

VI. Responsibility and Accountability of Former Colonial Powers

(i) Introduction

The item 'Responsibility and Accountability of Former Colonial Powers' has been on the agenda of the Committee since the Twenty-ninth Session held in Beijing in March 1990. The subject was taken up following a reference made by the Government of Libyan Arab Jamahiriya. At that session, the Committee mandated the Secretariat to examine the legal issues involved in the consideration of the item. The Secretariat in consultation and co-operation with the Libyan Government officials prepared a study which focussed on the Libyan situation in the context of remnants of war and traced the development of international law in that respect. At the Thirtieth Session, held in Cairo, in April 1991, the item could not be discussed due to lack of time.

During the Thirty-first Session, held in Islamabad from 24 January to 1 February 1992, the item was taken up for consideration at the fourth Plenary Meeting. After a brief introduction by the Secretary-General, the delegates of Libyan Arab Jamahiriya, DPR Korea, Uganda, Palestine, Ghana, Egypt, Sierra Leone, Japan and the observer for Italy took the floor. The views expressed in these interventions differed in regard to approach and future course of action.

A view was expressed that since the Committee had exhausted its discussion on the topic, the time was ripe to affirm the AALCC's position in the form of a resolution stipulating among other things the norms of international law which should govern the responsibility and liability of the former colonial powers to pay compensation for the damage caused to those countries which were under colonial rule. Another view, while recognising the vastness of the subject, underlined a cautious approach to deal with the complex issues. Still another view questioned the legal basis

of such claims and advocated a bilateral approach to find a viable solution.¹

No consensus could be reached. However, the Committee in its decision² adopted on the concluding day reaffirmed the right of all peoples formerly under colonial rules to receive compensation for damage suffered as a result of colonial rule. It called on former colonial powers to fully and effectively co-operate with the former colonial people in eliminating the consequences of colonial rule and providing information on those exiled or detained during the colonial rule. Further, it called upon the colonial powers to return to their rightful owners the cultural heritage which was illegally plundered and removed by colonial Powers. Lastly, the Secretariat was asked to continue its detailed study on the topic.

In view of the time constraint and inadequate information, the Secretariat was not in a position to prepare a detailed study for consideration at the AALCC's Thirty-second Session. However, a brief note tracing the legal developments relating to return or restitution of Cultural Property to the Countries of Origin is set out in the next part of this Chapter.

Thirty-second Session:- Discussions

The Secretary-General while introducing the above item gave brief account of the background information and the progress of work in regard to this topic. He pointed out that since the Organization of African Unity (OAU) had a similar item under study as this one, the AALCC intends to work in consultation with the OAU. This proposal was placed before the Committee for its approval. Another issue raised in the Secretariat Note³ Return or Restitution of Cultural Property to the Country of Origin was taken up. It was stated that there existed already an international convention dealing with certain aspects of this matter, concluded in 1970 under the auspices of UNESCO and about 26 AALCC Member States were a party to this convention, individually. The Secretary General observed that there was a move to prepare another international convention as a supplement to the 1970 Convention. He expressed the view that these two conventions together may provide sound basis to establish legal claims in regard to the return and restitution of cultural property. Views of Member Governments were invited on this issue as well.

1. See the Report of the Thirty-first Session, held in Islamabad, from 25th January to 1 February 1992, PP (172-176). Also, the Verbatim Records PP (132-152).

2. See the Report of the Islamabad Session, Page 113. The delegation of Japan expressed their reservation on this decision stating that the subject was of highly political nature and was not appropriate to be dealt within a multilateral legal forum like the AALCC.

The **Delegate of the Libyan Arab Jamahiriya** referred to the Islamabad resolution, recognising the responsibility of colonial powers and the right of the people under colonialism to demand compensation, return of their cultural heritage and to obtain information about the destiny of those who had been exiled during the colonial period and observed that this subject was of great concern to the third world countries, as the OAU also has this topic on its agenda.

He recalled the statement by President Museveni during the inaugural session, emphasising the importance of this subject in particular and highlighting the fact that there were many people from Asia and Africa who had been transported or transferred to other countries to be used as slaves or forced labourers. Earlier Nigeria had also requested the colonial powers for compensation for using a large number of her people, taken as slaves by those countries.

The **Delegate of Japan** reiterated his Governments position on this item as stated in previous sessions and placed on record the reservation of his delegation to the text of the resolution. He stated that since the topic was of a highly political nature, it was not appropriate to be dealt with in a multilateral forum like the AALCC especially when the AALCC Agenda already is too heavy.

The Committee took note of the reservation of the Delegation of Japan and formally adopted the text of the decision, which has been reproduced herewith.

(ii) **Decision on “Responsibility & Liability of Former Colonial Powers”**

(Adopted With Reservation of Japan On 5.2.1993)

The Asian-African Legal Consultative Committee.

Taking Note of the Brief Note on the Responsibility and Accountability of Former Colonial Powers contained in Document No. AALCCXXXII\Kampala\93\9;

1. **Requests** The Secretary-General to hold consultations with the Organization of African Unity on the preparation of a joint study on issues concerning Responsibility and Liability of Former Colonial Powers.
2. **Calls upon** the Member Countries to provide relevant instructions to the Secretariat relating to their claims in regard to the restitution of their cultural property.
3. **Requests** the Secretariat to prepare an analytical study on the ongoing work in this field as well as the need for wider participation in the 1970 UNESCO Convention; and
4. **Decides** to include in the agenda of its Thirty-third Session an item entitled “Responsibility and Liability of Former Colonial Powers”

(iii) Secretariat Study : Responsibility and Accountability of Former Colonial Powers

Secretariat Note :

Legal Developments relating to Return or Restitution of Cultural Property to the Countries of Origin

Over the last two decades the issues concerning return or restitution of Cultural Property to the countries of Origin have been discussed extensively in the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the General Assembly of the United Nations.¹ It was under the auspices of UNESCO, that an International Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property was adopted in Paris on 14 November 1970. The UNESCO established an Intergovernmental Committee for Promoting the Return of Cultural Property to the countries of origin or its Restitution in case of Illicit Appropriation. This Committee since its establishment in 1980 has met seven times and discussed the issues concerning Promotion and the implementation of the 1970 Convention.

The United Nations has been seized with these issues since 1973, when at the initiative of Zaire, an item entitled "Return or Restitution of Cultural Property to the Countries of Origin" was placed on the agenda of the

1. The UNEP has briefly dealt with some aspects of Protection of cultural heritage. The International Law Commission has examined these issues in connection with its work on Succession to State Property. As for the regional organisations, the Council of Europe adopted the European Convention on the Protection of the Archaeological Heritage signed in London on 6 May 1969. This Convention was subsequently revised on 3 October 1985 and 16 January 1992 (Valetta Convention).

Twenty-eighth Session of the General Assembly. In the ensuing discussions, it was recognised that the Paris Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property could play a major role in combating illicit traffic in cultural property. Although the sphere of its application has been international, the main thrust of the Convention, however, has been to promote bilateral approach on this matter. There are several instances where the two Parties to the Convention through bilateral negotiations have either successfully resolved the issue or established the negotiating process.²

The Convention has also encouraged State parties to adopt or strengthen their national legislation with regard to Protection of their national heritage. It has helped wider dissemination of information among the State Parties and provided assistance to establish national inventory of the cultural objects of historical importance. More recently, two important initiatives have been taken to strengthen the implementation of the 1970 Convention. The first one is the preparation of a draft model bilateral treaty for the prevention of crimes against cultural heritage. The second one in cooperation with the International Institute for the Unification of Private Law (UNIDROIT), which envisages preparation of a preliminary draft convention on Stolen or illegally exported cultural objects with the objective to supplement the Private law provisions of the 1970 Convention.

As of today there are 71 States which are parties to the 1970 Convention. Among them are the following AALCC Member States: Bangladesh, China, Cyprus, D.P.R. Korea, Egypt, India, Iran (Islamic Republic of), Iraq, Jordan, Kuwait, Libyan Arab Jamahiriya, Mauritius, Mongolia, Nepal, Nigeria, Oman, Pakistan, Qatar, Republic of Korea, Saudi Arabia, Senegal, Sri Lanka, Syrian Arab Republic, Turkey and Tanzania.

The AALCC Secretariat is of the view that the Member States which had not yet become parties to the 1970 Convention may consider doing so. The Secretariat would continue to monitor progress in the UNIDROIT and other forums and prepare further studies without duplicating the ongoing work.

The Committee may also wish to consider establishing an Expert Group which could meet during the intersessional period to examine the relevant issues in the context of Asian-African region and make necessary recommendations which could provide inputs for the UNIDROIT and UNESCO meetings on this issue.

2. For instance negotiations between Turkey and Germany for the return of a Sphinx to Turkey and Islamic Republic of Iran and Belgium for return of archaeological collection from necropolis.

With regard to the matters relating to the responsibility of former colonial powers, the issues involved are complex and need to be examined extensively both from the historical perspectives and the emerging international law on State responsibility. Since the Organisation of African Unity (OAU) also has on its agenda a similar item, it would be desirable to work in concert with that Organisation. The recently concluded co-operation Agreement between the AALCC and the OAU provides a good basis to take such an initiative to prepare a joint programme on this agenda item.

VII. Work of the International Law Commission (ILC)

(i) Introduction

Under Article 4(a) of the Statutes, the Committee is required to examine questions that are under consideration by the International Law Commission (ILC) as well as to consider the report of the Commission and to make recommendations thereon to the Member Governments. This traditional function of the Committee had led to very close working relations between the Committee and the Commission. It has been the practice that the Chairman of the Commission attends the Committee's annual sessions. The Secretary-General also represents the AALCC during the annual sessions of the Commission in Geneva.

The cooperation between the Committee and the ILC during the last three decades has greatly strengthened. The AALCC has played a supportive role in fulfilling the ILC's mandate in the codification and progressive development of international law, through its constructive comments.

The member states of the Committee have been able to formulate common view point with regard to the ongoing process of reviewing and examining the customary international law which indeed, needed updating in many areas. The ties between the two organizations have been fruitful.

Over the years the Committee has endeavoured to promote and develop legal cooperation among its members with a view to harmonising their efforts not only from the perspective of the Asian-African states but also in ensuring that the interests and wider concerns of the AALCC member states are integrated in the formulation of international legal rules.

This item has regularly been taken up at the Committee's annual sessions.

The Commission held its Forty-fourth Session in Geneva from 4th May to 24th July 1992. There were five substantive topics on the agenda of this

session, namely :

- (i) The Draft Code of Crimes against the peace and security of mankind;
- (ii) The law of Non-Navigational Uses of International Water Courses.
- (iii) State Responsibility.
- (iv) International liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law; and
- (v) Relations between States and International Organisations.

Thirty-second Session : Discussions

At the Thirty-second Session of the AALCC the Chairman of the International Law Commission Mr. Christian Tomuschat recalled the long standing cooperation between the AALCC and the ILC and said that the ILC had at its Forty-fourth Session heard the statement of the Secretary-General of the Committee on matters of mutual concern. Referring to the work of the Commission at its previous session he said that it had three items on its agenda viz the Draft Code of Crimes Against the Peace and Security of Mankind, State Responsibility and International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law. The Commission had decided to accord priority to the question of the establishment of an International Criminal Court. The work on that subject, he said, had proceeded in two phases. In the first phase, the Plenary of the Commission had considered at length, the report of the special Rapporteur Mr. Doudou Thiam and after due deliberation had appointed a Working Group. In the second phase, the Working Group on the Establishment of an International Criminal Court under the chairmanship of Mr. A. Koroma had debated on several aspects of the question. The Working Group had considered such diverse issues relating to the establishment of the proposed court as the mode of its establishment, its jurisdiction, the substantive law applicable, the procedural aspects of the cases to be brought before it etc. At the end of the deliberations the need for the establishment of an International Criminal Court had been established and the Commission had endorsed the recommendations of the Working Group.

Professor Tomuschat sketched the progress of work relating to the other two items on its agenda viz. State Responsibility and International Liability for Injurious Consequences Arising of Acts not Prohibited by International Law. He pointed out that the Commission had not considered the two items : the Draft Code of Crimes Against the Peace and Security of Mankind and the Non-Navigational Uses of International Watercourses as the Commission awaited comments of Member States of the UN on the

draft articles adopted by the Commission on first reading at its Forty-third Session.

The **Delegate of China** stated that the establishment of an International Criminal Court (ICC) would be a desirable development in further strengthening international cooperation to curb and combat the scourge of international and transnational crimes. In his opinion, the establishment of such a court would forestall international disputes arising from diversity of national criminal jurisdictions. In his view however, there were numerous issues concerning establishment of an International Criminal Court including the need to uphold the principles of the Charter of the United Nations. He urged the International Law Commission to study all aspects of the question before adopting the text of the statute of the proposed International Criminal Court.

The **Delegate of Japan** said that his delegation believed that the ILC should place greater emphasis on progressive development of International Law rather than the codification of customary International Law. The Commission, in his view, would be expected to address the newly emerging legal issues of rapidly changing international society. He recalled in this regard that the AALCC at its Islamabad Session had requested the Commission to address the question of the legal regime of Environment.

Referring to the proposed International Criminal Court he said that its establishment was quite desirable. His delegation favoured the mandate given by the General Assembly to the Commission to proceed with the drafting of the Statute of an International Criminal Court. He urged the Commission to ensure that the procedure to be followed by the proposed court would ensure due process, independence and impartiality.

Turning to topic of State Responsibility, he expressed the hope that the Commission would expedite the drafting process. In his view, countermeasures would remain an effective instrument to deal with internationally wrongful acts in the absence of the enforcement mechanism of International Law and that it would be appropriate to regulate them rather than shying away. The extent to which countermeasures might be allowed to be resorted to would be related to the dispute settlement regime.

As regards the topic of International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law, his delegation noted that the Commission had decided that the topic should be understood as comprising both issues of prevention and of remedial measures and that the Commission would give precedence to considering the issue of prevention over the question of remedial measures. His delegation while recognising the importance of prevention believed that provisions relating to remedial

measures should form the core of the topic.

The **Delegate of Kenya** stated *inter alia* that the question of the establishment of an International Criminal Court was not merely an exercise in jurisprudence but was replete with many political questions. Such questions as the jurisdiction and competence of the proposed court could be resolved only after crossing the political hurdle. The universal acceptance of the statute of the proposed International Criminal Court was one of the political considerations, he said.

He raised points for consideration relating to the jurisdiction, rules of procedure and the substantive law to be applied by the proposed court. He emphasised that the jurisdiction of the court must be universally accepted and be applicable uniformly.

The **Delegate of the Democratic People's Republic of Korea** expressed the view that formulation of the proposed Code of Crimes against the Peace and Security of Mankind required to be dealt with continuously. It should ensure that the mechanism to check criminal acts should have a universal character.

The **Delegate of Syria** referred to the item "Non-Navigational uses of International Watercourses" on the agenda of the ILC which had not been given consideration by the Commission at its Forty-fourth Session. He emphasised the concern of his delegation on the draft articles on 'obligation not to cause appreciable harm', "obligation to cooperate"; and the "Regular Exchange of Data and Information" as adopted by the ILC on first reading. He pointed out that his delegation had also expressed their concern on the matter at the Islamabad session (1992) of the Committee.

The **Delegate of Tanzania** stated that the establishment of an International Criminal Court was an intricate issue which required consideration of some basic principles of criminal justice such as violation of a specific law, the maintenance of peace and preservation of law and order, the rules of procedure, the rules of evidence; the right to defence and above all questions relating to both original and appellate jurisdictions. He expressed the view that the Commission be given more time to further scrutinise these issues.

The **Delegate of the Libyan Arab Jamahiriya** expressed his reservation relating to the establishment of an International Criminal Court, its jurisdiction and competence and the law to be applied.

The **Delegate of India** stated *inter alia* that the Commission should carefully delimit the scope of the topic "International Liability for Injurious Consequences arising out of the Acts not Prohibited by International Law.

On the question of State Responsibility, the delegate stated that the Commission should carefully provide for the role of peaceful settlement of disputes, proportionality test, relevance of interim measures and the powers and functions of multilateral instruments and bodies in the maintenance of international peace and security of mankind.

At the end of the deliberations, the Plenary formally adopted its decision on this topic which has been reproduced herewith.

(ii) **Decision on the “Work of the International Law Commission at its Forty-fourth Session”**

Adopted on 4.2.1993

The Asian-African Legal Consultative Committee

Having listened to the comprehensive statement of the Chairman of the International Law Commission;

Further, having taken note with appreciation of the report of the Secretary-General on the work of the ILC at its Forty-fourth Session. (Doc. No. AALCC/XXXII/Kampala/93/1).

1. **Express** its felicitations to the International Law Commission on the achievements of its Forty-fourth Session;
2. **Acknowledges and appreciates** the contributions of the Chairman of the International Law Commission, Professor Tomuschat and thanks him for the lucid and succinct report that he has presented;
3. **Expresses** its appreciation to the Secretary-General for his report on the work of the International Law Commission at its Forty-fourth Session, and particularly the progress made on the question of the Establishment of an International Criminal Court;
4. **Requests** the Secretary-General to bring to the attention of the International Law Commission the views expressed during the Thirty-second Session of the AALCC; and
5. **Decides** to inscribe on the agenda of the Thirty-third Session of the Committee an item entitled “The Report on the work of the International Law Commission at its Forty-fifth Session”.