147.

5 See The Soviet Aliya : A New Beginning, in *News from Israel*, Vol. XXXVII, No. 5 [Bombay] May 1990, p. 4.

of a large group of commercially active Jewish population will boost economic contacts with Israel. In view of a quick transition to the market and the dismantling of the USSR, many Soviet Jews who planned to leave for Israel have changed their minds in the hope of doing business in the former USSR.

11. The Note by the Secretary-General which prefaced the Secretariat Study on the Deportation of Palestinians in Violation of International Law in particular the Geneva Conventions of 1949 prepared for the Twenty-eighth Session held in Nairobi in 1989 had *inter alia* observed that "it is indeed regrettable that in flagrant violation of the relevant articles of the Hague Convention (II) of 1890 and Hague Convention of 1907 Israel has made "unauthorised use of the West Bank and the Golan Heights land by converting part of it into settlements for its own nationals."[6] The Israeli Government reportedly intends to move up to two million Israelies to these settlements. In respect of the settlements in the Golan Heights, the former Israeli Prime Minister Yitzhak Rabin stated that Israel did not build the settlements in the Golan Heights so as to abandon them or to create a situation as a result of which they would not be part of the Jewish State. A former Minister of Housing, Abraham Ofer, admitted that "These settlements are important to us in defining the borders of the State and in strengthening our security." Thus, the Israeli Government is committing an act of annexation of Arab territories, in signal violation of international law. The United Nations General Assembly has repeatedly stressed the impermissibility of annexing occupied territory.

12. The brief prepared by the Secretariat for consideration by the Committee at its Twenty-eighth Session held in Nairobi in 1989 had pointed out that the creation of militarised settlements runs counter to Article 53 of the Geneva Convention for it is merely a means of depriving the local inhabitants of their property and a method of implementing discrimination.[7] Only Jews are allowed to live on the lands seized from the Arabs and intended for settlers. The United Nations condemned these Israeli actions.[8] By its resolution 252 of May 21, 1968 the Security Council declared them juridically invalid.

13. Recently the Soviet Government made a representation concerning the intention of Israeli authorities to use immigration, including that from the Soviet Union, for settlement in the occupied Arab territories. The Soviet Union urged the Israeli Government to cease immediately its policy of settlement in the occupied territories, including East Jerusalem and Gaza

6 See Doc. No. AALCC/XXVII/89/2.

7 Article 53 of the Convention reads as follows : "Any destruction by the occupying power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."

8 Arzumanov Ivan : *In Disregard of the Law* (Progress Publishers, Moscow, 1981), p. 200.

Strip and to give unequivocal assurances that it won't permit such use of immigrants coming to the country.[9]

14. As a result of the Israeli policies and practices of establishing settlements in the Palestinian and other Arab territories, occupied since 1967, the Security Council, by its resolution 446 (1979) determined that the policy of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967 had no legal validity and constituted a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East. The Security Council called on Israel to abide by the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949[10] and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem and, in particular, not to transfer parts of its own civilian populations into the occupied Arab territories.

15. It may be recalled that the Security Council had also established a Commission of three members of the Council, to examine the situation relating to settlement in the Arab territories occupied since 1967, including Jerusalem.[11]

16. Thereafter the Security Council by its resolution 465 of 1 March 1980 *inter alia* determined that "all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem, or any part thereof have no legal validity and that Israel's policy and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Geneva Convention relative to the Protection of Civilian Persons in Time of War and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East.[12]

17. That resolution also called upon "all States not to provide Israel with any assistance to be used specifically in connection with settlements in the occupied territories". The Security Council requested the Commission *inter alia* to continue to examine the situation relating to settlements in the Arab territories occupied since 1967, including Jerusalem.

18. The Israeli practice and policy of establishment of settlements on Palestinian territories occupied since 1967 has been condemned by the members of the international community – individually and collectively. At

9 *Tass*, Moscow, 12 March 1990.

10 For the text of the Convention See : *UNTS*, Vol. 75 (1950).

11 The members of the Commission were Bolivia, Portugal and Zambia. The Commission filed a preliminary report in July 1979.

12 The Security Council adopted Resolution 465 (1980) after considering the 2nd Report of the 3-Member Commission it had established by its resolution 446 (1979). For the Report of the Commission See : S/13679.

its Forty-fourth Session the General Assembly condemned the Israeli policies and practices of "establishment of new Israeli settlements and expansion of the existing settlements on private and public Palestinian and other Arab lands, *and transfer of an alien population*[13] and the eviction, deportation, expulsion, displacement and transfer of Palestinians and other Arabs from those occupied territories and denial of their right to return."[14]

19. It also condemned the arming of Israeli settlers in those occupied territories to perpetrate and commit acts of violence against Palestinians and other Arabs, causing deaths and injuries.[15] The General Assembly also reaffirmed that all measures taken by Israel to change the physical character, demographic composition, institutional structure and legal status of those occupied territories, or any part thereof, including Jerusalem are null and void and that Israel's policy of settling parts of its population and *new immigrants* in those occupied territories constitutes a flagrant violation of the Geneva Convention of 1949 and of the relevant resolutions of the United Nations.[16]

20. While demanding *inter alia* that Israel desist forthwith from the policies and practices mentioned above, the General Assembly reiterated its call upon all States, in particular those Parties to the Geneva Convention of 1949, and upon international organizations, including the specialised agencies not to recognise any change carried out by Israel, in those occupied territories and to avoid *actions* which might be used by Israel in its pursuit of the policies of annexation or colonization or any of the other policies and practices referred to in the resolution.

21. By its resolution 44/48C the General Assembly *inter alia* expressed grave anxiety and concern at the present serious situation in the Palestinian and other Arab occupied territories, including Jerusalem, as a result of the continued Israeli occupation and the measures and actions taken by Israel, designed to change the legal status, geographical nature and demographic composition of those territories. It determined that all measures and actions taken by Israel in the Palestinian and other Arab occupied territories since 1967, including Jerusalem, are in violation of the relevant provisions of the Fourth Geneva Convention of 1949 and constitute a serious obstacle to the efforts to achieve a comprehensive, just and lasting peace in the region and therefore have no legal validity. While deploring Israel's persistence on carrying out such measures, in particular, the establishment of settlements in the Palestinian and other occupied Arab territories including Jerusalem, the General Assembly demanded that Israel desist forthwith from taking

13 See General Assembly Resolution 44/48 operative paragraph 8(d).

14 *Ibid.*, paragraph 8(e).

15 *Ibid.*, operative paragraph 11.

16 *Ibid.*, paragraph 14. (Emphasis added). The expression relevant resolutions of the United Nations, needless to say, refers to the resolutions of any or all of the organs of the United Nations.

any action that would result in changing the legal status, geographical nature or demographic composition of the Arab territories occupied since 1967.[17] It also demanded that Israel comply strictly with its international obligations in accordance with the principles of international law and the provisions of the Fourth Geneva Convention of 1949. By its resolution 45/74C adopted on December 11, 1990 it also called upon all State Parties to the Geneva Convention to respect and to urgently exert all efforts in order to ensure respect for and compliance with its provisions in all occupied Palestinian territory, including Jerusalem and other Arab territories occupied by Israel since 1967.

The Convening of A Peace Conference

22. By a vote of 151 in favour, 3 against and 1 abstention, the General Assembly at its Forty-fourth Session emphasized that achieving a comprehensive settlement of the Middle East conflict, the core of which is the question of Palestine, will constitute a significant contribution to international peace and security. It also reaffirmed the principles for the achievement of comprehensive peace which *inter alia* included the withdrawal of Israel from the Palestinian territory occupied since 1967 including Jerusalem, and from the other occupied Arab territories and the dismantling of Israeli settlements in the territories occupied since 1967.[18]

23. At its Forty-fifth Session the General Assembly while reaffirming the urgent need to achieve a just and comprehensive settlement of the Arab-Israeli conflict, the core of which is the question of Palestine, called once again for the convening of the International Peace Conference on the Middle East under the auspices of the United Nations, with the participation of all parties to the conflict, including the Palestine Liberation Organization, on an equal footing, and the five permanent members of the Security Council, based on Security Council Resolutions 242 (1967) of 22 November 1967 and 338 (1973) of 22 October 1973 and the legitimate national rights of the Palestinian people primarily the right to self-determination.[19] The General Assembly Resolution 45/68 also noted the expressed desire and endeavours to place the Palestinian territory occupied since 1967 including

17 The resolution was adopted by 146 votes in favour, 1 against and 3 abstentions. While Israel alone opposed the resolution, Dominica, Kenya and the United States abstained.

18 See General Assembly Resolution 44/42 on Question of Palestine which was opposed by Dominica, Israel and the United States while Belize abstained from taking part in the vote. The other principles for the achievement of a comprehensive peace in the Middle East identified in the resolution are guaranteeing arrangements for security of all States in the region, including those named in resolution 181(II) of November 29, 1947 within secure and internationally recognised boundaries, resolving the problems of the Palestine refugees in conformity with General Assembly resolution 194(II) of December 11, 1948 and subsequent relevant resolutions; and guaranteeing freedom of access to Holy Places, religious buildings and sites.

19 See General Assembly Resolution 45/68 entitled "International Peace Conference on the Middle East" adopted on 6 December 1990.

Jerusalem under the supervision of the United Nations for a limited period as part of the peace process.

24. However, at the Middle East Peace Conference convened in Madrid in October 1991 Israel once again rejected the Arab 'Land for Peace' proposal and any role for the United Nations in the Conference. In fact, on the eve of the Madrid Peace Conference Israel Radio reported that Israel will inaugurate a new settlement in the Golan Heights. According to the report the settlement of Kela was to be opened to civilian habitation just prior to the October 30, 1991 Conference after having served as an army base in recent years. The Office of the Prime Minister Mr. Itzhak Shamir is reported to have appealed to the Golan settlers to delay the start of the settlement on the ground that "it would appear to the United States as a provocation."

INTIFADAH

25. In its resolution on 'Living Conditions of the Palestinian People in the Occupied Palestinian Territory' the General Assembly at its Forty-fourth Session taking into account the *intifadah* of the Palestinian people against the Israeli occupation and alarmed by the continuation of the Israeli settlement policies in the Palestinian territory occupied by Israel since 1967, including Jerusalem, which have been declared null and void and a major obstacle to peace, rejected the Israeli plans and actions intended to change the demographic composition of the occupied Palestinian territory, in particular the increase and expansion of the Israeli settlements.[20]

26. At its Forty-fifth Session the General Assembly, aware of the *intifadah* of the Palestinian people since 9 December 1987 against Israeli occupation, expressed its deep concern at the alarming situation in the Palestinian territory occupied since 1967 as a result of the continued occupation by Israel, the occupying power, and of its persistent policies and practices against the Palestinian people. By a recorded vote of 141 for, 2 against and 3 abstentions the General Assembly by its resolution 45/69 condemned the policies and practices of Israel which violate the human rights of the Palestinian people in the occupied Palestinian territory, including Jerusalem and demanded that Israel abide scrupulously by the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949 and desist immediately from those policies and practices which are in violation of the Convention.[21] It also called upon States Parties to the Geneva Convention to ensure respect for the Convention in all circumstances, in conformity with Article 1 of the aforementioned Geneva Convention.

20 See General Assembly Resolution 44/174 of 19 December 1989 adopted by a recorded vote of 140 for, 2 against and 8 abstentions.

21 While Israel and the United States of America opposed the resolution, Costa Rica, Dominica and Honduras abstained.

27. Apart from the collective and individual denunciation of Israel's policy of establishing settlements in occupied Arab Territories listed above, this policy of "Climb the Mountain and open up the desert" has also been denounced in several other fora including the AALCC, the OAU and the NAM. It would have been observed that Israel's policy of establishing settlements in territories annexed and occupied by force is not only violative of all norms of international law, the Declarations on Friendly Relations,[22] the United Nations Charter and the Fourth Geneva Convention, it (the policy of establishing settlements on occupied Arab territories) is also the extension of the Zionist Slogan "land for people for people without land". The practice and policy of deportation of Palestinians from Palestine and other occupied Arab territories are thus two faces of the same ugly picture.

28. The international community has repeatedly declared that the Israeli policies and practices in the occupied Palestinian territory are in violation of its obligations as a party to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War and contrary to the resolutions of the United Nations as well as generally recognised norms of international law.

29. Recently the General Assembly by its resolution 45/74A of 11 December 1990 condemned the continued and persistent violation by Israel of the said Geneva Convention of 1949 and other applicable international instruments. It condemned in particular those violations which the Convention designates as "grave breaches" thereof. The Assembly also declared that Israel's grave breaches of the Geneva Convention are war crimes and an affront to humanity.

30. The international community has deplored the statements made by the Israeli officials, implying the prospect of increased settlement of immigrants in the occupied Palestinian territory even as Israel continues to deny Palestinians the right to return to their homes. Whilst the international community

22 The Declaration on Principles of International Law Governing Friendly Relations and Cooperation Between States in accordance with the Charter of the United Nations *inter alia* provides :

"The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognised as legal. Nothing in the foregoing shall be construed as affecting :

(a) Provisions of the Charter or any international agreement prior to the Charter regime and valid under international law; or

(b) The powers of the Security Council under the Charter.

The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention; and

"Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the declaration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit to the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter."

recognises and supports the right of freedom of movement and the right of everyone to leave any country and the right to return to one's own country, it believes that these rights cannot be used as a pretext to settle immigrants or Israeli civilians in the occupied Palestinian territory, including Jerusalem.

31. Reference may in this regard be made to General Assembly resolution 45/83 on the situation in the Middle East which *inter alia* condemned Israel's aggression, policies and practices against the Palestinian territory and outside this territory, including appropriation, establishment of settlements, annexation and other terrorist, aggressive and repressive measures which are in violation of the Charter and the principles of international law and the relevant international conventions. By that resolution the General Asssembly also condemned the imposition by Israel of its laws, jurisdiction and administration on the occupied Syrian Arab Golan, its annexation policies and practices, the establishment of settlements, the confiscation of lands, the diversion of water resources and the imposition of Israeli citizenship on Syrian nationals. It declared all these measures to be null and void and constituted a violation of the principles and rules of international law, relative to belligerent occupation in particular the Fourth Geneva Convention of 1949. By its resolution 45/74 the General Assembly *inter alia* condemned the persistence of Israel in changing the physical character, demographic composition, institutional structure and legal status of the occupied Syrian Arab Golan.

32. More significantly, the General Assembly at its Forty-fifth session *inter alia* strongly condemned the establishment of the Israeli settlements and expansion of the existing ones on private and public Palestinian and other Arab lands, and transfer of an alien population thereto, reaffirming that all measures taken by Israel to change the physical character, demographic composition, institutional structure or legal status of the occupied territories or any part thereof, including Jerusalem, are null and void and that Israel's policy of settling parts of its population and new immigrants in those occupied territories constitutes a flagrant violation of the Fourth Geneva Convention and of the other relevant resolutions of the United Nations. The General Assembly by its resolution 45/74 demanded that Israel desist from those policies and practices.

33. In this regard the policy of deportation of Palestinians from occupied territories is in violation of international law in general and the Laws and Customs of War as enshrined in the Geneva Conventions of 1949 in particular. Secondly, while Israel has in part sought to justify the establishment of Jewish settlements on occupied Arab territories on the right of movement and the right to leave any country including one's own and also the right to return to one's own country, Israel has denied the same right to the Palestinians. In any case this right cannot be used as a pretext to settle immigrants or Israeli civilians in the occupied Palestinian territory, including Jerusalem.

34. A word about the right to return may be in order. Numerous international instruments such as the Universal Declaration on Human Rights 1948, the International Covenant on Civil and Political Rights 1966; the Declaration on the International Convention on the Elimination of Discrimination Against Women, 1979 all recognise both the right to freedom of movement and the right also to leave any country including one's own, but both the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights also recognise the right to return to one's own country.

35. However, Israel denies this right to freedom of movement to Palestinian nationals in blatant and flagrant violation of all norms of international law. In the West Bank and Gaza, Military Order No. 3 gives the military commander power to declare "closed areas" and consequently forbid movement into or out of such areas without a permit. A permit is needed to leave the West Bank and it is granted or denied at the sole discretion of the military governor.[23] Palestinians who are denied by these methods the right to travel to and reside in their own homelands are convinced that these restrictions are not related to security considerations but refer to the Israeli intention to rid the land of its original inhabitants.

36. The right of the Palestinian people to return to their country has not only been recognised by the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights, it has also been specifically affirmed and reiterated in several resolutions of the General Assembly. The General Assembly at its seventh emergency session in 1980 on the question of Palestine adopted resolutions ES-7/2 which *inter alia* reaffirmed :

> "The inalienable right of the Palestinian people to return to their homes and property in Palestine, from which they have been displaced and uprooted, and calls for their return."

The right to return is an acknowledged fundamental human right guaranteed to all peoples and the Palestinian people are no exception to this norm of international law.

37. At its Forty-fifth Session the General Assembly by its resolution 45/73 of 11 December 1990 *inter alia* reaffirmed the inalienable right of all displaced persons to return to their homes or former places of residence in the territories occupied by Israel since 1967. It declared that any attempt to restrict, or to attach conditions to the free exercise of the right to return by any displaced person to be inconsistent with that inalienable right and, therefore, inadmissible. The General Assembly considered any and all agree-

23 Although the reasons for denying a permit often appear arbitrary there is said to be a specific political motive behind it. The occasion for granting a permit is at times used as an opportunity for the military governor to exert pressure on a particular person. A mayor, or a political activist, may be granted or denied this permit depending on the acceptability of his views to the Israeli Government.

ments embodying any restriction or condition for the return of the displaced inhabitants as null and void. Having thus implicitly and explicitly accorded to the norm of the right of displaced inhabitants to return to their homes the status of *jus cogens* the General Assembly deplored the continual refusal of the Israeli authorities to take steps for the return of the displaced inhabitants. It called upon Israel to (i) take immediate steps for the return of all displaced inhabitants; and (ii) desist from all measures that obstruct the return of the displaced inhabitants including measures affecting the physical and demographic structure of the occupied territories.

38. A reference may at this juncture be made to the Conference on Palestine held at Tehran in October 1991 at the initiative of the Government of the Islamic Republic of Iran.[24] The main objective of the said Conference, which the Secretary-General of the AALCC had been invited to participate as an Observer, was to support the Palestinian cause. Although divergent views were expressed in the course of discussions which took place against the backdrop of the West Asia Peace Conference, the majority of the participants were opposed to the Madrid Conference.[25] These participants were of the view that the Madrid Conference would not solve the problem of Palestine and was being convened only to wrest more concessions out of Palestine.

39. In a statement circulated on behalf of the AALCC at the Tehran Conference the Secretary-General had *inter alia* stated that :

> "One possible solution to the problem is the convening at an early date the Middle East Peace Conference. In our view, alongwith the permanent members of the Security Council, all the States in the region as well as the Palestinian people represented by their legitimate leaders must also be present in their own right"—and that the "Parties to the multilateral negotiations must agree to the obvious fact that the presence and participation of the Palestinian people is a *sine qua non* of any possibility of a just and lasting peace in the region. The urgency of an international conference on Middle East which will resolve peace and stability in the region cannot be over emphasized."

40. In his statement circulated at the Tehran Conference the Secretary-General had also pointed out that the Draft Articles on the Code of Crimes Against the Peace and Security of Mankind as adopted on first reading by the International Law Commission at its recently concluded Forty-third Session *inter alia* provided for the conviction and sentence of an individual who orders the commission of an exceptionally serious war crime. Draft Article 22 of the aforementioned Code, among other things, defines the term "Exceptionally Seribus War Crimes" and includes the establishment of settlers

24 The Conference on Palestine was held at Tehran from October 19 to 22, 1991.

25 The Madrid Conference opened on October 30, 1991.

in an occupied territory and changes to the demographic composition of an occupied territory.

41. Finally, it may be stated that in the opinion of the Secretariat of the AALCC, both the issue of deportation of Palestinians as well as the massive immigration of Jews into Israel and their settlement in the occupied Arab territories including the West Bank and Jerusalem have been adequately considered since the item was first taken up for consideration by the AALCC. The AALCC may at its Thirty-first Session while considering the future course that the work on this agenda item could take consider mandating the Secretariat to prepare for the International Peace Conference scheduled to be held at the end of the United Nations Decade of International Law.

IV. RESPONSIBILITY AND ACCOUNTABILITY OF FORMER COLONIAL POWERS

(i) INTRODUCTION

1. The item "Responsibility and Accountability of former Colonial Powers" was included in the agenda of the Twenty-ninth Session held in Beijing from 12th to 19th March 1990, at the request of the Government of the Libyan Arab Jamahiriya. It may be recalled that the Memorandum[1] submitted by the Libyan Government requested the AALCC to include the following four items on its agenda :

(i) Accountability of the colonial powers for the losses caused to the Libyan Arab people due to the left-over mines and other vestiges of the Second World War on the Libyan soil which was the arena of major battles between the warring colonial forces.

(ii) Accountability of the colonial powers for the losses caused to the colonised countries in general which include the looting of their resources and subjugating their peoples.

(iii) Accountability of the colonial powers for freezing the assets of the developing countries in their banks which resulted in loss to those countries and amounted to the violation of international law.

(iv) Responsibility of the colonial powers to give compensation and provide information on the fate of those who were exiled during the period of colonial domination."

2. At the Beijing Session it was decided to group these items under the heading "Responsibility and Accountability of former Colonial Powers".

3. At that Session the item was taken up for discussion at the Sixth Plenary Meeting held on the 16th of March 1990. The Delegate of Libya in his detailed statement underscored the importance of issues involved in the consideration of the item and drew attention to their particular relevance in the context of his country. He asked the Secretariat to examine the legal principles establishing the liability of the colonial powers, payment of compensation for the damage caused to the Libyan people and restoration of historical monuments and cultural property. The Delegates of Sudan, Syria, State of Palestine, Kuwait, Saudi Arabia and Yemen Arab Republic supported the Libyan request. The Delegate of Egypt while endorsing the Libyan proposal for preparation of a legal study suggested that the AALCC should undertake a joint programme in cooperation with the UNEP.

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1 See Document No. AALCC/XXIX/90/II.

4. The Delegate of Japan doubted the appropriateness of the item for consideration by the AALCC. These matters, in his view, were of a political nature and should be dealt with on a bilateral basis or multilaterally among the States concerned.

5. The Observer for Italy while rejecting any obligation of his Government on the basis of international law expressed his Government's readiness to co-operate with the Libyan Government to deal with the problems arising out of the left-over mines.

6. The Secretary-General, while assuring full co-operation of the Secretariat, pointed out that since it lacked technical expertise, it would be necessary to convene an expert group meeting to examine the technical aspects of the problem.

7. At the close of discussions, the AALCC took note of the Memorandum submitted by the Government of the Libyan Arab Jamahiriya and directed the Secretariat to prepare a study on the legal aspects of the issues raised. The AALCC also requested the Government of the Libyan Arab Jamahiriya to extend all necessary assistance to the Secretariat in the preparation of the study.

8. Pursuant to the AALCC's request, the Government of the Libyan Arab Jamahiriya extended an invitation to the Secretary-General to visit Libya for consultations. The Secretary-General nominated the Director in the Secretariat for that purpose. The Director visited Tripoli for five days from 14 to 18 January 1991 and held discussions with the officials of the Ministry of Foreign Affairs and other experts. He also collected some useful documents for the preparation of the study.

9. Subsequently, a study was prepared by the Secretariat and presented to the Thirtieth Session of the AALCC held in Cairo in April 1991. However, it could not be taken up for discussion at that session for lack of time. Consequently, the study was resubmitted to the Thirty-first Session of the AALCC held in Islamabad (Pakistan) in January-February 1992.

Discussions and Decisions taken at the Islamabad Session

10. The *Secretary-General* introducing the Secretariat study entitled "Responsibility and Accountability of the Former Colonial Powers", stated that the item was included in the agenda of the Twenty-ninth Session held in Beijing, following a reference made by the Government of the Libyan Arab Jamahiriya. At that Session, after a brief discussion, it was decided to place the item for further consideration at the Thirtieth Session and the Secretariat was asked to prepare a study on the legal issues related to the item.

Following the recommendations of the Beijing Session, the Secretariat prepared a study which was submitted for consideration at the Cairo Session. The item could not be taken up due to lack of time. It was, however, decided to place it on the agenda of the Thirty-first Session. The Secretariat, therefore, had not prepared any new study on this item. It had, however, contacted the Libyan Arab Jamahiriya for any additional material to update the report but none was forthcoming. The Study prepared earlier has been reproduced.

The Secretary-General explained briefly the approach followed by the Secretariat in the preparation of its study. When the Secretariat embarked upon the preparation of this study, it was realised that it would be a vast study both in time span and the issues involved. For the time being, it was considered more practical to examine the legal issues raised in the context of the Memorandum submitted by the Libyan Government, particularly concerning the remnants of war. The study is divided into three parts. The first part gives a historical background of the special situation in Libya.

After the end of the Second World War, feeble efforts were made to help the Libyan Government to deal with the problems of remnants of war, particularly the mines. Subsequently, in order to draw the attention of the international community, the Libyan Government took the initiative of raising these issues in international fora such as the United Nations, UNEP, the Non-Aligned Conference, the Islamic Conference, the OAU and the Arab League. This generated some momentum for the consideration of these issues in the United Nations and the UNEP. Unfortunately, this did not last long. In recent times, the Libyan Government has taken significant initiatives at the national level to collect and disseminate the relevant information. This would help reviving the interest of the international community and to formulate an objective approach for the consideration of the issues involved.

The second part contains a general survey of legal developments related to the issues referred to in the Memorandum of the Libyan Government. Many fundamental questions and principles related to the conduct of war have been codified to a great extent by the Hague Regulations of 1907, the four Geneva Conventions of 1949 and the Additional Protocols of 1977. The application of these Rules and Conventions in the context of remnants of war have been examined in the present study. There are several decisions by the national and international judicial institutions which could help supplement the analysis of the application of these laws. However, because of shortage of time, such an analysis could not be done.

He observed that a study of State responsibility was a vast topic. There were variety of circumstances which can give rise to international responsibility. The Secretariat study sketches the history of its codification by the International Law Commission. This historical analysis would facilitate consideration of the relevant issues in the context of the Libyan reference in a proper perspective.

Finally, in Part III, some general observations have been made. The Secretariat intends to prepare a study in the light of the views expressed during this Session if this is the mandate of the Committee. To facilitate such a study which might involve some travel for consultations with relevant institutions, the Secretariat would welcome a generous financial contribution from the Libyan Arab Jamahiriya.

11. The *Delegate of Libyan Arab Jamahiriya* recalled that during the consideration of this item at the Beijing Session, his delegation had made a detailed statement. In order to assist the Secretariat in the preparation of a study on the legal issues involved, his Government had invited an official from the Secretariat to Tripoli. All relevant materials and documents related to this topic were given to him. He said that the study prepared by the Secretariat was in full compliance with their request. In his view, since the matter had been examined in various fora, it would be desirable that the AALCC passed a resolution incorporating the relevant legal principles.

12. The *Delegate of the Democratic People's Republic of Korea* stated that many governments were concerned with similar problems raised during the colonial rule.

13. The *Delegate of Uganda* was of the view that the item was of paramount importance and it was not the first time that it had been raised in an international forum. The Organization of African Unity at its meeting in Nigeria in 1991 had discussed these issues at length. In his view, the basic question was related to illegal deprivation of human rights.

14. The *Delegate of Palestine* recognised that the item was of great importance.

15. The *Delegate of Ghana* expressed the view that the subject was vast in scope. The issues involved were complicated and covered the whole history of mankind set out in those resolutions. He put forward the draft of such a resolution for the consideration of Member States.

16. The *Observer for Italy* recalled the statement of his delegation at the Beijing Session and said that his Government rejected any obligation on the basis of existing rules of international law.

17. The *Delegate of Libya* stated that his Government's relations with the Italian Government were cordial and there were no problems between them. While stressing the need to recognise the right of the colonised countries to receive compensation from the colonial powers, he observed that the issues involved covered many areas such as human rights and State responsibility.

18. The *Delegate of Egypt* considered it essential to promote international co-operation to deal with this matter effectively. With regard to the legal principles, he referred to Nuremberg trial judgement which, in his view, laid down many rules of international law.

19. The *Delegate of Sierra Leone* recognised the importance of the item which has been considered by the United Nations and other international bodies. Since the AALCC was a specialised legal body, it was imperative that it followed a judicious approach. He cautioned against any attempt to draw a conclusion at this stage. In his view, the first step was to demarcate areas and then proceed systematically.

20. After the conclusion of the debate, the following text of resolution was adopted :

RESPONSIBILITY AND ACCOUNTABILITY OF FORMER COLONIAL POWERS

The *Asian-African Legal Consultative Committee* meeting at its 31st Session in Islamabad

Recalling the Charter of the United Nations;

Having considered the report of Secretary-General on the topic;

Recalling the U.N. General Assembly resolution No. 1514 (XV) on the right of self-determination by colonial peoples;

Further recalling the relevant U.N. General Assembly resolutions on the return of the cultural heritage to their rightful owners,

1. *Reaffirms* the right to self-determination of countries and peoples under colonial rule;
2. *Further reaffirms* the right of all peoples formerly under colonial rule to receive compensation for damage suffered as a result of colonial rule;
3. *Calls on* former colonial powers to fully and effectively cooperate with the former colonial people in eliminating the consequences of colonial rule and providing information on those exiled or detained during the colonial era;
4. *Further calls upon* the colonial powers to return to their rightful owners the cultural heritage which was illegally plundered and removed by the colonial powers;
5. *Requests* the Secretary-General to continue his detailed study to enable the AALCC to take a definitive decision on the matter; and
6. *Decides* to inscribe the item on the agenda of its Thirty-second Session.

21. The *Delegate of Japan* expressing his reservations stated that "this subject is of highly political nature, and is not appropriate to be dealt with in a multilateral forum like the AALCC.

(1) Any bilateral approach is the best means to initiate negotiations to arrive at any viable solution. The same is suggested also by the Secretariat Study on the issue, namely, Doc. No. AALCC/XXXI/ Islamabad/92/12.

(2) What is mentioned above regarding the position of Japan was expressed clearly at the Beijing Session 1990, when the item was proposed by the representative of Libya and there has been no change thereof since then."

Part - I

The Problem of Remnants of War : Special Situation in Libya

The plight of Libyan people under the Italian colonial regime dates back to 1911 when it began deporting several thousand Libyans to concentration camps in Italian islands and other neighbouring countries. Such deportation on a large scale helped strengthening the hands of the colonial regime and weakening the national resistance which was gaining ground among the Libyans. This process continued unabated for nearly four decades.

With the outbreak of the Second World War, Libya became a theatre of war. From 1940 to 1942, it had to bear the brunt of several military operations from both the Axis and the Allied powers. These military operations involved extensive mine laying and booby traps of all kinds in large areas, of the Libyan territory.

The defeat of Italy by the Allied forces marked the beginning of the process of freedom for Libya from the colonial rule. To begin with, Libya was placed under the Administration of four Powers, namely, France, the UK, the USA and the USSR. Subsequently, a Treaty of Peace with Italy was concluded by the Allied and Associated Powers on 10 February 1947.[2]

Section IV, Article 23 of the Peace Treaty dealt with the Italian colonies. Italy renounced all rights and titles to the Italian territorial possessions in Africa, i.e., Libya, Eritrea and Italian Somaliland. Further, it was provided that these territories would continue under the Administration of four Powers and they would jointly determine their final disposal. In a Joint Declaration annexed to the Treaty, the USSR, the UK, the USA and France reiterated their intentions concerning these territories and assured that if with respect to any of these territories the Four Powers are unable to agree upon their disposal within one year from the coming into force of the Treaty of Peace with Italy, the matter shall be referred to the General Assembly of the United Nations for a recommendation and the Four Powers agree to accept the recommendation and to take appropriate measures for giving effect to it.[3]

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2 The Treaty of Peace was signed at Paris on 10 February 1947 between the USSR, the UK, the USA, China, France, Australia, Belgium, Brazil, Canada, Czechoslovakia, Ethiopia, Greece, India, the Netherlands, New Zealand, Poland, the Ukranian Soviet Socialist Republic, the Union of South Africa and Yugoslavia referred to as Allied and Associated Powers, of the one part and Italy, of the other part. The Treaty came into force on 15 September 1947.

3 Joint Declaration by the Governments of the Soviety Union, the United Kingdom, the United States of America and France concerning Italian Territorial Possessions in Africa, Annex XI, *U.N. Treaty Series*, Vol. 49, 1950. pp. 214-215.

The Four Powers referred to the General Assembly on 15 September 1948 the question of disposal of former Italian colonies. The General Assembly while considering the matters concerning Libya recommended that it should achieve independence latest by I January 1952.

The General Assembly requested the Economic and Social Council, the Specialized Agencies and the Secretary-General of the United Nations to consider extending such technical and financial assistance to Libya as it might request in order to establish a sound basis for economic and social progress.

The General Assembly recognised that Libya as a result of war had suffered extensive damage to private and public property, both movable and immovable, as well as to its system of communications. It stressed that, the existence of those war damages and the necessity of repairing them was one of the major economic and financial problems to be taken into consideration. It requested the Secretary-General to study the problem and submit a report at the Sixth Session of the General Assembly.[4]

In order to prepare the report the Secretary-General appointed an expert who assumed his duties in July 1951. Because of the limited time and inadequacy of records, the expert could make only preliminary conclusions. The report estimated that war damages for the two regions – Tripolitania and Cyrenaica – were approximately 12,500,000 lire. The Second Committee of the General Assembly considered the report at its 189th and 190th meetings on 21 and 22 January 1952.

The Representative of Libya urged that the problem of war damages was of great importance for his country, especially in view of the heavy damage to private and public property. He requested the Secretary-General to furnish Libya a certain number of technical experts to make a full and detailed study of the problem and to help the Government to work out a reconstruction programme.

The General Assembly took up this matter for consideration at its 366th plenary meeting. After a brief discussion, it adopted a resolution urging the Secretary-General and the Agencies participating in the Technical Assistance Board to give sympathetic consideration to the request of the Libyan Government for assistance to the economy, including the repair and reconstruction of damaged property and installations, public and private. Further, it recommended appointment of additional experts, as requested by the Libyan Government, to collect the necessary data and complete the survey of the problem of war damages and make necessary recommendations.[5]

Subsequently, in 1955, 1958, 1960 and 1962 the United Nations discussed the Libyan problem in the context of development assistance requesting various United Nations agencies to provide technical and financial assistance for that purpose.

In the following years, the United Nations did not pay any attention to the problem of left-over mines in the Libyan territory. The Libyan Government, at the national level, constituted a department entrusted with the task of studying this problem. A bilateral Agreement was concluded between Italy and the Libyan Government in 1956. The Agreement provided for financial assistance from Italy for economic reconstruction purposes.[6]

In the wake of the Revolution in 1969, a new government took power in Libya. This marked the beginning of renewed efforts to draw the attention of the international community towards the problem of remnants of war. The issue was first raised in the Non-Aligned forum and subsequently at other fora including the General Assembly of the United Nations.

(i) The Conference of Ministers of Non-Aligned States (August 1975)

The Conference of Ministers of Foreign Affairs of the Non-Aligned States, held at Lima (Peru) from 25 to 30 August 1975, noted with deep concern that countries and peoples of the Third World faced important losses of properties and human lives as a result of the colonialist wars and wars that took place on their territories between the colonialist countries. While recognising that the economic development programmes in these countries were hindered by the remnants of these wars and aggressive acts such as the placing of mines, the Ministers regretted the failure of the belligerent States and/or the colonialist powers and/or the aggressors to remove the remnants of their military operations and/or to indicate the position of mines. They requested all States that took military or other aggressive acts to remove the remnants of such acts, i.e. mines, to indicate their position and to offer technical assistance for their removal. Finally, they recognised that it was the right of all countries of the Third World and National Liberation Movements that suffered from these acts to ask for compensation for loss of lives and/or properties.[7]

Subsequently, the fifth summit of the Heads of State or Government of Non-Aligned States held in Colombo in August 1976, endorsed the recommendations made by their Foreign Ministers at Peru. While reaffirming that colonialist States must assume responsibility for material and moral damage from which the latter continue to suffer, the Summit demanded that affected countries be provided with all necessary assistance and information concerning the areas in which mines were placed and the types of those mines, and to support all the efforts made by the affected States to remove these remnants. Finally, it recognised that in order to resolve the problem of war remnants, especially mines, it was

4 General Assembly Resolutions 289(IV) of 21 November 1949 and 387(V) of 17 November 1950.

5 General Assembly Resolution No. 529(V) adopted on 29 January 1952. See also *Yearbook of the United Nations*, 1951, page 276.

6 The Agreement was concluded in Arabic and Italian languages. No English text is available.

7 Text of the Resolution is reproduced in *The White Book*, published by the Libyan Studies Centre, 1981, page 15.

necessary to convene an international conference on this problem and urged the United Nations to take such an initiative.[8]

(ii) The Seventh Islamic Conference of Ministers for Foreign Affairs held at Istanbul, 12-15 May 1976

The Conference recognised that the development of certain developing countries had been impeded and threatened by the remnants of wars, especially mines still present in their fields. While condemning those States who had neglected to remove the remnants of wars, particularly mines, the Conference called upon them to assume responsibility for material and moral damage inflicted upon the affected countries and provide all possible help and information concerning the areas in which mines were placed, including site maps, and the types of mines, in view of their importance in supporting efforts of the affected countries to remove those destructive remnants. Finally, it recommended that concerted measures should be taken by all States to convene an international conference to consider this problem.[9]

At its successive sessions, the Islamic Conference during the consideration of this agenda item reiterated its recommendations in more or less similar terms.

(iii) OAU and the League of Arab States

The Organisation of African Unity (OAU) and the League of Arab States have also in their deliberations expressed concern over the problem of remnants of war and extended full support to the various initiatives taken to solve this problem.

(iv) Consideration by the United Nations and the UNEP

The recommendations of the Non-Aligned Ministers' Conference found its echo at the Thirtieth Session of the General Assembly, which by its resolution of 9 December 1975 recognised that the development of certain developing countries had been impeded by the material remnants of war, particularly mines which continued to be present in their territories. It considered that the colonialist powers which have neglected to remove those mines to be responsible for any material or moral damage suffered by the countries in which such mines are placed. It called upon those States which created that situation to compensate forthwith the countries in which such mines were placed for any material and moral damage suffered by them as a result thereof and to take prompt measures to give all information on the areas in which such mines had been placed and provide technical assistance for their removal. Lastly, it requested the UNEP to undertake a study of the problem of the material remnants of wars, particularly mines

8 *Ibid, pp. 17-18.*

9 *Ibid* pp 16-17.

and their effect on the environment, and to submit a report on the subject to the General Assembly at its Thirty-first Session.[10]

Following the request made by the General Assembly, the Executive Director of UNEP convened a meeting of an advisory group of experts to assist him in the preparation of such a study. On 9 April 1976, the Governing Council of UNEP by its decision 80(IV) authorised the Executive Director to proceed with the preparation of an appropriate study by seeking information from the Governments and taking into account the relevant work being done in other forums. It requested the Executive Director to consult with Governments regarding the feasibility and desirability of convening an inter-governmental meeting to deal with the environmental problems of material remnants of war and provide assistance in the field of environmental protection to those States, upon request, which are engaged in preparing their own programmes for the elimination of mines in their territories.[11]

The Executive Director submitted an Interim Report to the General Assembly at its Thirty-first Session in compliance with the request made at the earlier session. The Interim Report stressed the need for obtaining statistical data and other relevant material from the Governments and contemplated preparation of guidelines which could cover both action to remedy the environmental damage caused by existing material remnants of war and ways of reducing such damage resulting from future conflicts.[12]

In its resolution 31/111 of 16 December 1976, the General Assembly took note of the Interim Report and requested the UNEP to complete its study.

The completed study, after approval by the Governing Council of UNEP at its Eighth Session, was submitted to the Thirty-second Session of the General Assembly. At that session the General Assembly took note of the Report and urged the Governments concerned to co-operate with the Executive Director of the UNEP to further promote the work in this area.

For the next five years there was hardly any progress. The Executive Director of UNEP continued his efforts to seek the views and observations of all States.

At its Thirty-seventh Session, the General Assembly while considering this item requested the Secretary-General, in co-operation with the Executive Director of UNEP, to prepare a factual study on the problem of remnants of war, particularly mines, which should include an analysis of the following aspects of the problem :

"(a) The economic and environmental problems experienced by developing countries affected by remnants of war, the loss of life and property they have suffered, their specific demands in this respect

10 General Assembly Res. 3435(XXX), adopted on 9 December 1975.

11 UNEP/GC/84 and UNEP/GC/84/Add I.

12 See General Assembly Document A/31/210.

and the extent to which the responsible States are willing to compensate the affected States and to assist them in solving the problem;

(b) The legal status of the problem;

(c) The international co-operation required to solve the problem;

(d) The role of the United Nations in this regard, including the possibility of convening a conference under the auspices of the United Nations."[13]

Following the recommendations of the General Assembly, the Executive Director of the UNEP, by his letters dated 15 and 18 April 1982, requested the Governments to provide the relevant information. He also convened a high level expert meeting at Geneva from 25 to 28 July 1983. The expert group dealt with the issues concerning economic, environmental and legal aspects of remnants of war and prepared a study entitled *Explosive remnants of conventional war*. The study besides surveying the various aspects of the problem suggested the areas of international co-operation, including the role of the United Nations. In the concluding part, several recommendations were made for urgent remedial action on the problem of material remnants of war. This study was attached to the Report of the Secretary-General submitted to the General Assembly at its Thirty-eighth Session.[14]

At the Thirty-eighth Session, the General Assembly *inter alia* requested the Secretary-General, in co-operation with the Executive Director of the UNEP, to continue to seek the views of States on the recommendations contained in Section VIII of the study annexed to his report submitted at the previous session and report to the General Assembly at its Thirty-ninth Session on the results of his consultations with the States concerned.[15]

At the Thirty-ninth Session, the General Assembly regretted that no concrete measures had been taken to solve the problem of remnants of war despite the various resolutions and decisions adopted thereon by it and the UNEP. It reiterated its support for the just demands of the developing countries affected by the planting of mines and the presence of other remnants of war in their territories for compensation and for complete removal of those obstacles by the States that implanted them. It requested the Secretary-General, in co-operation with the UNEP and other organisations of the United Nations system, to collect all information on expertise and available equipment, so as to evaluate, on request, the actual needs of the developing countries affected and to assist those countries in their efforts to detect and clear material remnants of war. While requesting all States to co-operate, it called upon those developed countries directly responsible for the presence of remnants of war to intensify bilateral consultations with

13 General Assembly Resolution 37/215, adopted on 20 December, 1982.

14 General Assembly Doc. A/38/383.

15 General Assembly Resolution 38/162, adopted on 19 December 1983.

the aim of concluding, without undue delay, agreements for the solution of those problems.[16]

At its Fortieth Session, the General Assembly once again requested the Secretary-General to continue his efforts with the countries responsible for planting the mines and the affected developing countries in order to ensure the implementation of the relevant resolutions of the General Assembly.[17]

Pursuant to aforesaid resolution, the Secretary-General requested all State members and non-members of the United Nations to furnish information in this regard. However, in view of the limited response and the lack of information, the Secretary-General in his report to the Forty-second Session observed that "in these circumstances, the Secretary-General is not in a position to evaluate the actual situation and needs of the developing countries affected."[18]

(v) Further Initiatives by the Libyan Government

(a) Studies by the Libyan Studies Centre

Apart from raising the issue at various international fora, the Libyan Government has been making relentless efforts at the national level by initiating studies and organising conferences. A significant step in this direction has been the establishment in Tripoli of a Centre for Studies and Researches on the Libyan Struggle against the Italian Invasion (the Libyan Studies Centre).

The Libyan Studies Centre has been instrumental in collecting and disseminating information concerning the losses suffered by the Libyan people during the colonial regime. One of its main functions has been to organise international conferences and exhibitions dealing with the past history of the Libyan Jamahiriya. Besides establishing a permanent exhibition in Tripoli, the Centre organised International Seminars on "Libya – History and Revolution" in Rome in 1981 and "the consequences of war damages and international responsibility" in Geneva in April 1981, respectively. The Centre also brought out *The White Book*;[19] which gives valuable information about the damages suffered by the Libyans and the efforts made by the Libyan Government both at the national and international levels to draw the attention of the international community.

In 1982, the Libyan Studies Centre effected a statistical survey in various municipalities of the Jamahiriya to collect the information on the damages suffered by the Libyan people as a result of colonialism and its residues since 1911. It was contemplated that the survey would cover any type of damage suffered by the Libyan people due to the Italian aggression, which

16 General Assembly Resolution 39/167, adopted on 17 December, 1984.

17 General Assembly Resolution 40/197, adodpted on 17 December 1985.

18 General Assembly Doc. A/42/514.

19 The *White Book* was published by the Libyan Studies Centre in 1981.

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".[20] 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.[21]

(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.

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

21 *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".[22]

(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.[23]

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.

22 *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.

23 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. Petersberg 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.*[24] 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.[25]

(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.[26] 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.[27] 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.[28]

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."[29]

29 Preamble of the 1977 Protocol I.

(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.[30] 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.[31] 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.[32]

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.

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

31 Oppenheim L., *op. cit., pp. 592-95.*

32 *Ibid.*

(e) War Crimes

(i) The Nuremberg Tribunal

During the Second World War, the attrocities, 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.[33] 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."[34]

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.[35] Subsequently, the

33 *Ibid., p. 578.*

34 *Ibid, pages 578-579.*

35 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.[36]

(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 Sesssion 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.[37]

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.[38]

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

36 *Oppenheim, op. cit,.* page 582.

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

38 *Ibid*, pp. 116-117.

(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 Documents 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 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 mainly 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 23.

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,

57 *Ibid*, page 3.

58 *Ibid*, pages 8-16.

59 *Ibid*, page 19.

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

60 *Ibid*.

61 See A/CN.4/96.

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 repercussions 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

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

63 *Ibid*, pp. 81-82.

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

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. A/45/10/XXX/Corrs/91/1, pp. 89-101.

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 stupendous 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 propositions 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

its subsequent session (1992). Consequently, the AALCC decided to include the topic as a separate agenda item in its following session (1992) to facilitate substantial discussion on the topic which would be helpful to the Member Governments. The Secretariat was directed to prepare a detailed analysis of the draft articles which may be adopted by the ILC in its first reading.

Discussions and Decisions taken at the Islamabad Session

16. The thirty-first session of the AALCC was held in Islamabad (Pakistan) from 25 January to 1 February 1992. At that session, the topic was taken up for further consideration on the basis of a study entitled "The Law of International Rivers"[4] presented by the Secretariat.

The *Secretary-General* while introducing the Secretariat study stated that it was at the Tokyo Session (1983) of the AALCC that it had been decided to undertake a preliminary study on the topic with a view to :

(i) identifying the areas which were not likely to be covered by the work of the ILC 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 ILC; and

(iii) to submit a tentative programme of work for consideration of the AALCC.

Subsequently, pending a final decision on the future work to be undertaken by the AALCC, it had been decided to direct the Secretariat to continue to examine the draft articles prepared by the ILC and to furnish comments thereon. Consequently, the present Secretariat study not only commented on the seventh report of the Special Rapporteur on the topic but also on the draft articles adopted by the ILC at its first reading.

17. The *Delegate of India* stated that the needs of the States through which an international river flows should not be ignored. The cognisance of the needs of the riparian States did not vitiate the need for cooperation between the reparian States. A common shared interest rather than the legal obligation should be the basis of co-operation between the riparian States.

18. The *Delegate of Jordan* observed that the diversion of the waters of the River Jordan by Israel contravened the provisions of Article 6 of the draft articles on the non-navigational uses of international watercourses.

19. The *Observer for Sweden*, referring to the draft articles on the non-navigational uses of international watercourses, emphasized the importance of preventive measures and the provisions relating to notification.

4 See Doc.. AALCC/XXXI/Islamabad/92/5.

20. The *Delegate of Turkey* dealt in his statement primarily with the concept of 'watercourse' as defined in the draft articles prepared by the ILC. He conveyed his delegation's apprehensions as regards the technical reasons which directed the eminent Rapporteur of the ILC, Prof. McCaffrey, to consider the concept of "watercourse" as a "system of inter-related hydrological components" on the basis of hydrological reality and he found such an enunciation of the concept of "watercourse" too broad, as it included glaciers, canals and particularly groundwaters. This, the Delegate pointed out, was in contradiction with the generally accepted principle of international law concerning the 'permanent sovereignty of States over their natural resources', thus interfering in each State's right to use its own resources in accordance with its national priorities and interests.

Referring to the Secretariat's study, he agreed that 'groundwater' could be categorised as 'free groundwaters' and 'confined groundwaters'. He noted that the ILC draft articles included in the definition only "free groundwaters".

According to the Delegate, this approach posed two types of problems : one, the international practice until now only dealt with surface waters and there were generally no such practices as regards the groundwaters. Therefore, he was of view that it would be very difficult, if not impossible, for sometime, to identify the new legal principles applicable to groundwaters as well. He found this approach unrealistic, complicating the already complex subject-matter that was before the ILC. Secondly, he dealt with the problem of 'verification of the necessary elements', specially among the Member States of the AALCC. Referring to the question of collecting scientific data concerning 'free' and 'confined' groundwater in the Asian-African region, he found that gathering of data and its subsequent utilization were both difficult and time-consuming. Consequently, he suggested the non-inclusion of 'groundwaters' in the draft articles of the ILC.

He pointed out that the concept of 'international watercourse system' which listed all components of a watercourse simply on the basis of the physical relation together with all branches and connected subsidiaries appeared too broad to his delegation. Further, he found that this framework served to bring the parts of the branches and subsidiaries of an international watercourse within the territory of a sovereign State under the will of other States. For these reasons, he clarified his delegation had doubts as to the acceptability of this' concept.

21. The *Delegate of Jordan* underlined the crucial needs of the people of the Middle East in relation to underground waters. He pointed out that the information regarding the underground waters was not unorganised and in fact it was identified in clear terms. By utilizing more water indiscriminately, material harm was inflicted on the underground water sources. This, the Delegate noted, had been taking place in the occupied Arab territories, water had become a major cause of differences. Keeping these developments in mind, the Delegate emphasized on an appropriate definition of 'underground watercourses' to be taken up by the AALCC in its future deliberations in

anticipation of the diplomatic conference whose idea was proposed by the AALCC.

22. The *Delegate of Syria* stated that his delegation wished to affirm what it had presented during the discussion on the work of the ILC. During the discussion his delegation had put forward certain suggestions to be incorporated in the ILC draft, specially in matters of cooperation and the definition of 'watercourse'. He requested the Commission to take into account these suggestions in the interest of all countries, specially countries in the Middle East. Further, he wished to second the opinion of the Delegate of Jordan as regards the utilization of groundwater resources in the Middle East. This aspect he found particularly important as 71 per cent of the rivers had 'underground' water sources in the Middle East.

23. The *Delegate of Sierra Leone* thanked the AALCC Secretariat for its study. Referring to the importance of fresh water for the Asian and African countries, he noted that there was only 2 per cent of fresh water resources for utilization and out of this only 1 per cent was really harnessable for the utilization of the whole humanity. Forty per cent of the global population, the Delegate mentioned, was in dire need of fresh water. According to him, non-availability of fresh water in sufficient quantities was one of the main reasons for the increasing infant mortality in Africa. To mitigate these problems, he suggested that more emphasis should be placed on cooperation in harnessing and effective utilization. He felt that there was an increasing necessity to find ways and means not to pollute these fresh waters, even while it was used for agriculture. Referring to underground water resources in Africa, he pointed out that scientific data was sufficiently available as regards its course and flow; only a small area was to be charted out. Finally, he emphasized that the countries should view this whole subject from the utilization perspective, at the same time taking into account the provision of maintaining it 'clean'.

24. Subsequently there was a discussion with regard to the question, whether this matter should be placed on the agenda of the next session. Arguing against its inclusion, the *Delegate of India* suggested that since this subject was being considered by the ILC, there was no necessity of putting it on the agenda of the AALCC as a separate item.

25. The *Delegate of Pakistan* did not agree with the viewpoint presented by the Delegation of India. According to him, there were areas which needed consideration, especially regarding the 'uses' and early notification of changes made in the course of the river, so that the study might be continued further.

26. Supporting the contention of the Delegation of Pakistan, the *Delegate of Syria* insisted that this item was very necessary as it would include certain crucial suggestions made by them and more importantly, these suggestions could be made use of during the second reading by the Commission. The Delegate pointed out that these suggestions were very crucial and important for Arab countries.

27. The *President* in his intervention drew the attention of the Indian Delegation to page 34 of the study (paragraphs 83 and 85) which mentioned, *inter alia*, about the user agreements and its further study. The President read paragraph 85 of the study which stated, "Nevertheless, with a view to assist Member Governments in the negotiation of user agreements in the future, the AALCC could take up the study of State practice in the region of user agreements and examine the modalities employed in the sharing of waters of international watercourses such as the Niger, the Nile, the Gambia, the Mekong and the Indus. It would be expected that the Member Governments would place at the disposal of the AALCC material concerning the working of the existing River Commissions Organizations."

28. The *Delegate of India* did not agree with the scope of the study and insisted that it never accepted to submit to any such study.

29. The *Secretary-General* in his brief intervention defended the inclusion of this study on the agenda. He pointed out that there were many uses which fell beyond the existing scope of "non-navigational uses" and these could be studied. At the Tokyo Session, he said, the Delegate of Nepal had suggested that the AALCC could prepare some guidelines for regional system agreements. Pursuant to those suggestions, the Secretary-General mentioned that the AALCC could prepare "regional model agreements" on the uses of the river water systems.

30. The *Delegate of India*, maintaining his earlier viewpoint on this issue, thanked the President and the Secretary-General for their clarifications. India, the Delegate said, had no objection as regards the assistance rendered on this count provided all States concerned consented to it but he wanted to maintain an independent position and his country's own view on the subject.

At the end of the deliberations, the following decision was adopted :

"THE LAW OF INTERNATIONAL RIVERS

The *Asian-African Legal Consultative Committee*

Taking note of the study prepared by the Secretariat on the item "The Law of International Rivers" contained in document No. AALCC/XXXI/Islamabad/92/5;

Decides to inscribe the item on the agenda of its next session to facilitate substantive discussions on the topic; and

Recommends to the Member States to utilize the study on the draft articles adopted by the International Law Commission on first reading contained in document No. AALCC/XXXI/Islamabad/92/5 in the preparation of their comments and observations for the second reading of the draft articles by the International Law Commission at its next session."

PROGRESS OF WORK IN THE INTERNATIONAL LAW COMMISSION DURING ITS FORTY-THIRD SESSION

1. At its twenty-third session in 1971, the International Law Commission (ILC) included the topic "Non-navigational Uses of International Watercourses" in its general programme of work pursuant to the General Assembly resolution 2669(XXV) of 8 December 1970 with a view to progressive development and codification of the international law on the topic on a universal basis.

2. The Commission has taken a long time in completing its work on the topic, partly because of frequent changes of the Special Rapporteurs. So far, the Commission has appointed four Special Rapporteurs, namely Mr. Richard D. Kearney, Mr. Stephen M. Schwebel, Mr. Jens Evensen and the present one, Mr. Stephen C. McCaffrey who was appointed at the thirty-seventh session of the Commission in 1985.

3. At its thirty-seventh, thirty-eight, thirty-ninth, fortieth and forty-first sessions, the Commission considered the first[1], second[2], third[3], fourth[4] and fifth[5] reports prepared by the Special Rapporteur, Mr. McCaffrey.

4. At its forty-second session in 1990, the Special Rapporteur presented to the Commission the second part of the fifth report[6] and the sixth report[7] for consideration. During that session, the Commission provisionally adopted Articles 22 and 27. On the recommendation of the Special Rapporteur, it also referred to the Drafting Committee Articles 24 to 28 together with paragraphs 1 of Articles 3 and Article 4 of Annex I. The apparent confusion of numbering is due to redesignation of articles earlier adopted by the Commission[8].

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1 A/CN. /4/393.
2 A/CN. /4/399 and Adds. 1 and 2.
3 A/CN. /4/406 and Adds. 1 and 2.
4 A/CN. /4/412 and Adds. 1 and 2.
5 A/CN. /4/421 and Adds. 1 and 2.
6 A/CN. /4/421, Add. 2.
7 A/CN. /4/427 and Adds. 1 and 2.
8 Doc. No. A/CN. 4/L.436, page 3, footnote 6.

5. At its forty-third session in 1991 the Commission had before it the second part of the Sixth Report[9] and the Seventh Report[10]. The second part of the Sixth Report contained a chapter on settlement of disputes which had been introduced at the forty-second session but was not discussed due to lack of time. In order to enable the Commission to make the best use of its time, the Special Rapporteur proposed not to take up that part of the Sixth Report. He recommended that the debate focus on his Seventh Report and, in particular, on the question of the use of terms.

6. The Seventh Report submitted by the Special Rapporteur contained chapters on the structure of Part I of the draft articles and on the use of terms. It also contained a proposal for Article (1) (2) on the use of terms which comprised two alternatives, namely A and B.

7. The Seventh Report of the Special Rapporteur dealt primarily with the question of the definition of the term "International Watercourses" and the concept of a watercourse as a "system of waters". The Special Rapporteur considered that it was important that the draft articles under preparation be based on hydrologic reality, namely that a watercourse is a system of inter-related hydrological components. An international watercourse could then be defined as a watercourse, parts of which are situated in two or more States. He proposed two alternative versions A and B for Articles (1) (2) on the use of terms as follows :

Articles (1) (2)

Use of Terms

ALTERNATIVE (A)

For the purposes of the present article :

(a) A watercourse system is a system of waters composed of hydrographic components including rivers, lakes, groundwater and canals, constituting by virtue of their physical relationship a unitary whole.

(b) An international watercourse system is a watercourse, parts of which are situated in different States.

(c) A (watercourse) (system) State is a State in whose territory parts of an international watercourse system is situated.

9 A/CN. 4/427/Add. 1.

10 A/CN. 4/436 & Corr. 1 to 3.

ALTERNATIVE (B)

For the purposes of the present articles :

(a) A watercourse system is a system of waters composed of hydrographic components, including rivers, lakes, groundwater and canals, constituting by virtue of their physical relationship a unitary whole.

(b) An international watercourse is a watercourse, parts of which are situated in different States.

(c) A (watercourse) (system) State is a State in whose territory parts of an international watercourse is situated.

8. It may be observed from the above that alternative versions A and B for Articles (1) (2) on the use of terms are almost identical. However, the terms defined were slightly different; alternative (A) included the expression 'system' while alternative (B) confined itself to the expression 'watercourse'.

9. The Seventh Report of the Special Rapporteur also dealt with the question of groundwater which according to him formed one of the most important components of a watercourse system. In terms of quantity, the groundwater constitutes 97 per cent of fresh water on earth even excluding polar icecaps and glaciers. This contrasted with the water contained in lakes and rivers, which together amounted to less than 2 per cent. Based on this calculation, the Special Rapporteur, therefore, proposed the inclusion in its entirety of groundwater in the scope of the draft articles.

10. The Special Rapporteur in his Seventh Report also raised the issue of whether the notion that a watercourse could have a relative international character should be retained. Basically, the issues are simple – they are whether the draft articles should apply to all hydrographic components of international watercourses or whether for the purposes of the draft articles the watercourses should be treated as having a 'relative' international character as has been the understanding since 1980.

11. Consequently, the Special Rapporteur considered that the notion of relativity was incompatible with the unitary nature of a watercourse system. He pointed out that, in any event, the requirement of an actual or potential effect on other watercourse States had been built into the draft articles themselves. He, therefore, suggested that it was no longer necessary to include the notion of relative internationality in the definition of the term 'watercourse'.

12. The Seventh Report of the Special Rapporteur requested comments from the members of the Commission on the following substantive points :

(a) Whether for purposes of the draft articles the term 'watercourse' should be defined as a 'system' of waters;

(b) Whether groundwater should be included within the definition of 'watercourse' and, if so, whether the draft articles should apply both to groundwater related to surface water ('free' groundwater)

and to groundwater unrelated to surface water ('confined' groundwater), or whether they should apply only to 'free' groundwater; and

(c) Whether for the purpose of the draft articles a watercourse should be regarded as having a 'relative international character'.

13. The Special Rapporteur also raised the question of restructuring Part I of the Draft Articles. He recommended reversing the order of Articles 1 and 2 so that the draft would begin with an article on "Scope" followed by that on the "Use of terms". He also proposed to transfer Article 3 on the definition of a watercourse State (or system State), as adopted by the Commission previously to the article on the use of terms since the definition was closely related to that of an "International Watercourse" or "International Watercourse System".

Comments on the Seventh Report of the Special Rapporteur

14. On the question of restructuring of Part I of the Draft Articles, many members were of the view that such restructuring would be logical and would seem to be more helpful to the reader than the previous organization.

15. Part II of the Seventh Report of the Special Rapporteur dealt with the "Use of terms" which raised a more difficult aspect. In 1976, the Commission had agreed that the question of determining the scope of the term 'international watercourse' should be taken up at the final stage of drafting. Concerning the question of whether the term 'watercourse' should be defined as a system of waters, some members of the Commission, in general, favoured the use of that concept in the definition. According to them, only an overall approach to an international watercourse as a system in constant motion and inter-relation could allow for the full implementation of the principles of equitable and reasonable utilization of a watercourse. Some of members who expressed support for the system concept also felt that the definition should include the idea contained in the Helsinki Rules whereby the waters of a system must flow into a common terminus.

16. Some members, however, expressed reservation regarding the use of the system concept in the definition of a watercourse. It was feared that such definition might embrace all the waters in a given territory which would thus fall under international regulation. In their view, such an approach might infringe on State sovereignty and would interfere with each State's right to use its own resources in accordance with its national priorities and interests.

17. After the explanations provided in paragraphs 53 to 74 of the Seventh Report on the use of 'system' or related concepts, the Special Rapporteur proposed that the 'system' approach should be endorsed. In paragraph 74 he had concluded :

> "...The system is composed of a number of inter-related components which function as a unitary whole. It would seem to follow logically from this scientific fact that legal rules governing the relations of States with regard to international watercourses should take this inter-relationship into account, so that the operation of the rules – and thus the protection of the fresh water as well as watercourse State – will not be frustrated. Such frustration would be bound to occur where the scope of the legal regime is not co-extensive with the scope of the regime's subject-matter."

18. Despite the reservations previously expressed by members on the incorporation of the 'system concept', now that the Commission has fully delienated the scope of the Draft Articles, the AALCC Secretariat is of the view that the concept should be acceptable.

19. On the question of inclusion of groundwater as one of the components of international watercourse system, there was a general trend among the members of the Commission favouring the inclusion of 'free' groundwater in the definition. It was, however, the view of the majority that 'confined' groundwater should not be included since it lacked a physical relationship with surface water and, therefore, did not form part of the "unitary whole". It was, however, suggested by a few members that the scope of the articles should also incorporate groundwater which though not connected to a common terminus, is straddling the borders of two or more States. While this idea was not incorporated in the Draft Articles, it needs close re-examination during second reading, since most, if not all, of the principles incorporated in the Draft Articles as finally adopted by the Commission would seem to be equally applicable to such waters.

20. The 'free' groundwater has, however, been incorporated in the scope of the articles. Of course, it might be argued that the inclusion of groundwater in the scope of the Draft Articles might have the effect of making almost all of the waters in the territory of some States subject to international regulation. This fear is, however, somewhat exaggerated since the Draft Articles are restricted to 'free' groundwater and only to the extent that it becomes part of the watercourse in question.

21. Regarding the question whether for the purpose of the Draft Articles a watercourse should be regarded as having a "relative international character", it was argued by some members that any attempt to enlarge the scope of the Draft Articles at this stage would not only be counter-productive but possibly wreck the whole draft. The Commission had agreed on the assumption of relative character of international watercourse as the working hypothesis since 1980 when it provided as follows :

> 'A watercourse system is formed of hydrological components such as rivers, lakes, canals, glaciers and groundwater constituting by virtue of their physical relationship a unitary whole; thus any use affecting one part of the system may affect the waters in another";
>
> 'An international watercourse system is a watercourse system components of which are situated in two or more States".

"To the extent that part of the waters in one State are not affected by or do not affect uses of waters in another State, they shall not be treated as being included in the international watercourse system. *(Thus to the extent that uses of the water system have the effect on another and only to that extent. Accordingly there is not an absolute, but a relative, international character of the watercourse.")*

22. The Special Rapporteur in his Seventh Report had explained the hydrological cycle, the close inter-connection of the various components and their inter-dependence which makes it necessary for States in a watercourse system to cooperate with one another to avoid adverse harm. In his view, which was shared by several members, the concept of the 'relative international character' of a watercourse might give rise to uncertainty. If the concept of the 'watercourse system' was adopted, it would be clear that the use of all components constituting that 'system' must be regulated in such a way that it would not adversely affect other watercourse States or the watercourse itself. If, however, there was no such adverse result, the Draft Articles made clear that the proposed Convention would be inapplicable. The Commission accepted this logic in its final version of the first reading which seems to be reasonable. However, this is one issue which the States need to consider carefully to establish whether or not these Draft Articles have been made too expansive.

23. The Commission after examining the report of the Drafting Committee, adopted on first reading the remaining articles :

Article 2 (*Use of terms*); Article 10 (*Relationship between uses*); Article 26 (*Management*); Article 27 (*Regulation*); Article 28 (*Installation*); Article 29 (*International Watercourses and Installations in time of armed conflict*); and Article 32 (*Non-discrimination*).

24. The Commission also adopted Article 30 (*Indirect Procedures*) and Article 31 (*Data and information vital to national defence or security*) which were amended and re-numbered as revisions of two previously adopted articles, namely Article 20 and Article 21. The other articles had been adopted earlier by the Commission and hence the first reading is now complete.

Comments on the Draft Articles Adopted by the Commission at its First Reading

25. Besides taking up the Seventh Report of the Special Rapporteur the Commission also adopted the whole text of Draft Articles on the Law of Non-Navigational Uses of International Watercourses and thus completed the first reading during the last session.

26. For ready reference, the text of the Draft Articles has been annexed to this study. The Draft Articles contain 32 articles which have been divided into six parts. The pattern of the Draft Articles is as follows :

Part - I : Introduction

Article 1 : Scope of the present articles

Article 2 : Use of terms

Article 3 : Watercourse agreements

Article 4 : Parties to watercourse agreements

Part - II : General Principles

Article 5 : Equitable and reasonable utilization and participation

Article 6 : Factors relevant to equitable and reasonable utilization

Article 7 : Obligation not to cause appreciable harm

Article 8 : General obligation to cooperate

Article 9 : Regular exchange of data and information

Article 10 : Relationship between uses

Part - III : Planned Measures

Article 11 : Information concerning planned measures

Article 12 : Notification concerning planned measures with possible adverse effects

Article 13 : Period for reply to notification

Article 14 : Obligation of the notifying State during the period for reply

Article 15 : Reply to notification

Article 16 : Absence of reply to notification

Article 17 : Consultations and negotiations concerning planned measures

Article 18 : Procedures in the absence of notification

Article 19 : Urgent implementation of planned measures

Part - IV : Protection and Preservation

Article 20 : Protection and preservation of ecosystems

Article 21 : Prevention, reduction and control of pollution

Article 22 : Introduction of alien or new species

Article 23 : Protection and preservation of the marine environment

Part - V : Harmful Conditions and Emergency Situations

Article 24 : Prevention and mitigation of harmful conditions

Article 25 : Emergency situations

Part VI : Miscellaneous Provisions

Article 26 : Management

Article 27 : Regulation

Article 28 : Installations

Article 29 : International watercourses and installations in time of armed conflict

Article 30 : Indirect procedure

Article 31 : Data and information vital to national defence or security

Article 32 : Non-discrimination.

27. In general, the scheme of the Draft Articles as submitted by the Special Rapporteur during the thirty-seventh to forty-third sessions and its adoption by the Commission at its first reading during the forty-third session, is highly commendable and acceptable according to the Secretariat of the AALCC. Nevertheless, it is felt necessary to comment on a few specific Draft Articles which the Secretariat considers as of utmost importance.

Part - I : Introduction

Article 1

Scope of the present articles

28. Recommended for adoption.

Article 2

Use of terms

29. In paragraph (b), consideration should be given to the possibility of inclusion of groundwater straddling the borders of two or more States, even if such water does not flow into a common terminus. It is our view that the rules enunciated in the Draft Articles would equally apply to such groundwaters since similar rights and duties would apply. It is noted that ILC has suggested groundwaters as a subject for future study. If our suggestion is accepted, such a study would become redundant.

Article 3

Watercourse agreements

30. This provision allows the watercourse States to adjust the provisions of these articles to fit the special conditions of their particular watercourse. It should be noted that paragraph 2 provides that States may define the

water to which it applies. To that extent it provides for the relativity previously specified in the assumption accepted in the Commission in 1980.

Article 4

Parties to watercourse agreements

31. This article provides for each watercourse State to have a right to participate in the negotiations and to become a party to any international watercourse agreement affecting it. Consequently, it is a suitable article for adoption.

Part - II : General Principles

Article 5

Equitable and reasonable utilization and participation

32. Paragraph 1 of this Draft Article states that the principle of equitable utilization is cast in an obligatory term but expresses explicitly the corelative entitlement of a watercourse State within its territory to a reasonable and equitable share, or portion, of the uses and benefits of an international watercourse. Paragraph 1 clearly enunciates that a watercourse State has both the right to utilize an international watercourse in an equitable and reasonable fashion, and the obligation not to exceed its right to equitable utilization or to deprive other watercourse States of their right to equitable utilization.

33. Paragraph 2 enunciates the concept of equitable participation. In effect, this article provides for cooperation with other watercourse States through participation on an equitable and reasonable basis. Thus, the principle of equitable participation is based on the rule of equitable utilization and does not in any way prejudice the principle of sovereign right over natural resources.

Article 6

Factors relevant to equitable and reasonable utilization

34. This article is very important in the sense that it stipulates objective factors relevant for the concept of 'equitable and reasonable utilization'. The proper application of the rule requires that watercourse States take into account concrete factors pertaining to the international watercourse in question as well as the needs and uses of the watercourse States concerned. The list is, however, indicative and not exhaustive. The formulation of provisions also does not draw any hierarchy or attach any priority to the factors and circumstances listed therein.

Article 7

Obligation not to cause appreciable harm

35. This article has one paragraph which refers to 'appreciable harm', but does not define that concept. Although there is this lacuna but the concept is difficult to define and it may be better to leave precise meaning to specific agreement or any peaceful settlement of disputes which may later be adopted.

Article 8

General obligation to cooperate

36. As drafted, this article seems to be appropriate for adoption.

Article 9

Regular exchange of data and information

37. Article 9 was originally introduced by the Special Repporteur in his Fourth Report[11] as Article 16. While commenting on Article 16, previously the AALCC had suggested that the scope of the article should include ecological and environmental issues. As drafted now, this article on regular exchange of data and information which has been renumbered as Article 9, contains within its scope ecological data and information. The AALCC is, therefore, of the view that the draft is satisfactory and should be supported.

Article 10

Relationship between uses

38. Article 10 was originally proposed by the Special Rapporteur in his Sixth Report[12] as Article 24 entitled 'Relationship between navigational and non-navigational uses; absence of priority among uses'. This article has been renumbered as Article 10 and it now has a smaller title. The article is well balanced in categorically removing any assumption of priority for navigational uses. The reference to special regard being given to the requirement of vital human needs is welcome as it provides a sound criterion for resolving priority in the case of conflicting uses.

Part - III : Planned Measures

39. This set of articles provides useful basis for disputes avoidance.

11 A/CN. 4/412.

12 A/CN. 4/427.

Article 11

Information concerning planned measures

40. Exchange of information would alleviate suspicion and provide early opportunity to resolve any misunderstanding between watercourse States. The Secretariat of the AALCC is of the view that the article is well balanced.

Article 12

Notification concerning planned measures with possible adverse effects

41. The watercourse State which intends to implement a planned measure should take into consideration, while notifying the other watercourse States, the provisions of Articles 13, 14, 15 and 17. Any delay in the execution of the project should not possibly have the cost escalation which may have an adverse effect on the notifying watercourse State. To aviod this, the notifying State should, at the earliest opportunity, notify the other watercourse States for them to assess whether such measures are likely to have adverse effects upon them.

Article 13

Period for reply to notification

42. It is proposed that a period of six months for reply is reasonable. Nevertheless, many watercourse States may not have the requisite resources and technology to study and evaluate the possible effects of the planned measures within the period and a possibility of extension should be considered.

Article 14

Obligation of the notifying State during the period for reply

43. The obligations specified in this article seem to us reasonable and acceptable.

Article 15

Reply to notification

44. Paragraph 1 which provides for the phrase 'as early as possible' should be made more specific by fixing a time-limit similar to Article 13.

Article 16

Absence of reply to notification

45. The provision seems to be reasonable and should be accepted.

Article 17

Consultations and negotiations concerning planned measures

46. This provision provides for well balanced safeguards for all parties concerned. However, good faith must require that negotiations should not be unduly protracted.

Article 18

Procedures in the absence of notification

47. Here again the Commission has attempted a well balanced provision which should be broadly acceptable.

Article 19

Urgent implementation of planned measures

48. While this article is broadly acceptable, it is suggested that the phrase 'other equally important interests' needs further explanation.

Part - IV : Protection and Preservation

Article 20

Protection and preservation of ecosystems

49. This provision should meet the broad support of all States in view of the need to protect the ecosystem of international watercourses.

Article 21

Prevention, reduction and control of pollution

50. This article was originally introduced by the Special Rapporteur in his Fourth Report[13] as Article 16(17). Paragraph 1 of Article 21 defines 'Pollution of an international watercourse' in a manner which should be acceptable. The phrase 'appreciable harm' in paragraph 2 has been the subject of some comments with regard to Article 7 which are equally applicable here. In the absence of a dispute settlement mechanism and of clear established standards, the concept 'appreciable harm' cannot be objectively assessed. What is 'appreciable' to one party could be mere inconvenience to the other and what is insignificant for one purpose could be catastrophic for another. Nevertheless, it would be difficult to find a better standard than that of 'appreciable harm'. It would, however,

13 A/CN. 4/412.

be advisable for States concluding particular watercourse agreements to specify a more detailed provision on what could be considered appreciable harm. Further, it should be pointed out that the article does not prohibit all pollution but only that which causes 'appreciable harm'. Thus, paragraph 2 is not intended to impose strict liability on the State for all harm caused by pollution.

Article 22

Introduction of alien or new species

51. This is an innovative article designed to avoid serious detrimental harm to a watercourse through the introduction of new or alien species. We believe it should be widely supported.

Article 23

Protection and preservation of the marine environment

52. This Draft Article is very important since it deals with the problem of protection and preservation of marine environment; hence we recommend its adoption.

Part - V : Harmful Conditions and Emergency Situations

Article 24

Prevention and mitigation of harmful conditions

53. The thrust of the obligation to prevent and mitigate harmful conditions should need general support.

Article 25

Emergency situations

54. Article 25 is almost identical to Article 23 as proposed by the Special Rapporteur in his Fifth Report.[14] The only difference is that paragraph 1 of Article 25 defines 'emergency' which was lacking in the earlier text. It is proposed in Article 25 that a watercourse State 'shall without delay and by the most expeditious means available notify other.....' In theory, it might appear to be a very simple communication network requirement, but many States, particularly those that are least developed, may not possess that kind of technology or remote sensing satellite capability to detect imminent danger in advance. Due to lack of resources and technology, many

14 A/CN. 4/421.

developing countries only detect the imminent danger when it has arrived at their doorsteps and when it is too late to take any preventive or remedial action, let alone to give early warning and prior notice.

55. Few States possess remote sensing capabilities to detect any water-related dangers or hazards in advance. Thus it would seem desirable if States who have the capacity to detect the danger should have the obligation to forewarn the potentially affected State in any given region. Such action and cooperation should be done as an extension of the principle of good neighbourly relations and international solidarity. While a legal obligation cannot be imposed on such States to inform other States, the matter should be treated as one of cooperation. Further, it is preferable if consideration is given in future to establish an international agency which would have the remote sensing capability or would act as the channel for sharing and transmitting data to all potentially affected States concerning any water-related emergencies.

56. The AALCC Secretariat, however, endorses the proposal that the notification of any emergencies be notified not only to the watercourse States but also to all 'potentially affected States'.

Part - VI : Miscellaneous Provisions

Article 26

Management

57. Originally, the Sixth Report[15] of the Special Rapporteur, the Draft Article was numbered 26 with a different heading 'Joint Institutional Management'.

58. With respect to paragraph 1, the use of words '— at the request of any of them —' may perhaps not be the most suitable for it may give the unintended impression that at the whim of any watercourse State, consultations shall and must be forthwith commenced.

Article 27

Regulation

59. This article is well balanced and takes into account the interest of all the States concerned. It should, therefore, be broadly acceptable.

15 A/CN. 4/427.

Article 28

Installation;

and

Article 29

International watercourse and installations in time of armed conflict

60. These two articles in the Sixth Report[16] of the Special Rapporteur were numbered Articles 27 and 28. The protection of international watercourses and its installations is necessary and self-evident whether in peace time or in war time. In any belligerent activity they should be considered inviolable and immune. Article 28 deals with the peace time and Article 29 is applicable during the course of an armed conflict. Both articles should command broad support.

Article 30

Indirect procedures

61. There is a typographical mistake in the English text of this Draft Article. In the last line of the Draft Article which says 'through any *direct* procedure accepted by them' should read 'through any *indirect* procedure accepted by them'. The footnote to this article referring to Draft Article initially adopted as Article 21[17] makes this clear. Otherwise, the article makes good sense.

Article 31

Data and information vital to national defence or security

62. This provision is essential to provide for national security. The second paragraph, however, provides for the necessary safeguard to avoid possible abuse.

Article 32

Non-discrimination

63. This article may raise difficulties of procedural nature due to the existence of diverse legal systems. In many countries jurisdictional competence of courts is restricted to territorial jurisdiction. While this provision is

16 *Ibid.*

17 *Report of the International Law Commission on the work of its Forty-second Session.* The UN General Assembly Official Records : Forty-fifth Session. Supplement No. 10(A)/45/10. p. 144

desirable and reasonable, it should be pointed out that it may raise a real problem in its implementation.

Possible Work That Might Be Undertaken By The AALCC

64. The programme of work of the ILC is directed towards adoption of a set of general principles applicable to all international watercourses in regard to the rights and obligations of the riparian States in the non-navigational uses of the waters and envisages the negotiation and conclusion of user agreements amongst the watercourse States taking into account the characteristics of the international watercourse in question. The ILC Draft Articles adopt the underlying theme to recognise the right of each watercourse State to a reasonable and equitable share in the use of the waters of an international watercourse and then to provide for cooperation and management among the riparian States in such matters as development of the watercourse; construction of works; collection, processing and dissemination of data; pollution control; control and prevention of water-related hazards; safety of international watercourse, installations and constructions as also modalities for settlement of disputes. A diplomatic conference will probably be convoked for adoption of a multilateral convention on the subject. The work of the ILC would provide useful guidelines in this regard. But it would be the conclusion of user agreements that will translate into reality the rights and obligations of watercourse States in the sharing of the waters of an international watercourse.

65. The work previously done by the AALCC during the years 1969 to 1973 including the Secretariat studies and the draft propositions prepared by the AALCC Rapporteur, Dr. Shihata, were brought to the notice of the successive Rapporteurs of the ILC, Mr. Kearney, Mr. Schwebel and Mr. Evensen. Indeed, the Special Rapporteurs have taken the AALCC's work into consideration while formulating the Draft Articles as expressly stated in the reports.

66. The ILC draft formulations expressly exclude the navigational uses of waters but at the same time take into account the effect of navigational uses on the other uses of the waters of an international watercourse (see Article 1). What effect this has had on the formulations is not clear. During the Lagos Session of the AALCC held in 1972, views were expressed that it would be difficult to formulate principles concerning non-navigational uses of international watercourses without taking into account such matters as navigation or timber floating since navigation does affect the quantity or quality of the water available for other uses. Navigation may often pollute watercourses and require waters to be maintained at certain levels. Consequently, the AALCC may wish to consider whether to study the matter relating to navigation and timber floating so as to supplement the work of the ILC. Other specific matters which could also be studied in some detail may relate to development and management of fishery resources and flood control. Such a study might prove to be useful to member governments in the formulation of user agreements.

67. It may be stated that non-navigational uses that are within the purview of the ILC Draft Articles would include the following :

(A) Agricultural Uses

(i) Irrigation;

(ii) Drainage;

(iii) Waste disposal;

(iv) Aquatic Food Production;

(v) Development of Fisheries.

(B) Economic and Commercial Uses

(i) Energy production/power generation (Hydroelectric, mechanical and nuclear);

(ii) Manufacturing;

(iii) Construction;

(iv) Transportation other than navigation;

(v) Extractive (Mining oil etc.).

(C) Domestic and Social Uses

(i) Consumptive (Drinking, cooking, washing, laundry, etc.);

(ii) Waste disposal;

(iii) Recreational (Swimming, sports, fishing, boating, etc.)

68. The Commission, however, does not contemplate formulation of any norms concerning such uses. It is expected that such consideration would be taken care of in the negotiation of user agreements. This is an area which could be studied by the AALCC.

69. At the AALCC's Session in Kathmandu (1985) the Delegate of Nepal suggested that the AALCC might prepare some guidelines for regional system agreements. This might be somewhat complicated to undertake in view of the fact that the geographical, hydrological and climatic conditions considerably vary within the Asian-African region leading to the diverse characteristics of various watercourses. Furthermore, the needs of riparian States in each sub-region are also different and consequently any formulation of general guidelines might not be very helpful.

70. Nevertheless, with a view to assist Member Governments in the negotiation of user agreements in the future, the AALCC could take up the study of State practice in the region of user agreements and examine the modalities employed in the sharing of waters of watercourses such as the Niger, the Nile, the Gambia, the Mekong and the Indus. It would

be expected that the Member Governments would place at the disposal of the AALCC material concerning the working of the existing River Commission Organisations.

ANNEXURE

Text of the Draft Articles adopted by the International Law Commission at its Forty-third Session (1991) at its first reading[18]

Part - I

INTRODUCTION

Article 1[19]

Scope of the present articles

1. The present articles apply to uses of international watercourses and of their waters for purposes other than navigation and to measures of conservation related to the uses of those watercourses and their waters.

2. The use of international watercourses for navigation is not within the scope of the present articles except in so far as other uses affect navigation or are affected by navigation.

Article 2[20]

Use of terms

For the purposes of the present articles :

(a) "International watercourse" means a watercourse, parts of which are situated in different States;

(b) "Watercourse" means a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus;

(c) "Watercourse State" means a State in whose territory part of an international watercourse is situated.

Article 3[21]

Watercourse agreements

1. Watercourse States may enter into one or more agreements, hereinafter referred to as "watercourse agreements", which apply and adjust the provisions

18 See Doc. No. A/CN. 4/L. 463/Add. 4.

19 Initially adopted as Article 2.

20 Subparagraph (c) was initially adopted as Article 3.

21 Initially adopted as Article 4.

of the present articles to the characteristics and uses of a particular international watercourse or part thereof.

2. Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse or with respect to any part thereof or a particular project, programme or use, provided that the agreement does not adversely affect, to an appreciable extent, the use by one or more other watercourse States of the waters of the watercourse.

3. Where a watercourse State considers that adjustment or application of the provisions of the present articles is required because of the characteristics and uses of a particular international watercourse, watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements.

Article 4[22]

Parties to watercourse agreements

1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to the entire international watercourse, as well as to participate in any relevant consultations.

2. A watercourse State whose use of an international watercourse may be affected to an appreciable extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse or to a particular project, programme or use is entitled to participate in consultations on, and in the negotiation of, such an agreement, to the extent that its use is thereby affected, and to become a party thereto.

Part - II

GENERAL PRINCIPLES

Article 5[23]

Equitable and reasonable utilization and participation

1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal utilization thereof and benefits therefrom consistent with adequate protection of the watercourse.

22 Initially adopted as Article 5.

23 Initially adopted as Article 6.

2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present articles.

Article 6[24]

Factors relevant to equitable and reasonable utilization

1. Utilization of an international watercourse in an equitable and reasonable manner within the meaning of Article 5 requires taking into account all relevant factors and circumstances, including :

(a) geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;

(b) the social and economic needs of the watercourse States concerned;

(c) the effects of the use or uses of the watercourse in one watercourse State on other watercourse States;

(d) existing and potential uses of the watercourse;

(e) conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;

(f) the availability of alternatives, of corresponding value, to a particular planned or existing use.

2. In the application of Article 5 or paragraph 1 of this article, watercourse States concerned shall, when the need arises, enter into consultation in a spirit of cooperation.

Article 7[25]

Obligation not to cause appreciable harm

Watercourse States shall utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States.

24 Initially adopted as Article 7.

25 Initially adopted as Article 8.

Article 8[26]

General obligation to cooperate

Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimal utilization and adequate protection of an international watercourse.

Article 9[27]

Regular exchange of data and information

1. Pursuant to Article 8, watercourse States shall on a regular basis exchange reasonably available data and information on the condition of the watercourse, in particular that of a hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.

2. If a watercourse State is requested by another watercourse State to provide data or information that is not reasonably available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated.

Article 10

Relationship between uses

1. In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses.

2. In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to the principles and factors set out in Articles 5 to 7, with special regard being given to the requirements of vital human needs.

26 Initially adopted as Article 9.

27 Initially adopted as Article 10.

Part - III

PLANNED MEASURES

Article 11

Information concerning planned measures

Watercourse States shall exchange information and consult each other on the possible effects of planned measures on the condition of an international watercourse.

Article 12

Notification concerning planned measures with possible adverse effects

Before a watercourse State implements or permits the implementation of planned measures which may have an appreciable adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information in order to enable the notified States to evaluate the possible effects of the planned measures.

Article 13

Period for reply to notification

Unless otherwise agreed, a watercourse State providing a notificatioin under Article 12 shall allow the notified States a period of six months within which to study and evaluate the possible effects of the planned measures and to communicate their findings to it.

Article 14

Obligation of the notifying State during the period for reply

During the period referred to in Article 13, the notifying State shall cooperate with the notified States by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation, and shall not implement or permit the implementation of the planned measures without the consent of the notified States.

Article 15

Reply to notification

1. The notified States shall communicate their findings to the notifying State as early as possible.

2. If a notified State finds that implementation of the planned measures would be inconsistent with the provisions of Articles 5 or 7, it shall communicate this finding to the notifying State within the period referred to in Article 13, together with a documented explanation setting forth the reasons for the finding.

Article 16

Absence of reply to notification

If, within the period referred to in Article 13, the notifying State receives no communication under paragraph 2 of Article 15, it may, subject to its obligations under Articles 5 and 7, proceed with the implementation of the planned measures, in accordance with the notification and any other data and information provided to the notified States.

Article 17

Consultations and negotiations concerning planned measures

1. If a communication is made under paragraph 2 of Article 15, the notifying State and the State making the communication shall enter into consultations and negotiations with a view to arriving at an equitable resolution of the situation.

2. The consultations and negotiations shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State.

3. During the course of the consultations and negotiations, the notifying State shall, if so requested by the notified State at the time it makes the communication, refrain from implementing or permitting the implementation of the planned measures for a period not exceeding six months.

Article 18

Procedures in the absence of notification

1. If a watercourse State has serious reasons to believe that another watercourse State is planning measures that may have an appreciable adverse effect upon it, the former State may request the latter to apply the provisions of Article 12. The request shall be accompanied by a documented explanation setting forth the reasons for such belief.

2. In the event that the State planning the measures nevertheless finds that it is not under an obligation to provide a notification under Article 12, it shall so inform the other State, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that

other State, promptly enter into consultations and negotiations in the manner indicated in paragraphs 1 and 2 of Article 17.

3. During the course of the consultations and negotiations, the State planning the measures shall, if so requested by the other State at the time it requests the initiation of consultations and negotiations, refrain from implementing or permitting the implementation of those measures for a period not exceeding six months.

Article 19

Urgent implementation of planned measures

1. In the event that the implementation of planned measures is of the utmost urgency in order to protect public health, public safety or other equally important interests, the State planning the measures may, subject to Articles 5 and 7, immediately proceed to implementation, notwithstanding the provisions of Article 14 and paragraph 3 of Article 17.

2. In such cases, a formal declaration of the urgency of the measures shall be communicated to the other watercourse States referred to in Article 12 together with the relevant data and information.

3. The State planning the measures shall, at the request of any of the States referred to in paragraph 2, promptly enter into consultations and negotiations with it in the manner indicated in paragraphs 1 and 2 of Article 17.

Part - IV

PROTECTION AND PRESERVATION

Article 20[28]

Protection and preservation of ecosystems

Watercourse States shall, individually or jointly, protect and preserve the ecosystems of international watercourses.

Article 21[29]

Prevention, reduction and control of pollution

1. For the purposes of this article, "pollution of an international watercourse" means any detrimental alteration in the composition or quality of

28 Initially adopted as Article 22.

29 Initially adopted as Article 23.

the water of an international watercourse which results directly or indirectly from human conduct.

2. Watercourse States shall, individually or jointly, prevent, reduce and control pollution of an international watercourse that may cause appreciable harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse. Watercourse States shall take steps to harmonize their policies in this connection.

3. Watercourse States shall, at the request of any of them, consult with a view to establishing lists of substances, the introduction of which into the waters of an international watercourse is to be prohibited, limited, investigated or monitored.

Article 22[30]

Introduction of alien or new species

Watercourse States shall take all measures necessary to prevent the introduction of species, alien or new, into an international watercourse which may have effects detrimental to the ecosystem of the watercourse resulting in appreciable harm to other watercourse States.

Article 23[31]

Protection and preservation of the marine environment

Watercourse States shall, individually or jointly, take all measures with respect to an international watercourse that are necessary to protect and preserve the marine environment, including estuaries, taking into account generally accepted international rules and standards.

Part - V

HARMFUL CONDITIONS AND EMERGENCY SITUATIONS

Article 24[32]

Prevention and mitigation of harmful conditions

Watercourse States shall, individually or jointly, take all appropriate measures to prevent or mitigate conditions that may be harmful to other watercourse States, whether resulting from natural causes or human conduct,

30 Initially adopted as Article 24.

31 Initially adopted as Article 25.

32 Initially adopted as Article 26.

such as flood or ice conditions, water-borne diseases, siltation, erosion, salt-water intrusion, drought or desertification.

Article 25[33]

Emergency situations

1. For the purposes of this article, "emergency" means a situation that causes, or poses an imminent threat of causing, serious harm to watercourse States or other States and that results suddenly from natural causes, such as floods, the breaking up of ice, landslides or earthquakes, or from human conduct as for example in the case of industrial accidents.

2. A watercourse State shall, without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of any emergencey originating within its territory.

3. A watercourse State within whose territory an emergency originates shall, in cooperation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate harmful effects of the emergency.

4. When necessary, watercourse States shall jointly develop contingency plans for responding to emergencies, in cooperation, where appropriate with other potentially affected States and competent international organizations.

Part - VI

MISCELLANEOUS PROVISIONS

Article 26

Management

1. Watercourse States shall, at the request of any of them, enter into consultations concerning the management of an international watercourse, which may include the establishment of a joint management mechanism.

2. For the purposes of this article, "management" refers, in particular, to :

(a) planning the sustainable development of an international watercourse and providing for the implementation of any plans adopted; and

(b) otherwise promoting rational and optimal utilization, protection and control of the watercourse.

33 Initially adopted as Article 27.

Regulation

1. Watercourse States shall cooperate where appropriate to respond to needs or opportunities for regulation of the flow of the waters of an international watercourse.

2. Unless they have otherwise agreed, watercourse States shall participate on an equitable basis in the construction and maintenance or defrayal of the costs of such regulation works as they may have agreed to undertake.

3. For the purposes of this article, "regulation" means the use of hydraulic works or any other continuing measure to alter, vary or otherwise control the flow of the waters of an international watercourse.

Article 28

Installations

1. Watercourse States shall, within their respective territories, employ their best efforts to maintain and protect installations, facilities and other works related to an international watercourse.

2. Watercourse States shall, at the request of any of them which has serious reason to believe that it may suffer appreciable adverse effects, enter into consultations with regard to :

(a) the safe operation or maintenance of installations, facilities or other works related to an international watercourse; or

(b) the protection of installations, facilities or other works from wilful or negligent acts or the forces of nature.

Article 29

International watercourses and installations in time of armed conflict

International watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and internal armed conflict and shall not be used in violation of those principles and rules.

Article 30[34]

Indirect procedures

In cases where there are serious obstacles to direct contacts between watercourse States, the States concerned shall fulfil their obligations of cooperation provided for in the present articles, including exchange of data and information, notification, communication, consultations and negotiations, through any direct procedure accepted by them.

Article 31[35]

Data and information vital to national defence or security

Nothing in the present articles obliges a watercourse State to provide data or information vital to its national defence or security. Nevertheless, that State shall cooperate in good faith with the other watercourse States with a view to providing as much information as possible under the circumstances.

Article 32

Non-discrimination

Watercourse States shall not discriminate on the basis of nationality or residence in granting access to judicial and other procedures, in accordance with their legal systems, to any natural or juridical person who has suffered appreciable harm as a result of an activity related to an international watercourse or is exposed to a threat thereof.

34 Initially adopted as Article 21.

35 Initially adopted as Article 20.

INTERNATIONAL TRADE LAW

VI. DEBT BURDEN OF DEVELOPING COUNTRIES : AN EVALUATION OF RESCHEDULING PROCESS

(i) INTRODUCTION

1. The item "Debt Burden of Developing Countries" has been on the work programme of the AALCC since its Kathmandu Session (1985). During the succeeding years the matter was under active consideration by an Expert Group Meeting at New Delhi (November 1986) as well as by the seccessive sessions of the AALCC. The Secretariat produced several studies on the subject for consideration of the AALCC.[1] The study entitled "Legal Aspects of International Loan Agreements" was submitted to the Singapore Session of the AALCC (1988). During that session, the AALCC decided to circulate the study in view of its importance to the entire membership of the Group of 77.

2. During its Nairobi Session (1989), the AALCC while considering a report on the debt burden prepared by the Secretariat directed the Secretariat to prepare a study dealing with the legal aspects of rescheduling of loans and debt relief with a view to formulating workable legal guidelines for rescheduling and debt relief. Accordingly, the Secretariat prepared a preliminary study on the various aspects of rescheduling of debts. During the Beijing Session (1990), the AALCC took note of that study and asked the Secretariat to continue to update it and commence formulation of a set of legal guidelines on this aspect. In the Cairo Session (1991), this item could not be taken up due to lack of time. Nonetheless, the Secretariat kept on monitoring the developments and updating its study. At the thirty-first session of the AALCC held in Islamabad (Pakistan) in January-February 1992, the Secretariat presented a revised study entitled "Debt Burden of Developing Countries – Legal and Policy Aspects of Rescheduling of Loans". Unfortunately, the study could not be taken up for discussion at that session due to lack of time. However, in view of the importance of the topic for the developing countries, the study is being reproduced in the following pages.

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1 The Debt Burden of the Developing Countries: A Preliminary Study on the Problems and Prospects (AALCC/XXV/9 and Add. 1); Report of the Expert Group Meeting on Debt Burden of Developing Countries (AALCC/XXVI/16); The Debt Burden of Developing Countries : New Developments, Debt Management and Formulation of Principles relating to Debt Relief (AALCC/XXVII/88/9); Legal Aspects of International Loan Agreements (AALCC/XXVII/99/9-A); Legal and Policy Aspects of Rescheduling of Loans : A Preliminary Study (AALCC/XXIX/9/12).

(II) LEGAL AND POLICY ASPECTS OF RESCHEDULING OF LOANS : A PRELIMINARY STUDY

1. The debt crisis faced by the developing world continues unabatedly affecting their development process. There was, however, a marked difference in the regionwise distribution of the debt burden. The external debt of the Asian developing countries stood at $ 336 billion (approximately). The debt in Africa was largely unchanged at $ 195 billion (approximately) owing mainly to continued official concessional lending, debt cancellations and the negative valuation effect of the stronger United States dollar.[2] Available figures put the total debt burden of the developing world (including short-term debt) at $ 1,265 billion.[3] As the external debt position worsens, Asian and African nations are increasingly devoting energies and scarce resources, which otherwise should have gone to promoting development, to grappling with the debt crisis. The net inflow of capital to the developing countries in general has been showing a massive negative trend.[4]

2. At the Eighteenth Special Session of the United Nations General Assembly on International Economic Co-operation held from 16 to 28 April 1990, Member States adopted by consensus a declaration in which it is stated that "a durable and broad solution of the external debt problems of the developing debtor countries, should continue to be given urgent attention, and the serious debt-servicing problems of some other countries should be further addressed with a view to an early solution. Recent initiatives and measures to reduce the stock and service of debt or to provide debt relief for developing countries should be broadly implemented. Relief measures should aim at the resumption of vigorous growth and development in these countries and should address all types of bilateral debt of debtor developing countries. Serious consideration should be given to continuing to work towards a growth-oriented solution of the problems of developing countries with serious debt-servicing problems, including those whose debt is mainly to official creditors or to multilateral institutions."[5]

3. The proposals enunciated by the United States Treasury Secretary Mr. Brady (popularly known as 'Brady Plan') for alleviating debt and debt-service in 1989 seems to have made some significant contribution in achieving

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2 *The Effects of the External Debt and the External Debt Servicing on the Industrial Development of the Developing Countries*, UNIDO, IDB. 7/20, 6 September 1990. It should be noted that about 90 per cent of the debt of African countries is represented by their long-term borrowings, or their drawings from IMF. The remaining 10 per cent is short-term debt. Further an important feature of the African debt is that over 96 per cent of the long-term debt was either publicly contracted or publicly guaranteed, and is thus sovereign debt.

3 *Ibid.*

4 During 1988, for example, while the net inflow of capital to the developing countries was to the tune of $ 92 billion, the outflow of resources and the capital by way of debt service touched $ 142 billion. See *The World Bank Annual Report, 1989*, p. 27.

5 *Current Trends and Policies in the World Economy* quoted in *World Economic Survey 1990* United Nations 1990, p. 8. The item "External Debt Crisis and Development" has been included in the agenda of the forty-sixth session of the General Assembly (A/46/250).

the above stated purpose. This was, however, made possible due to official support extended by international financial institutions including IMF and World Bank. But, it should be noted that these proposals have touched only a part of the debt burden problem. The official support by these financial institutions has, operationally, taken the form of more concessional rescheduling terms for official bilateral debt and the provision of official resources to facilitate market-based debt and debt-service reduction for commercial bank claims.[6]

4. In order to assist the General Assembly in its efforts to enlarge the area of international agreement on policy approaches to the problems of developing countries debts, at the end of 1989 the Secretary-General of the United Nations appointed Mr. Bettino Craxi, former Prime Minister of Italy, as his Personal Representative on Debt.[7] After extensive consultations Mr. Craxi submitted his report in October 1990. This report contains an extensive analysis of the origins, evolution, scope and character of debt problems facing developing countries and proposes policy remedies. It also sets the debt crisis in the context of international economic relations and deals thoroughly with the need for increasing financial flow to developing countries.

5. Despite these initiatives, it has been felt that the current implementation of the Brady Plan for debt and debt service reduction, although very important, does not go far enough towards an alleviation of the debt problem. Current rescheduling exercises involving only the rescheduling of interest and repayments of obligations lead to the piling of new obligations to old ones thus increasing the long-term burden and the "debt-overhang". Further, the debt crisis is a manifestation of the malfunctioning of the world economy at a time of great turbulance. It inevitably raises serious questions about the way in which global economy is functioning.

6. A recent UN study outlines important changes in the functioning of world economy, especially between 1980 and 1990.[8] It identifies changes in the relative position of countries in the world economy with large shifts of income between them. This change accelerated marginally due to further globalization and interdependence among countries. This study further points out that the "structure of production and trade shifted from primary production towards manufactures and even more markedly towards services." However, the stagnation in international trade in the early 1980s raised serious concern about

6 *Ibid.* The results emanating from the implementation of these proposals are worth noting. Mexico, for example, has signed an agreement with its commercial bank creditors which has reduced its outstanding liabilities by $ 6.8 billion and its debt-service payment on an additional $ 22.5 billion resulting in an annual savings of $ 1.4 billion. The Philippines has also concluded a bank financing arrangement composed of new money ($ 0.7 billion) a cash buy-back ($ 1.3 billion) and debt restructuring. Concurrently, Costa Rica, Morocco and Venezuela have also reached similar agreements in principle under the new scheme. See : *External Debt and Industrial Development*, UNIDO/IDB/7/19, 21 August 1990.

7 *Trade and Development Report, 1991* UNCTAD.

8 *Supra*, n. 5.

the international trading system. It is important to recall that the protectionism increased in the late 1970s and early 1980s as a response to rising unemployment in the industrialized countries. Trade barriers continued to proliferate. The multilateral trading system, conceived as an arrangement based on the principles of transparency and non-discrimination, was being eroded.

8. With a view to strengthen the multilateral trading system, the GATT Ministerial Meeting in 1982 approved an elaborate programme of work. This meeting was followed by a special session of GATT in 1986 which decided to commence a full-scale multilateral trade negotiation. In its scope and complexity, the Uruguay Round of negotiations launched at that session was the most ambitious round of trade talks so far. It brought under the purview of GATT rules major sectors such as agriculture and textiles, the inadequacy of the GATT dispute settlements and enforcement machinery, the role and needs of the developing countries, safeguard measures and, indeed the fundamental issues of balance of rights and obligations under GATT. Further, the evolution of the world financial and trading system had brought into prominence the new and complex issues of services, intellectual property and trade-related investment.[9]

9. The four-year preparatory work could not conclude, as scheduled, at the Brussels Ministerial meeting held from December 2-7, 1990, due to a deadlock between the United States of America and the European Community (EC) nations over farm subsides. The EC, however, had offered to cut farm subsidies by 30 per cent over 10 years beginning in 1986. But what worries the US and the Cairns Group of food producing countries (comprised of Argentina, Australia, Brazil, Canada, Chile, Colombia, Hungary, Indonesia, Malaysia, New Zealand, Philippines, Thailand and Uruguay) is the way EC's Common Agricultural Policy works. Instead of paying subsidies directly to farmers, the EC guarantees prices and buys up surpluses at those prices. It then has to pay further export subsidies so that the surpluses can be sold competitively at the lower world prices. Despite these differences the negotiations have continued since January 1991 to finalise this multilateral exercise. Recently, Mr. Arthur Dunkel, Director-General of the General Agreement on Tariffs and Trade (GATT) submitted a 500-page document outlining the most ambitious plans ever to liberalize global commerce. Negotiating Governments have until January 13, 1992 to respond to the draft Uruguay Round trade accord which Mr. Dunkel called "the best possible balance across the board". However, the continuing disagreement over farm subsidies threaten to block the progress of any talks; France already has said it will opppose the draft; EC also has so far maintained its consistent stand.

10. The efforts to revitalize the global economy during 1980s have not yielded any perceptible results. As pointed out, the position of developing countries in international trade and finance has substantially weakened further,

9 *Uruguay Round Papers on Selected Issues*, UNCTAD/ITP/10/1989; Chakravarti Raghavan, *Recolonization : GATT the Uruguay Round and the Third World*, Third World Network, 1990; *Trade and Development Report*, 1991, UNCTAD.

widening the gap between developing and the developed countries. External indebtedness continues to be a main factor in the economic stalemate of the developing countries. Their capacity to service debt was seriously weakened as interest rate grew and terms of trade deteriorated. This problem has contributed to the fall in investment and the cessation of new financial flows. Outlining the "Challenges and opportunities for the 1990s" the Declaration adopted by the UN General Assembly at its Eighteenth Special Session on International Economic Co-operation and Development, April 1990, called for[10] . . . . "finding an early and durable solution to the international debt problems meeting the increasing needs for development finance, creating an open and equitable trading system and facilitating the diversification and modernization of the economies of developing countries, particularly, those that are commodity-dependent, are conditions for the revitalization of growth and development in the developing countries in the 1990s and require continued concerted efforts".

11. At the international level, efforts have been consistently made especially at the UN level, to alleviate the problem of debt and its servicing by developing countries. The United Nations Industrial Development Organisation (UNIDO), for example, has adopted certain programmes and activities which specially address the external debt problem.[11] The main thrust of these activities is directed towards the mobilization of financial resources for industrial development and a comprehensive strategy, via technical co-operation for industrial restructuring and rehabilitation. The UN Secretary-General in his statement addressed to the Second Committee of the UN General Assembly, referred to the need for developing countries themselves to reform their economies in order to cope more effectively with the crisis and made full use of opportunities for future growth.[12] Further, he also identified the need for making public sector more efficient and also to encourage investments in private sector so as to improve productivity. Investment in human resource development must also be accorded high priority.

12. In the light of above initiatives UNIDO's investment technical co-operation programmes aim, in one way or another, at :[13]

(a) identifying viable investment opportunities in developing countries, backed by serious local investors seeking one or more foreign investment resources, including finance, technology, expertise, training, market access, etc.

(b) assisting the local investors in the formulation of these investment opportunities and in identifying and contacting potential foreign suppliers of investment resources, as well as in negotiating co-operation agreements; and

10 *Supra*, n. 5.

11 *Ibid*

12 UNGA, A/C.2/44/SR.26.

13 *External Debt and Industrial Development*, UNIDO, IDB/T.19, 21 August 1990.

(c) upgrading national, individual and institutional capabilities in investment project identification, formulation, screening and promotion as well as improving the investment climate in developing countries.

13. While the above set of market initiated measures have been applied mostly in the case of Latin American heavy debtors, the creditor governments have been adopting rescheduling as the remedy for a vast majority of the low income countries. In certain cases debts have been waived by the creditor countries. Nevertheless, the main policy plank for debt relief in the case of low income countries has been rescheduling.

Evolution

14. The roots of the debt crisis can be traced to the rising expectation for rapid economic growth mainly in the countries of Asia, Africa and Latin America. During 1960s and 1970s, when majority of the Afro-Asian countries became independent, devastated by colonial exploitation they had no capital to fuel the rapid economic growth that they hoped for.[14] They had, therefore, to invite foreign investment to come to the newly independent nations and do business on terms favourable to the investor.[15] As a result of this policy, many of these countries enacted investment codes which guaranteed full ownership of equity, generous tax concessions and unrestricted repatriation of profits. All these incentives, however, failed to attract requisite amount of foreign investment in substantial quantity. Therefore, they had little option left, but to borrow to finance development and growth.[16]

15. During 1970s, the first oil-price shock occurred and forced many Asian-African countries to resort to heavy external borrowing. Subsequently, there was a decline in the price of primary commodities which affected the debt repayment capacity of the debtor countries. This resulted in the variation of amount of funds to be "recycled" to debtor countries, and the increase in interest rates further aggravated the debt problem, with the creation of severe balance of payment difficulties. In addition, several debtor countries had to face precarious internal political and economic turmoil due to civil wars, government derelictions, natural calamities such as drought, desertification and population explosion. The countries also need to construct and maintain physical infrastructure to support expanding agricultural and industrial activities. These are long-term tasks requiring sustained international support and cooperation, especially in finance, trade investment, science, technology and training.[17]

14 Yacob Haile-mariam, "Legal and other Justification for Writing Off the Debts of the Poor Third World Countries : The Case of Africa South of the Sahara," *Journal of World Trade Law* 1990, p. 36.

15 Jomo Kenyatta, *Suffering Without Bitterness* (East African Publishing House, Nairobi, 1968), pp. 76-92, Quoted in Haile-Mariam, *Supra*, note 14

16 John A. Bohn, "Government Response to the Third World Debt : The Role of the Export and Import Bank" *Stanford Journal of International Law*, 1985, pp. 861.

17 Y. Seyyid Abdulai, "Africa's External Debt : An Obstacle to Economic Recovery", *The*

16. After the crisis of repayment faced by Mexico in 1982, a spate of rescheduling began at the behest of the creditors.[18]

However, the methods and procedures adopted for rescheduling have been controversial and the results have not been as expected by the debtors.[19] The rescheduling of the existing debts are done primarily by two associations namely, Paris Club and London Club. Paris Club is an association of official creditors i.e., governments. It is not a legal body but an *ad hoc* group of western governments under the chairmanship of the French Treasury officials who have been meeting since 1956 to renegotiate the debt of countries falling behind in debt service payments. The London Club is primarily made up of private creditors.[20]

Debt Relief

17. The proposed solutions for the debt burden could be summarized as being rescheduling, refinancing and capitalization i.e., conversion of the debt to assets in the debtor country. It should be noted that the rescheduling and capitalization of the interest have been the main debt relief for most Asian-African countries. Debt-equity swap forwarded as debt relief mechanism, for example, is considered to be of little practical use in Africa. The equity to be swapped for the debt are the equities of State-owned enterprises, known in Africa generally as parastatals and which are mostly bankrupt. It is well known that most of the State-owned enterprises have, in fact, not even been able to cover running costs, let alone make profit.[21]

18. Exporting more funds in the form of loans or as direct foreign investment has also been termed as a solution. This, it is argued, would stimulate the economy, by generating more export surplus. However, the inflow of foreign investment has been so far subject to stringent rules and regulations, especially in Africa. Even the Baker Plan under which, commercial banks were to increase their exposure by slightly more than 2 per cent per year was of little benefit to Asian-African countries. Commercial banks since the Baker Plan contributed only $ 0.2 billion to Africa, in contrast to their contribution of $ 1.8 billion to Latin America.[22]

OPEC Fund for International Development, 1990, p. 13.

18 For a detailed discussion on "Rescheduling Measures" adopted in Mexico. *See*, Enrique Castro Tapia, "Mexico's Debt Restructuring" *Columbia Journal of Transnational Law*, Vol. 23, No. 1, 1984.

19 *See*, AALCC Doc. XXV/9, pp. 22-25.

20 For details see : Karen Hudes, "Coordination of Paris and London Club Reschedulings", *New York University Journal of International Law and Politics*, 1985, Vol. 17, Nos. 3, pp. 560-562.

21 Yacob Haile-Mariam and Berhanu Mengistu, "Public Enterprises and the Privatisation Thesis in the Third World", *Third World Quarterly*, October 1988, pp. 1565-1567.

22 *Ibid.*

Rescheduling

19. The countries burdened with the mounting arrears of debt may find it difficult to repay the debt in keeping with the scheduled terms and conditions. Factors ranging from balance of payment difficulties, to managing their own internal resources, may result in such an unhappy position. Mexico, for example, in 1982 declared its first unilateral moratorium on the debt servicing process. In such a case, it may become necessary to reorganise the whole debt; the repayment arrangement between debtor and creditor may, either have to be 'renegotiated' or 'reorganised' from time to time.[23]

20. Generally, 'debt rescheduling' means any change or modification in the payment arrangement of an existing debt. In other words, new repayment terms and conditions are settled in the light of new realities relating to an existing debt. The "debt rescheduling" involves the payments of principal and/or interest falling due in a specified interval being deferred for repayment on a new schedule.[24] Functionally, debt relief has a more wider application; it involves "any deferment or cancellation of arrears or of scheduled payments or any interest rate concession granted by a creditor."[25] "Debt restructuring," on the other hand, is a form of debt reorganization in which the entire schedule of amortization payments relating to an existing stock of debt is modified normally to extend the period of repayment."[26] It should be noted that 'rescheduling' will not in anyway minimise the burden of debt. It is, in fact, a short term measure in overcoming growth factors in the debtor countries.

21. The approach of Paris Club (an association of official creditors i.e. governments) to countries applying for the rescheduling of official debt has generally been to treat debt problems as if they were essentially balance of payment problems resulting from excess aggregate demand. As in most cases of commercial debt rescheduling, debtor countries are required to reach satisfactory agreement with IMF on Structural Adjustment Programme (SAP). The rescheduling of debt when granted is limited to consolidating periods of approximately the same length as country's stand-by programme with IMF, often, only for one year. The Paris Club proceedings, however, do not consider the overall situation such as the long-run dynamic effect of a loan, debt management relation to the evolution and the link between service obligations and productive capacity of a debtor nation. The London Club, on the other hand, provides a forum for the rescheduling of debts owed

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23 The amount of rescheduled debt service rose from under 5% of annual debt service in the three years before the crisis (1980-82) to over 20% in each of the succeeding three years. In 1986, $ 73 billion of rescheduling was negotiated involving 24 countries. In seven years (1980-86) $ 320 billion was renegotiated involving 52 countries and $ 28 billion was bank debt.

24 Alexis Rieffel, "The Paris Club, 1978-1983", *Columbia Journal of Transnational Law*, Vol. 23, No. 1 1984 pp. 83-104.

25 *Ibid.*

26 *Ibid.*

to the commercial banks. It also insists on the same conditionalities, namely, prior agreement with IMF relating to Structural Adjustment Programme and the sovereign debtor should have undertaken a Paris Club rescheduling.

22. The debtor countries negotiating under Paris Club must be in a situation of "imminent default". Such a situation arises "when a debtor country uses of foreign exchange which are usually projected for one year in advance, exceed its sources."[27] In addition, it is the perception of the creditor that the debtor is in the imminent threshold of default and that he needs the relief. The other aspect of debt rescheduling is the conditionality, that a debtor must have an IMF sponsored/approved structural adjustment programme as a pre-requisite for acquiring eligibility for rescheduling. However, normally such adjustment programmes are supported by a borrowing arrangement with IMF involving drawings in the upper tranches.[28]

23. The conditionalities put forward by the IMF generally are of the following nature[29] :

(a) Liberalization of external trade and payments and in particular, the removal of import controls, foreign exchange controls and other protectionist measures;

(b) The removal of restrictions on the activities of foreign capital, such as discrimination against foreign capital, removal of limitations on the transfer of profits;

(c) The devaluation of national currencies;

(d) The reduction of State subsidies for food, health and transportation;

(e) Changes in budgetary policies intended to reduce direct and indirect taxes on companies and to increase direct or indirect subsidies for companies (e.g. provision of investment finance, infrastructure, and industrial outputs);

(f) A reorientation of national economic policy and development towards increased promotion of production for export, with the concomitant neglect of areas producing for domestic demand consumption.

(g) State intervention in the determination of wages and other incomes;[30]

27 The sources include exports of goods and services, workers' remittances, private and official transfers, loan disbursements foreign investment, borrowing from the IMF, and foreign exchange reserves.

28 Upper credit tranches means borrowings by a member of 25% of its quota because drawings in the first credit tranches do not require meaningful policy reforms by the member country.

29 For a brief critical evaluation of IMF conditionalities *see* : Folker Frobel, Jurgen Heinrichs, Otto Kreye, "The Global Crisis and Developing Countries", in *Trade and Development*, UNCTAD, No. 5, 1984. Also see Wilfried Barg and Gunthes Thiele, "IMF Policies and their Adverse Consequences for Human Rights in Bulletin. *GDR Committee for Human Rights* No. 3, 1986, pp. 164-174.

30 This conditionality could lead to political instability. For example, when the Venezuelan

Further, it should be noted that while both Paris and London clubs work in tandem with the IMF, the debtors are prevented from acting collectively. For example, during the Paris Club proceedings while the creditors appear collectively with greater cohesion, the debtor is made to face the group of creditors unilaterally thus curtailing bargaining power to protect the country's interests and priorities.

Rescheduling Agreements

24. The rescheduling agreements are generally of two kinds. The first set of agreements are among the sovereign States for their official and officially guaranteed loans. Such agreements (whether they are original loan agreements or restructuring ones) are governed by the principles of public international law.[31] The second set of restructuring agreements take place between sovereign borrowers from developing countries and the commercial banks of the OECD countries. The credit arrangements between the sovereign borrowers and commercial banks are governed generally by what is known as "syndicated loan" agreements. The "syndicated loans" are a very complex and technically difficult process which give rise to equally complex legal dimensions.

25. The syndicated loans are advanced by a consortia of banks mostly situated in the financial centres, such as New York, London, Paris and Tokyo.[32] Generally, there are no governmental or inter-governmental regulations of these consortia, which means they are not bound to observe the normal requirements or restrictions of banking. These consortia, for example, do not observe certain critical requirements such as the reserve that a bank must keep in respect of its operations. Even the interbank transactions are carried on very informally, adopting some times flexible methods to meet a large demand. Such operations could lead to disastrous situations in case of non-compliance by any one of them. The Eurodollar Market has its own rules for establishing the London-Inter Bank Offered Rate (LIBOR) of interest which fluctuates periodically.[33]

Government implemented "price rise" so as to fulfil IMF conditionality it faced a severe resistance from the people which finally resulted in the death of 300 people and more than 2000 were injured.

31 Georges R. Delaume, *Legal Aspects of International Lending and Economic Development* (Oceana Publication) 1967, pp. 97-102. Mann, "Reflections on a Commercial Law of Nations", *British Yearbook of International Law*, Vol. 29, 1957.

32 "Consortium" reflects the sophisticated organizational capacity and the institutional solidarity. Gongalo Biga, "*Legal Aspects of the Latin American Public Debt*", *CEPAL Review*, No. 25, p. 171.

33 LIBOR is a variable interest rate which fluctuates according to the market in London. This rate represents the amount which a bank operating on the London Inter Bank Market pays to another bank operating on the same market for a Eurodollar deposit, for a term of six months or one year. The US counterpart is known as the US Prime Rate.

26. There are two fundamental purposes behind these consortia loans. Firstly, the possibility of mobilizing more reserves; secondly, the proportionate reduction in the risk to each member in the consortium. So it is organized through a mandate letter from a loan applicant authorising a bank to act as the lead manager bank. At the same time the applicant sends a memorandum giving detailed information on his economic and financial situation. The mandate letter and the information memorandum then enable the lead bank to invite other banks to participate in the formation of a consortium. And it establishes a separate legal relationship which is independent of the loan contract between lead bank and the borrower.

Guidelines For Rescheduling

27. The debt rescheduling and renegotiation process between sovereign debtors and their creditors has evolved into a highly specialised and complex practice. It should be noted that prior to 1973, sovereign States obtained most of their credit from multilateral institutions such as the IMF and the IBRD, from bilateral loans from other States, or from the sale of bonds. However, during the 1970s the combination of increased energy costs, aggressive use of funds from private commercial banks, and the demand for credit for development projects and for financing the servicing of existing debt resulted in dramatic increase in external borrowing by developing countries.[34]

28. Further, in the 1980s the recession in the development countries and an increase in the worldwide supply of petroleum contributed to decreased demand for exports from developing countries, reduction in the amount of funds to be "recycled" to the developing countries and higher interest rates. Because of the limited foreign exchange potential, particularly through commodity exports, some developing countries of Asia and Africa have been facing enormous balance of payments deficits. Hence, they have failed to pay back the principal of and interest on medium and long-term loans that were incurred four or five years earlier, and which required further loans to finance current debt service and development projects.

29. Upon finding itself faced with such a severe balance of payments deficit, a developing country is forced to consider the necessity of some form of debt rescheduling or renegotiation.[35] Following is a brief account of various steps to be taken while rescheduling or renegotiating debts, specially keeping in view the interests of developing countries.[36]

34 James B. Hurlock, "Advising Sovereign Clients on the Renegotiation of their External Indebtedness" *Columbia Journal of Transnational Law*, Vol. 23, 1984, p. 29.

35 On the balance of payments problems and the role of Transnational Banks, See, generally *Foreign Direct Investment : Debt and Home Country Policies*, ST/CTC/SER. A/10, July 1990.

36 *Supra*, n. 34, p. 29.

30. First of all, the sovereign debtors may consider the necessity for employing an expert legal counsel to assist in the preparation of a renegotiation/rescheduling plan. Such a decision may be necessary on the following grounds : (i) the country's lack of experience in the area of rescheduling/renegotiation; (ii) the applicability of foreign law to govern such agreements; and (iii) the country's lack of sufficient personnel to deal with several hundred lenders spread throughout the world.

31. Secondly, review of the data available concerning sovereign's external debt portfolio and legal system, as well as expressed intention of its creditors to decide which types of debt are capable of being rescheduled and how much additional credit, if any, will be needed.[37] (There are, however, going to be difficulties in obtaining accurate data which eventually will have to be accepted and appreciated by all parties concerned). It is also important to determine who are the borrowers of external debt; for example, the sovereign itself, government entities, private sector companies. If the sovereign debtor does not have a comprehensive debt registration system already in place, it may be necessary to begin collecting data from the various governmental and non-governmental borrowers in order to reach an informal decision as to which debt to include in the rescheduling plan, and to establish feasible target figures and schedules for completion of the plan.

32. Next step is to review the sovereign's exchange control regulations and constitutional and political framework to determine what legislative or executive action may be necessary to implement the rescheduling plan and also to assess the likelihood of political opposition to the rescheduling ... to examine constitutional requirement and political climate before structuring the plan. Review should also be made of the sovereign's payment and exchange control systems to determine the most practical way to structure future payments and promote internal compliance with the plan.

33. To prepare as comprehensive a proposal as possible before approaching the different groups of creditors is vital. In addition to the basic financial terms of a proposal, such as whether to request any additional credit, or better interest rates and repayment terms, three basic formulations must be defined[38] :

(a) *Classes of Affected Debtors* : This will depend on the view of available data. Sovereign debtor must also decide whether each of the affected debtor should be party to the renegotiation agreement or whether a single government agency or bank should act on behalf of all.

(b) *Classes of Affected Creditors* : The basic groups of creditors that the sovereign must consider are, international lending institutions (IMF, IBRD), governments (both as direct lenders and as guarantors of

37 As regards the incentives for investments in developing countries and other related issues : See : *Supra*, n. 35, p. 25.

38 *Supra*, n. 34, p. 29.

commercial bank debts), public debt holders, and commercial bank lenders and suppliers. International lending institutions and public debt holders usually are excluded from rescheduling plans on policy grounds and since they provide basic funding for stability and development projects of the sovereign.

(c) *Types of Affected Debt* : One of the first steps in establishing the categories of affected debt is to fix a cut-off date based on the date that the debt is incurred or on the date that the debt falls due, or on some combination of both.

Negotiating the Agreements

34. This stage begins once the above requirements are met. Generally, the cornerstone of the negotiation package has been the sovereign's arrangement with the IMF. This, however, usually creates great difficulties to developing countries as IMF imposes performance criteria and conditionalities. The final group of creditors to be approached are commercial lenders, which may consist of 500-600 banks at a time. So, commercial lenders usually appoint a group of 10-15 of the banks with the largest exposure in the debtor country as a steering committee to deal with the major issues and to act as liaison with the banks at large.

35. Initial negotiations will focus on the basic terms of rescheduling plan. Subsequently, a summary of the principal terms of the debt reschedule will be prepared. This will include, the definitions of affected debtors, affected creditors, affected debt and the payment schedule. Briefly, following three are the important provisions that are negotiated[39] :

A. *Negative Pledge Clause* : It limits the sovereign's ability to incur future debt that will rank ahead of the obligations governed by rescheduling agreement. It should, however, be noted that such a restriction may have impact on the sovereign's daily banking and commercial activities.

B. *Cross Default Clause* : It links together the various groups of lenders by making it a default under the rescheduling agreement if a default occurs under any other agreement to which the sovereign or any governmental entity is a party. This clause requires that all lenders should be treated equally.

C. *Material Adverse Change* : The lenders will insert a default clause which permits each individual lender to declare a default if it determines that a "Material adverse change" in circumstances threatens the sovereign's activity to repay its obligations.

Finally, it should be noted that these negotiations can take several months. Agreements on the terms of rescheduling plans may have to be

39 *Ibid.*

reached after thorough consultations. All these modifications, however, will have to meet the domestic requirements of both sovereign debtors and creditors so as to legalise renegotiated plan.

Conclusions

36. The rescheduling process is only a temporary measure and it only brings a short-term relief. It has been argued that unless the underlying economic causes such as decline or stagnation of exports, coupled with increased import burdens, are fully addressd, the debt problem is merely postponed and renewed negotiations become necessary a year or two later.[40] The process of debt reorganisation should have a longer perspective and should be designed to provide sufficient time over which structural adjustment measures can be implemented.[41]

37. The Common African Position on rescheduling outlines clearly the consequences of postponing debt service payments through rescheduling. Rescheduling also does not adequately deal with the issue of how the portion of the principal not rescheduled should be financed in future, nor does it provide for rescheduling of previously rescheduled loans. Moreover, it carries heavy costs in terms of fees and additional interests on rescheduled debts.[42] Further, it has been strongly urged that the rescheduling method adopted should be based on the development and investment needs of each country, as well as on a realistic assessment of the country's repayment capacity taking into consideration expected growth of export earnings, import requirements and expected financial inflows as well as budgetary situation.[43]

38. A special focus on possible new and workable relief measures for Asian-African low income countries is required now since existing initiatives (including Baker and Brady Proposals) practically address themselves to selective category of debtors on the basis of commercial and strategic interests. Debt problem of low income Asian-African region requires to be addressed within the framework of objective realities coupled with consideration of the welfare of the peoples concerned. It is necessary to identify concrete debt relief measures which suit the debtor countries of Asia and Africa. Such measures can be initiated for discussion and implementation through regional organisations and other UN bodies.

39. It has been suggested that the borrowers (i.e. debtor developing countries) instead of examining the legal aspects of rescheduling separately, examine the implications of the overall context of the international credit relations. The study relating to these issues has already been placed before the AALCC. Further, it has been suggested that a study of formulation of

40 *Special Memorandum by the Economic Commission of Africa : Conference of Ministers on African Economic and Social Crisis* (United Nations, 1984), p. 49.

41 *Ibid.*

42 *Ibid.*

43 *Ibid.*

a set of legal guidelines and model agreements that could form the basis of future borrowings from both official and commercial creditors can also be undertaken. In this regard, it is extremely important to take into account the differences in the legal systems and regulations concerning the rescheduling of debts in the debtor as well as in the creditor countries so as to formulate an acceptable model. The present study has made an attempt to outline generally the procedures followed in the negotiation of 'rescheduling agreements".

40. Further, as mentioned earlier, with the present high interest rates, plunging commodity prices, increased exclusion of African exports from the markets of the industrialized world and persistent natural calamities, there is no prospect of most African countries ever being able to pay their debts in the forseeable future. By way of a possible solution, many including the World Bank have recently suggested that the African countries may seek from the creditor countries as well as the private and multilateral financial institutions "a programmed gradual total write-off of the debt".[44] Therefore, the only effective solutions to the problem of the African debt, particularly in Sub-Saharan Africa, are essentially within the realm of political goodwill of the major donor countries rather than in any other debt relief measure such as rescheduling. The African countries, however, must accept realistic economic restructuring as well as creating the necessary political climate if they are to expect debt relief from these countries.

44 *Supra*, n. 14, p. 79.

VII. LEGAL ASPECTS OF PRIVATISATION

(i) INTRODUCTION

1. At the thirtieth annual meeting of the AALCC held in Cairo in April 1991, it was noted by the AALCC's Standing Sub-Committee on International Trade Law Matters that in the economies of most of the Member States of the ALLCC, public sector enterprises or undertakings (PSEs or PSUs) played an important role and that their economies were dominated by such enterprises. It was further noted that in recent years, various multilateral financial and monetary institutions had put pressures on developing countries to go in for privatisation of these undertakings, making it virtually a precondition for the grant of financial assistance and the extent thereof. The Sub-Committee, taking note of these developments, requested the AALCC Secretariat to commence a study on the legal issues involved in the matter of privatisation with the final objective of preparation of a guide on legal aspects of privatisation in Asia and Africa. The principal aim of such a guide would be to assist the Member Governments in carrying out privatisation programmes in a manner which is not detrimental to their national economic interests.

2. Since the preconditions, basic methods and procedures for privatisation and the legal issues involved were likely to vary from one country to another, the view was expressed that it would be necessary for the Secretariat first to collect the relevant information from the Member Governments so that it is able to identify the policy and legal issues involved before it commences its study on the topic. Consequently, the Secretariat prepared a questionnaire to facilitate the Member Governments to furnish the required information. That questionnaire was circulated by the Secretary-General of the AALCC vide his letter dated the 30th of July 1991 requesting the concerned authorities in the Member Governments to respond to the questionnaire as early as possible.

3. Unfortunately, only the Governments of the Republic of Singapore and Thailand responded to the questionnaire prior to the thirty-first session of the AALCC scheduled to be held in Islamabad (Pakistan) in January-February 1992. However, in view of the topical importance of this matter for the Member States and with a view to facilitating discussion at the Islamabad Session, the Secretariat prepared and presented a preliminary study on the topic. The questionnaire circulated by the Secretariat and the responses thereto by the Governments of the Republic of Singapore and Thailand were appended to that study.

Discussions and Decisions Taken at the Islamabad Session

4. At the Islamabad Session, the matter was discussed in the Standing Sub-Committee on International Trade Law Matters.

5. The *Assistant Secretary-General* (Mr. Essam Abdul Rehman Mohamed) while introducing the preliminary study on the topic (Doc. No. AALCC/XXXI/Islamabad/92/14) stated that the topic was included in the work programme of the AALCC in pursuance of a recommendation made by the Trade Law Sub-Committee at the last session of the AALCC held in Cairo in April 1991 and the mandate entrusted to the Secretariat related to studying the legal issues involved in privatisation with the final objective of preparation of a guide on legal aspects of privatisation in Asia and Africa.

6. Since the policy prescriptions, basic methods and procedures as well the legal issues involved in privatisation were likely to vary from one country to another, the Secretariat was advised that before it commenced a substantive study of the topic, it should first collect the relevant information from the Member Governments. Consequently, a questionnaire was prepared to facilitate the Member Governments to furnish the required information. Since that questionnaire was responded to only by the Governments of Singapore and Thailand, it was difficult for the Secretariat to prepare an indepth study. Consequently, the study submitted to the present session was only a preliminary one intended to facilitate the discussion and for indication of the direction in which the Secretariat must pursue further work.

7. Explaining the contents of preliminary study, the Assistant Secretary General pointed out that the study was in two parts, the first part being devoted to the socio-economic aspects of privatisation and the second part addressed to legal issues that might be involved in the process of privatisation. One tentative conclusion of the Study was that Governments of developing countries in the Afro-Asian region in their transition from the mixed economy to a market-oriented economy would have to carry out their privatisation programmes in a phased manner keeping in view their national interests as well as the need to align their economies with the global economy. The other tentative conclusion was that since privatisation could be carried out in two stages, the first stage consisting in the initial sale of shares of a Public Sector Undertaking to public at large upto a ceiling of 49 per cent and the second stage consisting in the sale of such shares to the extent of giving effective control to the private companies; the first stage might not require wholesale economic and legal restructuring but that would be necessary at the second stage.

8. As the Secretariat was required to elaborate the preliminary study in the light of the information requested from the Member States, the Assistant Secretary-General requested the Sub-Committee to recommend to the Plenary to urge the Member Governments which had not responded to the Secretary-General's letter to kindly do so at the earliest to enable the Secretariat to carry out the mandate entrusted to it.

9. The Sub-Committee expressed its appreciation for the Governments of Singapore and Thailand for providing the information desired by the Secretariat. The other delegations attending the Sub-Committee assured the Sub-Committee that they would contact the concerned authorities in their respective Governments and request them to furnish the information as desired by the Secretariat.

10. The *Representative of UNIDROIT* advised that in addition to seeking information from Member Governments, the Secretariat should also take into account the privatisation programmes under way in East Germany as well as in other States of the Eastern Europe and assured to make available to the Secretariat some literature in that regard. He also advised that since it would be somewhat difficult for the Member Governments to respond to the AALCC's questionnaire, it would be better for the Secretariat to request the Member Governments to furnish relevant literature on their progammes and texts of agreements on privatisation.

11. The Sub-Committee noting that the topic of privatisation had acquired immense importance for the developing countries in view of the far reaching structural changes taking place in the global economy having an impact on their national economies, *decided to request the Plenary to urge the Member Governments which had not responded to the Secretary-General's questionnaire to do so at the earliest and/or furnish any relevant documentation to the AALCC Secretariat.*

12. The above recommendation was endorsed by the Plenary of the AALCC.

(ii) SECRETARIAT'S PRELIMINARY STUDY

Introduction

1. Most of the developing countries in Asia and Africa achieved their political independence in 1950s as a culmination of the process of decolonisation set in motion by the United Nations soon after its inception in 1945. After attaining political emancipation, one major challenge before the newly independent States was to select a development model which could revitalize their depressed economies since little, if any, meaningful development had taken place in these countries during the colonial era. The development model that was chosen by most of these countries was that of a mixed economy consisting of the public sector and the private sector in which primacy was given to the public sector. All basic, strategic and infrastructural industries were entrusted to the public sector whilst the private sector was intended to play a complementary role. The rationale for lending primacy to the public sector was that the State should have a definite say in shaping economic policies and that welfare of the masses could be achieved only through socialism.

2. India became the chief proponent of this development model and it inspired a number of other developing nations in the region to adopt economic systems based on this model. To begin with, India, in 1951, had only five central public sector enterprises with an investment of Rs. 290 million.[1] Since then the public sector has registered a phenomenal growth. By March 1988, the number of PSEs had risen to 231 with an investment of Rs. 712,990 million[2]. At present, nearly 55 per cent of the PSE investment is in steel, coal, minerals and metals, electricity and petroleum. Products include such items as bread, paper, footwear and contraceptives; air, sea, river and road transport; national and international trade; consultancy, construction activities; hotels and tourism services.[3]

3. Although this model of development had the advantage of industrializing the country and making it largely self-reliant, it is now being realized that the overall performance of the public sector has not been satisfactory. In 1990, India had a total of 248 central public enterprises, out of which 103 had incurred losses to the tune of Rs. 17450 million during 1989-90. Out

1 Venkateswaran, R.J. "Aspects of Privatization. The Public Sector" in the *Hindustan Times*, New Delhi, dated 23 November 1991.

2 Prabhu, A.N. "Privatisation. How to make it work here" in the *Hindustan Times*, New Delhi, 2nd June 1991.

3 Dutt, R.C. *State Enterprises in a Developing Country. The Indian Experience 1950-90*, New Delhi, 1991.

of these loss-making units, 40 were chronically sick and their revamping required writing off losses worth Rs. 62,000 million while fresh investments in only 28 units (which were to be rehabilitated) were expected to involve additional outlays of Rs. 33,000 million.[4] In addition thereto, compensation in the event of closure was to involve a similar amount. In other countries of the region, the experience has not been dissimilar. The reasons that have been advanced for the overall failure of the public sector are along sthe following lines :

(i) Some of the PSEs have virtually become social welfare organisations with no accent on efficiency and productivity. They have become breeding grounds for corruption, patronage, inefficiency and bureaucracy, guzzling huge resources from the larger economy.

(ii) The PSEs are incurring continuous and staggering losses on account of their producing goods and services at high cost and of indifferent quality.

(iii) Their freedom of operation is severely curtailed due to excessive interference by Governments, formally or informally.

(iv) They have bred a culture of no work.

4. Since the PSEs have become a drain on the exchequer, of late pressures are being brought to bear on the governments to diminish the role of the public sector and increase the role of the private sector through industrial restructuring and privatisation. Since most of the governments in the region have been suffering from increasing budgetary gaps year after year while at the same time facing mounting external indebtedness, pressures are being exerted on them in particular by the international financial and monetary institutions to close down the chronically sick PSEs and reorganize or privatise the remaining ones if they wish to be favourably considered for developmental assistance. Since governments would face the prospect of industrial unrest in ordering closure of sick units, they are being promised by these agencies financial assistance to enable them to meet the cost of retrenchment and other monetary benefits to be given to the workers of such units.[5]

5. Probably, it is in response to these pressures coupled with the overall unsatisfactory performance of the public sector, that privatisation and deregulation of national economies have become the watchword in about 50 countries around the world. In fact, deregulation, relaxation of State control and the withdrawal of State from certain economic processes is already in process in India, Pakistan, Sri Lanka, China, South-East Asia, Angola, Algeria, Ethiopia, Kenya, Mexico, Chile, Western and Eastern Europe and the USSR. There have been other factors also which have aided and abetted this

4 Mitra Chenoy, Kamal A. "Privatizing India" in *Mainstream*, New Delhi. Vol. XXIX. No. 41, dated 3 August 1991.

5 The Government of India has been promised $ 1 billion of this score by the World Bank.

development. Firstly, the successful British experience, Mrs. Thatcher, former Prime Minister, privatised over two dozens PSEs in UK including giants in steel, air and telecom services and showed that there was a no panacea save for trusting her people. The second is the crumbling of the concept of public sector in the Soviet Union and East European bloc which are now switching over to the market oriented systems and contemplating privatisation of the majority of their public enterprises. Thirdly, most of the developing countries have now come out of the time-honoured managing agency system fostered by the British. Large private sector companies are now in the hands of professional managers and a new entrepreneurial class has come up. Fourthly, in several developing countries, there is now in place an industrial and technological base and a fairly good infrastructure and heavy industry have been well set. Fifthly, the capital market, by and large, is growing in a number of countries of the region. Sixthly and lastly, the recognition that withdrawal of the State from economic process is one of the keys to further development since new industries such as micro-electronics, computers, auto-revolution, information technology, automation of textiles and several other industries need less interference from the State.

6. However, a crucial question that arises in this context is in the manner and at what pace can the public sector be privatised since the private sector even now has neither the resources nor the competence to take over all public enterprises. If privatisation is taken to mean selling away the assets of the public sector, partially or fully, to some individuals or to some private companies including foreign enterprises, however efficient or financially sound, that will not be in the interest of the developing economies since no country or government would be willing to risk the political fallout that will be generated if any such step is even contemplated. Privatisation in the present context should, therefore, mean only disinvestment of PSE's shares to the public at large including workers – partially, substantially or fully. Even in this restricted sense, full privatisation, given the present state of economies in the countries of the region, would not be in a position to absorb the shock of full privatisation without a fundamental restructuring of national economies. Moreover, taking into account the experiences of the privatisation in Latin America and UK, it appears that privatisation works only to the degree that the rest of the economy works. If the general economy suffers from a overdoze of bureaucratic controls, rules and regulations, permits and licences, it would make only a nominal difference whether an enterprise is in private or public sector.

7. It is contended that four preconditions have to be satisfied before privatisation can be successful :

"(i) The economy should be globalised. Inranational and international competition should be fully encouraged. Otherwise privatisation will result in the replacement of inefficient public monopolies by exploitative private monopolies.

(ii) Subsidies will have to be abolished. Full privatisation in a regime

of subsidies will be an absurdity.

(iii) Administered prices and privatisation is an equally glaring contradiction. No privatisation with simultaneous price controls can ever work.

(iv) Internal and external protection through non-tariff measures will have to be abolished. Whatever tariffs are needed have to be fully rationalized, otherwise efficiencies will deteriorate and the consumer and tax payer will become the victims. Privatisation in essence means competition.[6]

8. These are major microeconomic issues and involve restructuring of the national economies and a fundamental change in the overall historical perspective. Alleviation of poverty, equitable distribution of goods and services and maintenance of regional balances continue to be the major demands in the States of the region needing subsidies through the mechanism of administered and retention prices. Since Governments are likely to take time in taking a position on these major issues, full privatization of the public sector at the moment should remain a long-term objective.

9. However, within the present framework a partial divestment is possible and desirable if the objectives are to : (a) improve the efficiency of performance of the PSEs; (b) make available funds to PSEs for modernization, expansion and corporate growth; and (c) distance government from day-to-day functioning of the PSEs. A partial divestment is feasible without affecting major policy changes and without waiting for a total restructuring of the economy. A divestment of upto 49% should pose no problem as the governments would still be able to retain effective policy control. This is essential because experience indicates that the success of late industrialisers like Japan or the Republic of Korea was based, not on indiscriminate investment by private investors pursuing market signals, but industrialization guided by the State that influenced the number of units, the size of each, and the technology and marketing strategy adopted in each industry. At a later stage divestment even up to 60% can be tried provided the equity is distributed amongst a large number of shareholders including the workers of the enterprise.

10. However, it will not be possible to divest the shares of all PSEs, particularly those which are industriallly sick as nobody would be interested to invest in them. The remedy for the sick units should be the same as for sick private enterprises. First, give an opportunity to the workers to run the units. If they cannot, one must face the unpleasant task of closing them down, with appropriate measures for relocation and rehabilitation of workers. The capital raised by disinvestment of selected PSEs should not go into the exchequer but should go into a separate Fund with the following objectives : (i) For reinvestment in the public sector for modernization,

6 Moosa Raza. "Exploding the Efficiency Myth" in *The Economy*, Vol. I — *Crisis and Adjustment*. New Delhi, 1991.

expansion and corporate growth; (ii) For assisting ailing PSEs and turning them around; (iii) To create a social security scheme to safeguard the rights of workers; and (iv) For intervention in the market to sustain public confidence in this equity. Such a Fund should be governed by a select body consisting of government nominees, public sector chiefs, chiefs of financial institutions and eminent economists from the public and private sectors, who would have all the authority to manage the Fund for the objectives listed.

11. Once partial disinvestment has been achieved, the next logical step would be restructuring of the management of PSEs. Their Boards should be reconstituted to give representation to the general shareholders. The government should avoid the temptation to use its large shareholding to get its nominees elected as this will defeat the purpose of partial privatisation. Today, the annual general meetings of the PSEs are closed meetings between the Chairman and Managing Directors of the enterprises and a representative of the Government. There is really no accountability and transparency in their operations in the true sense of the word. In fact, accountability of the PSEs should be looked at from the viewpoint of accountability for efficiency, productivity and profitability rather than from day-to-day operations. The management of the PSEs should not be the responsibility either of politicians or bureaucrats. They should be given independence and then made accountable for their performance. Unless, governments consciously adopt this approach, no amount of industrial restructuring of public enterprises would ever succeed.

12. From the foregoing account, the inescapable conclusion that can be derived is that Governments in the region in their transition from the mixed economy to that of a market-oriented economy will have to sequence their privatisation programmes in a phased manner keeping in mind the national interest as well as the need to align their economies with the global economy.

Legal Aspects

13. In any programme of privatisation, four stages can be contemplated. The first stage is 'partial privatisation' which consists in the initial sale of shares of a PSE to the public at large including the workers. The initial divestment is generally limited to 20 to 25%. The second stage consists in the sale of shares of a partially privatised PSE in which such divestment is limited to 49%. The third stage, which may be called 'effective privatisation' consists in the sale of shares to the extent of giving away control of a PSE to the private companies. The last stage is "total privatisation" which means complete withdrawal of the State from the enterprise. In stages I and II, the State control relatively remains intact but in stages III and IV, it is either minimised or completely eliminated.

14. For implementing stages I and II of privatisation, which can be characterized as partial privatisation, there is already in place in most of the countries of the region the requisite legal framework, although a few changes will be required in certain legislation and a few fresh legislation

may have to be enacted to create the new autonomous bodies to be entrusted with the task of facilitating and overseeing the process of partial privatisation. At present, the equity of PSEs is not quoted at stock exchanges and therefore arrangements will have to be made to determine the sale and purchase prices of their shares. For this, appropriate changes and devices will have to be worked out in the Companies and Securities law. Moreover, while embarking on a programme of progressive privatisation, industrially sick units will have to be closed down which will result in massive retrenchment and unemployment of workers. Suitable amendments will have to be effected in the relevant industrial/labour laws to ease the cost of human adjustment.

15. For implementing stages III and IV of privatisation, since the character of the PSE undergoes a transformation, considerable restructuring will be involved. Such restructuring will need a suitable legal framework. This legal framework generally includes constitutional guarantees and/or a law creating and respecting property rights, in which the term 'property' is given the widest connotation; a law setting forth provisions for the transfer of property; a law regulating industrial development; a law relating to pollution prevention and environmental protection; a companies law; a contract law; an insolvency law; a securities law; a law of taxation on corporate incomes and dividends; an excise law (*ad valorum* and value-added taxes); a competition law; and a set of industrial/labour laws regulating, *inter alia*, the treatment of employees in privatised enterprises.

16. Constitutional guarantees and/or a law creating and respecting property rights is a prerequisite because clearly defined property rights are an essential precondition of privatisation. The law regulating transfer of ownership of land and businesses is required because almost all businesses to be privatised will involve the transfer of, or the right of use, land from the State to the enterprises concerned. Such a law will provide whether companies with a certain percentage of foreign ownership can hold real property, and if so, under what conditions. The law relating to industrial development will specify the sectors which are reserved to the public sector and those which are open to the private enterprise. The prevention of pollution law, apart from checking pollution, will fix the liabilities for pollution damage caused by industrial accidents. The company law will specify the forms of business organization (joint stock companies, both public and private, partnerships etc.), confer separate legal personality on the business organizations and provide the extent of protection to investors from liabilities incurred by the business organizations in which they invest. The contract law is *sine qua non* for commercial exchanges as it makes the contractual obligation binding on the parties to a contract. The insolvency law is necessary to deal with those businesses which fail to make a profit or are unable to continue to pay to their creditors. This will apply to private individuals as well as to businesses and will deal with the way in which outstanding creditors are paid from the pool of remaining assets. The securities law is required to create the necessary legal and regulatory framework within which the market for trading securities is established and made functional and to protect the

interests of investors. Such a law will also lay down rules governing the operation of a stock exchange and the information that must be disclosed by companies to obtain a listing on the exchange. The tax law, apart from taxing corporate incomes and dividends, will provide fiscal incentives for the establishment of new industrial enterprises. The competition law, an essential precondition for privatisation, is intended to promote a healthy competitive environment and to ensure that PSEs, once privatised, do not maintain their monopolistic position. Side by side with the competition law, an independent *quasi* judicial body (such as the Monopolies and Restricted Trade Practices Commission in India) will have to be created to investigate and to implement the said legislation.

17. This body of laws may have to be complemented by a transformation law and a privatisation law. The transformation law will be needed to facilitate the transfer of title to businesses from the State to the private sector. Such a law will provide that a PSE may be transformed either by the Government itself or by the management and/or workers with the permission of the Government. It might adopt either of the following two approaches : (i) The PSE may be transformed into a company, and once this has taken place the State will be the sole shareholder of the company and the shares may then be sold in the privatisation process; and (ii) a new company will be formed and the government will contribute various assets together with the business as a going concern as its contribution to the capital. The remaining shares in the new enterprise may then be sold to raise finance for the running of the business.

18. A specific law on privatisation will be necessary to empower the government to carry out the privatisation programme. This is because under the Constitutions of many a State, a trade or industry can be nationalised by legislation and that too for a public purpose. From that it necessarily follows that a trade or industry can be privatised only by a specific enactment for that purpose and that such legislation must disclose the grounds on which public or community interest is better served by privatisation. Moreover, in the case of those countries whose Constitutions ordain the State to function as a welfare State and vest the ownership of all means of production and natural resources in the State, a constitutional amendment may be necessary specifically providing that privatisation is justified in public interest only when it leads to greater productivity, efficiency and development.[7]

ANNEX - I

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

Questionnaire

1. What have been the social, economic and political factors which have

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7 Upendra Baxi, "Constitutional Perspectives in Privatisation", *Mainstream* (India), July 4, 1981.

led your Government to go in for privatisation ?

2. How is the term 'privatisation' defined in your country ?

3. What aims has your country set for privatisation ?

4. What is the precise sphere of privatisation (sectors and industries) ?

5. What are the economic, financial, fiscal and legal preconditions for privatisation in your country ?

6. The basic methods and procedures for privatisation appear to be as follows :

(i) *Private sale of shares* – In this, the State sells all or part of its shareholding in a wholly or partly-owned State enterprise to a pre-identified single purchaser or group of purchasers.

(ii) *Public offering of shares* – In this the State sells to the general public or to a limited class of purchasers all or large blocks of stocks it holds in a wholly or partly owned State enterprises.

(iii) *Management/Employees Buy-out* – This refers to the acquisition of controlling shareholding in a company by a small group of management and/or employees.

(iv) *Sale of assets* – This involves sale of particular assets (trade marks, plants etc.) rather than shares in a going concern.

(v) *Restructuring* – This involves the breaking-up of a state-owned enterprise into several subsidiaries.

(vi) *New private investment* – In this modality, the State does not dispose of its existing equity in a public undertaking, but increases overall equity and causes a dilution of the Government equity.

(vii) *Leases and Management Contracts* – These are arrangements whereby private sector management, technology and/or skills are provided under contract to a State-owned undertaking or in respect of State-owned assets for an agreed period and compensation.

Which of these modalities are adopted in your country for privatisation and what have been the legal problems encountered in that regard ?

7. Has your Government set up a statutory body to supervise privatisation process ? If so, what is its role, rights and obligations ?

ANNEX - II

SINGAPORE

Answer to Question 1 :

The rationale for our privatisation programme is as follows :

(a) To withdraw from commercial activities which no longer need to

be undertaken by the Public Sector;

(b) to add breadth and depth to the Singapore stock market by the floatation of government linked companies and statutory boards and through secondary distribution of government-owned shares; and

(c) to avoid or reduce competition with the private sector.

Answer to Question 2 :

The initial sale of shares of a subsidiary that has hitherto been wholly-owned by the Government is "partial privatization". The sale of shares of a partially privatized company is "further privatization"; sale to the extent of giving away control of a company is "effective privatization" and complete withdrawal from a company is "total privatization".

Answer to Question 3 :

Please see answer to Question 1.

Answer to Question 4 :

The Goverament has shareholdings in a very diversified group of companies. Our policy is to privatise as many companies as possible.

Answer to Question 5 :

Companies which are privatized through public floatation must satisfy the listing requirements laid down by the Stock Exchange of Singapore. Please see attachment.

Answer to Question 6 :

We do not restrict ourselves to any one particular method, as we have to look at the situation and circumstances of each case of privatisation. We have not encountered any major legal problems so far.

Answer to Question 7 :

No.

PART - I

ORIGINAL LISTING REQUIREMENTS

A. Criteria for Original Listing

101. General

The approval of an application for the listing of securities on the Stock Exchange of Singapore Limited is a matter solely within the discretion of the Exchange.

The Exchange has established certain numerical standards, set out below, which will be considered in evaluating potential listing applicants. Aside from the numerical standards set out below, there are, of course, other factors which must necessarily be taken into consideration in determining whether a Company qualifies for listing. A Company must be a going concern or be the successor of a going concern. While the amount of assets and earnings and the aggregate market value are considerations, greater emphasis is placed on such questions as the degree of national interest in the Company, the character of the market for its products, its relative stability and position in its industry, and whether or not it is engaged in an expanding industry with prospects and/or maintaining its position.

102. Ordinary Shares

Companies applying for quotation of ordinary shares are, as a general rule, expected to meet the following criteria :

(1) It has a paid-up capital of at least $ 4,000,000.

(2) At least $ 1,500,000 or 25 per cent of the issued and paid-up capital (whichever is the greater) is in the hands of not less than 500 shareholders.

(3) A minimum percentage of the issued and paid-up capital is in the hands of shareholders each holding not less than 500 shares and not more than 10,000 shares :

Nominal value of issued and paid-up capital	*Minimum percentage*
Less than $ 50 million	20%
$ 50 million and above and less than $ 100 million	15% or $ 10 million whichever is the greater
$ 100 million and above	10% or $ 15 million whichever is the greater

In complying with this distribution, the following are to be excluded :

(a) Holdings by parent, or companies deemed to be related by virtue of Section 6 of the Companies Act.

(b) Holdings by directors (including those of persons designated directors under the Companies Act).

(4) Except in very exceptional circumstances, the Exchange will refuse a quotation to partly paid shares, and even, should such a quotation be granted to such partly paid shares, the Exchange may impose such restrictions on the dealings in such shares.

103. Bonds, Debentures and Loan Stock

A Limited Liability Company seeking official quotation of Loan Securities may be considered for admission to the official list if :

(1) It has at least $ 750,000 of issued loan securities of the class to be quoted;

(2) There are at least 100 holders of such securities;

(3) The securities are created and issued pursuant to a Trust Deed, which must comply with the Trust Deed requirements of the Exchange as set out in Part X, the trustee of which is :

(a) A company authorised by the law of Singapore to take in its own name a grant of Probate or Letters of Administration of the estate of a deceased person;

(b) A company registered under any law of Singapore relating to Life Insurance;

(c) A banking company;

(d) A company of which the whole of the issued shares are beneficially owned by one or more companies referred to in (a), (b) and (c) above;

(e) A company approved for this purpose by the Government of Singapore as trustee for the holders of such securities.

104. Securities of Foreign Companies

The requirements for admission to the Official List of foreign companies shall be prescribed by the Exchange from time to time and such requirements shall be published as "Guidelines for the listing of foreign companies".

105. Exploration and Development Companies

An application for listing from a Company whose current activities consist solely of exploration will not normally be considered, unless the Company is able to establish :

(1) The existence of adequate reserves of natural resources which must be substantiated by the opinion of an expert in a defined area over which the Company has exploration and exploitation rights, and

(2) An estimate of the capital cost of bringing the Company into a productive position, and

(3) An estimate of the time and working capital required to bring the Company into a position to earn revenue.

106. Property Investment/Property Development Companies

The Exchange generally will not list a property Company unless a valuation of the freehold and leasehold property of the Company or the Group (such as the case may be) has been conducted by an independent professional valuer on a date which should be not more than six months

from the date of the Company's application to the Exchange for quotation.

107. Special Type of Companies

(1) Companies with good prospectus for growth and are in need of raising capital may be considered for listing notwithstanding that they have yet to establish any track record or otherwise unable to comply with any of the listing requirements of the Exchange. The Exchange will take into consideration all pertinent factors, particularly with regard to the quality and expertise of the management and/or board of directors of the companies.

(2) If, in the opinion of the Exchange, a Company seeking admission to the Official List is engaged in a business or activity which is peculiar to a particular trade and for which the requirements of the Exchange may not be totally applicable, the Continuing Listing Requirements of the Exchange in general and the Directorate Requirements in particular, may be amended to bring the requirements more in line with the nature or activity of the company.

B. Policies

111. Conflicts of Interest

The existence of material conflicts of interest between Companies and their officers, directors or substantial shareholders (or members of their families or concerns controlled by them) will be reviewed by the Exchange on an individual basis in considering the eligibility of Companies for original listing. In many cases, Companies may be able to eliminate conflicts situation prior to listing within a reasonable period after the listing and may be asked to do so. Where a conflict cannot be resolved promptly for some business reasons, the Exchange will consider all pertinent factors.

The most common types of conflict situation to which this policy applies include personal interests of officers, directors or principal shareholders in any business arrangements involving the Company, such as the leasing of property to or from the Company, interests in subsidiaries, interests in business that are competitors, supplies or customers of the Company, loans to or from the Company etc.

In considering the eligibility of Companies applying for original listing under its conflicts of interest policy, the Exchange considers, among other factors :

(1) persons involved in conflict and relationship to the Company;

(2) significance of conflict in relationship to the size and operations of the Company;

(3) any special advantage for management involved in the conflict;

(4) whether the conflict can be terminated, and if so, how soon and on what basis, and, if the conflict cannot be promptly terminated, whether :

(a) the arrangement is necessary or beneficial to the operations of the Company;

(b) the terms of the arrangement are the same or better than those that can be obtained from unaffiliated concerns;

(d) the arrangement has been adequately disclosed to shareholders through prospectus, proxy statements or any reports.

In some cases, the Exchange will require a Company to enter into a special arrangement with the Exchange, designed to reduce the possibility of a conflict situation that could not be terminated immediately.

112. Memorandum and Articles of Association

Companies seeking admission to the Official List of the Exchange are required to incorporate into their Memorandum and Articles of Association various provisions which are set out in Part IX of this Manual.

C. Additional Requirements

121. Original Listing Application

Companies seeking admission to the Official List must submit an application for original listing in accordance with Part II of this Manual. Application for original listing is designed to serve the purpose of placing before the Exchange the information essential to its determination as to the suitability of the securities for public trading on the Exchange.

122. Prospectus

All Companies seeking admission to the Official List of the Exchange, whether through a public issue, Offer for Sale or an Introduction, must issue a prospectus which must, in addition to complying with the prospectus requirements of the Companies Act, comply with the prospectus requirements of the Exchange as set out in Part VII.

123. Additional Listings

Following listing, Companies and their registrars are not permitted to issue any securities in excess of those authorised for listing until the Exchange has approved an additional listing application covering the additional securities as described in Part IV.

124. Listing Undertaking

Companies applying for listing on the Exchange are required to enter

into an Undertaking with the Exchange to comply with all the listing requirements and policies of the Exchange.

125. Allotment of Shares reserved for Employees etc.

Companies seeking admission to the Official List may be permitted by the Exchange to reserve up to 10% of the offered shares for allotment to their employees, executive directors, customers, suppliers etc. provided that the companies lodge with the Exchange a statement giving number of shares to be allotted to the following categories of persons and the basis of allotment :

(a) employees;

(b) executive directors;

(c) customers;

(d) suppliers; and

(e) others (state relationship with issuer).

ANNEX - III

THAILAND

1. What have been the social, economic and political factors which have led your Government to go in for privatisation ?

   – Economy is the main factor which has led the Thai Government to adopt the policy of privatisation. Thailand's high rate of economic expansion has led to the problem of the lack of basic infrastructure and the consequential bottleneck problems. In order to support the country's rapid economic expansion, it is, therefore, necessary for the Thai State enterprises to expand their services in cooperation with the private sector.

2. How is the term 'privatisation' defined in your country ?

   – In Thailand, the term 'privatisation' connotes the increase in the private sector's role in the management of State enterprises.

3. What aims has your country set for privatisation ?

   – The objectives set by Thailand in the case of privatisation are as follows :

     1. to maintain Thailand's financial stability by reducing foreign loans;

     2. to reduce the burden of government subsidies;
     3. to improve the efficiency in the management of State enterprises; and
     4. to mobilize the private sector to use more of their savings to invest in State enterprises by means of increasing the potential of the domestic capital market.

4. What is the precise sphere of privatisation (sectors and industries) ?

   – The sphere of privatisation mainly covers the following infrastructure :

     1. transporation;
     2. communication; and
     3. energy.

5. What are the economic, financial, fiscal and legal preconditions for privatisation in your country ?

   – The preconditions for privatisation in Thailand are as follows :

     1. a clear plan of action;
     2. legal preparation including amendment of the existing legislation which impedes privatisation, and enactment of new legislation to facilitate privatisation;
     3. public relations campaigns with a view to making the objectives of privatisation clear and acceptable to the public; and
     4. development of capital market to support privatisation.

6. The patterns/procedures for privatisation applied in Thailand appear to be as follows :

   (i) *Private sale of shares* was introduced in the case of the Chonburi Sugar Industry Co. Ltd., whereby all of its shares were sold to the private sector;

   (ii) *Public offering of shares* was introduced in the case of the North East Jute Mill Co. Ltd., whereby its shares were sold in the Stock Exchange of Thailand;

   (iii) *New private investments* were introduced in the case of the Thai Airways International Co., Ltd., whereby its capital was increased and its shares will be listed in the Stock Exchange of Thailand;

   (iv) *Joint venture* as in the case of the NARAYANA Phand Co. Ltd., and the Erawan Hotel, of which the Government is now a minority shareholder;

(v) *Concessions* as in the cases of the Bangkok Mass Transit Authority and the Transport Company Limited whereby part of their bus routes were conceded to the private sector. (A similar method is used in the case of the second phase of the Express Way Project); and

(vi) *Liquidation* as in the case of the Jute Mill of Ministry of Finance.

- Legal problems concerning privatisation arise when some State enterprises want to sell their shares to the public. Since these State enterprises were not established in the form of limited companies, they, therefore, have no share capital. However, legislation allowing the division of the capital of these State enterprises into shares is being contemplated.
- In some cases, investment and competition by the private sector have not yet been possible since certain existing legislation, such as the laws on telegraphic and telephone services still prohibit the private sector from providing such services.
- So far, Thailand has not enacted any legislation specifically to protect the interests of either the State or the private sector in case of privatisation.

7. Has your Government set up a statutory body to supervise privatisation process ? If so, what is its role, rights and obligations ?

- At present two government agencies have been assigned to look after and supervise privatisation process. The Office of the National Economic and Social Development Board is responsible for policy matters, while the Ministry of Finance looks after the actual implementation of the privatisation schemes.

VIII. ESTABLISHMENT OF A DATA COLLECTION UNIT IN THE AALCC SECRETARIAT

(i) INTRODUCTION

1. During the Nairobi Session of the AALCC (February 1989), the Head of Delegation of the Republic of Korea commended the AALCC for tackling legal aspects of economic problems in the Asian-African region, but felt that it should assume a more active role in removing legal obstacles in the way of promoting the cause of economic development in the region in the context of the prevailing world economic situation. Noting the significant nexus between economic development and harmonization of legal regimes governing economic activities through sharing of accumulated experiences amongst the Member States of the AALCC, he proposed the establishment of a Centre for Research and Development of Legal Regimes applicable to Economic Activities and Changing Situation of the Afro-Asian countries under the auspices of the AALCC entrusted with the following functions :

(i) to collect and distribute overall information on existing legal regimes and the changes taking place therein relating to economic development of Member Countries;

(ii) to organise research, seminars or symposia on relevant matters;

(iii) to give legal advice and assistance to Member Governments upon request; and

(iv) to train officers of the Member Governments in dealing with legal aspects of economic matters.

He assured the AALCC of his Government's willingness to make financial contribution for organising the Centre under the auspices of the AALCC and for the preparation of a feasibility study for establishing such a Centre.

2. Noting the importance of the proposal, the Nairobi Session authorised the Secretary-General to appoint a Consultant from one of the Member States to prepare a feasibility study on the proposed Centre for consideration at its subsequent session.

3. After the Nairobi Session, the Government of the Republic of Korea placed a sum of US $ 25,000 at the disposal of the AALCC Secretariat. Thereafter the Secretary-General appointed Prof. Kazuaki Sono of the Hokkaido University, Sapporo (Japan) as Consultant and entrusted him with the task of preparing a feasibility study for establishing the proposed Centre.

4. During the Beijing Session of the AALCC held in March 1990, the matter was discussed by the Heads of Delegations on the basis of a preliminary report presented by Prof. Sono, the Consultant. The Consultant was unable to prepare a definitive report in the absence of an indication as to the

venue of the proposed Centre and the sources and extent of funding. The preliminary report envisioned the proposed Centre as an information and research institution as the bulk of the relevant information was already available but required processing and expertise which would be a major commitment. The report also emphasized the necessity to ensure that the proposed Centre would not duplicate activities already underway in other global or regional institutions.

5. The Heads of Delegations took note, with appreciation, of the report of the Consultant and directed the Secretariat to submit an indepth study on the ways and means of concretising the ideas contained in the proposal of the Republic of Korea which was considered commendable.

6. At the thirtieth session of the AALCC held in Cairo in April 1991, the Secretariat presented an indepth study on the matter contained in document No. AALCC/XXX/Cairo/91/17. That study, at the outset, surveyed the work of a number of UN organs and other organisations to ascertain whether their activities encompassed harmonisation of laws and regulations relatable to economic matters and came to the finding that that sort of activity was not being pursued in any of those institutions although they did collect information on a universal basis on the topics falling within their respective fields of competence some of which might be of relevance to the Member States of the AALCC. After conducting that survey, the Study examined the validity and viability of the projected Center in the light of the contemporary international economic environment and came to the conclusion that the proposed Center would be a unique institution as a collector and disseminator of overall information about the legal regimes applicable to economic activities and the changes taking place therein, not only in the Afro-Asian region, but worldwide having an impact on the economies of the region.

7. Having established the justification for the proposed Centre, the Study examined two modalities for implementing the proposal by the Government of the Republic of Korea : the first one contemplated the establishment of the Centre as an autonomous institution to be hosted by a Member Government albeit under the auspices of the AALCC. The second one envisaged the setting up of a Data Collection Unit as an integral part of the AALCC Secretariat as the first practical step towards launching of the projected Centre by utilising the unspent portion of the Republic of Korea grant for that purpose. Having examined these modalities, the Secretariat felt that although the proposed Centre as an autonomous institution was a *sine qua non* to help Member States in Asia and Africa to quicken the pace of their development as information is key to development, the establishment of such a Centre should be pursued as an ideal long-term objective because such a project requires not only substantial finance but also preparation of considerable groundwork and development of a certain degree of expertise. Moreover, serious thought could be given to establishing the Centre as an autonomous institution only as and when a Member Government came forward to host the Centre and to bear its running costs singly or jointly

with other interested Member Governments. The Secretariat, therefore, suggested that the first practical step towards implementing the aforesaid long-term objective should be to set up a Data Collection Unit as an integral part of the Secretariat to be financed by the unspent portion of the grant of US $ 25,000 made by the Government of the Republic of Korea. If after two years the Member States consider to continue the Unit, its cost would be met from the general budget of the AALCC.

8. At the Cairo Session, the foregoing study was discussed by the Heads of Delegations with the Heads of Delegations of the Republic of Korea, Ghana, Kenya and Arab Republic of Egypt taking an active part. Although there was general agreement amongst the Heads of Delegations on the proposed establishment of a Data Collection Unit as an integral part of the Secretariat as a first step towards the long-term objective of setting up of an autonomous Centre for Research and Development as and when a Member Government came forward to host the Centre and to bear its running costs singly or jointly with other interested Member Governments, they were somewhat concerned about the financial implications of the proposed Data Coollection Unit for the AALCC. The Head of Delegation of the Republic of Korea made a statement that although the initial expenses for installing the Unit could be met by the contribution made by his Government, it would not be possible for his Government to make further voluntary contributions to meet future operational and maintenance expenses of the Unit. Concern was also expressed about the prospect of the Unit being sustained on the basis of voluntary contributions as was suggested by a few Delegations. In view of these concerns, the Heads of Delegations directed the Secretariat to prepare a further study detailing information on the financial implications involved for the AALCC in the establishment and running of the Unit as an integral part of the Secretariat. The Secretariat was also directed to put up such a study before the Liaison Officers before its submission to the Thirty-first Session in Islamabad for a final decision on the matter.

Discussions and Decisions taken at the Islamabad Session

9. At the thirty-first session of the AALCC held in Islamabad in January-February 1992, the matter was further discussed by the Heads of Delegations on the basis of a note presented by the Secretariat entitled "Establishment of a Data Collection Unit as an Integral Part of the AALCC Secretariat" contained in Doc. No. AALCC/XXXI/Islamabad/92/17 which was a study on the financial implications of the setting up and running of a Data Collection Unit within the Secretariat which had earlier been approved by the Liaison Officers at their 229th meeting held on 28th of November 1991.

10. The *Secretary-General* introducing the Secretariat study outlined the gist of the proposal and the financial implications to be as follows :

"It is proposed to set up the Unit initially for a period of two years, viz. 1992 and 1993. The establishment and operational costs of the Unit

will be fully covered by the unspent portion of the Republic of Korea's grant. For these two years, there will thus be no financial burden on the AALCC, whilst the advantages would be considerable in the sense of modernising the Secretariat and providing a service to the Member Governments. The only financial implication involved for the AALCC would be the creation of a new post of Director which is intended to be filled internally which, however, will amount to only US $ 500 per year as the post will be filled through promotion. From the third year onwards, should the Member Governments wish to continue the operations of the Unit, the overall operational costs would be around US $ 3,000 which is quite modest."

11. The Head of Delegation of the *Republic of Korea* appreciated the Secretary-General's proposal for the establishment of a Data Collection Unit within the Secretriat as it was highly practical. He was happy to note that the initial expenses for the setting up and running of the Unit would be met by the unspent portion of his Government's contribution. He expressed the hope that other Member Governments would lend support to the proposal.

12. The Head of Delegation of *Japan* while thanking the Republic of Korea Government for its grant and supporting the Secretary-Generals proposal, suggested that after two years, the functions of the Unit should be reviewed by the Heads of Delegations so as to determine its continuance.

13. The Head of Delegation of *Egypt* endorsing the views expressed by the Delegations of the Republic of Korea and Japan considered the establishment of the Data Collection Unit as a practical demonstration of South-South co-operation. He suggested that the Unit should be linked to the databank with the Cairo Centre and that the Secretariat must think of running the Unit on commercial lines.

14. The Head of Delegation of *Ghana* felt that since all international organisations had databanks, it was quite appropriate for the AALCC Secretariat to have one. He extended support to the establishment of the Data Collection Unit.

15. The Head of Delegation of *Sierra Leone* also supported the establishment of the Data Collection Unit. He considered it a progressive step and an essential one if the AALCC was to discharge its advisory role effectively. He considered the suggestion of the Japanese delegation a good one, but wished the AALCC at this session itself to consider its establishment on a permanent basis.

16. The Delegate of *India* suggested that the Secretariat must give a serious thought to the kind of information and data it should collect. It might perhaps start with collecting information related to international trade law, monitor developments in that field, status of trade law conventions etc.

17. The Delegate of *Egypt* agreeing with the suggestion of the Indian delegate stated that the information collected should not only be on legal but economic matters as well. Those two must be the parameters.

18. The Delegate of the *Republic of Korea* suggested that once the mandate for establishing the Unit is given by the Heads of Delegations at this session, the Liaison Officers' meeting will be the best forum to work out detailed modalities for the operation of the Unit as suggested by the Indian Delegate. The Liaison Officers meeting will also be appropriate for the review of the Unit's functioning after two years of the Unit's establishment, as the meeting is regularly held in the Secretariat where the Unit would be set up.

19. The *President* stated that the Secretary-General's proposal on the establishment of a Data Collection Unit as an integral part of the Secretariat was unanimously accepted with the conditions that such specific matters related to the operation of the Unit as the working modalities and the future review will be taken up by the Liaison Officers' meeting.

Validity and Viability of the Proposed Centre in the Context of Prevailing International Situation and in the Light of Work of Existing Organisations

1. The validity and viability of the proposed Centre needs to be examined in the light of the profound changes that have taken place on the world scene since 1989 having a major impact on national economics. On the political plane, these include the end of the cold war between the two Super Powers, the revival of democratic institutions in Eastern Europe and the recent Gulf Crisis. The end of military rivalry between the two Super Powers has ushered in prospects of peace and stability resulting in appreciable cuts in national defence budgets which, it is hoped, would be diverted to the cause of development. It has also given rise to the expectation that the United Nations, which from its inception has been preoccupied with averting the possibility of another World War breaking out, would now be able to focus its concentrated attention on economic cooperation for development and that the North-South dialogue, which has been stalled for more than a decade, will be able to take-off the ground.

2. But the recent Gulf Crisis, apart from reviving fears of political instability and international tension, has plummeted the world in a situation in which a majority of oil importing developing countries will face the prospects of collapse of their economies due to sudden rise in oil prices. Further, upsurge of democracy in Eastern Europe has resulted in the breakdown of the centrally planned economy and its displacement by the market economy. Although a prosperous and democratic Eastern Europe will open the prospects of new markets for developing countries' exports, one of the negative consequences is likely to be that initially global assistance to reforming Eastern Europe will be at the expense of assistance to the developing countries. Already there has been substantial reduction in foreign aid allocation in the U.S. and EEC's aid budgets for the year 1990 for the Third World countries[1] Major industrialized countries have brought into being a new Bank to finance reforms in Eastern Europe in April this year. The bank called the European Bank for Reconstruction and Development (EBRD) will have a capital base of $ 12,000 million with a 30% as paid-in capital. The USA, with a 10% share, will have the largest shareholding in the new Bank. The EBRD will be heavily focussed towards the private sector.[2]

3. On the economic front, the important events include the Uruguay Round of Multilaterial Trade Negotiations under the auspices of GATT and the upcoming economic integration of Europe in 1992.

4. The economic integration of Europe in 1992 combined with the recent developments in East Europe present both opportunities and challenges to

1 OPEC "East Europe at the expense of the South" *OPEC Fund News Letter*, January-April, 1990.

2 *The Hindustan Times, (New Delhi)* 10 April 1990.

the developing countries as a whole. It is feared that because of the geographical contiguity and cultural affinity towards the East European States, the EEC aid budgets traditionally allocated to the developing countries are likely to be diverted to the reconstruction of Eastern Eruope. Moreover, the developing countries, particularly the newly industrialized ones in the Asian region, face significant risks from the European integration in that despite assurances that the average level of external protection will not be increased as national tariffs are converted to a common European Community structure, fears remain that non-tariff barriers in the more restrictive countries may be adopted by the European Community as a whole, thus increasing the average level of external protection.

5. It is also anticipated that improved efficiency within the European Community will make its products more competitive to the imported goods from outside and this will tend to dampen prospects for trade with Asia. But the reduction of barriers to the circulation of goods within the European Community, such as the elimination of national quotas, should benefit Asian exporters as well as producers within the European Community by giving them access to wider market. Should protectionism increase, it is likely that there would be an intensification of direct investment in the European Community, particularly from the newly industrialized countries and Japan which have tended to neglect the European Community in favour of USA and South-East Asia. It is argued that the fear of 'Fortress Europe' is totally unfounded. With the exception of agriculture, which will for a few more years continue to receive protection, in all other areas the European market will be thrown open not only within Europe but also to other countries. It has been estimated that formation of a single economic market will result in almost one percentage point faster rate of growth all over the Community. It will create two million additional jobs within the next six years. Increasing stress on technology will lead to more concentration on production of fewer goods leaving the rest to be imported from outside. Investment activity in Europe will remain dynamic for several years and the level of investment will be robust. It will open up innumerable opportunities for participation and cooperation with countries all over the world.

6. However, according to a report submitted to the recent OAU summit in Addis Ababa[3] the change of equations in Europe has put new pressures on the continent of Africa which would increase when a unified Europe embracing both East and West becomes a reality. Although there is as yet no withdrawal by USA from Africa, a subtle readjustment of responsibilities seems to be underway as a result of diminishing US and Soviet interests in the area. France has stepped into Africa in a big way. There seems to be a parallel between what France is doing in the Pacific and what it is doing in the Indian Ocean. France is using satellite technology to mount special TV programmes for its former colonies in Africa. The USA's CNN has already made deep inroads in English-speaking Africa.

7. Africa is rich in natural and mineral resources. Europe needs all these for its industries. As environmental awareness movement grips the developed world, it will turn for dumping grounds for its industrial wastes and for natural resources elsewhere, and an impoverished Africa could be an easy prey. Africa could well be heading for an environmental disaster as Europe turns to it for greater economic activity. The pressures from united Europe have already become crude with new conditions being attached to whatever little aid the countries of Africa are receiving. These conditions are in addition to those already imposed by the IMF and World Bank and cover such sensitive areas as plurality in political system and greater care for human rights. The pressures that Africa faces today are aptly brought out in the conclusion of the OAU report on the crisis :

> 'Africa today is the most economically backward region of the world. This state of affairs alone is enough cause for grave concern on the part of the continent's leaders. But what is even more alarming is the fact that Africa's economic performance is either stagnant or actually on the decline.'

8. With the end of the cold war, non-alignment for political purposes has lost its rationale. But that opens up vistas of South-South co-operation to force the industialized North to take a reasonable stand. However, it is up to the other fortunate countries of the partially developed South to rise to the occasion to meet this challenge.

9. Trade has become a major force in world's economies. Since GATT was first set up more than forty years ago, world trade has soared from US $ 60 billion to more than $ 3 trillion a year. Currently ninety per cent of world trade is transacted under the GATT rules. Yet as trade has become more important, it has also become a source of international tension. With more and more newly industrialized countries of the Third World emerging on the world scene and with the virtual collapse of the Warsaw Pact, future frictions are even more likely to centre around economic disputes rather than military ones. This is where GATT comes in. Its purpose is to set rules for world trade and to resolve disputes. Seven previous rounds of GATT negotiations have substantially reduced tariffs and improved the world trading environment. But GATT now needs to be revised to deal with a more complex global economy. It was designed when trade was much smaller and traded goods were mostly agricultural commodities and natural resources. Today, trade content has expanded to include sophisticated services and new technologies. The Uruguay Round is intended to bring GATT rules on trade up-to-date with today's global economic realities. The on-going negotiations are focussed on reduced tariffs, improved discipline on safeguards and avoidance of dumping, cuts in trade distorting subsidies, better rules on government procurement, a speedier and more effective dispute settlement mechanism, and lastly, the expansion of GATT discipline over trade-related aspects of intellectual property rights (TRIPS), trade related aspect of in-

3 OAU. *Secretary-General's Report on Economic Crisis in Africa* submitted to the OAU Summit held in Addis Ababa, July 1990.

vestment measures (TRIMS) and trade in services, these being negotiated for the first time under GATT's auspices.[4]

10. The Uruguay Round began in September 1986 and is scheduled to end in December 1990. However, present indications are that despite three and a half years of talks, the negotiations are hampered in four key issues viz. agriculture, trade, textiles and services. There are differences, on the one hand, between the USA and EEC and, on the other, between the Group of Seven led by USA and the newly industrialized developing States.

11. The USA and EEC are sharply divided on farm trade and on phasing out subsidies. The USA is seeking fundamental reforms in farm trade, including an end to subsidies paid to European farmers to capture foreign markets, internal support payments that encourage excess production and barriers to imports. This view is not acceptable to EEC States. Besides, while the EEC and Canada are seeking to elevate GATT to a full-fledged international trade organisation, the USA appears to be in no mood to have a supra-national body with powers to regulate the US trade. Unilateral measures initiated by USA under its Omnibus Trade Act of 1988 are seen as violative of GATT principles of non-discrimination and multilateralism.

12. The contention between the industrialized countries and the developing ones is centred around the Multi-Fibre Agreement (MFA) which has governed the trade in textiles for more than three decades and the inclusion of intellectual property rights (TRIPS), investment (TRIMS) and trade in services in the GATT system which have adverse implications for the developing countries. India, Brazil and other developing countries consider MFA to be a serious aberration of GATT principles and wish it to be phased out. But the industrialized countries have refused to do so. In addition thereto, the USA, Japan and EEC countries demand that developing nations open up their economies for investment and for strict rules against trade in pirated products. In this context, they have described India and Thailand as having "major industries devoted to making pirated products" and not wanting to pay royalties under worldwide patent agreements.[5] They have also insisted upon inclusion of trade in goods and services — such as banking, engineering and insurance — under the GATT system on the premise that some one trillion dollar worth of trade in services out of the total three trillion of international trade is unregulated. Developing countries consider the inter-linkage between TRIPS, TRIMS and trade in services a mechanism for their recolonisation.

13. For the Uruguay Round to succeed and the GATT talks to come to a satisfactory conclusion involves as much the developing countries as it is for the larger trading nations. Only that way could the smaller countries talk to the major industrial countries on the basis of equality and the international democracy in economic relations strengthened. Almost every

4 US Embassy, New Delhi, *Economic News from the United States*, September 1990.

5 *The Hindustan Times, (New Delhi)* 24 July 1990.

country, whether developed or developing, is concerned with the struggle for technological advantage, mobile investment flows and finding easy export markets for its goods. The competition is necessarily stiff and the only way to keep it within the bounds of acceptable trade norms is to arrive at a broad multilateral agreement under the GATT. The promised benefits of the Uruguay Round may be limited, but its long-term psychological effect on international economic climate will prove beneficial to all

14. Hitherto, the developing nations had sat on the sidelines in GATT's multilateral trade negotiations as they had then nothing to offer in across the board exchanges. But with the structure of their trade having undergone a transformation, 36 developing countries are now participating in the on-going Uruguay Round. They have turned away from exclusive exporters of primary products into exporters of industrial goods. Their share of primary products (achieved traditionally by representing the greater part of exports) dropped from 30% in 1970 to 18.3% in 1980.[6] Some of the newly industrialized countries have achieved their best results in the exports of industrial products and concrete projects as well as in sales of patent licences, in consulting and execution of capital investment projects.

15. However, for their active participation in the multilateral trade negotiations, the developing countries need adequate preparation as well as a forum to be able to concert their viewpoints and finalize their strategies. Although they have utilized the Group of 77 and the South Commission for this purpose, for want of a permanent institutional support system, they have been sorely handicapped in that regard. It may be pointed out that unlike the OECD which has a huge Secretariat in Paris with a staff of over 2,000 and 700 of them Ph.Ds, the developing countries lack similar permanent secretariat with the result that their pious declarations never get implemented for lack of follow-up action. A permanent institutional support system is, therefore, imperative for convergence of their views and articulation of their aspirations in international forums.

16. Certain lessons have to be taken from these developments. The first one is that affluence of a group of countries in a region depends upon the extent the countries of that region are able to globalise or regionalise their economies dismantling national barriers to the flow of trade and exploiting regional complementaries. The European Community has been able to achieve unprecedented growth mainly because of very close cooperation and coordinated working within the member countries. Countries in the Pacific region (ASEAN) have been able to achieve significant growth by cooperating with each other. Canada and USA are progressing well as a result of mutual cooperation. Mexico has recently proposed to the US to have free trade flows between the two countries. Every where regional cooperation with neighbouring countries has produced significant results.

17. However, regional cooperation will yield dividends only when it is

6 Asian Development Bank, *Asian Development Outlook, 1990*

preceded by a certain degree of harmonisation of national outlooks, laws and regulations in the economic field. It is perhaps for this reason that in the Afro-Asian region, with the exception of ASEAN, numerous attempts at regional cooperation, such as South Asian Association for Regional Cooperation (SAARC), the Gulf Cooperation Council (GCC), West African Economic Community (CAEO), Economic Community of West African States (ECOWAS), Preferential Trade Arrangement between the Southern and Eastern African States (PTA), Economic Cooperation among Maghreb States, Council of Arab Economic Community (CAEU), etc. have not been able to produce tangible results.

18. In the Afro-Asian region, regional cooperation would remain elusive unless and until economic laws and regulations of the countries in the region are harmonised to a substantial extent. It, therefore, seems that the establishment of the proposed Centre invested with the function of harmonization of legal regimes applicable to economic activities could play a significant role in promoting economic cooperation in the region.

19. Another lesson to be appreciated is that developing countries stay poor not only because of lack of capital and technology, but also because of lack of access to coordinated information about their potential. Industrialized countries and the transnational corporations seem to know much more about the developing nations than they about each other. It is perhaps for this reason that our economies have been North-oriented instead of being South-bound. Moreover, in the economic sphere, these days developments take place so fast that it often becomes difficult to keep track of them unless a specialised institutional machinery is devised and necessary skills developed for the purpose.

Justification of the establishment of proposed Centre

20. It has been stated that since there are a number of inter-governmental institutions active in this area and that the information collected by them is easily accessible to the Member States of the AALCC, the proposed Centre would merely be duplicating the work of those institutions. It should, however, be pointed out that the activities of these institutions are limited to their respective fields of competence and the information collected by them is on a universal basis on the topics falling within their competence, some of which might be of relevance to the AALCC Member States. For instance, the World Bank compiles and updates information only on laws in selected areas of direct relevance to its operations. It is not, therefore, a source for fully comprehensive information on legal regimes having a bearing on the economic development of its member countries. However, its subsidiary organ, the International Centre for the Settlement of Investment Disputes (ICSID) has prepared a compilation of Investment Laws of the Developing Countries as well as the investment protection treaties concluded by them. Similarly, the IMF, which acts as a global financial policeman, does compile and update copies of laws and important regulations of its member countries, including the African and Asian countries in some fields

of particular relevance to its activities, such as exchange controls, central banking and taxation. UNCTAD's broad mandate includes preparation of legal frameworks for restrictive business practices, transfer of technology, economic cooperation among developing countries, shipping and transport, and commodities. They have brought out studies on regulation of foreign investment in Asia, Arab countries and in Africa; bilateral agreements on trade and economic cooperation concluded by developing countries; and on counter trade regulation in selected developing countries.

21. The UN Commission on Transnational Corporations (UNCTC), whose primary concern is formulation of legal frameworks for regulating the activities of transnational corporations, compiles and updates information on laws and regulations, codes and contracts, and agreements relating to foreign investment and technology transfer and in all sectors of economy. UNCITRAL which is primarily concerned with unification of international trade law by removing or minimising legal barriers to the flow of trade, compiles information only on topics under its consideration such as the law governing procurement or the law governing guarantees. WIPO's mandate includes preparation of legal frameworks for the protection of intellectual property rights. UNIDO's primary task is to quicken the pace of industrialization in the Third World and one of its activities is concentrated on formulation of model contracts and clauses, guides and checklists of issues for contractual arrangements to facilitate industrial collaboration in some of the industrial sectors.

22. At the regional level, the institutions proposed to be set up include the Investment Information and Promotion Services for Asia and the Pacific (a project of UNCTAD) and the South Investment Data Exchange Centre (SIDEC) which will be located in Kuala Lumpur[7]. While the main objective of the UNCTAD's project would be to promote industrial joint ventures among enterprises of the countries in the Asian Pacific region, the SIDEC envisages collection of relevant data on subjects such as manufacturing, investment, human resources, and physical infrastructure of its participating countries.

23. As for the national institutions active in the area, there are aplenty, but they collect and analyse information pertaining to developments in the economic field from purely national angle. Thus, there appears to be no institution in sight which collects and disseminates information on a comprehensive basis about the legal regimes governing economic activities in the Afro-Asian region. The proposed Centre would, therefore, be a unique institution as a collector and disseminator of overall information about the legal regimes and the changes taking place in the economic field, not only in the Afro-Asian region, but worldwide having an impact on the economies of the region.

24. As stated earlier, the Secretariat approached a number of institutions

7 One of the decisions taken by the Summit Meeting of the Group of 15 held in Kuala Lumpur on 1-2 June 1990.

to know their reactions to the proposed Centre and to ascertain whether these institutions would be prepared to have cooperative relations with the proposed Centre. The replies received from them have been very encouraging as each one of them has not only supported the establishment of the projected Centre, but all of them have expressed their willingness to establish cooperative relations with the AALCC or the proposed Centre as and when the latter comes up and to permit the Centre to have ready access to information or documentation available with them.

Ways and means of concretizing the proposal to establish an autonomous Centre

25. Having established the rationale, necessity and usefulness of the proposed Centre, it now remains to consider the modalities by which the proposed Centre could be brought into being. There appear to be two modalities which need to be considered by the Member Governments. The first one contemplates the establishment of the Centre as an autonomous institution hosted by a Member Government albeit under the auspices of the AALCC. The second one proposes the setting up of a data collection unit within the AALCC Secretariat as an initial step to the proposed Centre to be brought into being over a period of time after adequate groundwork therefor had been laid.

26. In deciding on the first modality, i.e. establishment of the Centre as an autonomous institution, consideration will have to be given to its possible venue, status and relationship with the AALCC, staffing of the Centre, provision of logistic support and physical facilities to enable the Centre to function effectively and efficiently, and finally and more importantly, the sources of its funding.

27. As the proposed Centre is intended to serve the Member States in Asia and Africa, an ideal location of the venue of the Centre would partly be the place which is centrally situated between the regions of the two continents though with modern communications this is not an overriding factor. Moreover, political, social and economic stablity at the place of location would also be of importance. However, these considerations would only be relevant if more than one Member Government had come forward to host the Centre. The willingness of a Member Government to host the Centre and provide necessary infrastructural facilities is an essential pre-requisite to the launching of the Centre in view of cost-effective considerations and considering the lack of resources in the AALCC membership, barring a few exceptions.

28. It has been proposed that the Centre should function under the auspices of the AALCC. Therefore, as a subsidiary organ of the AALCC, its relationship with the AALCC and the host Government will have to be clearly spelt out. As a creature of the AALCC, the Centre would have the character of an inter-governmental organisation and have the same immunities and privileges for itself and its foreign-based officers as those conferred on the AALCC. A headquarters agreement would, therefore, need to be concluded

between the AALCC and the Host Government defining not only the Centre's status, privileges and immunities but also containing provisions concerning its functional relationship with the AALCC on the one hand, and the Host Government, on the other. The headquarters agreement should also include a clear commitment by the Host Government to respect the independence of the Centre.

29. Since the Centre is to be organised under the auspices of the AALCC, it is implicit that the Centre would operate under the administrative and substantive jurisdiction of the AALCC. The administrative jurisdiction shall be exercisable by the Secretary-General of the AALCC, in consultation, where necessary, with the Host Government, and would extend to such matters as appointment of the executive and professional staff, their terms and conditions of service, periodic review of the progress made by the Centre, organisation of seminars and symposia by the Centre, its budget allocation and expenditure. The substantive jurisdiction shall vest in the AALCC itself and shall be exercisable over the Centre's programme of work and the studies and reports prepared by the Centre.

30. Since 1971, the AALCC is served by a Standing Sub-Committee on International Trade Law Matters which has the mandate of monitoring and reviewing recent legislative developments in the field of international trade and economic relations. The Sub-Committee meets concurrently with the plenary meetings during the annual sessions of the AALCC and is generally attended by the delegates and observers having an interest or expertise in trade law matters. It, therefore, stands to reason that the Trade Law Sub-Committee should be authorised to oversee the work of the Centre. However, to enable the Sub-Committee to discharge this extended function efficiently, it would not only need to be strengthened and broadbased, but the frequency of its meetings would have to be increased during the annual sessions. Hitherto, its meetings have been restricted to five or six meetings. In this context, it should also be considered whether the work of the Centre should be reviewed by Ministerial Meetings convoked by the AALCC periodically and attended by Ministers of Foreign Trade, Economy or Commerce, to ensure that appropriate follow-up action is taken on the recommendations of the AALCC based on the Centre's work. It may be mentioned that in the past the AALCC had convened two such meetings, one in September 1980 in Kuala Lumpur and the other in September 1981 in Istanbul to consider regional cooperation in industry.

31. The Consultant in his report presented before the Beijing Session had raised the question whether the Centre would be a policy formulating institution. It is believed that the South Korean proposal does not contemplate the proposed Centre as a policy-making one. This suggestion should in any case be ruled out on two reasons : firstly since the Centre is intended to be organised under the auspices of the AALCC which by itself is a consultative organisation with its recommendations being hortatory in nature, it would be a contradiction in terms if the subsidiary organ, the Centre, were to have a policy-making role. Secondly, there could be a more fundamental

objection to such a proposition in view of the fact that the developing countries which have asserted their right to adopt an economic system of their choice and to set their national economic priorities without any external pressure or interference as reflected in the UN resolutions on permanent sovereignty over natural resources and the Charter of Economic Rights and Duties of States would not be prepared to assign such a role to the Centre. The Centre can and should be envisioned as an information and research institution for the use of the Member States of the AALCC.

32. As for the staffing of the Centre, considering the functions proposed to be assigned to it and the quality of work expected, it is felt that when and if it is established, it should initially have as a minimum a Director, a Deputy Director, four or five legal/economic officers, one computer programmer, one computer operator, one administrative and financial officer and subordinate staff as may be required. The Director might be appointed by the Secretary-General of the AALCC in consultation with the Host Government and could be a national of that Government. The Deputy Director could be deputed by the AALCC either from among its staff or from one of the Member Governments. Both the Director and Deputy Director should be recognised experts in the field of economic relations so that they could give policy orientation and direction to the work of the Centre. The key personnel of the Centre will, however, be the legal/economist staff which would have to be recruited from amongst such nationals of Member States who have recognised proficiency in both law and economics. These will have to be suitably remunerated to ensure staff of high calibre. Such officers may be deputed by Member Governments or recruited directly from amongst the nationals of Member countries. The make-up of the Centre's staff should be such as to ensure appropriate international or regional staffing.

33. To enable the Centre to discharge its functions effectively, the Centre would also need a specialised library, a computerized data bank as well as a fax machine to enable it to monitor, classify and store information concerning developments taking place around the globe in the economic field in their international, regional and domestic settings. A suggestion had been made at the Beijing Session that the computerized data bank at the AALCC's Cairo Centre for International Commercial Arbitration should be utilised for gathering information. It is felt that although information available with the Cairo Centre could be availed of by the proposed Centre, to make the Centre completely dependent on the Cairo Centre for access to information for its day-to-day work would seem to be impractical. For the Centre to function effectively, its staff must have the computerized information within their easy reach.

34. Even assuming that a Member Government would host the Centre, provide it with requisite infrastructural facilities and even bulk of funding to start with, substantial additional funding would be required not only for having a contingent of competent professional staff, building of a specialized library and installation of a computerized data bank, but also for the continued operations of the Centre. The Director of the Centre would have to be a person of some standing and eminence in the field of international economic relations so that he could give policy direction to the work of the Centre. His deputy would have to be nearly equal to him. The incumbents to these posts would have to be remunerated commensurate with their experience and standing. To fill in the professional positions, the Centre will have to locate experts in the twin disciplines of law and economics which would not be an easy job. Even if they were located, an attractive package will have to be offered to induct them in the Centre. It may be pointed out that legal officers in UNCITRAL and UNCTAD working in similar fields draw anything between $ 2500 to 3500 p.m., besides the perks and perquisites admissible to them under the UN service rules. Comparable treatment and conditions of service would have to be provided to attract best talents to the Centre. A high calibre personnel is needed not only to enable the Centre to give advisory opinion and guidance to Member States on legal aspects of economic questions, but also for the purpose of imparting training to officers of Member Governments in dealing with those questions. On a rough estimate, therefore, in order to launch the Centre straightway with a minimum of paraphernalia, at least $ 500,000 to 750,000 would be needed as the first capital investment.

35. The crucial question is how and where this money could be raised even assuming that the host government would be providing the required infrastructural facilities. Would it be provided by the more affluent Member Governments or would the entire membership of the AALCC be prepared to take on this financial burden ? Prospects do not appear to be bright taking a cue from the present financial situation of the AALCC which is not a happy one. Despite the fact that annual contributions of the Member Governments to the AALCC are quite modest as compared to their contributions to other inter-governmental organisations of which they might be members, only 40 to 50 per cent of the Member Governments pay their contributions on a systematic basis which has forced the Secretariat to curtail some of its activities. A number of Member States have not paid their contribution for the last several years and the present situation is that the accumulated arrears of contributions exceed the annual budget of the AALCC. This scenario does not bode well for initiating the establishment of the Centre straightaway.

Establishment of a Data Collection Unit within AALCC Secretariat

36. It is, therefore, felt that although the proposed Centre as an autonomous institution is a *sine qua non* to help Member States in Asia and Africa to quicken the pace of their development through regional cooperation, the establishment of such a Centre should be seen as an ideal long-term objective because such a project requires not only substantial finance, but preparation of considerable groundwork and development of a certain degree of expertise. It is, therefore, suggested that as a first practical step towards implementing the aforesaid long-term objective, the AALCC should set up a data collection unit as an integral part of the Secretariat.

37. As an integral part of the Secretariat, the data collection unit would obviously function under the supervision and direction of the Secretary-General and would be staffed by two/three legal officers having some specialisation in the discipline of international economic law, one as a computer programmer and one as a computer operator. Its main function would be to get in touch with competent authorities or concerned institutions in the Member Governments for acquisition of information and documentation on their respective laws, regulations and practices in the economic field. The unit would also approach concerned UN organs and other organisations for obtaining relevant information available with them. It may be mentioned that AALCC has already established a framework for mutual cooperation with the United Nations, its subsidiary organs and agencies as well as close working relations with a number of other inter-governmental organisations. The collected information would be classified subject/topic-wise and fed into computer for storage and dissemination. Initially, the unit shall directly report to the AALCC or its Trade Law Sub-Committee on the extent and kind of data collected by it and seek its directions as to whether research should be initiated on the topics it may specify.

Financial implications and viability of the Data Collection Unit

38. The unspent portion of the Republic of Korea grant at the disposal of the Secretariat is US $ 19,546.66. If the Heads of Delegations agree in principle to the creation of the proposed Unit as an integral part of the Secretariat, albeit without entailing any financial burden on the AALCC for the time being, it is proposed to set up and run the Data Collection Unit for a period of two years, viz. 1992 and 1993 from the funds provided by the Republic of Korea which has already given its consent provided she will not be expected to furnish any further funds for maintaining the Unit. The Annex to this study sets out the details on the proposal. This would not entail any financial burden for the AALCC during those years and at the same time it would do away with the necessity of raising any voluntary contributions during those two years for this purpose.

39. On a most-cost effective basis, the proposed Unit can comprise of a Director, a Legal Officer, one part-time Consultant, one Programmer and one Operator. The Unit to succeed would require to be headed by a person well-versed in the field of international economic law, and this is why it is proposed to create a new post of Director which could be filled internally. The financial implications involved in the promotion of one of the senior officers currently dealing with Trade Law matters will be modest and could be absorbed by the general budget of the AALCC. As a matter of fact, it will roughly amount to US $ 500 per annum. Besides, the other Legal Officer working in the Secretariat on some aspects of economic matters can also be inducted in the Unit and his emoluments being borne by the general budget of the AALCC would not involve any extra expense. However, one part-time Consultant and full-time Programmer would have to be recruited from outside. The services of a Consultant are essential because in addition

to maintaining the equipment and training of the personnel involved, he will be recruited to programme the computers so that the data collected by the Unit could be stored in the computers in a readily accessible form. The Programmer will be the person who will process the data into the computers from day-to-day in the form and manner required. The post of Operators is intended to be filled by in-house steno-typists so as to save costs.

40. Since the data will be collected from not only Member Governments but also from United Nations, its agencies and organs and other inter-governmental organisations with which the AALCC maintains mutual cooperation arrangements, it is expected that the information and data that would come in would be massive and it will take quite some time to catalogue, code and systematise before it is processed in the computers. However, all efforts will be made to ensure that the envisaged databank would become fully operational and adaptable for any use that is intended as soon as practicable.

41. The minimum equipment requirement (hardware) for the Unit would include two computers, one of 40 megabite capacity and the other of 20 megabite capacity; one hand scanner; and one UPS equipment for uninterrupted power supply. The higher capacity computer is a versatile machine suitable for different purposes. It is, however, intended to be used primarily as a databank. The second computer of lesser capacity is intended to be used for day-to-day activities as well as for use in emergencies if the other computer blacks out. The Printer is meant for taking out printouts as and when required. A Hand Scanner is a must for feeding maps and graphs into the databank. The UPS equipment is essential for ensuring uninterrupted power supply. In addition, there will be recurrent requirements of softwares like cartridges, tape drive and disk floppies.

42. As spelled out in the Annex, the estimated costs of one-time acquisition of the necessary equipment and the operational costs of the unit for a period of two years aggregates to Rs. 350,500 or US $ 14,020. Since the unspent portion of the Republic of Korea's grant with the Secretariat is US $ 19,546.66, the Unit can easily be organised and maintained for a period of two years without any conceivable difficulty. However, from the third year onwards, if the AALCC decides to continue the operations of the Unit, the overall operational cost works out to Rs. 77,000 or US $ 3080 per annum. These costs include the breakup costs of maintenance of the equipment, purchases of required software and salaries of the Programmer and the Operator, there being no need to retain the services of the part-time consultant after the initial period of two years. Since operational costs of the Centre after two years are modest, they can easily be absorbed by the general budget of the AALCC until such time when a host government comes forward to host the projected Centre and to bear its operational costs singly or jointly with other interested Member Governments. The attendant benefits of the Unit would consist in the introduction of modern office equipment in the AALCC Secretariat and the Secretariat

personnel getting acquainted with the modern techniques of office management.

Consideration by the Liaison Officers

43. The proposal was placed before the Liaison Officers of the Member States of the AALCC at their 229th meeting held on the 28th of November 1991. The Liaison Officer for the Republic of Korea complimented the Secretary-General for his proposal on the creation of a Data Collection Unit by utilising the grant made by his Government as a first practical step towards the long-term objective of establishing an autonomous Centre as proposed by his Government during the Nairobi Session (1989).

44. The Liaison Officer for Ghana also commended the proposal as the most sensible and practicable in the sense of providing a feasible implementation of the proposal of the Government of the Republic of Korea while at the same time contributing towards the modernisation in the AALCC Secretariat without any financial implications for the Member Governments at least for the two initial years. He pointed out that significant developments in the economic sphere were taking place worldwide and the proposed Data Collection Unit would make it possible for the AALCC Secretariat to pool the latest information about these developments for dissemination to the Member States. He further pointed out that the proposed personnel, who would largely be drawn from the existing staff, would only marginally increase the budget even after the initial stage. Supporting the creation of a new post of Director to run the Unit, he pointed out that the cost to the organisation would only amount to some US $ 500 per annum. The part-time consultant would be phased out while other staff would largely be recruited from the existing staff. He, therefore, urged the Liaison Officers' Meeting to endorse the Secretary-General's proposal for the establishment of the Data Collection Unit as an integral part of the Secretariat for the years 1992 and 1993.

45. The Secretary-General in supporting the views expressed both by the Liaison Officers of the Republic of Korea and Ghana underscored the fact already underlined by the Liaison Officer for Ghana that the cost to the Organization, at least in the initial stages, would be minimal while the advantages would be considerable. Even after the initial two years, since the hardware would already have been purchased, the recurrent cost of maintaining the Unit would be fairly manageable.

46. The Liaison Officers unanimously approved the proposal and recommended its transmission to the Member States and Heads of Delegations at the forthcoming annual session of the AALCC in Islamabad for their final approval.

ANNEX

ESTIMATED COSTS OF INFRASTRUCTURAL FACILITIES, EQUIPMENT AND PERSONNEL NEEDED FOR THE ESTABLISHMENT OF DATA COLLECTION UNIT IN THE AALCC SECRETARIAT FOR A PERIOD OF TWO YEARS

Infrastructural Facilities and Equipment Needed

1.	Computer Room	:	Air-conditioned to ensure dust free environment. One air-conditioned room can be provided by the Secretariat for this purpose.
	(HARDWARE)		
2.	Computers	:	Two – to perform different operations on the given data including mathematical and data classification.
3.	Printer	:	One – to take out copies on the data or whatever classified data required.
4.	U.P.S. (Uninterrupted Power Supply Unit)	:	One – to ensure uninterrupted power supply.
5.	Hand Scanner	:	For feeding maps and graphs in the computers.
	(SOFTWARE)		
6.	Cartridge Tape Drive	:	One.
7.	Disk Floppies	:	As and when required.
8.	Personnel required	:	(i) Director – One
			(ii) Legal Officer – One
			(iii) Part-time Consultant[8]
			(iv) Programmer[8]
			(vi) Operator – In-house.

ESTIMATED COSTS

1. *HARDWARE*

(a) WIPRO Computer PC/XT-20 MB/MONO Rs. 44,500

8 These will have to be recruited from outside. The rest will be inducted from the AALCC Secretariat and will continue performing their present functions.

(b)	WIPRO Computer PC-AT-286-40 MB Hard Disk	Rs. 63,500
(c)	WIPRO Printer EX 1000 136 Col 300 CPS DMP	Rs. 32,500
(d)	Hand Scanner	Rs. 10,000
(e)	U.P.S.	Rs. 20,000
(f)	Maintenance for the second year (No cost for the first year because of warranty)	Rs. 15,000
II.	*SOFTWARE*	
(a)	Cartridge Tape Drive	Rs. 20,000
(b)	Other softwares and training	Rs. 20,000
		Rs. 225,500
III.	*FURNITURE*	Rs. 5,000
IV.	*PERSONNEL*	
(a)	Consultant part-time for 2 years @ Rs. 1500 p.m.	Rs. 36,000
(b)	Programmer for 2 years @ Rs. 3000 p.m.	Rs. 72,000
(c)	Operator In-house for 2 years @ Rs. 500 p.m.	Rs. 12,000
		Rs. 125,000

Total : Rs. 225,500
Rs. 125,000
Rs. 350,500 or US $ 14,020.

ENVIRONMENT AND DEVELOPMENT

IX. ENVIRONMENT AND DEVELOPMENT

(i) INTRODUCTION

1. The United Nations General Assembly, by its resolution 44/228 of 22 December 1989, decided to convene the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, Brazil, in June 1992. The mandate of UNCED as formulated by the aforesaid resolution covered a wide range of major environmental and developmental issues, all of which had actual or potential legal implications. These included :

(a) Protection of the atomosphere by combating climate change, depletion of the ozone layer and transboundary pollution;

(b) Protection of the quality and supply of fresh water resources;

(c) Protection of the oceans and all kinds of seas, including enclosed and semi-enclosed seas, and of coastal areas and the protection, rational use and development of their living resources;

(d) Protection and management of land resources by *inter alia* combating deforestation, desertification and drought;

(e) Conservation of biological diversity;

(f) Environmentally sound management of biotechnology;

(g) Environmentally sound management of wastes, particularly hazardous wastes, and of toxic chemicals, as well as prevention of illegal international traffic in toxic and dangerous products and wastes;

(h) Improvement of the living and working environment of the poor in urban slums and rural areas, through eradication of poverty, *inter alia*, by implementing integrated rural and urban development programmes as well as taking other appropriate measures at all levels necessary to stem the degradation of the environment; and

(i) Protection of human health conditions and improvement of the quality of life.

2. The UNCED was also mandated to promote, as a specific objective, the further development of international environmental law and to examine in this context the feasibility of elaborating general rights and obligations of States, as appropriate, in the field of environment.

3. In practical terms, six concrete results expected from the UNCED included :

(a) an agreed statement of principles on environment and development to govern the conduct of nations and peoples (The Earth Charter);

(b) a globally agreed programme of work addressing major environmental and developmental priorities for the initial period of 1993-2000 and leading into the 21st century (Agenda 21);

(c) agreement on the financial resources required for implementing the programme;

(d) agreement on access to environmentally sound technologies for developing countries;

(e) agreement on measures to strengthen and supplement existing international institutions and institutional processes; and

(f) specific legal instruments on climate change and conservation of biological diversity.

4. Pursuant to resolution 44/228, a Preparatory Committee (PREPCOM) for the UNCED was established which held an organisational session and four regular sessions during its preparatory process (March 1990—April 1992). The PREPCOM created three working groups to address the major substantive issues. Working Group I of the PREPCOM concentrated on the issues concerning the protection of the atmosphere, land resources and conservation of biological diversity. Working Group II dealt with the protection of the oceans and all kinds of seas, freshwater resources and environmentally sound management of wastes. Working Group III was allocated the legal, institutional and related matters.

5. In parallel with the preparations launched by the PREPCOM for the UNCED, two Inter-governmental Negotiating Committees (INCs) were established to negotiate a Framework Convention on Climate Change and a Framework Convention on Conservation of Biological Diversity and submit the same to UNCED for signature.

AALCC's role in the preparations for UNCED and its follow-up

6. The AALCC has had a long history of addressing the environmental issues from the legal perspective. As early as its Tokyo Session held in 1974, the item "Environmental Protection" was included in the agenda of that session, and since then, the topic has been under its consideration. After conclusion of the basic preparatory work and general exchange of views at the AALCC's sessions held in Tehran (1975), Kuala Lumpur (1976), Beghdad (1977) and Doha (1978), an Expert Group Meeting was convened in New Delhi in December 1978 in order to identify areas and issues where efforts were most needed for protection of the environment in the context of the situation and the needs of the developing countries in the Asian-African region. A programme of work which could be meaningfully undertaken by the AALCC to assist its Member States was drawn up by the Expert Group and later approved at the Seoul Session of the AALCC held in early 1979.

7. In the subsequent period, priority was given to the question of protection of the marine environment including the promotion of ratification of or accession to some of the major Conventions in the field of marine environment, and regional seas programmes coordinated by the UNEP which were related to the Asian-African region.

8. At the twenty-eighth session of the AALCC held in Nairobi in February 1989, a new item entitled "Transboundary Movement of Hazardous Wastes and Their Disposal" was inscribed in the environmental law programme of the AALCC. The Secretary-General was mandated to participate at the plenipotentiary conference held in Basel in March 1989 which adopted the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal. In December 1989 and April 1990, the Secretary-General was invited by the OAU to participate in the work of legal and technical experts of the Member States of the OAU on the subject of transboundary movement of wastes in Africa. The Secretary-General actively participated in the preparatory process of the African Convention on the subject. Subsequently, the Bamako meeting in February 1991 adopted the OAU Convention on the Ban of the Import into Africa and Control of Transboundary Movement of Hazardous Wastes within Africa based on the proposals of the Legal and Technical Experts' Group.

9. Following the General Assembly's decision to convene the United Nations Conference on Environment and Development (UNCED) in Rio, Brazil in June 1992, the AALCC at its twenty-ninth session held in Beijing in March 1990 recommended, *inter alia*, that it should involve itself in the preparations for the UNCED and render assistance to its Member States in that regard. Since then, this matter has been a priority item with the AALCC. A special environmental fund was launched to facilitate participation of the Secretariat officials in the meetings of the PREPCOM for UNCED and those of the INCs for Conventions on Climate Change and Biodiversity. While the contributions to this fund were received only from Saudi Arabia (US $ 25,000) and Turkey (US $ 5,000), it nevertheless enabled the AALCC Secretariat to actively monitor the developments in the preparatory process of UNCED and negotiations of the Conventions on Climate Change and Biodiversity and to advise its Member States accordingly. The thrust of the AALCC's endeavours has been on (i) Promotion of ratifications of/accessions to the 1982 United Nations on the Law of the Sea and its subsequent implementation; (ii) Transboundary movement of hazardous wastes and their disposal; (iii) Consideration of the issues before the PREPCOM for the UNCED, particularly Working Group III dealing with legal and institutional matters; (iv) Assistance in the preparation of the Framework Conventions on Climate Change and Biodiversity; and (v) Development of legal principles on environmentally sound and sustainable development. The AALCC Secretariat prepared a series of analytical studies and recommendations on these issues so as to assist the Member States to actively participate in the preparatory meetings for UNCED and finally in UNCED itself.

Discussions and decisions taken at the Islamabad Session

10. The endeavours of the AALCC in preparing for the UNCED to be held in June 1992 were reinvigorated during the thirty-first session held in Islamabad in January-February 1992 when it was decided to hold during that session a two-day Special Meeting on Environment and Development. Mr. Jamshed Hameed (Pakistan) and Mr. Rohan Perera (Sri Lanka) were designated as Rapporteurs for the Special Meeting. The Special Meeting held on 25th and 26th of January 1992 debated the matters related to the UNCED, the proposed Convention on Climate Change and the Draft Convention on Conservation of Biodiversity. To facilitate the debate during the Special Meeting, the Secretariat had presented three studies entitled : "Notes and Comments on Major Agenda Items before Working Group III of the PREPCOM for UNCED";[1] "Framework Convention on Climate Change : An Overview";[2] and "Development of a Global Convention on Biodiversity".[3] These studies are reproduced in this Report.

Major Items before Working Group III of the PREPCOM for UNCED

11. The *Secretary-General* introduced the Secretariat study entitled "Notes and Comments on Major Agenda Items before Working Group III of the PRECOM for UNCED" and recounted the role played by the AALCC and its Secretariat in preparing for the UNCED. In view of the long-term nature of the environmental protection, he proposed that the AALCC's concern and involvement should continue even after the conclusion of the UNCED. He suggested the following measures and actions to be taken in that regard :

(1) The general assessment of the outcome of the Rio Conference concentrating particularly on the issues with legal implications;

(2) Monitoring the on-going process of UNCED at its next stage and follow-up aspects of its new programmes with legal implications;

(3) The preparation of detailed analyses and comments on the two Framework Conventions on Climate Change and Biodiversity if adopted, monitoring the developments after the signing of the two Conventions, and making recommendations thereon to the Member States of the AALCC in respect of ratification of the two instruments;

(4) Undertaking studies on the further development of international environmental law. An item, "Legal Aspects of the Protection of the Environment of Areas not subject to National Jurisdictions (Global Commons)" might be taken up by the AALCC.

(5) Rendering assistance to the Member States at their request in the field of national legislation concerning the protection of environment; and

(6) Strengthening co-operation between the AALCC and the UNEP, through the conclusion of a co-operation agreement between the two bodies.

12. The *Delegate of Japan* stated that after three meetings of the PREPCOM for the UNCED to be convened in Brazil in 1992 the negotiations had reached a crucial change, and that the array of tasks awaiting the UNCED was very broad and many issues of vital concern remained to be finalized. He proposed that the PREPCOM take steps to streamline its procedures, concentrate its attention on the most pressing issues and make efforts to reach agreements.

Referring to the cross-sectoral issues, he stated that his delegation was aware of the high priority accorded to commercial resources and the question of transfer of technology and that the concerns and differences had become considerably clear. The PRECPOM, in his view, at its next session needed to fill the gaps by identifying the real needs of the developing countries and devising means of meeting their requirements. He observed that the Global Environment Facility (GEF) had become a focus of attention but its functioning as a funding mechanism required careful examination.

According to him, there had been at the previous session of the PREPCOM, a degree of agreement on some important issues particularly those relating to : (i) the need for effective utilization of existing mechanisms rather than the creation of new institutions; (ii) the importance of coordination among inter-governmental organizations and Secretariats; and (iii) economic and social factors. Admitting that the issue of institutions is complex he expressed the hope that a concentus could be reached if a practical approach that builds the points of agreement was adopted.

Referring to the Earth Charter, the delegate stated that his delegation looked forward to a clear and concise document that articulated key principles and general rights and obligations.

With regard to Agenda 21 viz. the Action Plan relating to the Earth Charter, he stressed that the PREPCOM should refrain from producing an elaborate detailed document and endeavour to reach agreement on a truly action-oriented programme that could be easily translated into government policies and private sector initiatives.

He proposed that the members of the international community should consider ways of improving the situation in which unsustainable production patterns in the affluent societies and environmentally insensitive development and abject poverty in the less privileged countries damaged the environment.

1. Doc No AALCC/XXX/Islamabad/92/1
2. Doc No AALCC/XXX/Islamabad/92/2
3. Doc No AALCC/XXX/Islamabad/92/3

13. *The Delegate of Libya* pointed out that his Government had in matters relating to the protection and preservation of the environment been cooperating with its neighbouring countries since the Stockholm Declaration of 1972. He informed the house that his Government had in recent years ratified or acceded to a total of nineteen international agreements and protocols including the Vienna Convention on the Protection of the Ozone Layer and the Montreal Protocol thereto.

Referring to the steps that his Government had taken to preserve and protect the environment, he stated that a Centre for protecting the Environment had been established to coordinate and supervise the enforcement of environmental legislation.

He further pointed out that his Government was following the OAU decision relating to the Bamako Convention that before ratifying the Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal, OAU States should ratify the Bamako Convention first and that his country had planned to ratify the two Conventions. His Government had also adopted other legislation to supervise the production of any dangerous or hazardous chemical substances. It has also imposed taxes on imports of hazardous products.

The Delegate supported the Secretary-General's proposal that the AALCC be represented at the Rio Conference and assist the Member States both in preparing for it and in assessing the final outcome of the Conference.

14. The *Delegate of Kuwait* stated that his Government's concern for the cause of protection and preservation of the environment was underscored by the fact that the State of Kuwait had, among other things, hosted the Gulf Organization for the Protection of the Environment.

Recounting the occupation of the State of Kuwait by Iraq and the events leading to the Gulf War the Delegate pointed out that the wanton and indiscriminate destructive acts of the retreating Iraqi forces had resulted in pollution of the land, air and marine resources of the State. The effect, that this pollution caused by effluence and wastes would have on the health of the people and their hygiene and life style, would require intensive study. The prognosis in the meantime, however, could hardly be said to be good.

The Delegate further stated that his country would like the PREPCOM of the proposed UNCED to study the effects of the wide spread degradation of his country's environment. He pleaded for aid and assistance from the international community for the restoration of his country's environment.

15. The *Delegate of Turkey* stated that her Government attributed great importance to the UNCED process. Turning to the documentation prepared by the Secretariat, she said that the Draft Convention on Biodiversity had not sufficiently elaborated the term "biodiversity". She was of the opinion that a definition of that term should find place in the final text. She proposed that the term should not be limited to those species that are consumed by man and have, thus, an economic value, but should be extended

to species which form a part of the web of life and those that play an important role in supporting life on Earth and in the regulation of the environment of the planet. She felt that only thus can the species that play a significant role in the global life support system be brought under conservation and such species and their habitat etc. protected, restored and conserved.

On the matters relating to the UNCED, she affirmed that the survey work done by Working Group III should be action-oriented and that the examination of, and search for the ways and means for the further development of international environmental law reflecting the understanding of combining environment and development should be emphasized. The new international legal regulation of the environment should, however, address the life support systems that are vital in the self-regulation of the planet and provide for their conservation.

She emphasized also the importance of avoiding the proliferation of new agreements or instruments unless their realistic implementation could be provided for.

She was of the view that the International Law Commission could perhaps, elaborate on the "Legal Aspects of the Protection of the Environment not subject to a National Jurisdiction (Global Commons)". She drew attention to the possibility of forming a connection between the global commons and their effect on climate. In her view, considering the self-regulatory nature of the planet (Earth) a link could be established between the projection of the global commons and the legal regulation of climate change.

As for the Institutional Issues, she stated that her delegation would like to see the revitalization of the ECOSOC and shared the view that the General Assembly should remain in-charge of overviewing global action in the implementation of sustainable development. On the proposal relating to the strengthening of the UNEP and the provision of a new mandate concerning the "settlement of international ecological disputes" she was of the view that the issue needed further study and clarification mainly due to the fact that a classification of "international ecological dispute" did not exist. She, therefore, found it difficult to accept the suggestion of giving the mandate of handling an international dispute of a juridical nature to an administrative organ of the United Nations such as the UNEP.

16. The *Delegate of the Republic of Korea* stated that the question of environment was a matter of life and death to all mankind because it was obvious that without the health of mother Earth mankind's days would be numbered. He was of the view that while the task of the UNCED was really formidable, it should stop at nothing but to serve as an important vehicle for establishing a concerted strategy in the field of environment and development. He shared the view that for Asian-African nations it was a historical imperative to strike a balance between the developmental needs and environmental priorities without stifling the burgeoning economies of the developing countries.

He was of the view that since the developed countries were responsible for most of the troubles causing environmental changes, they should take the lead in protecting the global environment and to bear more of the responsibilities. He emphasized that the burden sharing of the developing countries should be considered only to the extent that financial support and transfer of the environmentally clean technologies enabled them to do so.

While renewing his Government's commitment to fulfilling its responsibilities for environmental protection, he said that due attention should be paid to the difficult situation of the newly industrializing economies which were virtually caught in the cross-fire of the contradictory demands for development and environmental needs.

Referring to the last session of the PREPCOM before the convening of the Rio Summit, he expressed the hope that the current session of the AALCC would function as a forum for frank assessment of the past achievements and for free exchange of ideas and proposals recommended by the Secretariat of the AALCC enabling it to form a common stand in the preparations for the UNCED.

Emphasizing that environmental regulations should not be used as tools of non-tariff barriers in global trade, he proposed that an additional and comprehensive report on the following areas be submitted :

(i) Tariff or non-tariff measures provided for both in national legislation for the purpose of environmental conservation and in bilateral or regional agreements; and

(ii) Possible trade distortions through intellectual property rights of environmental technology.

He believed that the Earth Charter should reflect a high standard of moral and political norms for all States and individuals in pursuing sustainable global development and that Agenda 21 should highlight concrete action plans for an environmentally sound and sustainable development strategy. He also believed that the success of global efforts for the UNCED depended largely on whether progress can be made on cross-sectoral issues like transfer of technology, funding mechanism and institutional framework. Finally, he said that he shared the concern of many environmentalists that the UNCED might end up producing yet another grandiose but empty declaration unless it successfully incorporated the three cross-sectoral issues named above in the Agenda 21.

17. The *Delegate of Pakistan* expressed the hope that the proposed Earth Charter would be prepared by consensus of all the members of the PREPCOM. He stated that while the final document/declaration was still evolving, every effort should be made to come up with a document acceptable to all and not only to a particular group and that the success of the PREPCOM would depend upon the ability of the negotiators to bring about a consensus on different issues.

In his view, the three factors at the heart of the issue of the implementation of the environmental treaties which need to be resolved were :

(a) the transfer of additional resources and of relevant environmentally sound technologies; the Third World countries must be given the chance to leap-frog the environmentally unsound technologies that have caused so many environmental problems.

(b) the question of liability and compensation, alongwith the related topics of dispute prevention and resolution; and

(c) on-site verification.

He believed that the process of negotiations necessarily involved a give and take approach and if all the groups adhered to hard stances, the Rio de Janeiro Declaration would be a statement of good wishes rather than a document containing principles and definite commitments.

His delegation appreciated the work of the Secretariat and agreed with the list of possible areas to be examined in the context of Agenda 21. He agreed with the objectives and achievements and the parameters suggested for participation, implementation, information review and adjustment as well as codification programming.

He further stated that while the AALCC Secretariat had proposed that the work to be done by the Working Group III under the subject item should be action-oriented, it was important to find out why many of the developing countries did not participate in the Conventions or treaties adopted so far. The obvious reason, according to him, was that these either did not address the concerns of the developing countries or they were inadequate in so far as their ability to discharge their commitments under these Conventions was concerned. In his view, the difficulties faced by the INCs in negotiating Draft Conventions on Climate Change and Bio-diversity were due to the fact that many of the developing countries had sharp perception and had developed better understanding of the implications of these international instruments. Consequently they were endeavouring to put forth their points of view more forcefully and to a certain extent with some rigidity.

Turning to the range and priority of the survey, the Delegate observed that it was difficult to agree to the recommendation that attention should be paid to the promotion of the ratification and entry into force of those Agreements that had not yet become effective. In the view of his delegation, it was not possible to agree to some of the provisions of those international Agreements/Conventions unless they addressed the concerns of the developing countries.

His delegation shared the views expressed under Part III on the criteria for the evaluation. The suggestion by the Secretariat regarding further development of international environmental law needed to be seen in the light of the concerns expressed by a large number of countries on the proliferation

of agreements and the conditionalities which might be imposed on the developing countries in an effort to integrate environment and development.

On institutional arrangements, his delegation shared the views expressed by the developing countries on the possible proliferation of institutions relating to environmental issues. It was already difficult for many of the developing countries to interface with the existing institutions. Proliferation of institutions would add to their difficulties in effectively participating in the global effort.

18. The *Delegate of the People's Republic of China* stated that the qucations high on the agenda of the PREPCOM were how to address the problems relating to the environment and development, what solutions could be found to cover the immense cost of the protection of the global environment and how to realise a fair and rational international cooperation in the aspects of environment and development.

In his view, environmental pollution and ecological damage had become more and more serious and had become the major issues of global character. They constituted a grave threat to the sustainable development of economies and the subsistence of the human beings. The main causes for the issues were, the excessive exploitation and consumption of natural resources and the massive emission of pollutants by developed countries during the long period of their industrialization. They still remained to be the major consumers of the natural resources and the major polluters in the world. As far as the developing countries were concerned, they were under double pressure of both the protection of the environment and development of economies. His delegation favoured the view that the stress for the survey of existing agreements and instruments should be on the "examination of and search for the ways and means for the future development of the international environmental law, in the light of the need to integrate environment and development". The criteria for the evaluation, in his opinion, should first be whether or not the instruments integrating the environmental protection and sustainable development would bring about the participation by as many developing countries as possible or not. The criteria should include whether an agreement or instrument provided for the ways and means to enable developing countries to fulfil the obligations under such an agreement or instrument. Turning to the further development of the international environmental law, he said that the significance of integrating the environment and development ought to be emphasized. His delegation favoured the observation that the development of international environmental law should not lead to the proliferation of new agreements or instruments. If the development of environmental law exceeded the scope of what actually could be accomplished, it might become a burden upon most countries; economic development and result in the difficulty of maintaining the balance between the environmental protection and economic development.

With reference to the institutional issues, he observed that these issues should be discussed in conjunction with the other issues which were and

would be under deliberation in the PREPCOM, and in particular with those issues such as "Agenda 21", funding mechanism and technology transfer. The institutional arrangement would depend on the decisions to be taken by the PREPCOM. However, there was no institution in the UN system to coordinate and take account of the issues of the environment and development in a comprehensive manner. In the view of his delegation, whatever institutional arrangements were made, the following three points should be taken into consideration :

(i) The institutional arrangements should be conducive to strengthening the role of the UN in the fields of environment and development and facilitating the international cooperation in these fields, (ii) it should reach the goal of coordination of the environment and development in accordance with the UN resolution 44/228, and (iii) it should ensure equitable geographic representation and full and effective participation of developing countries and take due consideration of the interests of these countries.

19. *The Delegate of Sri Lanka* stated that the degradation of the environment had emerged as a major global concern and that the General Assembly which by its resolution 44/228 decided to convene a United Nations Conference on Environment and Development had *inter alia* recognised that environment and development were closely interwoven and that environmental issues could not be isolated from their underlying causes.

He expressed the view that the UNCED should take cognizance of the qualitative difference between environmental degradation in the developing and the developed countries. It was pointed out in this regard that while in the developed countries environmental degradation stemmed from the high levels of development consumption, on the other hand environmental damage in the developing countries arose out of conditions of extreme poverty and serious financial resource limitations which thwart economic development. He emphasized in this regard that his Government expected the UNCED to recognize that environmental degradation in the developing countries was in reality a symptom of underdevelopment and that the developing countries, in the contemporary international order, were unable to mobilise the resources that were needed to extricate themselves from their state of underdevelopment.

In the view of his delegation, it was imperative to recognise that while the protection of the environment was the common responsibility of the international community, the main onus lay on the developed countries where the main sources of environmental pollution had originated. Besides, he added, the developed States had the necessary capabilities and resources to take corrective measures. He further pointed out that the environmental standards applicable to developed States might involve excessive unwarranted economic or social costs for the developing countries.

Referring next to the need to meet the immediate requirements of the developing countries for the mobilization of new and additional financial resources and the transfer of environmentally sound technology on a concessional and preferential terms as well as the provision of assistance of manpower training and strengthening of institutional capacity, the Delegate observed that continued deprivation will not only cause degradation of the environment but also cause turmoil and disruption in the social fabric of the expectations of a new generation.

He stated that while it is true that each nation had to make an equal contribution towards resolving the problems related to environment and development, it was, however, of paramount importance that the principle of common but differentiated responsibility of States constitute the basis of any global response to environmental issues. The application of environmental standards, in his view, by developing countries should be in accordance with their respective capabilities and responsibilities.

The Delegate stated that his Government expected the aforementioned basic tenets to guide the nations at UNCED in addressing themselves to the declaration of an Earth Charter embodying the "basic principles for the conduct of nations and peoples in respect of environment and development." He stated further that his Government expected the UNCED to go beyond a formal declaration of broad intentions and to draw up a specific agenda for action. The agenda for action should focus on areas of major global concern relating to the conservation of the climate and preservation of the earth's bio-diversity. His delegation also desired that the UNCED should focus on areas of concern pertaining to the developing countries where environmental issues have to be addressed mainly through the pace of economic development. While developing countries should pledge to incorporate environmental safeguards into their development programmes, the developed countries should pledge to promote economic development of the developing countries through a reduction of external debt and the amelioration of economic circumstances currently prevalent in these countries. Narrowing the gap between the developed and the developing countries was a vital necessity in dealing with economic issues, he added. Finally, he recounted the efforts being made by the SAARC to protect and preserve the environment.

20. The *Delegate of Sudan* expressed his grave concern about the constant and steady degradation of the environment. He was of the firm conviction that both the PREPCOM and the UNCED should take into consideration the endeavours of the AALCC to develop and codify international environmental law.

21. The *Delegate of Egypt* underscored the relationship between poverty and degradation of the environment. In his view, protection and preservation of the environment called for active international cooperation. His delegation favoured the appointment of an international supervisory authority to administer and coordinate activities and programmes aimed at the further prevention

of the degradation of the environment. He called upon the Secretariat to undertake further studies as well as to report to the Member Governments the outcome of the present Special Meeting as well as the forthcoming fourth and final session of the PREPCOM. He also favoured the convening of a meeting of legal and technical experts of the Member Governments of the AALCC either just before or during the meeting of the UNCED in Brazil in June 1992.

22. The *Delegate of India* observed that environment was a matter of common concern for all and his delegation favoured international cooperation and a multilateral approach in facing the challenges posed by the degradation of the environment. He expressed the hope that the environment would not become an instance of the North-South dialogue as sustainable development was the central theme.

His delegation was against any conditionalities being attached to the aid or financing or the erection of new trade barriers against the developing countries. The proposed regulatory approaches should enable the developing countries to tackle the environmental problems that were not of their own creation. He cautioned against the transfer of clean production technologies becoming a matter of commercial profit for the developed States.

He expressed the view that the AALCC as an exclusive legal body had a specific role in identifying issues involved on behalf of the Member States as well as for the UNCED. In the view of his delegation, the hard-core legal issues involved were (i) the common concern or common heritage of mankind; (ii) the responsibility of States; (iii) liability; (iv) the settlement of disputes; and (v) the nature and status of the proposed Declaration to be adopted at the end of the session. He further stated that closely related to these hard-core issues were certain other issues which were close to the heart of not only the Member States of the AALCC but all developing countries. Under this rubric, he spelt out and enumerated the following viz. (i) the right to a safe and clear environment; (ii) the right to sustainable development; (iii) the transfer of technology; and (iv) funding.

Amplifying on the hard-core legal issues that he had identified, the Delegate said that while these require a close look both by the AALCC and the UNCED, the concepts themselves were not new as they had been recognized and debated upon by UNCLOS III. In his opinion they were generic concepts.

Finally, on the question of drawing up of a final statement or a declaration, he stated that while his delegation agreed with the notion of a final document, it did not have the necessary brief to do so at the present session.

23. The *Observer for Sweden* stated that following the adoption of the Stockholm Declaration in 1972 and the establishment of a special UN body, the UNEP, some 80 agreements, global and regional, had been adopted by the international community. In addition, a whole host of ministerial declarations and other 'soft law' instruments abounded the field of international

environmental law. Even as new legal instruments were being negotiated in various fora, he stated, older conventions were under review to bring them in line with the latest available technical and scientific developments.

The environment was today a concern and responsibility of everyone and it was against this backdrop that the development of environmental law should be seen, he stated.

Referring to the UNCED, he said that it had been mandated *inter alia* to :

(i) promote the development of international environmental law taking into account the special needs and concerns of the developing countries; and

(ii) elaborate a document, an "Earth Charter" spelling out the fundamental principles, rights and obligations of Governments, organisations and individuals in the field of environment.

He then focussed on some issues of relevance in discussing the methods to improve international cooperation.

Some problems, such as the depletion of the ozone layer and the global warming needed to be tackled globally. Although the effectiveness of international cooperation depended on the widest possible participation of States, however, not many international conventions attracted enough adherence to make them efficient instruments for cooperation.

The financial aspect was, in his view, the crucial one which will have a direct impact on the result of the negotiations on the Conventions on Climate Change and Bio-diversity.

Another means that had been tried in order to enhance a broad participation was the use of differentiated obligations for contracting parties. Such an approach made it possible to take into account specific needs and circumstances of developing countries.

Most conventions lacked precise and clear provisions with regard to obligations and commitments. The use of more precise and concrete language in the defining of obligations would facilitate monitoring and compliance control so as to make cooperation more efficient.

Most international conventions also lacked provisions with regard to responsibility for environmental harm and compensation in case of environmental damage. The efforts to fill this lacuna had so far not been successful. Instead new approaches had emerged, such as the application of the "precautionary principle", the use of environmental impact assessment etc. placing emphasis on preventive measures to anticipate, prevent and attack the causes of environmental degradation.

Provisions relating to dispute avoidance and settlement and compliance and control were either too general or lacking. There was neither a mechanism for effective enforcement or dispute resolution nor was there a machinery of sanctions for non-compliance.

The "Earth Charter" was the document in which fundamental principles and rights and obligations of governments, organisations and individuals would be laid down. The need to elaborate yet another instrument of this kind could be questioned given the number that already exists, although Sweden had actively supported the idea of such an instrument.

Framework Convention on Climate Change

21. The *Secretary-General* while introducing the Secretariat Study on this topic stated that he was, however, happy to note that wide recognition had been given to the fundamental principle of differentiated obligations as an integral part of the Framework Convention although there still existed divergent views in regard to the content and interpretation of such an obligation envisaged for both the developed and developing countries. This aspect needed more attention and clarification during the next INC session scheduled to be held in New York from 19 to 28 February 1992. He recognised that there were notions such as equity, special situations, vulnerability etc. which formed part and parcel of the proposed Framework Convention and had important bearing in elaborating the concept of differentiated responsibility.

In view of the continuing scientific uncertainties in regard to the causes and impacts of global warming, he expressed the view that the Framework Convention ought to be flexible in fixing targets and time-frames. What was more important was the commitment to initiate and develop firm measures to stabilise and reduce emissions, particularly of carbon dioxide. A similar flexibility in the context of preparation of national reports and its review procedure would remove some of the hurdles being placed in the smooth negotiations of the Framework Convention.

He appreciated the UNEP initiatives to conduct impact assessment studies in the various regions and to evaluate the needs of developing countries in the context of their participation in the Framework Convention on Climate Change. Similarly, the involvement of the International Panel on Climate Change (IPCC) in the preparation of studies on technical aspects of the economic implications of climate change would help the negotiating process for a Climate Convention.

He recognised that the issues on which there still existed fundamental differences between the developed and developing countries were mainly concerned with the commitments in regard to the financial resources and the transfer of relevant technology to the developing countries. Discussions in the third session of the PREPCOM of the UNCED and the fourth session of Inter-governmental Negotiating Committee on Bio-diversity had also highlighted problems of a similar kind.

He stressed that a real breakthrough in the next session could be achieved only by mutual understanding and accommodation of the interests of both the developed and developing countries. The cost of the omissions on the part of the developed countries in the past had been pretty high. Although the cost in accepting the universal commitments to be undertaken presently to safeguard the future generations could not be underestimated, there was no alternative.

22. The *Delegate of Japan* recognised that since economic activities of individual countries transcended national borders and given the deepening interdependence in the international community, global environmental problems could not be tackled by the efforts of a single country. Since environmental damage progressed gradually over a long period of time, it might be too late to take action by the time the damage became visible. In addition, since any remedy generally would take long and cost much, effective preventive measures must be devised at an early stage. Enhancement of scientific knowledge was required for this. It was imperative for all the countries to cooperate in tackling global environmental problems. Not only the industrialized countries, but also the developing countries must take active part in solving the problems. Toward that goal, it was necessary to give due consideration to the particular situation of the developing countries, based on the concept of "sustainable development". Japan had the experience of overcoming the problem of industrial pollution while maintaining high economic growth. Using the knowledge and technology on environmental preservation accumulated in that process, Japan was more than willing to contribute positively to the preservation of the global environment.

The Delegate stressed the importance of implementing all feasible measures without delay to prevent global warming, while endeavouring to expand scientific knowledge and information, given that some areas were yet to be scientifically evaluated. Moreover, a legal framework agreed upon all over the world was necessary for an overall solution of the problem, based on a comprehensive global strategy with a long-term perspective.

She observed that in order to reach an agreement in the June 1992 meeting of the United Nations Conference on Environment and Development, it was important to elaborate a Framework Convention on Climate Change on the basis of a general agreement of all the countries including both developed and developing ones. Only in this way the Convention would lead to solutions acceptable to all nations.

As for the preservation of biological diversity, Japan attached great importance on the issue as one of the main concerns of the environmental problem. She stressed that there was a need for an international legal instrument for the conservation of biological diversity on the basis of *in situ* conservation and concrete measures must be included in the Convention. Furthermore, the protection of intellectual property rights was essential for the transfer of technology.

23. The *Delegate of the Islamic Republic of Iran* stated that the document on the Convention on Climate Change provided comprehensive information regarding the various aspects of the Convention. The Nairobi Meeting of AALCC member countries held during the third INC meeting at the initiative of the AALCC Secretariat, in which he had the honour to represent his country, indicated the sense of responsibility on the part of the AALCC towards this crucial matter.

He was of the opinion that the main responsibility for climatic changes on the Earth, that gave rise to the need for adoption of this Convention – although still with a lot of scientific ambiguities – lay heavily on the developed countries. During the previous meetings, the industrialized countries obviously tried to overlook their responsibility. They also tried to ignore the fact that the trend of industrialization caused widespread pollution in the world and the industrial progress in the industrialized countries had been achieved at the expense of a lot of natural resources on the Earth. He believed that the developing countries have the right to develop, and the dangers arising from climatic changes, even though very important, should not appear as an impediment on the way of economic development in these countries. Nevertheless, the developing countries in the course of their economic development must take proper measures to contribute to the improvement of the environment. He recognised that the transfer of technology to and provision of financial resources for the developing countries for their commitments towards the Convention on Climate Change were among the most important issues that have been repeatedly raised and discussed during the four meetings of the INC. There was no doubt that implementation of such a convention dealing with this matter will not be possible without preparing the groundwork for the financial assistance of the developed nations to the developing world and transfer of sound and advanced technology to this group of countries. He stressed that particular situation of the developing countries, especially those whose economies heavily depended on fossil fuels exports, must be taken into consideration. In this respect, the Convention should make provisions for some industrialized countries that are the largest producers of greenhouse gases to reduce the production of such gases.

He observed that the INC meetings, particularly the last one in Geneva, demonstrated how divergent were the differences of opinion on the content of a Convention on Climate Change. For instance, during the sessions of Working Group II of the fourth INC meeting responsible for adoption of a document on legal and organizational matters of the Convention, twenty-three articles and four annexes were discussed. However, with the exception of two non-substantive articles, no agreement was reached on other articles, such as those dealing with scientific cooperation, research work, exchange of information, conference of the parties, settlement of disputes, amendment of the Convention provisions, and the Convention's entry into force. The intensity of these differences convinced some participating delegations that the present trend of talks would not be conducive to the realization of the predetermined goal of adopting the draft of the Convention before the

forthcoming U.N. Conference on Environment and Development due to be held next June.

24. The *Delegate of Republic of Korea* stressed that reasonable time should be given for phasing out greenhouse gases. In his view, without adequate flow of funds and technology, no success could be achieved. He felt that the Global Environment Facility (GEF) was a good step but it was not enough. It should be supported by additional funds, including the principle of "Polluter pays."

Two other important aspects, in his view, were the training, education and development of human resources and redefinition of intellectual property to balance rights and the need for transfer of technology.

25. The *Delegate of People's Republic of China* observed that since the efforts to deal with the Climate Change issues were closely interrelated with the economic development, energy structure and other fundamental interests of the countries concerned, his country took the Climate Change issue very seriously. In his view, Climate Change was a common concern of mankind, which, in the final analysis, needed the concerted action of all the countries in the world. This concerted action could not be materialized without effective international cooperation based on the principle of equity. In such cooperation, the developed countries should make special contribution and provide the developing countries with requisite financial resources and technologies to enable the latter to participate effectively in international cooperation for dealing with the Climate Change issue without prejudicing their normal economic development.

While advocating the adoption of realistic and practicable response strategies by the developing countries within their capacities and means on the basis of the best scientific knowledge available, he stressed that the Framework Convention should have as one of its objectives the improvement of knowledge in this regard by establishing an organizational mechanism for further monitoring and research so as to provide a scientifically sound basis for the adoption of further measures.

In his view, the Framework Convention should be a Convention that sets forth general principles concerning Climate Change and general obligations for various countries, thereby preparing the ground for the eventual establishment of a legal regime for the protection of the global climate and furnishing the organizational framework for negotiating related protocols containing specific commitments on the basis of the principles enshrined in it. The Convention should :

(i) Strike a balance between environmental protection and the respect for State sovereignty;

(ii) Integrate environmental protection with economic development;

(iii) Recognize the responsibility of the developed countries for human induced Climate Change and their obligations in addressing it;

(iv) Establish the principle that the international community cooperate on an equitable basis in dealing with the matter and that, in particular, the developed countries provide financial resources and transfer technology to the developing countries to enable the latter's effective participation in related international action; and

(v) In view of the marked difference in the levels of economic development between developed and developing countries, the Convention should provide that different time-frames be set for execution of relevant measures, depending on varied economic as well as scientific and technological capabilities that obtain in different categories of countries.

Framework Convention on Biodiversity

26. The *Secretary-General* while introducing the Secretariat study entitled "Development of a Global Convention on Biodiversity" stated that a framework Convention on Biodiversity was being negotiated in the intergovernmental negotiations currently being held under the auspices of the UNEP as part of the on-going preparations for the United Nations Conference on Environment and Development scheduled to be held in Rio in June 1992.

The Secretary-General stated that biodiversity, which was the total sum of life's variety on this planet constituted at the genetic, species and ecosystem levels, was declining at an unprecedented rate as a result of man's activities, and that this loss was irremediable. As a result, there was mounting public awareness and pressure, particularly in the developed countries, about the need to conserve biodiversity. As for the developing countries which happened to be the repository of bulk of biological resources, their main concern was that commercial exploitation of their biological resources was proceeding without corresponding monetary compensation to them. They lacked capacity as well as economic incentives to conserve their biological resources for future generations, but were forced to incur costs including foregone revenues from alternative uses where conservation was attempted.

The Secretary-General pointed out that the irony of the situation was, while the areas of greatest biodiversity or importance were located in the developing countries, they did not have the resources to conserve them and needed substantial help from the developed countries in the form of financial and technical assistance to be able to do so. It was in recognition of these concerns that a global Convention on Biodiversity was being negotiated which was intended to evolve a broad legal framework pulling together a wide range of actions at national and international levels for conservation and sound use of biodiversity which had hitherto been taken on a piecemeal basis.

The Secretary-General further stated that the crucial issues in the current negotiations for a Convention on Biodiversity were, access to genetic resources, transfer of technology including biotechnology and provision of funds and

importance to the rational use and conservation of biodiversity. He supported the formulation of an International Convention on the Conservation of Bio-diversity. He was, however, of the view that the successful formulation of such a Convention would depend on the satisfactory resolution of the following issues :

(i) respect for national sovereignty over biological resources within national jurisdiction. This principle should be reflected in the Convention by making the access to genetic material subject to measures prescribed by the States concerned.

(ii) The Convention should be in conformity with the national plans and priorities of developing countries.

(iii) In the transfer of biotechnology, special and preferential treatment should be given to the developing countries, particularly to those providing the genetic materials.

(iv) Since the developing countries are the repository of bulk of biodiversity, and for a long time they have expended efforts and expenses for the conservation of biodiversity, such efforts of them should be recognised and compensated by the international community.

(v) The Convention should establish a fund to provide developing countries with adequate, new and additional financial resources with a view to ensuring the transfer to those countries of the environmentally sound technologies including biotechnology for rational use and conservation of biodiversity to enable the developing countries to implement the Convention.

Finally, the Delegate cautioned that since the negotiations for the Convention had entered the final stage, co-ordination of the developing countries' viewpoint on the various issues was of vital importance to the adoption of an acceptable Convention.

32. The *Delegate of the Philippines* stated that his country supported the efforts of the AALCC to contribute to the deliberations within the process of UNCED as well as the negotiations on the Framework Conventions on Climate Change and Biodiversity with the general aim of addressing global concerns over environmental degradation and the developmental requirements of the developing countries. His Government also supported the work of the AALCC in regard to the Working Group III of the PREPCOM of UNCED. He reiterated his Government's preference for naming the proposed Earth Charter as the Rio Charter or Declaration on Environment and Development which should be a clear and concise document with no legally binding effect and reflecting international solidarity. He was also of the view that the two Conventions in order to be effective must reflect the following two central issues of importance to the developing countries : (i) Transfer of environmentally sound technology on concessional, non-commercial

and preferential terms; and (ii) Financial resources – developed countries should provide new, adequate and additional resources to cover full incremental costs involved in addressing environmental issues and in implementation of relevant commitments derived from international legal instruments.

33. After the conclusion of the general debate, in the course of which several members and observer delegations had voiced their concern over the growing degradation of the global environment and stressed the necessity of evolving a common position amongst the Member States of the AALCC on the UNCED matters, it was *inter alia* decided that the AALCC should make its views known to the PREPCOM of the UNCED scheduled to meet in March 1992. To that end, the AALCC appointed an open-ended Working Group with a core group comprising the delegations of the Arab Republic of Egypt, China, Ghana, India, Japan, Kenya, Libyan Arab Jamahiriya, Pakistan and Sri Lanka to identify and formulate the common acceptable principles of international environmental law for adoption by the AALCC and later transmission to the PREPCOM for UNCED. The Working Group held a total of four meetings between the 28th and 30th of January 1992 under the joint chairmanship of Mr. Jamshed Hameed (Pakistan) and Mr. Amrit Rohan Perera (Sri Lanka). Following a series of formal and informal exchange of views, the Working Group recommended the following draft text for adoption by the AALCC.

"STATEMENT OF GENERAL PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW

The Asian-African Legal Consultative Committee,

after an exchange of views on legal aspects of environment and development, affirms :

(i) that the environment is the common concern of mankind and that the environment and development are intrinsically and inextricably linked;

(ii) that the principle of sustainable development shall be given due effect and development shall not be pursued in a manner as would endanger the environment;

(iii) that all members of the international community shall ensure that no appreciable or significant harm is caused to the environment and that the environment does not suffer severe and irreversible degradation:

(iv) that the responsibility of Member States of the international community shall be [common but differentiated] [differentiated] and the application and enforcement of environmental standards by the developing countries shall be in accordance with their respective capabilities and responsibilities;

(v) the need to protect inter-generation equities within the context of the progressive development and codification of international environmental law;

(vi) that the developed countries in the interest of the common future of mankind and the protection and preservation of the environment, seriously consider making available to the developing countries [new] [adequate] and environmentally sound technologies on a [preferential and non-commercial] [fair and most favourable] basis;

(vii) that the developed countries, international and regional organizations and financial institutions consider, explore and, where necessary, make provisions for [new] additional and adequate financial resources to the developing countries to meet the objectives of sustainable development and the protection and preservation of the environment;

(viii) that the UNCED should accord priority to the improvement and strengthening of the existing institutional mechanisms relating to environment and development in the United Nations system and to enhancing their cooperation and coordination; and

(ix) that any instrument to be adopted by UNCED should include appropriate provision for the peaceful settlement of disputes."

34. The above 'Statement' was formally approved by the plenary meeting of the AALCC and later submitted to the fourth session of the PREPCOM for the UNCED held in New York in March 1992. The Statement was circulated as an official document in all the working languages of the United Nations under the agenda item – "Principles on General Rights and Obligations" of Working Group III.

35. As for the future work of the AALCC related to the follow-up action to be taken after the conclusion of the UNCED, the AALCC adopted a series of decisions which are as follows :

Decisions on Further Working Programmes of AALCC on Environment after the Conclusion of UNCED at Rio in June 1992

In view of the long-term nature of environmental protection, the AALCC's concern and involvement should continue even after the conclusion of the Rio Conference in June 1992. The AALCC might wish to re-invigorate its endeavours and to further its environmental programmes. Its suggested measures and actions to be taken in this regard may include :

1. Preparation of a general assessment of the outcome of the Rio Conference concentrating particularly on the issues with legal implications;

2. Continue to monitor the on-going process of UNCED at its next stage and follow-up aspects of its new programmes with legal implications;

3. Preparation of detailed analysis and comments on the two Framework Conventions on Climate Change and Biodiversity, if adopted, and monitor the developments after the signature of the Conventions, and make recommendations to the Member States of the AALCC in respect of ratification of the Conventions respectively as deemed appropriate;

4. Make studies on the further development of international environmental law. An item, "Legal Aspects of the Protection of the Environment of Areas not subject to a National Jurisdiction (Global Commons)" might be taken up by the AALCC. The topic will hopefully be included in the future work programme of the ILC;

5. Render assistance to the Member States at their request in the field of national legislation concerning the protection of environment; and

6. Strengthen the co-operation between AALCC and the UNEP through the conclusion of a co-operation agreement between AALCC and UNEP.

Note on Drafting of the Earth Charter/Rio Declaration on Environment and Development

1. According to the terms of reference adopted by the Preparatory Committee (PREPCOM) for the United Nations Conference on Environment and Development (UNCED) at its second session (A/46/48, Part I, decision 2/3, sub-paragraph (ii), Working Group III of the PREPCOM was entrusted to examine the feasibility of elaborating principles on general rights and obligations of States and regional economic integration organizations, as appropriate, in the field of environment and development, and to consider the feasibility of incorporating such principles in an appropriate instrument/charter/statement/declaration, taking due account of the conclusion of all the regional preparatory conferences.

2. Working Group III placed the item, "Principles on General Rights and Obligations", on the agenda of its second session, scheduled in August 1991. The Working Group had before it an annotated check-list, prepared by the Secretariat of the conference, of principles on general rights and obligations (A/Conf. 151/PC/78) as well as several documents submitted by delegations (A/Conf. 151/PC/CRP. 8, A/Conf. 151/PC/83, A/Conf. 151/PC/WF.III/4, A/Conf. 151/PC/WG. III/L. 5, A/Conf. 151/PC/WG.III/L. 6), with a view to facilitating the drafting of the proposed Earth Charter/Rio Declaration on Environment and Development.

3. In the course of the discussion certain elements related to preparing the target instrument have been gadually approaching consensus.

(a) The title of the instrument should aptly reflect the need for the integration of environment and development and the linkage between environment and development. This is indicated by the General Assembly Resolution 44/228. In that context a title that may combine the term the Earth Charter with the Rio Conference on Environment and Development would therefore be preferable.

(b) The proposed charter/declaration should be in its nature not legally binding as a multilateral convention, but given the fact that it is likely to be adopted at the summit level, it would have the moral authority of the international community.

(c) The text of the proposed charter/declaration should be short and concise.

(d) The proposed charter/declaration should be closely linked to Agenda 21. However, there existed diversities on the question whether or not the proposed instrument should simultaneously constitute an organic part of Agenda 21.

(e) The text of the proposed charter/declaration should be appealing and inspiring with a view to enhancing public awareness of environmental and development issues.

(f) Its language and style, while ensuring legal precision of commitments, should be easily understood by the general public.

(g) The proposed charter/declaration should, in a forward looking manner, build on existing principles contained in documents such as the 1972 Declaration of the United Nations Conference on Human Environment.

4. During the deliberations of the last Session in August, a draft decision (A/Conf. 151/PC/WG. III/L. 6), entitled as "Rio de Janeiro Charter/Declaration on Environment and Development" was submitted by Ghana on behalf of the State Members of the United Nations that are members of the Group of 77, which contained a number of principles which should be fully taken into consideration in the elaboration of such document. The Working Group has decided to consider and take proper action on it at its next session.

5. Based on all proposals submitted and the outcome of informal consultations, the Chairman of Working Group III prepared a consolidated draft (A/Conf. 151/PC/WG. III/L. 8/Rev. 1). The Secretary-General of UNCED was requested to update this consolidated draft and to incorporate all proposals from delegations and to reflect the state of discussions at the end of the third session in preparation for further deliberation at the fourth session. The Working Group is expected to take the forthcoming updated consolidated draft as a basis for further discussion at the fourth session of the PREPCOM, without prejudice to further contributions or proposals to be submitted by national delegations or regional groups after the third session.

6. Drafting of an instrument/charter/declaration to contain principles on general rights and obligations in the field of environment and development has therefore entered into its final phase. The fourth session of the PREPCOM, scheduled to be held in New York in March 1992, will hopefully finalize the preparation of the draft text of such document, which will finally be examined and adopted by the Rio Summit in June 1992.

7. To provide as much assistance to its Member States as possible to assist them to make their contribution, the AALCC may wish to address the subject item regarding principles on general rights and obligations in the context of preparation for UNCED.

8. To this end, the Secretariat of the Committee suggests that the Committee may focus its consideration on the following aspects :

(a) To consider and take appropriate action on the draft decision proposed by the Group of 77, on the guiding principles to be applied to drafting of the proposed charter/declaration on environment and development.

(b) To examine the Chairman's consolidated draft, with a view to working out its own draft text.

(c) The views, proposals and conclusions on the subject-matter may be submitted to the fourth session of the PREPCOM.

Note on the Survey of Existing Agreements and Instruments, and Further Development of International Environmental Law
(Item 2 of the Provisional Agenda, Third Session, Working Group III).

Part One : Introduction

In accordance with the terms of reference adopted by the Preparatory Committee (PREPCOM) for the United Nations Conference on Environment and Development (UNCED) at its Second Session (A/46/48, Part 2, decision 2/3), Working Group III of the PREPCOM shall prepare an annotated list of existing international agreements and legal instruments in the field of environment, describing their purpose and scope, evaluating their effectiveness, and examining possible areas for further development of international environmental law, in the light of the need to integrate environment and development, especially taking into account the special needs and concerns of the developing countries.

Following the preliminary exchange of views at its first session of the Working Group III of the PREPCOM (18 March - 5 April 1991), the Secretariat of the Conference prepared a note (A/Conf. 151/PC/77) for the consideration of Working Group III at its Second Session (19 August–4 September) which contained a draft list of existing agreements and instruments to be evaluated for this purpose, together with a number of draft criteria for their evaluation in view of the further development of environmental law.

Because the Working Group had been entrusted with many important tasks and thus had a heavy agenda at its second session, including the drafts of the proposed Earth Charter/Rio Declaration on Environment and Development, it was generally agreed that in view of the limited period of time available to the working group, not too much time should be spent on the proposed evaluation of existing agreements and instruments.

The general discussion focussed on three issues : the range of agreements and instruments to be reviewed; the criteria to be applied in reviewing; and the expected outcomes of such reviewing.

Although there were some controversies on these issues, the Working Group reached concensus on this agenda item as follows :

(a) takes note of the report by the Secretariat on the survey of existing agreements and instruments, and criteria for evaluation (A/Conf. 151/PC/77);

(b) agrees on the expected outcomes of its work on this agenda item;

(c) requests the Secretary-General of the United Nations Conference on Environment and Development to compile the necessary background information in accordance with the agreed criteria for evaluating the effectiveness of existing agreements and instruments on the basis of a revised list of such agreements and instruments.

It has been agreed that possible areas to be examined in the context of Agenda 21 are :

(a) Priorities for future law-making at the appropriate level, incorporating environmental and developmental concerns;

(b) Measures to promote and support the effective participation of developing countries in the negotiation and operation of international agreements or instruments, including technical and financial assistance and other available mechanisms for this purpose;

(c) Measures for effective implementation and compliance, regular assessment and timely review and adjustment of agreements or instruments by the Parties concerned;

(d) Measures for improving the effectiveness of institutions and procedures for the administration of agreements and instruments;

(e) Measures for the resolution and prevention of conflicts, including potential conflicts between environmental and development/trade agreements or instruments, also with ensuring that such agreements and instruments are mutually reinforcing.

As regards the criteria for evaluating the effectiveness of existing agreements and instruments, the agreed criteria (some of the criteria may not be applicable to all agreements or instruments to be evaluated) include :

A. Objectives and Achievement

1. What are the basic objectives formulated in the international agreements and instruments evaluated, and how do these objectives relate to the promotion of sustainable development ?
2. In the case of regional agreements and instruments, what is their actual and potential bearing on global environmental protection and sustainable development ?
3. Do these agreements or instruments take into account the special circumstances of developing countries ?
4. To what extent have the basic objectives (environmental/developmental) formulated in international agreements and instruments been met, and how is goal achievement measured ?

B. Participation

5. Is membership limited or open-ended ?
6. Are reservations possible, and to what extent have they been used ?
7. What is the current geographical distribution of membership in existing environmental agreements and instruments, especially as regards developing countries ?
8. What is the record of actual participation by developing countries in the negotiation and drafting of these agreements and instruments, and in programme activities and meetings organised under these agreements and instruments ?
9. Which incentives (e.g. financial, trade, technology benefits) are available to encourage participation and facilitate implementation by developing countries ?
10. Which factors influenced the participation, especially of developing countries, in the agreement or instrument e.g. :
    (a) Financial resources required and available for participation in the agreement or instrument;
    (b) Technical assistance required and available for participation in the agreement or instrument;
    (c) Scientific assistance required and available for participation in the agreement or instrument;
    (d) Information on the (operation of the) agreement or instrument to Governments, parliaments, press, NGOs, industries and the general public;
    (e) Role of parliaments, press, NGOs, industries and the public opinion in general;
    (f) Availability of reservations.

C. Implementation

11. What are the commitments imposed on parties by these agreements and instruments and how is compliance by parties with their commitments monitored and measured ?
12. How do parties report on their performance in implementing agreements and instruments, and to what extent have they complied with reporting duties ?
13. Which are the specific requirements (if any) of data supply and data disclosure, and to what extent have they been met by the parties ?
14. Which possibilities exist to promote compliance and to follow-up

on non-compliance, and to what extent have they been used ?

15. What mechanisms are available to deal with disputes over implementation and to what extent have they been used ?

16. Which factors influenced the implementation e.g. :

(a) Financial resources required and available for implementation of the agreement or instrument;

(b) Technical assistance required and available for implementation of the agreement or instrument;

(c) Scientific assistance required and available for implementation of the agreement or instrument;

(d) Information on the (operation of the) agreement or instrument to Governments, parliaments, press, NGOs, industries and the general public;

(e) Role of parliaments, press, NGOs, industries and the public opinion in general;

(f) International supervisory or implementing bodies;

(g) Obligations to report on compliance and/or to supply and disclose data;

(h) Non-compliance procedures and procedures for settlement of disputes (including fact-finding procedures).

D. Information

17. In which form and in which languages are the texts of existing agreements and instruments published and disseminated ?

18. How is current information on the operation and implementation of international agreements and instruments made available to governments, to the industries concerned and to the general public ?

19. What additional materials are available to provide guidance for the implementation of international agreements and instruments at the national level ?

20. To what extent is the above information used in international and national training and education programmes ?

E. Operation, Review and Adjustment

21. Which are the institutional arrangements for international administration of existing agreements and instruments ?

22. What are the annual costs of international administration (secretariat, meetings, programmes of agreements and instruments, and how are they financed ?

23. Which are the main benefits and the main cost elements of knowledge and advice taken into account in policy-making decisions under these agreements and instruments ?

24. How do these arrangements and mechanisms ensure the effective participation of (a) national authorities, especially from developing countries; and (b) non-governmental participants, including the industries concerned and the scientific community ?

25. Which mechanisms are available to ensure periodic review and adjustment of international agreements and instruments in order to meet new requirements, and to what extent have they been used ?

F. Codification Programming

26. Which new drafts, or draft revisions of existing agreements and instruments in the environmental field are currently under preparation or negotiation ?

27. To what extent and through which mechanism is drafting coordinated with related work regarding other agreements and instruments ?

28. Which are the remaining gaps that need to be covered by legal provisions ?

29. To what extent are mechanisms other than formal agreements or instruments contributing to the development of international law in the field of the environment ?

The list contained in Document A/Conf. 151/PC/77 was based on the following assumptions :

(a) The range of existing international agreements and instruments in the environmental field should include formal multilateral treaties at the global and regional level; international technical rules and regulations in sectors having a bearing on environmental protection; and a number of instruments that are not legally binding but because of their adoption at an inter-governmental level may be considered as initial steps in the development of international environmental law.

(b) The draft list should be essentially concerned with environmental protection against man-made risks, and therefore should not include agreements or instruments that are primarily aimed at natural risks or diseases; nor should it cover the multitude of existing arrangements dealing with bilateral environmental co-operation with shared geographically limited resources, or the internal environmental enactments of regional economic integration organization; the principal

consideration should be the relevance of an agreement or instrument to the further development of international environmental law.

These assumptions and the draft itself were generally accepted by most delegations, with a few proposals in effect to rearrange certain sections, to add some specific agreements or instruments to or delete some from the list, to give representative examples of relevant bilateral agreements regarding shared natural resources and the protection and enhancement of the environment. As a result, a revised list was brought out in the light of these proposals.

Finally, the Working Group decided to put the subject item, in a broader term, "Further development of international environmental law in the light of the need to integrate environment and development", on the provisional agenda of its next (third) session, to be held in March-April 1992.

Part Two : Comments and Recommendations

I. On the Purpose of the Survey

According to the terms of reference adopted by the PREPCOM for UNCED, the item under the consideration of Working Group III has two purposes. The first one is to reflect the present state of existing international agreements and instruments in the field of environment, through describing their purpose and scope, and evaluating their effectiveness. The second is to examine possible areas for the further development of international environmental law, in the light of the need to integrate environment and development, especially taking into account the special needs and concerns of the developing countries. A lot of work has already been done for the first purpose alike by other organisations or institutions, such as the UNEP. A comprehensive and updated compilation of international treaties and agreements in the environmental field (UNEP G/C 16/INF. 4) was already available. Therefore the Secretariat of the AALCC is of the view that *the work to be done by Working Group III under this subject item should be largely action-oriented. The stress for the survey of existing agreements or instruments should be on the examination of and search for the ways and means for the further development of the international environmental law in the light of the need to integrate environment and development.* In this context one of the aims should be to find out the real reasons why States, particularly the developing countries did not sufficiently participate in certain multilateral conventions or treaties concerning the protection of the environment, and what could be done to increase their participation.

The AALCC, the membership of which mainly consists of the developing countries, may wish to address itself to these questions, as it has done recently in respect of the United Nations Convention on the Law of the Sea.

II. On the Range and Priority of the Survey

With regard to the range of the survey we agree on the proposal to cover not only legally binding agreements but also a number of instruments not legally binding because of their contribution or potential contribution to the development of international environmental law. We do believe, however, that *in order to avoid overgeneralization of the survey, proper distinction must be made between binding and non-binding instruments, between global and regional agreements.* Bearing in mind the limited time available before the Conference *it is neither necessary nor practical to survey all existing international agreements and instruments under the list. The first priority should be given to certain major global multilateral conventions that have the most significant impact on the protection of the global environment* such as the United Nations Convention on the Law of the Sea and Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal. It is further suggested that *different focus should be made on the different categories of the agreements and instrumens when they are evaluated. It seems to us the wider participation and more effective implementation might constitute the key elements in respect of the global conventions; in the case of the regional agreements the usefulness of reference to the other regions and the possibility of adopting similar agreements at the global level could be taken into due consideration. As regards the international agreements that have not yet become effective, attention should be paid to the promotion of the ratification and the entry into force of these agreements.*

III. On the Criteria for the Evaluation

The proposed criteria for evaluating the effectiveness of existing agreements or instruments and their overall contribution to the goal of sustainable development *might be too extensive and might cause serious confusion between the criteria for the effectiveness of an agreement evaluated* which are to be used to determine the extent to which the evaluated agreement is effective and *the specific items of the evaluation*, that is, the scope of the evaluation. It seems that most of the proposed criteria listed belong to the scope rather than the criteria for evaluating the effectiveness of existing agreements or instruments. Therefore we do not think it is appropriate to use the terms "criteria" to cover all the 30 questions listed thereof. Revision of the items listed may be required.

It is the view of the Secretariat of the AALCC that *the main criteria for evaluating the effectiveness of existing agreements or instruments and their overall contribution to the goal of sustainable development should be :*

(a) Whether or not and to what extent does an agreement or instrument under the evaluation meet the need to integrate the environment and development and is conducive to the promotion of sustainable development.

(b) Whether or not and to what extent does the agreement or instrument take into account the special needs and concerns of the developing countries.

(c) Whether or not and to what extent does the actual participation in the agreement or instrument reach the anticipated target set up by the agreement or instrument itself. In the case of multilateral convention, the extent to which developing countries participate in it and whether or not the convention includes adequate incentives to encourage the participation by the developing countries.

(d) Whether or not the agreement or instrument is implemented and complied by the participants. Are there appropriate mechanisms for the enforcement of the agreement and mechanisms for the settlement of disputes over the implementation ?

IV. On the Further Development of International Environmental Law

In this regard we consider that the suggested possible areas to be examined for the further development of international environmental law would be generally acceptable, with the following observations :

1. *The future law-making should be closely linked with the need to embody the principles contained in the Earth Charter/Rio Declaration* on Environment and Development *and to effectively implement Agenda 21,* taking into account the special needs of the developing countries.

2. Benefitting from the past experiences, it is important *to avoid the proliferation of new agreements or instruments without making concrete arrangements for their realistic implementation.* Much more attention in the future law-making process should be paid to bringing into force the existing international multilateral or regional treaties that have not yet become effective, and to expand the number of contracting parties, particularly the wider participation of the developing countries.

3. In considering further development of international environmental law, it would be very useful to *make the work of the UNCED associated with the work of the International Law Commission.* It should be recalled that at its 43rd Session, held in the Summer 1991, the International Law Commission considered issues to be included in its future agenda and recommended the inclusion of an item entitled *"Legal aspects of the protection of the Environment of Areas not subject to a National Jurisdiction (global commons)"* We appreciate this recommendation and hope the item will be included in the future agenda of the ILC. The AALCC might also wish to propose the inclusion in the agenda of an item entitled :

"Further Development of International Environmental Law in the Light of the Need to Integrate Environment and Development"

The Preparatory Committee for the United Nations Conference on Environment and Development might wish to make the following recommendations :

(a) Appreciates the recommendations of the International Law Commission, made at its 43rd Session (Summer 1991), to include the item, entitled "Legal Aspects of the Protection of the Environment of Areas not Subject to a National Jurisdiction (Global commons)," in its proposed items which might be asked to take up for consideration in the future;

(b) Requests the International Law Commission to place, as a priority, the proposed item concerning the protection of the environment on its formal agenda, and take it up as a priority item;

(c) Further requests that the consideration of the subject item should be taken in the light of the need to integrate environment and development, and in accordance with the Earth Charter/Rio Declaration on Environment and Development, to be adopted by the UNCED in June 1992;

(d) Requests the Secretary-General of the UNCED to give the International Law Commission the relevant information and materials on the deliberation of the subject by the sessions of the PREPCOM for the UNCED."

The Secretariat of the AALCC wishes the Committee to examine this proposal at its 31st Session, scheduled to be held in Islamabad in January 1992, and make a decision on it.

4. It is also strongly recommended to *pay due attention to the Montevideo Programme* for the Development and Periodic Review of Environmental Law (1981-1991). The programme was largely implemented in the last decade. The formulation of a programme for the development of environmental law during the next decade (1992-2002) is now on the way. For this purpose a meeting of senior environmental law experts and an *ad hoc* meeting of senior government official experts in environmental law were successively held in July and October 1991. The PREPCOM for the UNCED, therefore, is requested to take into account the results of these meetings when it works out its own working programme on the further development of international environmental law.

V. Conclusion

The survey of existing agreements and instruments in the field of environment, and the further development of the international environmental law is an important item on the agenda of the third session of Working Group III of the PREPCOM for the UNCED. The AALCC is expected to address this item at its 31st Session, scheduled to be held in January/February 1992. *The proposed topics on which the Committee may focus would include : the purpose, priority of the survey; the basic criteria for evaluating the effectiveness*

of existing agreements or instruments; and the guidelines for the further development of international environmental law in the light of the need to integrate environment and development.

To facilitate the final preparation for the UNCED, the Secretariat of the AALCC suggests that *the deliberation of the subject item should be largely action-oriented.* The Committee is requested to formulate a common stand on the above-mentioned matters, and to make its own proposals to the Fourth Session of the PREPCOM for the UNCED.

Note on the Institutional Issues

(Item 4, provisional agenda, Working Group III, 4th Session of PREPCOM)

I. The items on the agenda

Among the agenda items which the Preparatory Committee (PREPCOM) for the United Nations Conference on Environment and Development (UNCED) must address is the important issue of institutional arrangements arising from the needs identified in consideration of the substantial issues and related matters. According to the terms of reference adopted by the PREPCOM, this issue has been contained in the agenda item of Working Group III, "other legal, institutional and related matters, as well as legal and institutional aspects of cross-sectoral issues, including those referred to Working Group III by Working Groups I and II and the plenary of the Preparatory Committee".

At the second session of the PREPCOM (March-April, 1991), the Secretariat of the Conference prepared a subject document entitled "Progress Report on Institutions" (A/Conf. 151/PC/36), for the consideration of Working Group III. There was, however, little discussion on the contents of this report due to the shortage of time. When the third session of the PREPCOM was held in August 1991, Working Group III had before it a new progress report (A/Conf. 151/PC/80) as an addendum to PC/36. These two reports provided a useful basis for the deliberation on the subject item.

During the August session, Working Group III generally and primarily examined the item. Substantial deliberation was, however, decided to be left to the next session, recognizing that the final agreements on specific institutional arrangements or rearrangements would have to await agreement by the PREPCOM on recommendation regarding the other issues being considered by Working Groups I and II and the plenary which would certainly give rise to a number of institutional proposals. It was also recognized that the extensive range of institutional issues involved in the UNCED process should be considered in the context of the broader need for organisational aspects of the economic and social and related fields of the United Nations system which have been the subject of a great deal of study and dialogue in recent years. In the latest episode the General Assembly at its resumed 45th session on 13 May 1991, adopted by consensus a resolution (A/Res. 45/264) on the subject. The resolution contains basic

principles and guidelines and certain measures for the restructuring and revitalization of the Economic and Social Council (ECOSOC). Issues relating to the composition of ECOSOC and the complex subject of the subsidiary machinery of both ECOSOC and the General Assembly as well as the review of the Secretariat will be dealt with at future sessions of the General Assembly. The Secretary-General was requested to submit a progress report on these matters to the General Assembly at its 47th Session (1992). The General Assembly itself is also scheduled to review in 1993 the whole subject of restructuring and revitalization of the United Nations in the economic, social and related fields. At the same time, it is equally important that the UNCED's recommendation on the institutional issues concerning the integration of environment and development would undoubtedly have a significant impact on the ongoing overall reforms of the United Nations as a whole.

In conclusion of the item, after discussion, the Working Group adopted by consensus the following decisions :

(a) takes note of the progress reports on institutions by the Secretary General of the Conference (A/Conf. IH/PC/36), (A/Conf. IH/PC/80) and Corr.1) and comments thereon.

(b) requests the Secretary-General of the Conference to prepare an updated compilation of institutional proposals made by delegations and others during the third session of the Preparatory Committee, including those made in Working Groups I and II and the plenary as well as the information that may be contained in national reports, regional preparatory meetings, with a focus on option for action.

The Working Group further decided to put the same item on its provisional agenda for its next (final) session, scheduled to be held in New York in March-April 1992.

II. Existing proposals on Institutional Mechanisms

Since the beginning of the preparatory process for UNCED, there have been advanced a number of proposals on the institutional mechanisms for the need to integrate environment and development. Most of them have concentrated on the inter-governmental mechanisms. The following is a summary of the main proposals contained in PC/80, which the PREPCOM may wish to consider :

- The establishment of a "Sustainable Development Commission" to which all United Nations bodies, agencies and programmes as well as "treaty" Secretariats involved in the area of environment and development would be accountable. It would meet annually and examine policies and programmes for promoting global action on environment and development and would be both a political deliberative body and co-ordinating mechanism for the UN system's activities in this area.

- The establishment of a high-level deliberative body at the political level which would provide a forum for overview and policy co-ordination of environmental issues and their integration with other major issues to which they relate in the security, economic, social, humanitarian and common areas. Some suggest that this be done through establishment of an "Environmental Security Council" or a Committee of the General Assembly, supplemented, perhaps by a special committee of the Security Council to deal with the issues which are security related. It is also suggested that these functions could be performed according to the Trusteeship Council a new mandate as the forum in which Member States exercise their trusteeship for the integrity of the global environment and commons.

- The creation of an "Economic Security Council" composed of around 24 members, representing all groups of Member States, as the centrepiece of the "Economic United Nations" parallel and equal to the "Political United Nations". The Council would be supported by an Interdisciplinary Central Secretariat with a large number of highly qualified experts and a number of smaller sectoral Secretariats maintained at the level of each of the agencies. The Council would bring together the competent ministers, depending on the problems on the agenda, and Central Secretariat would be led by a group of independent persons (commissioners).

- The creation of an "International Development Council" within the United Nations to meet as a high-level forum for Member States to discuss development issues and give overall policy guidance for UN operational activities for development.

- The revitalization of the Economic and Social Council. It is suggested that, in principle, most of the functions envisaged for the proposed new inter-governmental mechanisms referred to above could be undertaken by ECOSOC. In order to do so, there would have to be a very significant improvement in its credibilities and strengthening of its effectiveness. The subject of restructuring and revitalization of ECOSOC is now on the agenda of the General Assembly.

- The convening of a World Summit on Global Governance similar to the meeting in San Francisco and at Bretton Woods in the 1940s. To prepare the ground for such a Summit, it was suggested to establish an independent international commission on global governance, composed of individuals functioning in their personal capacities.

In addition to the above-mentioned proposals, there are a number of proposals related to the constructive changes of the Secretariat of the United Nations itself and those of its agencies and programmes. The report of the World Commission on Environment and Development, *Our Common Future*, points to the need for a high-level centre of leadership for the United

Nations system as a whole with capacity to assess, advise, assist and report on progress made and needed for sustainable development. That leadership should be provided by the Secretary-General of the United Nations— who should constitute under his chairmanship a special United Nations Board for Sustainable Development". The principal function of the Board would be to agree on continued tasks to be undertaken by the agencies to deal effectively with many critical issues of sustainable development that cut across agency and national boundaries. In this context proposals have also been made for the revitalization of the Environmental Co-ordinating Board.

During the last August Session, a few more concrete proposals were brought out, and attracted the attention of many delegations. They called for the institutional adjustments, including :

- A possible combination of existing ECOSOC Committees into a single inter-governmental Committee to deal in a comprehensive way with the more political aspects of environment and development;

- An annual joint (or combined) UNDP-UNEP Session on Environment and Development as part of the UNDP Council's agenda;

- A high-level effective coordinating mechanism for UN and related agencies and programmes, co-chaired by the UNDP Administrator and the UNEP Executive Director;

- Regionally and nationally focussed efforts built around or based on the existing UNDP Roundtable/World Bank Consultative Group of Donors and UN agencies.

Quite a few proposals focussed on the strengthening of the UNEP, which *inter alia* suggested :

- that UNEP be strengthened in its own right as the central agency in the UN system on matters of environment and development. Its operations should be strengthened and enhanced by provision of additional funds, recruitment of experts and improvement of its infrastructural arrangements;

- that an inter-agency linkage be strengthened through the creation of coordinational offices at the UNEP Headquarters for all UN agencies;

- that the membership of the Governing Council be increased to make it more representative at the decision-making level in accordance with UNEP's new status;

- that UNEP's role be strengthened in coordinating regional environmental centres to enable them respond to issues of development both in the developed and developing countries;

- that a mechanism for the prevention and peaceful settlement of

ecological disputes be established under UNEP and be located at its headquarters.

Deliberation on the subject continues. All the proposals mentioned above, however, need to be carefully examined.

III. Preparation for the AALCC's Common Stand

1. Dimensions and emphasis of the issue

As stipulated by the Statute of the AALCC, one of the main purposes of the Committee is to exchange views and information on matters of common concern having legal implications and to make recommendations thereon if deemed necessary. The Committee may, therefore, wish to consider this subject item of institutions related to UNCED, which is on the agenda for Working Group III of the PREPCOM, and to make efforts to form a common stand thereon. This would render valuable assistance to its Member Governments in preparing for the UNCED at its final stage.

It is the suggestion of the Secretariat that general dimensions and the emphasis in the Committee's consideration of this item would be placed on the following substantive aspects which seem to be the key elements for the complex institutional issues :

(a) Basic principles and guidelines to be applied to deal with the institutional mechanisms arising from the need to integrate environment and development;

(b) Framework of inter-governmental mechanism for the political deliberation and policy guidance in the field of environment and development;

(c) Framework of inter-agency coordinating mechanisms within the United Nations system; and

(d) Other major institutional arrangements such as strengthening of the UNEP and settlement of ecological disputes.

2. Basic Principles and Guidelines on Institutions

It should be recalled that the General Assembly, at its resumed 45th Session, adopted resolution 45/264 on the subject of restructuring and revitalization of the United Nations in the economic, social and related fields. The resolution contains 7 basic principles and guidelines for action. They are :

(a) Restructuring is primarily the responsibility of member States;

(b) Political will is an essential prerequisite for reform;

(c) The exercise should aim at achieving greater complementarity between the bodies and organs of the United Nations with the General Assembly;

(d) The preservation of the "democratic principles" in the decision-making process of the United Nations;

(e) The need to preserve and strengthen transparency and openness;

(f) The most efficient and effective use of the financial and human resources of the United Nations system in the economic, social and related fields; and

(g) Importance of the ongoing revitalization of ECOSOC.

We are convinced that the above principles and guidelines are of direct relevance to UNCED. They could be applied not only to the restructuring and revitalization of ECOSOC but also equally to the institutional arrangements of UNCED. AALCC may thus wish to request the PREPCOM to comply with these principles and guidelines in considering the institutional issues related to the UNCED.

In the context of the sixth principle on efficient use of financial and human resources as mentioned above, we further suggest that the PREPCOM should ensure that no proliferation of new institutions will take place. First of all, it should concentrate on the improvement and strengthening of existing institutional mechanisms in the United Nations system, and on enhancing their better cooperation and coordination. We, therefore, stand firmly by the idea that no new inter-governmental bodies should be set up, except by combining or transferring resources from existing bodies. It would be the most logical and efficient way to meet the need for the institutions by making full use of the existing financial and human resources.

Based on the above-mentioned guidelines, the AALCC may wish to call attention to ECOSOC and UNEP.

At the higher level, without prejudice to the jurisdiction of the General Assembly, the focus could be on the restructuring and revitalization of ECOSOC so that it may be enabled to serve as an inter-governmental forum in the field of environment and development, and under the authority of the General Assembly, to play a central role in policydeliberation. It is true that most, if not all, of the functions so far envisaged for the proposed new inter-governmental mechanisms referred to above are within the scope of ECOSOC, and could be undertaken by it if the necessary restructuring would be completed. So the importance of ECOSOC in the context of the UNCED should be underscored.

With regard to UNEP, as pointed out in paragraph 7, PC/80, it is widely recognized that an important result of UNCED is expected to be substantial strengthening of the mandate and capacity of the UNEP, which is mandated to be the coordinator of the environmental activities of the United Nations system. The Secretatriat of the AALCC is of the view that the building of a better coordinating mechanism in the field of environment and development should take the UNEP as its core, and such mechanism should be designed on the basis of strengthening UNEP. In principle, UNEP

should play a central role in overseeing the implementation of Agenda 21 and in coordinating the various activities of the UN system as a whole in the field of environment and development.

3. The Framework of Inter-governmental Mechanism

The framework of an inter-governmental political deliberative mechanism could be constituted in a two-fold process.

At the first primary process, the General Assembly, which has the broadest membership of States and to which ECOSOC, UNEP, UNDP and other parts of the United Nations system report, should remain in charge of overviewing global action in the dimension of sustainable development as suggested in resolution XX/228's description of the General Assembly as the appropriate political forum for discussion of international environmental policy. It is also the appropriate body where new global initiatives can be taken. For this purpose the principal function of the General Assembly in the political deliberation and policy guidance related to environment and development should be further enhanced and reinforced. In this context we suggest that a main Committee of the General Assembly be designated to be responsible.

Various ideas have been raised with regard to a further strengthening of the inter-governmental cooperation at the highest level. It has been suggested that a regular high level meeting, preferably at the Ministerial level, be instituted, which would give general policy guidance to the implementation of the objectives and action proposals of the UNCED and which would consider possible gaps. In our opinion, it is not necessary to create such a regular meeting at Ministerial level. It is better to leave the matter of a Ministerial meeting to the discretion of the General Assembly in the light of importance of the issues to be dealt with and the feasibility of convening such a meeting.

Under the General Assembly, a forum for more focussed deliberation may also be needed. That is to be the second-fold process. ECOSOC which is able to devote indepth discussion to the thematic issues, and in which most of the time environment and development aspects play a dominate role could be considered in this context. One idea that has been suggested is that a number of existing Committees of ECOSOC dealing closely with related matters could be combined into a more comprehensive Committee to deal with environment and development. Reference could be made in this regard to the Committee on New and Renewable Sources of Energy, the Committee on National Resources and the Committee on Science and Technology for Development. The task of monitoring and reviewing the implementation of UNCED's results, including Agenda 21, could be entrusted to this Committee. We consider the idea as a positive one. We also underscore the importance of wider involvement and participation of the developing countries, and the democratic principle of decision-making in the proposed Committee. The proposed combined Committee could have the title of "The Commission/Board on Sustainable Development".

Furthermore, to facilitate the deliberation of the more technical aspects of environment and development, a special advisory group could be established under the direction and supervision of the proposed "Commission on Sustainable Development". The advisory group would be composed of a number of individual experts, mainly drawn from the human resources of UNEP and UNDP, the main tasks of which would be to consider, from the technical perspective, the questions referred to it by ECOSOC and its responsible Committee, and make recommendations thereto, as appropriate.

In short, the basic framework of the inter-governmental mechanism would be formed with a two-fold structure. At the first level, the General Assembly itself and one of its main Committees as well as a possible irregular higher-level meeting at the Ministerial level are envisaged. At the second level, ECOSOC in general, the "Commission on Sustainable Development" a new more comprehensive inter-governmental Committee which would be a restructured combination of several existing Committees of ECOSOC, in particular, and a subordinate advisory experts group would serve as the Centre for the regular inter-governmental policy deliberation in the field of environment and development, and for overseeing the implementation of Agenda 21.

4. The Framework of the Interagency Coordinating Mechanism

To establish a more effective and efficient interagency coordinating mechanism in the field of environment and development is undoubtedly crucial in the implementation of Agenda 21 and other outcomes of UNCED.

In keeping with the guidelines mentioned earlier, the Secretariat of the AALCC should like to make the following proposals :

(a) The coordinating mechanism should cover not only UNEP and UNDP but also other relevant agencies or programmes involved in the environment and development, namely, all the related activities within the United Nations system.

(b) The coordinating mechanism should be formed with the UNEP as its core making full use of its facilities.

(c) A steering interagency Coordinating Committee might be created under the chairmanship of the UNEP's Executive Director, who should have the rank of Under Secretary-General of the United Nations, or under the co-chairmanship of the Chiefs of UNEP and UNDP, or other appropriate joint management arrangement. The Committee would be composed of the responsible high ranking officers from UNEP, UNDP the Secretariat of UN, the World Bank and other UN bodies involved in the area of environment and development.

(d) The Coordinating Committee would most appropriately be located in the headquarters of UNEP so that UNEP's facilities and expertise would be fully used. Thus UNEP itself would play a real central role in effectively coordinating the various activities related to environment and development within the United Nations system.

(e) The Coordinating Committee would have close ties with the Administrative Committee on Coordination (ACC) of the UN Secretariat, which is chaired by the Secretary-General and is currently responsible for coordination of environmental and developmental activities in the UN system. Thus a better cooperation and coordination could be created and maintained between the Secretariat and its agencies concerned in the field of environment and development.

(f) With regard to the relationship of the Coordinating Committee and the "Commission/Board on Sustainable Development", the former should function under the supervision of the latter, through which it would report on its work.

5. Other Major Institutional Mechanisms

In addition to the inter-governmental political deliberative mechanism and the interagency coordinating mechanism, certain institutional arrangements may be necessary to substantially strengthen UNEP in the field of peaceful settlement of international ecological disputes.

That UNEP should be further strengthened as the central catalyzing, coordinating and stimulating body in the field of environment within the United Nations system has been widely recognized. Now the question is how to achieve the goal. A number of ideas and proposals have been suggested. It is the view of the AALCC Secretariat that in this regard, the following key elements should be primarily addressed :

(a) *The mandate of UNEP*, as contained in Resolution 299, should be reaffirmed in the context of UNCED and the need to integrate environment and development. The strengthening of UNEP first refers to strengthening its mandate, purposes and functions. In this respect, we suggest that the mandate of UNEP in the areas of further development of international environmental law, coordinating activities related to environment and development within the UN system and the settlement of international ecological disputes and overseeing the implementation of Agenda 21, these and other responsibilities emanating from UNCED might be strengthened or added.

(b) *The leadership of UNEP*. To ensure a wider participation of the developing countries, which is crucial to the performance of UNEP's mandate as enhanced in a satisfactory way, the Governing Council

of UNEP should be enlarged and its memberships increased so as to make it more representational at the decision-making level. The new memberships should be allocated on the geographical basis, taking into account the special needs of the developing countries. We also think that the rank of the Executive Director of UNEP should be at the status of the Under Secretary-General of the United Nations.

(c) *The Financial Basis*. To enable the UNEP to carry out its expanding mandate and responsibilities, it is requisite to call for the strengthening of its financial basis. This goal could be attained by enlarging its budget and opening up other additional financial resources besides voluntary contributions.

(d) *The Coordinating Mechanism*. To ensure that UNEP is capable of taking the responsibility for coordinating environmental activities within the United Nations system, a more effective and efficient coordinating mechanism should be established, the framework of which has been outlined above.

(e) *The capacity of UNEP*. Besides above elements, the improvement of UNEP's infrastructure and enhancement of its expertise should be addressed. We agree with the suggestion that UNEP needs greater expertise with respect to the developmental side of environmental questions, so that right from the outset environmental and developmental aspects of an issue could be fully considered.

We do believe that the strengthening both the human and material resources of UNEP would make it better able to assume the responsibilities which the UNCED might entrust it.

With regard to peaceful settlement of international environmental disputes, while we consider a more and effective use of the International Court of Justice, the Permanent Court of Arbitration and other international arbitration institutions very important, it is also worth envisaging a possible special environmental tribunal within the mandate of UNEP or the Commission on Sustainable Development.

IV. Conclusion

One of the important items on the agenda of Working Group III of the UNCED's PREPCOM is the institutional issues related to the UNCED. The forthcoming fourth session of the PREPCOM will substantially examine this item and make recommendations thereon to the UNCED. The AALCC is expected to consider the issue before the fourth session of the PREPCOM and to formulate a possible common stand/position on the subject-matter during its 31st session to be held in Islamabad in January 1992.

In this context, the Secretariat of the AALCC suggests that the Committee's consideration of this item be concentrated on the areas proposed by the Secretariat in Part III of this note. The ideas and proposals contained in

this Note might be regarded by the Member States of the Committee as a useful basis for their consideration.

Finally, it is further expected that the Committee would focus attention on the options for action. The conclusions and decisions made by the Committee would be submitted to the PREPCOM for UNCED so that the Committee may make its further contribution to the solution of UNCED's institutional issues.

BACKGROUND

Thanks to the initiative taken by the Government of Malta, the General Assembly at its forty-third session, while considering the item entitled "Conservation of climate as part of the heritage of mankind", recognised that climate change was a common concern of mankind and determined that necessary and timely action should be taken to deal with climate change within a global framework.[1] Subsequently at its forty-fifth session, the General Assembly, during adoption of the resolution "Protection of Global Climate for present and future generations of mankind" established an Inter-governmental Negotiating Committee (INC) and entrusted it with the task of preparation of an effective Framework Convention on Climate Change, and any related instruments as might be agreed upon. It considered that the negotiations for the framework convention and the related instruments should be completed prior to the United Nations Conference on Environment and Development in June 1992. It authorised the establishment of an *ad hoc* Secretariat and set the tentative time-table and the venue of the meetings of the INC.[2]

Accordingly, the First Session of the INC was held in Washington from 4 to 14 February 1991. The Committee elected Mr. Jean Ripert (France) as Chairman, Mr. Ahmed Djoghlat (Algeria), Mr. Ion Draghichi (Romania) and Mr. C.Dasgupta (India) as Vice-Chairmen. Mr. Ion Draghichi (Romania) was elected also as Rapporteur. It adopted the rules of procedure and the guidelines for negotiations and established two Working Groups.[3]

The guidelines for the negotiations, among other things, provided that the funding commitments, mechanisms and means for transfer of technology to developing countries, as well as matters concerning international scientific and technological co-operation should be an integral element in the negotiations. Further, "the final agreement on the Convention should cover in an integrated manner all areas of common concern, including, *inter alia* : (a) emissions, (b) sinks, (c) transfer of technology, (d) financial resources and funding mechanisms for developing countries, (e) international scientific and technological co-operation, and (f) measures to counter the effects of climate change and its possible adverse effect, particularly on small island developing countries, low-lying, coastal, arid and semi-arid areas, tropical regions liable to seasonal flooding and areas prone to drought and desertification."[4]

1 United Nations General Assembly Resolution, 43/53 adopted on 6 December 1988.

2 United Nations General Assembly Resolution, 45/212 adopted on 21 December 1990.

3 *Report of the Inter-governmental Negotiating Committee for a Framework Convention on Climate Change, First Session*, Washington D.C. 4-14 February 1991 (A/Ac. 237/6).

4 *Ibid*, page 23.

As for the work of the Working Groups, the guidelines provided that it should be inter-related and integrated by the Plenary, and to achieve that, it was envisaged that the Working Groups would report regularly to the Plenary.

The Working Group I which is concerned with matters concerning commitments was requested to prepare a text related to :

(a) Appropriate commitments, beyond those required by existing agreements, for limiting and reducing net emissions of carbon dioxide and other greenhouse gases, on the protection, enhancement and increase of sinks and reservoirs, and in support of measures to counter the adverse effects of climate change, taking into account that contributions should be equitably differentiated according to countries' responsibilities and their level of development.;

(b) Appropriate commitments on adequate and additional financial resources to enable developing countries to meet incremental costs required to fulfil the commitments referred to above and to facilitate the transfer of technology expeditiously on a fair and most favourable basis;

(c) Commitments addressing the special situation of developing countries, taking into account their development needs, including *inter alia*, the problems of small island developing countries, low-lying coastal areas and areas threatened by erosion, flooding, desertification and high urban atmospheric pollution; also taking into account the problems of economies in transition.[5]

The task which was assigned to the Working Group II was to prepare a text on mechanisms and related to :

(a) Legal and institutional mechanisms, including *inter alia* entry into force, withdrawal, compliance and assessment and review;

(b) Legal and institutional mechanisms related to scientific co-operation, monitoring and information;

(c) Legal and institutional mechanisms related to adequate and additional financial resources and technological needs and co-operation, and technology transfer to developing countries corresponding to the commitments agreed to in Working Group I.[6]

The Second Session of the INC was held in Geneva from 19 to 28 June 1991. The documents before the Session included a set of 25 informal papers submitted by various delegations including "non-papers", related to preparation of a framework convention on climate change.

5 *Ibid*, page 24.

6 *Ibid*

One of the items on the agenda was the election of the officers of the Working Groups. Inspite of hectic consultations, it had not been possible to achieve prior consensus on the designations of the Chairmen of the two Working Groups.[7] Ultimately, on the proposal of the Chairman, the Committee waived rules 40 to 50 of its Rules of Procedure and as an exceptional measure decided that the Bureau of each Working Group would consist of two Co-Chairmen and one Vice-Chairman. The Bureau of the two Working Groups were as follows :

Working Group I

Co-Chairmen :	Mr. N. Akao (Japan) Mr. E. de Alba-Alcaras (Mexico)
Vice-Chairman :	Mr. M.M Ould El Ghaouth (Mauritania)

Working Group II

Co-Chairmen :	Ms. E. Dowdeswell (Canada) Mr. R.F. Van Lierop (Vanuatu)
Vice-Chairman :	Mr. M. Sadowski (Poland)

Working Group I was allocated the item entitled "Elements related to commitments". Subsequently, issues concerning principles and definitions were also allocated to Working Group I. The Working Group I held extensive discussions on commitments and principles. It was agreed that the principles should be compiled under various headings and a draft proposal by the Bureau entitled "Draft compilation of Principles" was submitted for consideration.

Working Group II considered the question of legal and institutional mechanisms, including entry into force, withdrawal, compliance and assessment and review. Issues concerning legal and institutional mechanisms related to scientific co-operation, monitoring and information, additional financial resources and technological needs and co-operation, and technology transfer to developing countries were also considered.

INC Third Session, Nairobi

The Third Session of the INC was held in Nairobi, from 9 to 20 September 1991. Like the earlier two sessions, the Nairobi Session was also attended by a large number of delegations both from the developed and developing States. Among the AALCC Member States which attended the Session included :

7 In the course of the discussions in the Working Groups, some delegations had raised the question of designation of Rapporteurs for each Working Group. The Chairman, however, did not consider it necessary.

Bangladesh, Botswana, China, Cyprus, Egypt, Gambia, Ghana, India, Indonesia, Iran (Islamic Republic of), Japan, Jordan, Kenya , Kuwait, Malaysia, Mongolia, Nepal, Nigeria, Pakistan, Philippines, Republic of Korea, Saudi Arabia, Senegal, Sierra Leone, Singapore, Sri Lanka, Sudan, Thailand, Turkey, Uganda and Yemen.

The representation of the United Nations and its specialized agencies and other Inter-governmental Organisations was less as compared to the Geneva Session. The Asian-African Legal Consultative Committee (AALCC) was the only Inter-governmental Organisation participating from the Asian-African region. The Non-governmental Organisations attendance was in a fairly large number.

At the first plenary held on 9th September, the Chairman of the INC, H.E. Mr. Jean Ripert, in his opening remarks stressed the progress made so far and underscored the need to accelerate the pace of the work during the Nairobi Session. The Executive Director of UNEP, H.E. Dr. Mostafa Tolba, Secretary General of WMO, Professor G.O.P. Obasi, the Deputy Secretary-General of the UNCED Mr. Nitin Desai and the Chairman of the IPCC, Prof. Bert Bolin, also made statements assuring fullest co-operation of their respective organisations to the success of the work of the INC.

The Nairobi Session of the INC marked the beginning of the 'business-like' discussions in both the Working Groups.

Discussions in Working Group I

Pursuant to a request made at the Second Session of the INC, the Bureau of Working Group I prepared new compilations of principles and commitments which were circulated in Document A/Ac. 327/Misc. 6 and 7. Subsequently, the Bureau submitted document A/Ac. 237/Misc. 9 which had been prepared with the aim of simplifying the compilations contained in the above documents. It was agreed that these documents would be considered as co-chairs texts and would be taken up together as a basis for discussion in Working Group I.

During the first week of the Nairobi Session, Working Group I held formal as well as informal meetings and completed first round of discussions on principles, general objectives, general commitments and specific commitments. In the light of views expressed and the amendments proposed by various delegations Co-Chairmen of Working Group I prepared a set of four papers which were circulated as Conference Room Papers (CRP). The document A/Ac. 237/WGI/CRP. 1 set out the texts of Principles; A/Ac. 237/WGI/CRP. 2 and Add 1 dealt with commitments on sources and sinks; A/Ac/237/WGI/CRP. 3 dealt with the commitments on financial resources and technology; and A/Ac. 237/WGI/CRP. 4 dealt with the commitments related to paragraph 6(c) of the Decision 1/1 of the INC.

During the second week, Working Group I held another round of discussions focussing on these Conference Room Papers. In the light of

amendments and alternative texts proposed by various delegations, the Co-Chairmen further revised these papers which were circulated to the delegations almost before the conclusion of the Nairobi Session.

The Working Group I agreed that the Bureau would further revise these documents and submit them for consideration at the fourth session in Geneva.

Discussions in Working Group II

Working Group II took as a basis for discussion the Single Text on Elements relating to Mechanisms contained in document A/Ac 237/Misc. 8 which was prepared by its Co-Chairmen. It was agreed at the outset that the document would be considered as a "Co-chair's text".

Section A of the Text dealt with the matters concerning Scientific and Technical Co-operation, Exchange of Information, and Research and Systematic Observation. During the discussion, besides drafting changes, suggestions were made to include a separate provision dealing with Education, Training and Public Awareness. It was agreed that the matters concerning exchange of information needed further consideration. It was also recognised that the framework convention envisaged a commitment by the parties on these matters. The issue whether or not a Scientific Organ – Scientific Committee should be established within the Framework Convention, was also raised.

Another issues which evoked a great deal of importance was the role and function of the Conference of the Parties. During the discussion, it was generally agreed that the Conference of the Parties will have the preponderent role in the administration, policy-making and effective implementation of the framework convention. Views were expressed that it might be little premature to enumerate its functions in detail.

A proposal which came to the force was the establishment of an Executive Committee to assist the Conference of the Parties. Since, this issue was raised for the first time during the Nairobi Session, the Co-Chair's text did not include any provisions in this respect. The Working Group II held only preliminary discussions.

With regard to the constitution of a 'Secretariat' as an organ, there appeared to be general consensus. The Conference of the Parties would designate or establish a permanent Secretariat. There were, however, different views in regard to the arrangements for the 'interim' period until the Convention comes into force. Whether an interim Secretariat should be designated or the *Ad hoc* Secretariat established by the INC could continue to function until the permanent one was established by the Conference of the Parties was the issue raised in this connection.

The discussions on final clauses proceeded smoothly. There was general agreement on almost all the provisions, except the one on entry into force. There was, however, no consensus over the number of ratifications required and the criteria of determining the entry into force of the framework

convention. In that context it was felt that the concept of "net emissions" needed further consideration.

Preliminary discussions were held on the issues concerning verification and compliance and the settlement of disputes. Divergent views were expressed on both the issues. Similar divergent approach was discernible with respect to the crucial issues concerning financial and transfer of technology mechanisms.

The Working Group II decided to request its Co-Chairmen to prepare a revised single text taking into account the views expressed by delegations and the various proposals submitted by them during the last three sessions and those which might be received by the Secretariat before 15 October 1991.

The foregoing account of the Nairobi Session briefly describes the progress of the work in the two Working Groups. It may not be out of place to make a couple of general observations on the negotiating process. First, the financial assistance to the participants from the developing countries has certainly encouraged their wider participation in the INC Sessions. However, most of the delegations from the developing States consist of a single person, and since both the Working Groups meet simultaneously, it was difficult for such delegations to follow the discussions closely.

Secondly, on agenda items like commitments and mechanisms, it is not practical to draw a line dividing the issues for consideration in the two Working Groups. Although it has been in accordance with the decision taken at the first INC Session, some ways should be found whereby the discussions could proceed without raising the issue of allocation of items between the two Working Groups. The Co-Chairmen of the two Working Groups have been presenting frequent reports on the progress of the work. That, however, needs to be supplemented by other means, perhaps a joint sitting of the two Working Groups could be arranged to discuss the common issues which may be identified by the Co-Chairmen of the Working Groups. It may take away some precious time of the Session but at least it would ensure a clear understanding of the issues involved and avoid duplicate discussions as noticed during the last two INC Sessions.

General Comments on the issues related to the Framework Convention on Climate Change

1. The seven and half months of negotiations in the INC spread over three sessions have brought into focus the complex nature of the issues involved in the preparation of the Framework Convention on Climate Change. While there is no dearth of sceptic opinion, one should not underestimate the achievements made in such a short span of time. Many International Conferences have had longer history and meagre achievements.

2. Whether the Framework Convention will be ready for signature prior to June 1992 UNCED Summit in Brazil perhaps cannot be predicted even by an astrologer. However, there is hope which must be kept alive until

that time. A realistic assessment of the situation is the need of the hour. The industrialized countries are mainly responsible for creating this problem of climate change which today has assumed a global dimension. That makes it imperative for both the developed and developing countries to find an agreed but effective solution.

3. Discussions during the last three INC Sessions have helped in crystallisation of views on many of the fundamental issues. It appears that undue emphasis is being given to the 'Package deal approach'. Instead, it might be desirable to follow a "gentlemen's agreement" approach. It would be more productive and promote confidence among all. In essence, the Framework Convention on Climate Change should be wider in scope but general in nature so that, in course of time, it could be strengthened by supplementary instruments.

4. During the last three INC Sessions, no concrete discussion has been held on the structure of the proposed framework convention. However, the INC decision 1/1 and the guidelines thereto indicate a broad pattern. As for the contents of the framwork convention, it appears that it might include a wide ranging Preamble, a set of definitions, an article on general objective, a set of basic principles, sections on general and specific commitments, a section on special situation, a set of articles dealing with institutional mechanisms including financial resources and technology transfer and final clauses.

5. So far no discussions have been held on definitions and the Preamble. The document prepared by the Co-Chairs of Working Group I set out a list of preambular paragraphs. (Document A/Ac. 237/Misc. 9). At the Nairobi Session, during the discussions on Principles, views were expressed suggesting incorporation of certain principles in the Preamble Section. It is hoped that during the INC's Fourth Session in Geneva, there will be some discussion on the preamble and the principles that may be incorporated therein.

6. It is generally recognised that the objective of the Framework Convention is to reduce and stabilize greenhouse gases in the atmosphere at a level which would prevent dangerous anthropogenic interference with the climate and thus minimise the risks to the environment and sustainable development of societies and economies. Further, in line with the comprehensive approach, it has been suggested that the Framework Convention should address all greenhouse gases, sources and sinks, including the adaptation measures. During the Nairobi Session, even after two rounds of discussions on 'general objective' no common text could be agreed upon. The text submitted by Co-Chairmen (A/Ac. 237/WG1.CRP 2.Rev. 1) still contains as many as eight alternative formulations.

7. It may be recalled that during the INC Second Session in Geneva, the Bureau of the Conference prepared a document which set out a compilation of 110 Principles compiled on the basis of informal and non-papers and the views expressed by various delegations during the Geneva Session. The Bureau was further requested to prepare a consolidated compilation of

Principles. Accordingly, the Bureau submitted two documents namely, A/Ac./237.Misc 6 and A/Ac. 237/Misc. 9. The document A/Ac. 237/Misc. 6 contained compilation of texts related to principles arranged under five main headings and a number of subgroups. A/Ac. 237/Misc. 9 contained a more condensed set of Principles.

8. Working Group I took both these documents as the basis for discussion. During the discussion, there were divergent views on the purpose of inclusion of the Principles in the text of the Framework Convention. It was argued that many of these Principles could be accommodated in the Preamble and in the section on commitments. On the other hand, while emphasising the need to include a set of Principles, it was felt that a section dealing with basic Principles would strengthen the commitments and lay the guidelines to implement those commitments.

9. Although there are divergent views in regard to the utility of inclusion of Principles in the text of the Framework Convention, it appears that ultimately an agreement might be reached to that end, and a section containing a short list of basic principles will find a place in the Convention. It should be pointed out that there are precedents where similar Conventions have incorporated a section on Principles. Besides, the Earth Charter under consideration in the UNCED and the draft text of the Framework Convention on Bio-diversity also contemplate inclusion of a section on Principles. Such a section in our view should be in the body of the Convention rather than in the Preamble.

10. The Revised Conference Room Paper (A/AC. 237/WG1/Rev. I) prepared by the Co-Chairs of Working Group I in the light of the two rounds of discussions held during the Nairobi Session of the INC, contains a long list of Principles. Endeavour should be made to identify the principles which command wide support keeping in view their legal nature. Since 'environment' in general and the climate change in particular, are evolving concepts embracing many scientific and technical matters, care ought to be taken when identifying such principles to ensure fairness and their linkage to climate related issues.

11. A tentative list might include such principles as common concern of mankind, sovereignty, equity, common but differentiated responsibility, right to development, sustainable development, precautionary principles, polluter pays principle, non-conditionality, special circumstances, comprehensiveness, liability and flexibility. There is a possibility that the inclusion of some of these principles might be the bone of contention or an agreement might be reached to elevate some as commitments and general principles. That would help shorten the list. While streamlining the texts of the agreed principles, it would be desirable to use precise legal language. The Declaration of the Second World Climate Conference may provide useful guidance in that context.

12. The section on 'Commitments' will form the fundamental part of the Framework Convention. Indeed, the success or failure of the negotiations

on the Framework Convention will largely depend upon how the issues related to commitments will be tackled during the forthcoming INC Session in Geneva and the subsequent one in New York. In spite of extensive and intensive discussions during the last two INC Sessions, divergent views could not be narrowed down.

13. It is generally agreed that the Framework Convention should stipulate two types of commitments, namely (i) general commitments, and (ii) specific commitments. The general commitments should be undertaken by all the parties to the Convention whether they are developed or the developing States. The specific commitments could oblige a group of countries, particularly the industrialised countries.

14. It is evident from the trend of the discussions in Geneva and Nairobi Sessions that it would be difficult to draw a line between the two types of commitments. There may be areas where the obligations envisaged within the general commitments would spill over to specific commitments. There is likelihood that if the specific commitments are framed in a diluted form, they could take the shape of general commitments. In the course of the discussions, interesting concepts such as 'common but differentiated responsibility' and a third category of commitments termed as 'unilateral commitments' have been introduced. These concepts need to be examined in detail. They appear to be simple but translating them into specific legal language and the subsequent implementation of the obligations envisaged in that context, would have implications which may go well beyond the imagination at this juncture of negotiations.

15. The text on commitments submitted by the Bureau of Working Group I prior to the conclusion of Nairobi Session is very elaborate. Section II contains a set of eighteen paragraphs with several alternative formulations for most of the paragraphs. Among other things, these commitments envisage immediate and significant emission reductions, energy conservation, rational use of energy and development, promotion of co-operation by means of systematic observations, research and information exchange. Section III dealing with differentiation of commitments draws a distinction between the developed and developing countries mainly on the basis of economic criteria. Section IV is concerned with specific commitments in respect of all sources and sinks, including preparation of national strategies and programmes.

16. During the discussion, while there were different views on many of these commitments, it was generally recognised that all such commitments should be realistic and strike a balance between environment and economic development. The target and time-table for emission reduction should be flexible. With regard to sinks, it was stressed that while dealing with the question of forests, the relevant measures should take into account the ongoing deliberations in the UNCED. It was also pointed out that since oceans play an important role in the Earth Climate System, their significance as sinks needs to be examined. It was recognised that as the indirect consequences of the measures would vary, there was the need to consider

'special situations' and the degree of vulnerability. The examples of the countries whose economy depended upon the production and exportation of fossil fuels and those countries which were not in a position to find substitutes for fossil fuels were particularly relevant. On the question of the preparation of national strategies and programmes, concern was expressed particularly by the developing countries. On the other hand, it was emphasised by the developed countries that the availability of the financial and technological resources was closely linked to the commitments to be undertaken by the developing States.

17. The commitments on technology co-operation and transfer are crucial elements of the Convention. The General Assembly resolution 44/228 laid down the guidelines for establishing an effective technology transfer mechanism. Further, INC decision 1/1 provided that such mechanism should be an integral part of the Framework Convention. During the last two INC Sessions, Working Group I held discussions on the commitment relating to transfer of technology and its mechanism was discussed in Working Group II. Divergent views on both the issues among the developed and the developing countries appear to be a great stumbling block. It has been suggested that the issues relating to technology transfer should be viewed in a broader perspective and should include technical co-operation as well. Such a notion would promote a 'shared partnership' between the developed and developing countries. No doubt, this is an ideal suggestion. However, the 'ifs' and 'buts' associated with this ideal cannot be overlooked. The developing countries need the support to develop their technological base and the 'best available' 'state of-art technology' which should be cost effective and environmentally safe and sound. Their primary need is 'soft technology' to build up their own capabilities for climate monitoring and assessment. The Framework Convention must ensure expeditious transfer of the relevant technology on fair and most favourable conditions. How far such terms will be "non-commercial' would depend on the source. Also consideration might be given to the issues related to Intellectual Property Rights. The UNCED and the INC on Bio-diversity are also engaged in similar discussion. It would be desirable to bring the INC discussion on the framework convention on climate change on similar lines.

18. A proposal has been made for the formation of a study group on technology transfer. It would be desirable to constitute such a group during the forthcoming INC Session in Geneva. The Study Group could identify the basic issues and suggest modalities for a suitable mechanism on this matter.

19. Issues concerning commitments and institutional mechanisms for the provision of adequate and additional financial resources to enable developing countries to meet incremental costs required to fulfil the commitments envisaged in the Convention are of crucial importance. During the INC Second and Third Sessions, discussions on these matters have shown a great divergence of views. Some of the developed countries have expressed general support. However, there is no express commitment in this regard.

20. The first and the foremost consideration, therefore, would be to identify ways and means to provide a new and additional financial resource as it has been realised that the existing financial resources available from the United Nations system and other regional and bilateral arrangements would not be adequate. Suggestions have been made for the establishment of a funding mechanism for the purposes of providing financial and technical co-operation, including the transfer of technologies to the developing country parties. Such a mechanism would include a multilateral fund composed of adequate, additional and timely financial resources apart from other means or arrangements of multilateral, regional and bilateral co-operation.

21. Another proposal provides for the establishment of a Climate Fund which would operate under the authority and guidance of the parties to the Convention. It envisages establishment of an Executive Committee consisting of members selected on the basis of an equitable representation of the developed and developing country parties to the Convention. Further, the Climate Fund would be financed by contributions from developed country parties on a grant basis, and according to criteria to be agreed upon by the parties. Its function should be to meet the costs for developing country parties to adapt and mitigate the adverse effects of climate change and the development and transfer of technology and knowledge relevant to scientific and technical research. Finally, the Fund would also meet the expenses concerning the secretarial services and related support costs of the Climate Fund

22. Another interesting proposal provides for the establishment of a clearing house system based on a bilateral agreement between countries and regional agreement between several countries. Accordingly, a clearing house would appraise and select projects for reducing emissions according to their cost-effectiveness and co-ordinate the funding of these projects. The net reduction in emissions resulting from any specific project would be credited to the country that contributes to the funding of the project and deducted from its national commitments. Thus, the transfer of financial resources between countries would be integrated in the system and would also facilitate co-ordination with other financial mechanisms. Another suggestion is that the recent initiative jointly undertaken by the World Bank, UNEP and the UNDP in establishing the Global Environment Facility (GEF) provides an innovative financing mechanism to help developing countries to meet their financing requirements to an extent.

23. During the discussions at the Nairobi Session, broadly two sets of views emerged and they represented the different viewpoints of the developing and the developed States on the financial mechanism to be incorporated in the framework convention on climate change. The developing countries insisted on the establishment of an independent fund democratically operated under the guidance and supervision of the Conference of the Parties. As for the sources constituting the fund, it was stressed that adequate, new and additional financial resources should be provided to the developing countries to meet their obligations as envisaged in the Convention.

24. The developed countries, on the other hand, considered that the GEF operated by the World Bank, UNDP and UNEP would provide the suitable mechanism. The GEF was a three year pilot programme which could be improved both in terms of augmenting its resources and governance structure by enhancing the role of developing countries in its decision-making. There was agreement to commit adequate and additional financial resources to enable developing countries to meet incremental costs required to fulfil their commitments. However, views differed on whether it should be 'full' or 'agreed' incremental costs. It was stressed that the concept needs to be defined in a clear and comprehensive manner.

25. Suggestions were made to examine the concept of an insurance scheme and 'Polluter Pays Principle' taking into account relevant precedents and the development of international law in these areas.

26. Working Group II has been discussing issues related to legal and institutional mechanisms, including *inter alia*, entry into force, withdrawal, compliance, assessment and review. With regard to scientific assessment and exchange of information there are fairly convergent views. A suggestion was made for the establishment of a Scientific Committee. In that connection, it may be pointed out that the basic foundation of the Framework Convention is the scientific assessment of the factors related to climate change. The Inter-governmental Panel on Climate Change (IPCC) which was established in 1988 jointly by the WHO and the UNEP has provided valuable guidance and support to the work of the INC. This fact was also recognised by the General Assembly when it constituted the Inter-governmental Negotiating Committee for the Framework Convention on Climate Change. It is not yet clear what role the IPCC would play after the completion of the work of the Framework Convention. It is, however, generally felt that till the Framework Convention comes into force, there will be need for assistance from the IPCC. Irrespective of such transitional arrangements, the need for a Permanent Scientific Organ cannot be overemphasised.

27. Consideration should also be given for the establishment of a specialised body like GESAMP, which is an advisory body consisting of specialized experts nominated by the sponsoring agencies (IMO, FAO, UNESCO, WMO, WHO, IAEA, UN, UNEP) which provides authentic scientific advice on marine pollution problems. Perhaps IPCC could be made more broad based and could be thought of assuming such a task. In both cases, the structure, role and functions of the two bodies would have to be considered in detail.

28. Preliminary discussions on verification and compliance indicate the sensitive nature of the issues involved. While there is a clear understanding that the thread of common but differentiated responsibility should run through various commitments envisaged in the Framework Convention on Climate Change, there are divergent views with regard to the achievement of this objective. The over-emphasis on compliance mechanisms may delay and perhaps defeat the very purpose for which such a mechanism is being advocated. The commitment to establish a national reporting system, sub-

mission of periodic national reports, subsequent review by a supra-national authority and sanctions for any infringement of the commitments, all viewed together pose problems of many and different kinds. The lack of infrastructure to prepare the national inventory and collation of relevant information would deter the developing countries to undertake the commitment to make a report at regular intervals. What would be the worth of the national report if there is no substantive information to present ? Would it not be a cause for complaint ? This may sound negative but certainly not illogical.

29. Views have been expressed outlining the compliance procedure and ways to deal with the complaints. Suggestions have been made that recourse should be considered to refer the disputes to the International Court of Justice or to an Arbitration Tribunal. Non-resolution of a complaint would not necessarily give birth to a dispute for which recourse ought to be made compulsorily to the highest judicial organ. Any compulsive dispute settlement procedure has remained an idealistic goal for long. The Framework Convention on Climate Change is not the kind of international instrument where such an idea could be translated into action. There is some gap in establishing the scientific credibility of the Climate Change Convention. It would be far from reality to think of filling that gap with legal firmness. The 1985 Vienna Convention on the Protection of the Ozone Layer follows a practical step by step approach in regard to the matters concerning dispute settlement. Consideration may be given to incorporating a similar provision in the text of the Framework Convention on Climate Change. It would save time and close the discussion on a crucial issue.

30. The question of submission of national reports and its review would also need to be considered in a more flexible way, particularly in the context of the developing countries. The cart cannot be put before the horse. It is encouraging to note that there is great enthusiasm to support the developing countries in the preparation of country-studies and the creation of necessary national infrastructure which would enable them to undertake any commitment to this effect. A suggestion has been made that as an alternative to 'Pledge and Review', unilateral commitments could be undertaken by the parties to the Convention. The intention to chase out the twin ghosts which haunted the Nairobi meeting from its very first day is laudable. However, one cannot rule out the possibility that these ghosts might enter Geneva in a different shape.

31. It has been suggested that apart from the general and specific commitments or obligations, the Convention could envisage a legal framework for States to assume unilateral obligations. Such unilateral obligations would be 'additional' and could be related to the availability of financial and technical assistance particularly for those developing countries which are not in a position to fully implement unilateral commitments without such assistance. Although it has not been stated categorically, it is amply clear that such financial and technical assistance could be given preferably to those countries which are prepared to undertake 'unilateral' commitments to prepare and submit national reports which will be subject to review by an international review body.

32. It may be a little premature to make any specific comments on the concept of unilateral commitments at this juncture. However, at least two general observations may not be out of place. First, it has been noticed that during the discussions on the commitment with regard to the financial and technical resources, developed countries have zealously conveyed their hesitancy in making any specific commitments. It would be interesting to note if they will be prepared to make any express unilateral commitments in that respect. Secondly, the developing countries, indeed the Goup of 77 as a whole, have made it very clear, leaving no ambiguity, that their national strategy could not be the subject of review by an international body. The fear of the twin ghosts entering the Conference Room in Geneva from the back door is not imaginary but real. May be, on the eve of Christmas, an angel enters from the front door and saves the Geneva Session from the impending deadlock on this issue.

BACKGROUND

Bio-diversity or biological diversity can be defined as the total sum of life's variety on this planet, expressed at the genetic, species and ecosystem levels.[1] According to scientists, this variety is now declining at an unprecedented rate as a result of man's activities. Estimates of the rate of loss are uncertain, but in the case of certain species of animals, recent projections indicate a loss of between 20 to 50 per cent of species by the year 2025 if the present trends continue.[2] The reasons for growing international concern about this loss include : (i) the recognition of the moral imperative of the other species to co-exist with man as in no case man can exist in isolation from the rest of the natural world; (ii) bio-diversity is perceived as having an enormous value, both actual and potential; (iii) the rate and extent of loss is uncertain, but appears to be very rapid; and (iv) the loss is irremediable. As a result, there is mounting public awareness and pressure in the developed countries about the need to conserve bio-diversity which is reflected in higher political priority being attached to conservation issues. In so far as developing countries, who happen to be the repository of bulk of the biological resources, their chief concern is that the commercial exploitation of their biological resources is proceeding without corresponding monetary compensation. They lack capacity as well as economic incentives to conserve biological diversity for future generations, but are forced to incur costs including foregone revenues from alternative uses where conservation is attempted. It is ironic that the areas of greatest biological diversity or importance are located in the developing countries and in areas most threatened by population pressure or instability. The developed countries can help themselves, but the developing countries need substantial help in the form of financial and technical assistance if they are to be able made to conserve their bio-diversity. Moreover, the resources needed to tackle such a stupenduous task are concentrated in Europe and North America, which together have roughly 78 per cent of the world's ecologists and 78 per cent of the world's insect taxonomists. Only 5 per cent of active researchers are found in Africa and South America and around 5 per cent in the Oriental tropics—all areas of great terrestrial bio-diversity.[3] In view of this situation, the conservation of bio-diversity has become a key planetary responsibility.

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1 U.K. Department of Environment. *Conserving the World's Biological Diversity : How can Britain Contribute?* (June 1991).

2 U.K. Department of Environment and the Department of Trade and Industry. *Conservation of Biological Diversity —The Role of Technology Transfer* (London, Touche Ross, July 1991).

3 Clark and Juma. *Biotechnology for Sustainable Development—Policy Options for Developing Countries* (African Centre for Technology Studies, Nairobi, 1991).

2. It was in recognition of this international concern that the UNEP Governing Council, in its decisions 14/26 and 15/34, stressed the need for concerted international action to conserve bio-diversity by *inter alia* formulation of a comprehensive international legal instrument, possibly in the form of a Framework Convention. The Governing Council, accordingly, established an *Ad hoc* Group of Experts on Biological Diversity which held its first session in Geneva in November 1988. The second session of the *Ad hoc* Group was convened in Geneva in February 1990 to advise further on the content of a new international legal instrument, with particular emphasis on its socio-economic context. The Group requested the Executive Director to begin a number of studies as a means of responding to specific issues in the process of developing the new legal instrument. These studies covered : bio-diversity global conservation needs and costs; current multilateral, bilateral and national financial support for biological diversity conservation; an analysis of possible financial mechanisms; the relationship between intellectual property rights and access to genetic resources; and biotechnology issues. The results of these studies were presented to the *Ad hoc* Group at its third session which was held in Geneva in July 1990. At that session, the *Ad hoc* Group advised further on, *inter alia*, the content of elements for a global framework legal instrument on biological diversity. The Group agreed that in dealing with the issues of costs, financial mechanisms and technology transfer, the broad estimates of costs involved should be accepted. However, the Group maintained that the complex issues involved in biotechnology transfer required further expert examination before the set of elements covering the issues could be agreed. Accordingly, an expert meeting of the open-ended Sub-Working Group on Biotechnology, which was held in Nairobi in November 1990, discussed issues relevant to biotechnology transfer, mainly the scope of biotechnologies to be included in the proposed Convention and ways and means for their transfer to developing countries.

3. The outcome of the three sessions of the Expert Group and the Sub-Group on Biotechnology showed that there was an urgent need for an international legal instrument for the conservation of biological diversity encompassing it at three levels : intra-species, inter-species and ecosystems, including both *in situ* and *ex situ* conservation. It was clarified that certain issues might need to be considered in separate protocols and that, if possible, these protocols should be negotiated concurrently with the Framework Convention. It was agreed that the proposed Convention should contain firm funding commitments. Biotechnology transfer was recognised as an important element in the planned instrument, with a potential to contribute to improved conservation and sustainable utilization of genetic diversity. The experts also agreed that the access to genetic resources should be based on mutual agreement and full respect for the permanent sovereignty of States over their natural resources and that an innovative mechanism that facilitates access to resources and new technologies should be included in the legal instrument.

4. Subsequently, the UNEP Governing Council by its decisions 15/34 and SS.II.5 appointed an *Ad hoc* Working Group of Legal and Technical Experts with a mandate to negotiate an international legal instrument for the conservation of biological diversity. At its first session held in Nairobi from 19 to 23 November 1990, the Group focussed on the elements for possible inclusion in a global Framework Convention on Biological Diversity. On the basis of its consideration of these elements the session requested the UNEP Secretariat to prepare a Draft Convention on Biological Diversity (UNEP/Bio. Div./WG. 2/2/2) which was presented to the second session of the *Ad hoc* Working Group held in Nairobi from 25 February to 6 March 1991. The second session discussed parts of the Draft Convention and identified a number of issues for further clarification with the help of notes to be prepared by the UNEP Secretariat. It made recommendations to the Secretariat on the revision of the Draft Convention. The Session also requested the Executive Director to convene a meeting of a regionally balanced group of lawyers (Lawyers' Meeting) to review the Draft Convention as revised by the Secretariat. The session also made important decisions on procedural and organizational matters; adopted its rules of procedure; elected its officers; established two sub-working group assigning each group with specific parts of the Draft Convention.

5. The UNEP Governing Council, at its sixteenth session, by decision 16/42 renamed the *Ad hoc* Working Group of Legal and Technical Experts on Biological Diversity as the *Inter-governmental Negotiating Committee (INC)* for a Convention on Biological Diversity clarifying that the change of name did not mean a new negotiating body nor affect the continuity of the process of elaborating the Convention. The INC consists of Working Group I and Working Group II. Working Group I has been assigned almost two-thirds part of the Draft Convention. Working Group II has been allotted specific draft articles which can be said to constitute the heart of the Convention. The successful elaboration of the Convention depends upon agreement being reached on the issues being tackled by Working Group II. These include access to genetic resources; access to and transfer of technology including bio-technology and funds and funding mechanisms. The impact of these provisions is likely to permeate the entire fabric of the Convention.

6. The Bureau of the INC is as follows :

Chairman	H.E. Mr. V. Sanchez (Chile)
Vice-Chairmen	Mr. V. Koester (Denmark) Mr. J. Muliro (Kenya) Mr. G. Zavarzin (USSR)
Rapporteur	Mr. J. Hussain (Pakistan)

Working Group I

Chairman	Mr. J. Muliro (Kenya)
Vice-Chairman	Mr. Pavel Suian (Romania)
Rapporteur	Mr. Nordahl Roaldsy (Norway)

Working Group II

Chairman	Mr. V. Koester (Denmark)
Vice-Chairman	Mr. A. Vaish (India)
Rapporteur	Mr. S. Samba (The Gambia)

7. The first session of the INC was held in Madrid from 24 June to 3 July 1991; second session in Nairobi from 23 September to 2 October 1991; third session in Geneva from 25 November to 4 December 1991; and the fourth in Nairobi from 6 to 15 February 1992 which has produced the Fifth Revised Draft Convention on Biological Diverstiy contained in Document No. UNEP/BIO.Div/N7-INC.5/2. This text will be taken up for final consideration at the fifth session of the INC scheduled to be held in Nairobi from 11 to 19 May 1992 just before the UNCED to be held in Rio in June 1992.

An Overview of the Fifth Revised Draft Convention on Biological Diversity

8. The conservation of biological diversity and the problems relating to climate change are among the most important environmental issues facing the world at the present juncture. The destruction of habitats is causing thousands of species to become extinct every year and the consequent loss of biological diversity is a main factor in what might become an irreversible climate change. Biological diversity, therefore, needs to be conserved so that mankind can derive maximum sustainable benefit from world genetic resources.

9. The international community has already enacted instruments to protect biological diversity, but they have proved to be inadequate. It is, therefore, essential to supplement such action by a global Convention which would enable the present generation to discharge its responsibility to future ones through preserving their heritage.

10. The Draft Convention on Biological Diversity, presently under negotiation, is intended to evolve a broad legal framework pooling together a wide range of actions at national and international levels for conservation and sound use of biological diversity that have hitherto been taken on a piecemeal basis. The Draft Convention originally consisted of 41 articles, but during the course of the ongoing intergovernmental negotiations, a number of articles, paragraphs and subparagraphs have been deleted, moved or rearranged. Consequently, the draft provisions have been renumbered to read sequentially. The Fifth Revised Draft Convention consists of a Preamble, 43 Articles and an Annex. Part I of the Annex lays down the procedure for arbitration of disputes which may arise between the Contracting Parties over the interpretation and application of the Convention. Part II of the Annex sets out the procedure for settling such disputes through conciliation.

11. The Preamble is intended to provide the *raison d'etre* for laying down a comprehensive legal regime for the conservation of bio-diversity at

national and international levels. Although the text remains unchanged, it may have to be altered in the light of the proposal submitted by the Group of 77 and China contained in Annex II to the text of the Fifth Revised Draft Convention.

12. Article 1 is addressed to setting forth the objectives of the proposed Convention. The main objective of the Convention is to conserve biological diversity for the present and future generations. The text remains in square brackets as the objectives of fair and equitable sharing of the benefits of research in biotechnology, provision of adequate, new and additional funding by the developed countries and the conditions for the transfer of technology related to bio-diversity conservation remain to be negotiated.

13. Article 2 enumerates the definitions of terms used in the Convention. This is essential to impart clarity and unambiguity to the Convention regime. However, the present text is based on definitions prepared by a Sub-Working Group of Working Group II, although they have not yet been considered by the Working Group II itself. Moreover, the Sub-Working Group of Working Group I has also prepared a set of definitions which are appended to the text of the Fifth Revised Draft Convention. Since these are yet to be considered by Working Groups I and II, Article 2 stays in square brackets.

14. Article 3 on Fundamental Principles is a crucial article since it is closely related to Articles 4 to 22 which frame obligations for the Contracting Parties. The extent of these obligations would depend upon the content of the basic principles incorporated in Article 3. The basic principles ought to be recognised in this article are that obligations should include *in-situ* and *ex-situ* conservation, intergenerational equity and responsibility, arrangements for the transfer of the technologies including biotechnology and the establishment of financial mechanisms. Since the precise content of these principles is yet to be worked out, Article 3 remains in square brackets.

15. Article 4 frames the general obligations of the Contracting Parties at national and international levels. It stays in square brackets because of alternative texts. Article 5 obligates the Contracting Parties to develop their national strategies, plans and programmes for conservation and sustainable use of their biological diversity. Article 6 requires the Contracting Parties to identify and monitor components of biological diversity important for conservation within their sovereign jurisdiction. Article 7 obligates the Contracting Parties to conserve their biological resources through *in-situ* conservation. Article 8 requires the Contracting Parties to adopt measures for the *ex-situ* conservation of components of biological diversity identified pursuant to Article 6, for the purpose of complementing *in-situ* measures. Article 9 makes compliance by developing Contracting Parties of the obligations contained in Articles 5, 7 and 8 conditional upon the provision of technical and financial assistance. Its text is still to be negotiated.

16. Article 10 requires the Contracting Parties to integrate conservation of their biological resources into their national decision-making and to

encourage cooperation between governmental authorities and private sectors. Article 11 on Incentive Measures obligates the Contracting Parties to provide effective social and economic measures to encourage conservation and sustainable use of biological diversity. Its text is also still to be negotiated. Article 12 enjoins the Contracting Parties to establish research and training programmes for the identification, conservation, management and sustainable use and development of bio-diversity and its components. Article 13 requires the Contracting Parties to promote general awareness about the importance of and the measures required for the conservation of bio-diversity. Article 14 obligates the Contracting Parties to monitor environmental impact assessment of their proposed projects or programmes that are likely to have significant adverse effects on biological diversity, whether within or outside the limits of their national jurisdiction and to avoid or minimize such adverse effects. Paragraphs (d) to (g) of this article dealing with the question of liability and compensation for damage to biological diversity are yet to be negotiated.

17. Article 15 requires the Contracting Parties to submit to the Conference of the Parties, the apex body to administer the Convention, inventories of species found in their jurisdictions which are threatened with extinction on a global level. Inclusion of an area on the List of Biogeographic Areas of Particular Importance shall require the consent of the concerned State. This article stays in square brackets because of alternative provisions. Yet another proposal is to delete the whole of this article alongwith Article 25 on Procedure for Global Lists.

18. Article 16 to 22 constitute the backbone of this Convention. Article 16 regulates access to genetic resources which has hitherto been relatively free. Although it requires Contracting Parties to create conditions to facilitate access to genetic resources by other Contracting Parties and not to impose restrictions that run counter to the objectives of the Convention, such access shall be granted on mutually agreed terms and subject to the prior consent of the Contracting Parties providing such resources. It also obligates Contracting Parties to carry out scientific research based on genetic resources provided by other Contracting Parties with their full participation, and where possible, in those countries. It also requires Contracting Parties to share the results of such scientific research and the benefits arising from the utilization of genetic resources with the Contracting Parties providing those resources. This article has evolved a great deal and has now reached near agreement with the outstanding divergence being limited to whether the benefits should be shared with the countries of origin or with the countires providing genetic materials.

19. Article 17 amalgamates in a single text the previous two Articles on Access to Technology and Transfer of Technology. It obligates each Contracting Party to undertake to provide and/or facilitate access for and transfer to other Contracting Parties relevant technologies including biotechnology. Such access and transfer has to be effected under (fair and reasonable) (fair and most favourable) (preferential and concessional) conditions. However,

for developing countries providing genetic resources, the access to and transfer of technology should be on mutually agreed terms (notwithstanding patents and other intellectual property rights). It also obligates the Contracting Parties to encourage their private sectors to faciliate access, joint development and transfer of technology for the benefit of both governmental institutions and the private sectors of developing countries. It also requires co-operation of the Contracting Parties to ensure that patents and other intellectual property rights do not run counter to the objectives of the Convention. The areas of disagreement have substantially been reduced on this article with the outstanding differences being limited to countries of origin and countries providing genetic resources and the question of patents and other intellectual property rights.

20. Article 18 on Exchange of Information which is closely connected with both Articles 16 and 17, enjoins the Contracting Parties to facilitate continuing exchange of information and specialized knowledge and to establish the necessary modalities therefor. The only point which remains to be settled in regard to this provision is whether such information should be limited to that which is publicly available.

21. Article 19 on Technical and Scientific Co-operation obligates the Contracting Parties to promote such co-operation in the context of conservation of bio-diversity. In particular, it enjoins the developed Contracting Parties to promote such co-operation with the developing Contracting Parties and to provide financial resources for this purpose. It also mandates the Conference of the Parties, at its first meeting, to consider establishment of a clearing-house mechanism to promote and facilitate such co-operation.

22. Article 20 is addressed to Handling of Biotechnology and Distribution of its Benefits. It requires the Contracting Parties to take appropriate measures to involve the participation of other Contracting Parties, especially the developing countries, in biotechnological research activities, which provide the genetic resources for such research. It also obligates the Contracting Parties to provide access on mutually agreed terms to the developing countries to the results and benefits arising from biotechnologies based on genetic resources provided by them. It also obligates the Contracting Parties to ensure that any natural or legal person under their jurisdiction who intends to introduce in another Contracting State genetically modified organisms which may have an adverse impact on the biological diversity or environment in that country, to obtain the agreement/consent of that Contracting State and to make available to the latter information about the safety regulations. This provision also seems to be largely agreed

23. Articles 21 and 22 are the key provisions on financial resources and funding mechanisms. Paragraph (1) of Article 21 requires each Contracting Party to provide financial support for the conservation of biological diversity in accordance with its national plans, priorities and programmes. Paragraph (2) has two alternatives. The first alternative requires the developed countries to commit themselves to provide adequate, new, and additional financial

resources to enable developing countries to achieve the objectives of the Convention. Alternative 2 requires the developed countries' commitment to provide financial resources to meet the agreed incremental costs to developing countries for fulfilling their obligations under the Convention or for achieving the objectives of the Convention. Paragraph (3) clarifies that compliance by the developing countries of the obligations stipulated by the Convention would depend upon the availability of the financial resources to be provided by the developed countries.

24. Article 22 contemplates the establishment of financial mechanisms to provide financial support to the developing Contracting Parties to enable them to realize the objectives set by the Convention. This has two alternative texts. Alternative I envisages the establishment of a Biological Development Fund and requires the developed Contracting Parties to contribute thereto on a mandatory basis according to a formula which is as yet to be worked out. The agency to administer this Fund or the manner in which it will be administered are as yet to be negotiated. The criteria and guidelines for access and utilization of the Fund are to be established by the Conference of the Parties at its first meeting. It also enjoins the Contracting Parties to consider strengthening existing financial institutions to provide financial assistance for conservation of biological diversity. Alternative I reflects the proposal of the developing countries.

25. Alternative II, which seems to reflect the position taken by the developed countries, contemplates the establishment of a fund or financial mechanism to provide resources to the developing Contracting Parties to enable them to meet the agreed incremental costs of complying with the provisions of the Convention. Contributions to this fund or financial mechanism have to be made by all the Contracting Parties which would be assessed according to a formula yet to be worked out. The proposed fund or financial mechanism will be administered by the existing Global Environmental Facility or a Multilateral Fund for Biological Diversity. The other provisions are identical to those in Alternative I.

26. It is worth noticing that Alternative II is subject to a number of conditionalities. Firstly, it envisages contributions being made to the proposed Fund by all Contracting Parties basing the assessment of all States on their GNP and transfer to biodiverse States on the basis of need. Secondly, it restricts financial assistance to the developing Contracting Parties to enable them to meet the agreed incremental costs which they would incur in complying with the provisions of the Convention. Thirdly, the developed countries propose that the Fund should be managed on the pattern of the World Bank which would ensure that they have a dominant role as major donor countries. These conditionalities point to the strategy of the developed countries to make the Third World countries to agree to an overall aid package through IMF-World Bank rather than a separate environment-related assistance fund, including the transfer of technology. Since this is being resisted by the developing countries, there is as yet no agreement on the content of Article 22. It should be noted that disagreement on the role of

GEF managed by the World Bank permeates the negotiations on Climate Change as well.

27. Article 23 deals with the question of relationship of this Convention with other existing international conventions in the field of conservation of biological diversity. It stays in square brackets presumably because it does not address the question of the relationship of this Convention with future agreements.

28. Articles 24 to 35 deal with the institutional measures for the Convention itself. These contemplate the establishment of a Conference of the Parties as the apex body to administer the Convention with the help of a Scientific and Technical Committee and a Secretariat.

29. Article 24 establishes the Conference of the Parties as an apex body to keep under continuing review the implementation of the Convention. Article 25 lays down the procedure for compiling and publicising the Global Lists of Biogeographic Areas of particular importance for the conservation of biological diversity. With the proposed deletion of Article 15 on Global Lists, this Article is most likely to be deleted. Article 26 establishes a Secretariat to service the Conference of the Parties. The text of this article is almost settled except for sub-paragraphs 1(b) and (c). These stay in square brackets because the role and character of the Scientific and Technical Committee is as yet to be agreed upon while Articles 15 and 25 on Global Lists are likely to be deleted. Article 27 envisages the establishment of a Scientific and Technical Committee. Its text is not yet settled as the role and character of this institution is yet to be agreed on. Article 28 requires the Contracting Parties to submit reports to the Conference of the Parties on the actions taken by them for the implementation of the Convention. The text of this article is almost settled. Article 29 makes the expenses incurred in respect of technical and scientific co-operation amongst the Contracting Parties in pursuance of Article 19 a charge on the proposed Biological Development Fund.

30. Article 30 lays down the dispute settlement mechanisms in relation to the Convention. The text has alternative provisions, but is most likely to be settled at the forthcoming session of the INC. Article 31 relates to the adoption of Protocols; Article 32 is addressed to the amendment of the Convention and Protocols; Article 33 deals with adoption and amendment of Annexes; Article 34 with the Right to Vote; and Article 35 with the relationship between the Convention and its Protocols. The texts of these provisions appear to be settled.

31. Articles 36 to 43 are in the nature of Final Provisions dealing with signature; ratification, acceptance or approval; accession; entry into force; reservations; withdrawals; depository; and authentic texts. There appears to be no controversy in relation to the texts of these articles.

32. After six rounds of inter-governmental negotiations, the provisions of the Convention still pending further negotiations and settlement include the Preamble, Article 1 on Objectives; Article 2 on Use of Terms; Article 3 on Fundamental Principles; Article 4 on General Obligations; an unnumbered article on Co-operation; Paragraph (2) of Article 5 on Implementation Measures; Paragraphs (d), (g), (k) and (i) of Article 7 on *in-situ* Conservation; Paragraph (e) of Article 8 on *ex-situ* Conservation; Article 9; Article 11 on Incentive Measures; Paragraph (b) of Article 12 on Research and Training; Paragraphs (a), (e), (f) and (g) of Article 14; Article 15 on Global Lists; the references in Article 16 on Acces to Genetic Resources to States of origin of genetic resources or States supplying those materials; the terms on which access to and transfer of technology is to be provided and the question of patents and other intellectual property rights in Article 17; the references to States of origin or States supplying genetic materials in Article 20; Paragraph (2) of Article 21 on Financial Resources; Article 22 on Financial Mechanisms; Article 23 on Relationship with other International Conventions; Paragraph 4(b) of Article 24 on the Conference of the Parties; Article 25 on Procedure for Global Lists; Paragraphs 1(b) and (c) of Article 26 on Secretariat; Article 27 on Scientific and Technical Committee; alternative provisions in Article 30 on Settlement of Disputes; and Article 40 on Reservations.

33. However, the crucial points in the on-going negotiations appear to be access to genetic resources (Article 16), access to and transfer of technology (Article 17) and financial resources and financial mechanisms (Articles 21 and 22). There is an intrinsic interlinkage between access to genetic resources and transfer of technology since the value of genetic resources depends on the technology to use them. For the most part, genetic resources are concentrated in developing countries and access to them has hitherto been relatively unrestricted whilst the technologies needed to exploit them are mainly with the industrialized countries which are protected by intellectual property rights. Intellectual property rights and commercial profits are more than mere concepts related to transfer of technology. They, in fact, represent a certain philosophy of life and the way the free market economies are organised. In view of the obstacles posed by the intellectual property systems to the diffusion of technology, the main fear of the developing countries has been that the developed countries want them to conserve their genetic resources in order to enable the developed countries to continue to exploit them. The developing countries have, however, become aware of the enormous value of this resource and would like to have a trade-off with the developed countries so that in return for providing access to this resource they are able to secure relevant technologies so as to be able to build their own capability to maintain *ex-situ* collections including the use of technologies such as cyrogenics (freezing techniques) and biotechnology. Biotechnology has tremendous potential for contributing to improved health care, food

production, environmental problems and industry in developing countries. In a broader context, developing countries today require transfer of technology for four major purposes : They are for cleaner and more efficient production, minimising energy requirement, waste and pollution, implementation of obligations under specific conventions or agreements and for mitigation of adverse impacts of environmental damage caused by the industrialized world, specially concerning waste disposal and management. If protection of the Environment is the supreme need of the hour, the concepts of intellectual property rights and commercial profits will have to yield place to professional, concessional and non-commercial terms to enable the developing countries to make the technological transition.

34. Another issue of vital importance relates to financial resources (Article 21) and financial resources mechanism (Article 22) for the application of the Convention nationally and internationally. While the developing countries want the developed countries to provide adequate, new and additional financial resources to enable them to achieve the objectives of the Convention, the developed countries are only willing to provide financial resources to meet the agreed incremental costs to developing countries of fulfilling their obligations under the Convention. The expression 'agreed incremental costs' has a dubious connotation in that it might imply supervisory role for certain developed countries in the management of the environment which the developing countries are bound to resist.

35. In so far as the proposed multilateral fund is concerned, while the developing countries would wish such a fund to be funded only by the developed countries, developed countries propose that such a fund to be contributed by both the developed and developing countries with the narrowed objective of meeting the agreed incremental costs to the developing countries of complying with the provisions of the Convention and managed by the Global Environmental Facility established by the World Bank about two years ago. The GEF provides grants or highly concessional resources to developing countries to meet the costs of well appraised conservation projects. The developing countries have, however, expressed apprehensions about the operations of the GEF. The negative features pointed out about the GEF operations are that the UNEP has refused to put projects to GEF because it does not have clear environment assessment criteria; that a panel of experts to help with environment assessment has been put in place, but developing countries do not have confidence in the panel – they are good scientists but have little knowledge of development; and that the World Bank seems to consider grants of less than US $ 5 million not to be worthwhile, whereas a lot could be done with smaller amounts of money. However, the positive feature about the GEF is that at least a mechanism has been set up and countries are contributing money. If GEF is to become the funding mechanism for the implementation of the Convention, it would be crucial to make it more transparent and specific.

36. Something seems amiss with the negotiating strategy adopted to tackle the issues arising from the Draft Convention. Parts of the Draft

Convention have been assigned to two Working Groups for negotiations. While Working Group I has been assigned almost two-thirds part of the Draft Convention, the crucial issues like access to genetic resources, access to and transfer of technology and financial resources and financial mechanisms have been assigned to Working Group II. Since progress in the Working Group II has been slow on account of the contentious issues before it, the progress of work in Working Group I has also been adversely affected. Moreover, since the Draft Convention itself suffers from being structurally haphazard with some of its provisions being duplicative, overlapping and misplaced, it has quite often resulted in shuffling of the draft provisions from one Group to another entailing waste of precious time. Furthermore, simultaneous negotiations proceeding in the two Working Groups has posed a problem especially for developing countries with a limited number of expert personnel which could mean not being able to be involved in some of the crucial negotiations.

37. Since the forthcoming session of the INC is the last opportunity to hammer out an acceptable Convention, it is felt that stage has now been reached when negotiations should proceed in a single forum so that the required momentum could be generated to finalize the Draft Convention before the June 1992 deadline. A single forum would quicken the pace of negotiations on the outstanding issues since negotiators would have an integrated look at the overall Draft Convention and a better perspective of the outstanding problems so as to able to find the corrective solutions. This, of course, does not obviate the need for active Bureau which should be able to propose concrete compromises when consensus seems to be emerging on some of the outstanding issues. The time available for the final session is indeed very limited and the luxury of rehashing well known old positions cannot be afforded. If success on this Framework Convention, which seems to be desired by both developed and developing countries, is to be achieved, it is necessary that a spirit of genuine accommodation is adopted by all participants.
