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Ko Swan Sik - M.C.W. Pinto - J.J.G. Syatauw

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FOUNDATION FOR THE DEVELOPMENT OF INTERNATIONAL LAW IN ASIA (DILA)

Governing Board

Mailing address:
52 Cesar Franckrode,
2717 BE Zoetermeer,
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General Information

Editorial address:
Asian Yearbook of International Law
c/o Erasmus University, Faculty of Law, Department of International Law,
P.O. Box 1738, 3000 DR Rotterdam, The Netherlands
Fax: 31-10-4532913

Contributions to the Yearbook

The *Yearbook* invites contributions in the form of:
- articles (5000 words or more) on topics of international law, either with special reference to Asia or of general relevance;
- (shorter) notes and comments;
- translated versions of articles originally written in a language other than English;
- materials in the field of municipal or international state practice of Asian states and organizations, with relevance to international law;
- data on events and incidents relating to Asia and Asian countries and with relevance to international law and relations;
- information on literature and documents (in any language) either concerning international law in Asia or concerning international law in general and published or issued in Asia.

Contributors of articles and notes will receive 25 offprints free of charge. Contributors of other materials will receive 10 offprints of the *Yearbook*-section in which their materials are included.

Submission of manuscripts and other materials

The regular schedule of the *Yearbook* provides for publication in December of each year.

The final date of submission of manuscripts for articles and notes is 1 January. The final date of submission of other materials is 30 June.

Submission of a manuscript should be accompanied by information whether it has been published, submitted, or accepted elsewhere, or whether it is a translation.

Submission of manuscripts implies the readiness to consider editorial suggestions for change and, as the case may be, to introduce revisions. It also implies the author's agreement with linguistic revision by native speakers so far as these services are available to the Editors.

Authors are requested to submit three copies of their manuscript typed and triple-spaced, or one copy accompanied by a floppy disk (typed on IBM-compatible computer, with operating system MS-DOS 3.2 or higher, and wordprocessing package Wordperfect 4.2 or higher). The *Yearbook*'s stylesheet may be obtained from the Editors.

Authors are requested to submit data about their current affiliations. No academic titles or past affiliations will be included in references.

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SELECTED DOCUMENTS

ABBREVIATIONS

AC	-	Appeal Cases
ACHPR	-	African Charter on Human and Peoples' Rights
ACHR	-	American Convention on Human Rights
AIR	-	All India Reporter
AJIL	-	American Journal of International Law
All ER	-	All England Reports
Brooklyn JIL	-	Brooklyn Journal of International Law
Cmnd	-	Command Papers (UK)
ECHR	-	European Convention on Human Rights
Eur.Ct.HR	-	European Court of Human Rights
EXCOM	-	Executive Committee of the UN High Commissioner for Refugees
FEER	-	Far Eastern Economic Review
GAOR	-	General Assembly Official Records
H.C.	-	House of Commons
H.L.	-	House of Lords
HRQ	-	Human Rights Quarterly
IALR	-	Iranian Assets Litigation Reporter
ICCPR	-	International Covenant on Civil and Political Rights
ICJ Rep.	-	International Court of Justice, Reports of Judgements, Advisory Opinions and Orders
ICLQ	-	International and Comparative Law Quarterly
IHT	-	International Herald Tribune
IJECL	-	International Journal of Estuarine and Coastal Law
IJRL	-	International Journal of Refugee Law
ILM	-	International Legal Materials
ILR	-	International Law Reports
Int'l. Org.	-	International Organization
IRAC	-	Indochina Resource Action Centre
Iran-U.S. CTR	-	Iran-U.S. Claims Tribunal Reports
J.Space L.	-	Journal of Space Law
JDI	-	Journal de Droit International
JENRL	-	Journal of Energy and Natural Resources Law
LegCoProc	-	Legislative Council Proceedings (Hongkong)
MLJ	-	Malayan Law Journal
ML Rep.	-	Mealey's Litigation Reports (Iranian Claims)
ODIL	-	Ocean Development and International Law
Phil.LJ	-	Philippine Law Journal
Phil.YIL	-	Philippine Yearbook of International Law
PLD (19..) S.C.	-	Pakistan Law Digest (19..) Supreme Court
QBD	-	Queen's Bench Division
SCMP	-	South China Morning Post
SCRA	-	Supreme Court Reports Annotated (Phil.)
Stan JIL	-	Stanford Journal of International Law

UDHR	-	Universal Declaration of Human Rights
UKTS	-	Treaty Series (UK)
UNHCR	-	United Nations High Commissioner for Refugees
UNTS	-	United Nations Treaty Series
VaJIL	-	Virginia Journal of International Law
Vanderbilt JTL	-	Vanderbilt Journal of Transnational Law
WLR	-	Weekly Law Reports (UK)
YBECHR	-	Yearbook of the European Convention on Human Rights
YCA	-	Yearbook Commercial Arbitration
ZaöRV	-	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

INTRODUCTION BY THE GENERAL EDITORS

ASIA AND INTERNATIONAL LAW

So vast is the continent we call Asia, so varied its physical and climatic features, and consequently so diverse the characteristics of its some 3 billion inhabitants, that the name should be understood more as a term of geography than one that is definitive in any cultural or political sense. For the Assyrians, conquerors of Mesopotamia some 30 centuries ago, the lands to the east were *Asu*, and those to the west, *Ereb*. Perhaps these names were the origins of what have come down to our own day through Greek and Latin approximations of *Asia* and *Europe*. It is doubtful if, before the rise of Greece and Rome had carried the term 'Asia' and its derivatives eastward, any peoples of the region actually called or thought themselves "Asian", or considered the adjective as implying anything approaching a sense of identity or cohesion.

Asia's western boundary is thought to run southward along the eastern foot of the Ural Mountains, to turn approximately southwestward thereafter to the northern shore of the Caspian Sea, and from there to run generally southwestward to the Caucasus Mountains which form the boundary until the Black Sea is reached. The Mediterranean coast is then the continent's limit, which thereafter runs south across the isthmus of Suez and along the coast of the Arabian Peninsula. Although the Pacific Ocean forms a natural boundary of the continental landmass to the east, the island arc which includes Japan, the Philippines and Indonesia, as well as many smaller archipelagos and island States, are an integral part of Asia.

For some 4 millennia of human history countries in Asia led the world in science, technology, the arts and social organization. For our purpose we may recall here the influence of such works as the Code of Hamurabi, the Books of Moses, the Laws of Manu and Confucius' plan for a Grand Union of Chinese States, on the origins and development of law, including that system which we now call "international law". In more recent times Asia, as the birthplace of all of the great religions, may be said to have offered the world the very foundations on which canons of civilized conduct have been constructed.

Material decline among Asian nations over the last 5 centuries coincided with the emergence of powerful nation States in the West. Commercial and naval rivalries among them gave rise to the need for mutually beneficial regulation of certain fields of inter-State activity and, over some 400 years, the gradual acceptance of the regulatory system which is generally recognized today as international law. While that system was constructed on foundations of principle which may be thought of as Asian in origin, the nations of Asia themselves had little or no role to play in its early formulation. Unable at that time to match the capacities of the European powers, they had become the objects of Western dominance, a dominance manifest most clearly in the colonial empires that existed until the end of the Second World War.

Established as commercial outposts, "colonies" were soon the means of economic exploitation and political hegemony by the relatively well-organized, efficient and stable forms of government developed in the West. For an Asian nation, its sovereignty forfeit, and its territory and resources subject to governmental controls designed to serve the economic and strategic aims of a dominant metropolitan power, the latter tended to become the focus of its economic and political activity in a relationship that was

essentially one of dependency. There seemed neither need for opportunity, nor indeed any legal basis, for the colonized nation to initiate and represent policies of its own concerning relations with other countries whether of the region or elsewhere. Exchanges among colonized Asian peoples, particularly in the field of law, failed to develop despite the fact that the colonial era did present them with a tool of incalculable significance: knowledge of the language of the metropolitan power which became the key to communication among subject peoples. Such exchanges as did take place were between the subject people and the metropolitan power, and had to do essentially with a legal framework decreed by the metropolitan power with a view to maintaining legislative uniformity as an aid to administering a far-flung empire, and less with the expression, discussion and mutual comprehension of each other's indigenous laws and policies.

Thus, among the participants in the early modern law-making conference - twenty-six at the Hague Peace Conference of 1899 and forty-three at its sequel in 1907 - only four were from Asia: China, Iran, Japan and Siam. Significantly, none of them had actually been colonized. Four Asian States were among the twenty-seven "Original Members" of the League of Nations (China, Hedjaz, Japan, Siam) (1920), and eight were among the fifty-one "Original Members" of the United Nations (China, India, Iran, Iraq, Lebanon, Philippine Commonwealth, Saudi Arabia, Syria) (1945). It was not until the programme of decolonization initiated within the United Nations had been substantially completed, that the great majority of Asian countries were able to participate fully as sovereign States in the formulation of the laws that were to govern their conduct internationally. While the number of States in the Asian Group at the United Nations varies slightly depending on the purpose for which it convenes, the current overall total number of States in the Group at the time of writing is forty-three out of a total of some one-hundred-and-sixty-five members.

The study of international law in Asian countries developed gradually under the impetus imparted by independence and sovereignty regained. In many Asian universities the subject is taught at degree level. The Foreign Ministries of many Asian governments are advised on international law questions by their own specialist departments, while others rely on specialists located in the offices of the government's general legal advisers. Nevertheless, it is only in a few countries that the level of interest and pool of expertise has been deemed sufficient to support a journal dedicated to international law.

FOUNDATION FOR THE DEVELOPMENT OF INTERNATIONAL LAW IN ASIA (DILA)

The *Foundation for the Development of International Law in Asia (DILA)* was established in the belief that economic and political developments in and among the countries of Asia had reached the stage that they would welcome and benefit substantially from a mechanism that would promote and facilitate precisely those exchanges among their international law scholars that had failed to develop during the colonial era; and that a regular and reliable source of information concerning international law as applied or interpreted by the States of Asia would be of interest to other States and contribute significantly to the progressive development of an international legal order.

The Foundation was established, in the words of its charter, for

"1) promotion of the study and analysis of topics and issues in the field of international law, in particular from an Asian perspective;

2) promotion of the study of, and the dissemination of knowledge of, international law in Asia;
3) promotion of contacts and co-operation between persons and institutions actively dealing with questions of international law relating to Asia."

The Foundation will be concerned with reporting and analyzing through informed discussion, developments in the field of international law relating to the region, and not primarily with efforts to distinguish particular attitudes, policies or practices as predominantly or essentially "Asian". If they are shown to exist, it would be an interesting by-product of the Foundation's essential function, which is to bring about an exchange of views in the expectation that the process would reveal areas of common interest and concern among the State of Asia, and even more importantly, demonstrate that those areas of interest and concern are, in fact, shared by the international community as a whole.

ASIAN YEARBOOK OF INTERNATIONAL LAW

The principal means by which the Foundation will seek to accomplish its aims and purposes, is publication of the *Asian Yearbook of International Law*. The Editorial Board will, in accordance with the general policy laid down in the Foundation's charter, "foster the free expression and exchange of views" and select relevant material impartially, ensuring that "the highest standards of scholarship, and moral and ethical values prevalent in Asia, are maintained". The *Yearbook* will be published in English, as being the international language most widely used and understood in Asia.

It is the aim of the General Editors to include in each volume of the *Yearbook*, in addition to scholarly essays of an analytical, descriptive or speculative nature, materials that are evidence of the practice of States in the region. To that end the General Editors are currently engaged in trying to establish a network of correspondents in Asian countries, who would keep them currently informed of significant developments, and provide them with the associated documentation on a regular basis. The problem of securing and maintaining the collaboration of scholars, all of whom are already fully engaged in routine pursuits of their own, is compounded by a variety of difficulties including variations in the efficiency of communications and the fact that no funds are available to compensate collaborators for their efforts, or even for expenses connected with providing information. Also to be included in the *Yearbook* are a chronicle of events relating to the region and of relevance from an international law perspective, notes on selected activities of regional and international organizations, and a survey of selected works in the field of international law.

1991 being the target year for production of the first volume, it did not prove feasible to complete in time the arrangements for acquisition of the material needed for appropriate coverage of all projected sections of the *Yearbook*. A certain unevenness in the range of material contained in each section of the first volume will be remedied in later volumes. Moreover, selection and presentation of material in some sections is at an experimental stage. The General Editors, aware of these and many other shortcomings, cordially invite comments and suggestions aimed at improving the *Yearbook's* structure, as well as its responsiveness to the questions it seeks to address.

THE FUTURE

It should cause no surprise, in a world brought closer together through advances

in global communications technology, that an Asian yearbook should be printed and published in northern Europe; or that a foundation for the development of international law in Asia should have its legal seat in a European country. The considerations which led to a European location for an Asian initiative, were essentially practical: the *Yearbook* and the DILA Foundation were ideas that had originated among a group of international law scholars from Asian countries resident for the time being in the Netherlands, and were developed there over several years in close consultation with other international law specialists in Asia and elsewhere. The Governing Board of the Foundation, chosen eventually from among them, readily agreed that the aims and purposes of the Foundation were more important than the location of its legal seat; that to have the *Yearbook* published without undue delay was more important than the place of its publication; and that, in the spirit of the enterprise, we should seize the moment and put our ideas into practice taking into account speed, efficiency and the quality of the product. Accordingly, the DILA Foundation was established as a non-profit *stichting* under the law of the Netherlands, and production of the present volume has been entrusted to the Dutch publishing house, Martinus Nijhoff.

Although the Governing Board and the General Editors are currently of the opinion that the aims and purposes of the Foundation are best served by the present arrangement, they do believe that it would be most appropriate if, in due course, the seat of the Foundation were to be moved to a country in Asia, in which event it may be expedient to produce the *Yearbook* there as well. The Foundation's charter makes specific provision for this eventuality.

ACKNOWLEDGEMENT

The Foundation would like to express its deep appreciation for the financial support for production of this volume of the *Yearbook* received from the Netherlands Ministry of Development Co-operation. Had it not been for the latter's understanding and vision, it would not have been possible to launch the *Yearbook* as planned. The Foundation's gratitude is also due to the Secretary-General of the Asian-African Legal Consultative Committee, *MR. F.X. NJENGA*, who gave the *Yearbook* enthusiastic support, and his consent to publication therein of a selection from the valuable studies and briefs produced by his organization.

Martinus Nijhoff have contributed to this endeavour far more than their well-known publishing expertise and outstanding technical capacities. Director *Alan Stephens* encouraged the Editors from the outset, and was with them all the way along the often difficult road to publication, always ready to assist in resolving problems as they arose. The Editors are very grateful to him, and to his associates, in particular, *Ms. Selma Hoedt*, who undertook the vital and time-consuming task of coordinating the technical services needed for production of this volume.

Finally, the Editors would like to thank very warmly those scholars from Asia and elsewhere who contributed articles or assisted in the production of other sections of the *Yearbook*. For all concerned it has been a labour of love, for which the appearance of this volume and a sustained faith in the future of the *Yearbook* are the only rewards. The Editors appeal for continued support as they commence preparation of material for publication in the second (1992) and third (1993) volumes of the *Yearbook*.

ARTICLES

CONDUCT OF FOREIGN RELATIONS, INCLUDING TREATY-MAKING POWERS, UNDER THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN*

Jamshed A. Hamid**

The age of autocracy and despotism in which Montesquieu lived convinced him that "when legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner"[1]. He therefore, propagated his theory of "Separation of Powers". Montesquieu's view that the maintenance of independence as between the legislative, the executive and judicial branches was a security for the people found favour with the framers of the American constitution who attempted to avoid concentration of power in any single branch of Government. However, Madison in the Federalist No. 47 pointed at the impossibility of absolute division of power and interpreted Montesquieu's declaration not to mean isolation of fully independent organs but that the various branches of government should be independent of each other "as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of unity and amity".[2] In short, neither Montesquieu nor the framers of the American Constitution contemplated complete isolation in the sense that one organ or the Government acted independently of the other, but both aimed rather at establishing a balance between the various organs or the Government in such a way as to enable each branch to have a check upon the other.

* The views expressed in this article are those of the author and do not necessarily reflect the policy of the Government of Pakistan.

** Legal Adviser, Ministry of Foreign Affairs, Islamabad.

1. This quotation is from FREUND, A. SUTHERLAND; M. HOWE and E. BROWN, *Constitutional Law: cases and other problems*, (4th edn.) p. 649.

2. *Federalist* No. 47 at p. 246.

Ko Swan Sik et al. (eds.), Asian Yearbook of International Law, 3–18.

The term "separation of power" has, in recent years, once again acquired importance with the constitutional lawyers. The framers of the constitutions in the newly independent states endeavoured to include this principle in their constitutions to impress upon the world that the system of government they were evolving in their countries was democratic in nature and guaranteed individual liberty as specified in various international instruments and jealously guarded by the countries of Western Europe and other democratic States. In these countries human rights have acquired a prominent place not only in their domestic laws but also form an important pillar in the formulation and conduct of their external relations. Consequently, the framers, in many cases, genuinely attempted to create a system of government where governmental powers and responsibilities are distinctly set apart. However, despite the best of intentions and a genuine attempt to achieve that objective, complete isolation was found impossible, particularly in countries with the Westminster system of government. While attempting to implement the doctrine of "separation of powers", in most cases the framers came up with substantially mixed-up principles and as a consequence of this we perceive a shift towards the constitutional doctrine of "checks and balances", particularly between the legislative and the executive branches of government. In fact, the authors of the constitutions in various countries found in the British system of "checks and balances" an equilibrium through the constitutional mechanism for the successful resolution of the political problem of relationship between the legislative and executive organs of the government. In past practice, therefore, we see the evolution of a system in which there are separate organs or institutions of the government performing distinct functions assigned to them under the constitution but instead of competing with each other they share the powers and endeavour to accommodate each other through comity between the co-ordinate branches. The object to establish a mechanism where all powers were not concentrated in any single branch of government was achieved to a large extent and the system the framers of the constitutions came up with saw to it that while different organs performed different functions they were not wholly unconnected with each other or performed functions in complete isolation.

In domestic affairs the framers of the constitution did not face any serious problems. Consequently, we see that in this field the constitutional provisions for sharing of responsibilities are reasonably clear. However, it is mostly in the field of foreign affairs that the constitutional provisions of most of the constitutions are somewhat cryptic and ambiguous. The constitution of the Islamic Republic of Pakistan, too, does not articulate this point. However, as we shall see later, it acts to our advan-

tage for the successful conduct of diplomacy that our constitution does not clearly define the roles of the executive and the legislature in the formulation and conduct of foreign policy.

"Foreign Policy" consists of a variety of acts and may include both formal and informal processes. It includes, in the first place, an informal conduct of relations on day-to-day basis which may include appointment of ambassadors to foreign countries, receiving ambassadors of foreign countries etc. In the performance of more formal acts, on the other hand, the appropriate governmental authority may conclude treaties with foreign countries. It is this latter category of acts, more formal in nature, that we will be discussing in this article in greater detail.

In most constitutions the framers have attempted to resolve this difficult and often extremely sensitive issue by attempting to designate an organ or a governmental functionary of the State to negotiate and conclude treaties with foreign government and take measures to implement them within the State. It would, therefore, be pertinent to examine relevant constitutional provisions of some other countries before an in-depth examination can be undertaken of our own constitutional provisions on this subject.

In most of the constitutions within a federal system of government the framers contemplated a superstructure of the central government with specific enumerated powers contained in the federal legislative list and residuary powers entrusted to the provinces. However, even under this type of constitutional arrangement the central government, in most countries, is given virtual monopoly of power in foreign affairs. This is also the case in Pakistan as we shall see later in this article when discussing the relevant constitutional provisions.

In contemporary times the complex world situation prevents watertight divisions of functions as there are twilight zones in which there might be overlapping of authority as well as functions. Conduct of foreign relations falls into this category or the twilight zone. It not only involves the routine day-to-day conduct of affairs with foreign countries like sending letters on auspicious occasions, conveying messages on national days, or on assumption of high offices like that of the Head of State or the Head of Government, or receiving foreign diplomats accredited to that country, but also performing more formal functions like negotiating and subsequently concluding treaties which may have far-reaching consequences for that State both internally involving its own subjects, and externally, in its dealing with other countries. Some of these treaties may require covering legislations for their implementation whereas others may involve the legislature for their ratification and their enforcement within the State.

At times a conflict may arise between the legislative and the executive branches regarding foreign relations, particularly in a parliamentary form of government, where there is a greater degree of accountability and responsibility to Parliament as the government's life depends on it. However, even in such a system, the role of the executive in foreign policy is inherently more prominent. In our own constitution one thing is clear in that the executive is not bound to consult the legislature[3] but may do so if it so desires in order to keep an equilibrium between the executive and the legislative organs of government.

Further, co-operation between the two organs is also essential as in certain cases assistance of the legislature may be necessary for the successful conduct of international relations. The foremost reason for this co-operation is that legislative power for all practical purposes is unlimited. Under the constitution of Pakistan the responsibility of the *Majlis-e-Shoora* (Parliament) to enact laws and sanction funds means that it can influence virtually any aspect of the conduct of our relations with other nations. If for practical reasons our constitution has entrusted the executive to conduct our relations with other countries it does not mean that the legislature has lost its authority to participate in foreign affairs. It is, therefore, quite frequent that the National Assembly and the Senate, either separately or in a joint session of the *Majlis-e-Shoora*, discuss the government's foreign policy in general or any specific aspects of it. Further, the executive carries out its constitutional function by seeing to it that the laws passed by Parliament are not in any manner infringed while accepting international obligations under a treaty.

I shall now examine the relevant constitutional provisions of a few other countries to give a rough idea of the diverse constitutional provisions and disparate State practices. Some countries empower a specific organ of the State to conduct relations with foreign countries including the conclusion of treaties whereas the constitutions of other States provide for legislative approval for treaties concluded by the executive. In Algeria, for example, the President of the Republic has the authority to define the policy of the government and direct, conduct and co-ordinate the external policy of the country in accordance with the will of the people as rendered by the party and expressed by the National Assembly. However, the President is empowered to sign, and after consultation [4] with the National Assembly, ratify and implement treaties and agreements. In Brazil the constitution gives the President the "exclusive

3. See PLD (1973) S.C. 563.

4. The common meaning of «consultation» is to ask for advice or opinion. It is more than a mere «notification» which may imply only conveying of information, and perhaps less than to seek advice and consent as in the United States which contains the need for approval.

power" to maintain relations with foreign States, but for the conclusion of international treaties and convention or for ratification of those treaties he has to seek the approval of the National Congress.

On the other hand, in some other countries legislative approval is required in certain types of treaties only. The Czechoslovak constitution, for example, makes the approval by the national Assembly a necessary pre-requisite to the validity of political treaties, economic treaties of general nature and such other treaties which require legislative cover for their implementation. However, in other matters the President represents the State in foreign relations, including negotiation, conclusion and ratification of treaties, not requiring legislative approval. The last category of acts can also be delegated to the government or even individuals.[5] Similarly in Denmark the King acts "on behalf of the realm in international affairs" except that where his actions relate to acquisition or cession of territory he has to seek the concurrence of the Parliament (Folketing) as this may involve modification of the constitution. This amendment of the constitution is outside the pale of authority vested in the monarch by the constitution.

The constitutional provisions referred to above provide for legislative approval for treaties generally or for certain types of treaties only. However, for the conduct of foreign relations on day-to-day basis the head of State is endowed with absolute powers by which he constitutionally represents the State in its external relations. The reason perhaps is that in routine matters, which may at times require urgent handling, the head of State alone can act quickly and informally and if the situation so requires discretely and secretly. In certain cases of urgent nature, if no action is taken with dispatch, no action may be taken at all and a State may suffer irreparable loss on account of the default. Parliaments, which meet only occasionally, can act in a formal manner either by enacting laws or by adopting resolutions. They cannot respond expeditiously in cases requiring urgent attention to meet certain emergent situations. For those reasons the head of the executive, who is always in session, is generally given "foreign relations power" in the State. This aspect has been reflected in most of the constitutions adverted to earlier. However, there is also a tendency, particularly in those countries which follow the British constitutional pattern, not to involve the legislature either for conducting foreign relations in general or for entering into binding treaties, unless the implementation of these treaties require a change in the law of the State, in which case the legislature is approached to extend legal cover for their enforcement. This point shall be dealt with later while discussing the con-

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5. Articles 42 and 62 of the Czechoslovak constitution of 1960.

stitutional provisions of the Constitution of the Islamic Republic of Pakistan, which follows the Westminster pattern. But before undertaking that exercise it would be essential to determine the status of treaties in the context of our domestic law as that would, to a large extent, determine the ambit of applicability and their implementation within the country.

In some countries once a treaty is ratified in accordance with the domestic procedures it becomes the Law of the Land. In a few other cases a treaty may even overrule the domestic law if, there is a conflict between the treaty obligations and the municipal law. In such cases it can be said that a treaty not only becomes a part of the municipal law of that State but in its application is considered even superior to the internal laws. In France, for example, "treaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of laws, subject, for each agreement or treaty, to its application by the other party" [6]. This means that a treaty may have superior status subject to reciprocity in respect of the application of the treaty by the other contracting State or States.

In the Federal Republic of Germany the Basic Law provides that "the general rules of international law form part of the Federal Law. They take precedence over the laws and create rights and duties directly for the inhabitants of the Federal Territory".[7] If a treaty is concluded in accordance with customary rules of international law it shall fall within the ambit of this provision.

In the United States a treaty concluded by the President is submitted to the Senate for its advice and consent and if it obtains the consent of the Senate by a two-thirds majority[8] it shall become "the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding"[9].

While in some States the constitutions or domestic laws provide that treaties concluded in accordance with the prescribed procedure form an integral part of their internal laws, or even superior to them, a majority of States, including Pakistan, do not follow this principle. The rationale for the last mentioned principle is that a treaty cannot be the source of law and, therefore, it cannot impose duties or confer rights on anyone except the State in its international relations. Consequently, parliamentary sanction in the form of a statute is necessary, not only for treaties requiring for their execution a change in the law but also for treaties the execution

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6. Article 55 of the French constitution of 1958.
7. Article 25 of the Basic Law (constitution) of the Federal Republic of Germany.
8. Article II Sec. 2 of the constitution of the United States of America.
9. Article VI Sec. 2. Ibid.

of which presupposes the grant to the competent executive authority of some new powers already possessed by it. In view of the above the legal pre-requisite for the implementation of treaties in Pakistan are summed up in the following paragraphs.

If a treaty concluded by the Government of Pakistan does not alter the municipal law and does not require the conferment of any legal power on the executive for its implementation, no legislation would be required as such a treaty is consistent with the existing laws and may be implemented without the umbrella of a covering legislation.

On the other hand, if the provisions of a treaty are at variance with the provisions of our domestic laws or expressly contemplate that its performance pre-supposes a change in any existing law, statutory cover would be needed and therefore, would necessarily require the involvement of the *Majlis-e-Shoora* (Parliament).

In view of the general observations expressed the foregoing paragraphs, I would now like to turn to the specific provisions of the Constitution of the Islamic Republic of Pakistan (1973)[10] which constitute the legal basis for the government's authority to conduct international relations in general and, in particular, to conclude treaties with foreign governments, after having concluded a treaty, to express the consent of the State to be bound by the international conventions, treaties, agreements, etc. and/or, having ratified the treaties, to take all necessary measures to implement them in Pakistan.

The 1973 Constitution of the Islamic Republic of Pakistan provides that:

> "[t]he executive authority of the Federation shall vest in the President and shall be exercised by him, either directly or through officers sub-ordinate to him, in accordance with the Constitution" [11].

To facilitate his work the constitution further provides that:

> "[t]here shall be a Cabinet of Ministers, with the Prime Minister as its head, to aid and advise the President in the exercise of his functions" .[12]

Further still, the constitution envisages that while conducting the business of the Federal Government:

> "all executive actions of the Federal Government shall be expressed to be taken in the name of the President who shall by rules specify the manner in which orders and other instruments are made and executed"[13].

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10. This includes the amendments carried in 1985 under the Eighth Constitutional Amendment.

11. Article 90 Clause (1) of the Constitution of the Islamic Republic of Pakistan.

12. Article 91.

The above noted constitutional provisions clearly provide that all executive actions are taken by the Federal Government which consists of the "President and the Cabinet of Pakistan" is the "Head of State" and represents "the unity of the Republic" and the executive authority also vests in him, all executive actions are taken in his name. As regards the conduct of external relations in particular the constitution specifically proves that:

> "subject to the constitution, the executive authority of the Federation shall extend to the matters with respect to which the *Majlis-e-Shoora* (Parliament) has power to make laws, including the exercise of rights, authority and jurisdiction in and in relation to areas outside Pakistan".[14]

These constitutional provisions, read in conjunction, provide the juridical source for the exercise of functions relating to foreign affairs in Pakistan. It equips the executive with the tools to conduct foreign relations, but keeping in view the federal character of our constitutional system it also clarifies that executive power must follow the legislative power in the sense that the federal government can act only in respect of those subjects over which the federal legislature (*Majlis-e-Shoora*) has either the exclusive or preferential constitutional power to legislate. Those subjects are enumerated in the Federal legislative list and the concurrent legislate list respectively. In the latter case although the provinces can also legislate the federal legislature takes precedence in case of a conflict of interest between the centre and the federating units. The Fourth Schedule, which deals with the Federal legislative list, includes "External Affairs" as a subject over which the *Majlis-e-Shoora* has the exclusive authority to legislate. This item is further elaborated and brings within its ambit "the implementing of treaties and agreements, including educational and cultural pacts and agreements, with other countries; extradition, including the surrender of criminals and accused persons to governments outside Pakistan" .[15]

In view of the constitutional provisions referred to above it is submitted that under our constitution it is the executive that represents Pakistan in its relations with foreign countries. This position was confirmed by the Supreme Court in giving its advisory opinion on a reference by the then President of Pakistan, Mr. Z. A. Bhutto, following the events that took place in Pakistan in December 1971 and the circumstances in which Bangladesh emerged as an independent country. The Government of Pakistan was confronted with the question whether or not to accord recognition to this erstwhile part of Pakistan which, as a result of Indian intervention

13. Article 99.

14. Article 97.

15. Item No. 3 in the Fourth Schedule of the Constitution.

had become Bangladesh. The Government of Pakistan at that time thought it wise to move a resolution in the National Assembly "which would express the opinion of the National Assembly of Pakistan that the Government may accord formal recognition to Bangladesh at a time when in the judgment of the Government such recognition would be in the best national interest". In its advisory opinion on this reference the Supreme Court held:

> "[t]hat the recognition of a foreign State is an Act of State falling exclusively within the executive competence of the Government but there is no bar to the executive seeking the approval in advance of the legislature of its contemplated acts. Indeed [...] a general practice seems to be growing up for the executive as a matter of abundant caution to get such approval of the legislature even for acts which are purely within its executive competence"[16].

In fact tradition is crystallizing in Pakistan whereby the foreign policy is debated in both the National Assembly and the Senate either separately or in a joint session of the *Majlis-e-Shoora*. In recent months the opposition requisitioned several sessions of the National Assembly and/or the Senate to discuss government's foreign policy.

As regards what constitutes the "executive" under our constitution it is submitted that the powers of the Federation under the 1973 constitutional framework vest in the President of the Republic, although the constitution also provides that for the exercise of this power the President is dependent on the advice of the Cabinet or the Prime Minister, as the case may be. This position is reflected in Article 48 clause (1) of the constitution which lays down that "in the exercise of his functions, the President shall act in accordance with the advice of the Cabinet (or the Prime Minister)", although clause (2) mentions the exceptions. However, his functions relating to the conduct of foreign relations do not come within the exception contained in clause (2) of Article 48 which provides that "notwithstanding anything contained in clause (1), the President shall act in his discretion in respect of any matter in respect of which he is empowered by the constitution to do so, and the validity of anything done by the President in his discretion shall not be called in question on any ground whatsoever". The subjects in relation to which the President can exercise discretion are specified in the constitution. In the conduct of foreign relations the President has only limited discretion in cases such as declara-

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16. See PLD (1973) S.C. 563. In this opinion the Supreme Court upheld the views expressed in Halsbury's *Laws of England*, vol. II (3rd edn.) pp. 285 and 287, paragraphs 603 and 607.

tion of war, etc. [17], but in most cases he would be bound by the advice of the Cabinet or the Prime Minister, as the case may be.

Having established the constitutional power of the executive organ to conclude treaties it would now be appropriate to discuss the legally binding nature of treaties in our domestic law, and their implementation by the executive or their enforcement through the courts in case of failure on the part of the authorities to implement those obligations.

As pointed out earlier the power to enter into treaties vests in the executive. However, in the absence of an express provision in our constitution regarding the legal status of treaties in relation to our domestic law they do not become part of our domestic law and, therefore, in case of any conflict between any provision of the statute and our obligations under a treaty the statute shall prevail. In such cases, if Pakistan expresses its consent to be bound by a treaty through ratification or accession a covering legislation may be necessary either in the form of an overriding statute or as an amendment of the existing legislation or enactment of an enabling provision in an existing law, enabling the competent organ to apply an existing statute to situations envisaged in the treaty through an executive action. For example, as discernible from the earlier discussion, the executive organ has no authority to grant immunities from our laws under a treaty or otherwise, to any class of persons, who under the established law of the land are not entitled thereto. This would normally be possible only by a statute. This doctrine is based on the jurisprudential principle that creation of a new category of individuals who are placed outside the scope of the law of the land and to whom immunities should apply involves changes in the law which is outside the executive competence. Only legislature can change the law. Thus, if under a Pakistani law representatives of foreign State-owned corporations or officials of foreign governments on deputation in Pakistan are not entitled to immunity, then a treaty would not be able to confer the same upon them in a municipally binding manner. If this had not been the case, there would have been no legal necessity for the enactment of such laws as the United nations (Privileges and Immunities) Act 1948, and the Diplomatic and Consular (Privileges and Immunities) Act 1972. The prevailing legal position in Pakistan is that if the government desires to extend some or all the privileges and immunities mentioned in the first of the two legislative instruments mentioned above to the representatives or officials of any other international organization outside the United Nations system, then a notification will have to be issued in the official gazette under Section 2 of that Act extending its scope to such other organizations.

17. See Article 232 of the Constitution of the Islamic Republic of Pakistan.

Through this administrative mechanism the Government of Pakistan may clothe with immunity a person or a class of persons not normally entitled to it under the laws of Pakistan.

At times it is not necessary that all the provisions of a treaty much be given legal cover through an overriding legislation. Some of the provisions of the treaty may already have been covered by an existing legislative instrument whereas a few other provisions may be covered through minor amendments of some other related laws. Yet other provisions of the treaty may not require any legal cover as the same may fall within the ambit of the discretionary power of the executive and is capable of being implemented through an executive act. Thus in the Diplomatic and Consular (Privileges and Immunities) Act 1972 only those provisions of the Vienna Convention on Diplomatic Relations 1961 have been included in the statute which required legislative cover for their implementation. The provisions which could be implemented through amendments or minor changes in other relevant laws were excluded from the schedule annexed thereto.

For example, exemption from immigration registration of the diplomats was extended under section 6 of the Registration of Foreigners Act 1939. Under this section the Registration of Foreigners (Exemption) Order 1966 was promulgated which enumerated the persons to whom exemption applied. Exemption from registration under Section 3 sub-sections (e), (f), (h), and (j) applied to:

(e) the member of the diplomatic corps holding diplomatic passport and (i) their spouses and children (ii) servants (if they belong to the country of the mission);
(f) couriers holding diplomatic passports;
(h) (i) a Consul General, (ii) a Consul, (iii) a Vice Consul, and their spouses and children;
(j) "any foreigner to whom immunity from alien registration is granted under clause (d) of section 18 of the schedule to the United Nations (Privileges and Immunities) Act 1948 read with section 17 of the schedule to that Act".

As regards the freedom of movement of diplomats and their entry into and stay in Pakistan, the legal position is that all foreigners are governed by the Foreigners Act 1946 and the Foreigners Order 1951. Section 10 of the Act of 1946, however, gives the Federal Government the power to exempt from or modify the application of all or any provision of the Act of 1946 to any individual foreigner or any class or description of foreigners by an order issued by it. Consequently, the Federal Government may by an order exempt the application of the Foreigners Act of 1946 to diplomatic and consular officers and extend to them the freedom of movement

subject, however, to the reasonable restrictions imposed by the receiving State either in their (diplomat's) own interest such as the safety of the diplomats, or in its (State's) own public interest or its security. In such cases the receiving State can legitimately prohibit entry of diplomats to areas to which access is denied for reasons of security by declaring them as prohibited zones.

These are only a few cases cited for the purpose of illustration, in which the domestic laws give the executive the power to honour international commitments through executive directives as the enabling provision of the relevant legislative instrument cater for the situations envisaged under a treaty. It is, therefore, clear that if a treaty does not alter or modify or change the law, the powers of the executive under the constitution are unfettered. Art. 97 of our constitution clearly indicates that the powers of the executive are co-extensive with the legislative power of the Federation. While the executive cannot act against the provisions of a law, it does not follow that in order to enable the executive to function in relation to any particular subject there must be a law already in existence authorizing such action. However, legislation may be required where the constitution itself provides that the act can be done only by legislation, i.e. imposition of a tax or expenditure of money. Similarly, legislative cover would be necessary where the action amounts to amendment of an existing law.

Problems may also arise in cases where the constitution may vest in the executive the authority to act in certain spheres while the exercise of that authority might have the incidental effect of bringing about some changes in either the legal status of territories or the legal status of all or some members of their population, not because the treaty may have the effect of changing the domestic law, but because it might, when put in operation, have some legal consequences on certain aspects of the State. This, and the problems that the government may be faced with, are discussed in the subsequent paragraphs separately, namely (i) the case where the treaty has the effect of changing the status of the territory, and (ii) the case of imposing a Treaty of Peace.

In cases of treaties under which either a part of the territory is ceded or acquired, the question arises as to whether such treaties would require any legal cover for their implementation. The constitution defines territories of Pakistan as comprising territories known by their respective names and "such States and territories as are or may be included in Pakistan, whether by accession or otherwise". This is a residuary provision and may howsoever become included in Pakistan. In that event the inhabitants of that territory would become citizens of Pakistan from the date the President, by order, specifies that the inhabitants of the acceding ter-

ritories, by reason of their connection with that territory shall become citizens of Pakistan and such persons shall become citizen of Pakistan from the date of the order [18]. The procedure laid down by the statute is simple and merely provides that when such a situation arises the Federal Government may by notification in the official gazette, and on such terms and conditions as may be specified in such notification, apply all or any of the citizenship rules to persons who, by reason of their connection with any territory which may be incorporated in Pakistan, are to be citizens of Pakistan .[19]

On the other hand as regards the cession of a territory, the constitution is silent. It seems that where cession of a territory takes place the legislature may have to be taken into confidence, as it may, in certain circumstances, require legislative cover. Here two types of situations may arise.

One is where a part of the territory, which according to the definition in the constitution constitutes part of the territory of Pakistan, is ceded and where legislative cover may be required. This was the line of argument at the Supreme Court in its advisory opinion referred to earlier. The Supreme Court observed, *inter alia*:

> "[t]hough treaties relating to war and peace, the cession of territory, or concluding alliances with foreign powers are generally conceded to be binding upon the nation without express parliamentary sanction, it is deemed safer to obtain such sanction in the case of an important cession of territory" [20].

It is submitted that in the situation contemplated the legislature must be involved in all circumstances as cession of a part of the territory may in certain cases involve amendment of the constitution in accordance with the specified constitutional procedure. Here again we may be confronted with two types of situations.

The first type of situation that may arise is where boundary adjustments are carried out under a treaty in areas where no demarcation has ever taken place. This act of the executive may not require any covering legislation as it is not clear whether it has any affect on the territory of the State or not. In most cases settlement of boundary disputes cannot be held to be cession of a territory. Thus final demarcation of the boundaries with Iran and China did not need legal cover for their implementation. Neither was legal cover required for implementing the Rann of Kutch award.

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18. Section 13 of the Pakistan Citizenship Act 1951.
19. Rule 18 of the Citizenship Rules 1952.
20. PLD (1973) S.C. 563.

The other type of situation that may confront Pakistan is where a part of the territory, as defined in the constitution is ceded under a treaty. In such cases, the legislature will have to be involved as this act of the executive would, in fact, amount to an amendment of the constitution, which under the constitution of 1973 is outside the pale of the executive authority.

Another point that requires detailed consideration is whether the executive organ of the government can impose a treaty of peace on the people of Pakistan. In Pakistan, as already discussed, the Federal Government has the exclusive power to conclude treaties. Further, the constitution imposes on the Federal Government the obligation to take all necessary measures for the defence of the federation, or any part thereof, in peace or in war.[21] In this regard Article 245(1) provides that the "Armed Forces shall, under the direction of the Federal Government, defend Pakistan against external aggression or threat of war....". As declaration of war is the prerogative of the Federal Government (or more precisely the President) it can also be inferred that conclusion of peace treaties, which is an integral part of the conduct of the functions relating to foreign affairs, are also binding unless they require legal cover for any of the reasons discussed herein before. The Supreme Court in its advisory opinion referred to earlier held that "treaties relating to war and peace.....are generally conceded to be binding upon the nation without express Parliamentary sanctions" . Both[22] the Tashkent Declaration as well as the Simla Agreement were for all practical purposes peace treaties and neither of them required any legislative cover for their implementation.

It is clear that the executive may conclude and implement treaties without legislative cover which do not infringe upon domestic laws or are considered detrimental to public order. I now intend to briefly discuss the extend to which the court may apply treaties which do not conflict with out domestic laws while the subject-matter they deal with have not been covered by the municipal laws of Pakistan.

In our legal system, as is apparent from the earlier discussion, international law does not automatically form part of our domestic law. Consequently a treaty which has not been given statutory protection generally lacks the force of law in this country and, therefore, the courts are not legally bound to take cognizance of it. However, on the question whether they should or should not take cognizance of such treaties, there are two schools of thought.

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21. See item 1 of the Fourth Schedule of the Constitution of the Islamic Republic of Pakistan.
22. PLD (1973) S.C. 563.

One view is that a treaty should not be binding on the courts unless they have the legal cover. If the government, through an appropriate organ, did not take any action to make the treaty obligation legally binding it would not be appropriate for the courts to do so and thereby assume the role of the legislature. It would be wrong for the courts to do something indirectly which has not been done directly through the enactment of the law – a treaty to which the legislature has failed to attribute the force of law cannot be given that very same force by the judiciary.

The other school of thought base their argument on public policy and contend that a judge must give effect to a rule of customary international law and, therefore, it is incumbent upon him to ascertain the law as applied by other civilized nations. If a treaty is in conformity with the rules established in customary international law the court must consider the treaty either as a source or as evidence of customary international law provided that it does not violate the domestic statutory norms. This approach is also in accord with the public policy imperatives that customary rules of international law applied by the civilized States must be respected in deference to international comity.

As discussed in the foregoing paragraphs under our constitution the powers of the executive are co-extensive with the legislative powers of the Federation over which the *Majlis-e-Shoora* has the exclusive competence to legislate. Further, it has also been established that in our legal system, in case of any conflict between our laws and treaty obligations, the Courts shall apply the laws of the land. However, while it is clear that the executive cannot act against the provisions of any law for the time being in force in Pakistan, it does not at all follow that in order to enable the executive to function in relation to any particular subject or situation, there must be a law already in existence. As discussed earlier in this article, the constitution of the Islamic Republic of Pakistan gives the Federal Government ample space to maneuver while conducting its foreign relations. While it is true that the doctrine of the supremacy of the law denotes, *inter alia*, the overriding imperative to secure observance of the statute and the common law in all spheres, it is equally clear that there are spheres in which activities are reserved to other agencies including the executive, on which courts seek and accept guidance from the executive, particularly where the executive action in relation to the conduct of foreign affairs has legal implications. For example, the existence of a state of war has legal implications on whether a certain individual is a friendly alien or an enemy alien and the property owned by such person has to be given different treatment depending on whether a state of war exists or not; whether certain territory is recognised as an independent state and the decision of the executive one way or the other will have the legal

effect on whether or not to extend sovereign immunity to the State property or public actions; whether a particular representative is recognized as a diplomatic agent and the advice of the executive either way will have the legal consequence of determining whether he is entitled to diplomatic privileges and immunities or not. In all such cases the practice in Pakistan has been that the courts apply to the executive whenever they desire to know the factual position[23], and the advice of the executive authority concerned, in our case the Foreign Office, is usually considered as conclusive. In case of treaties concluded with foreign countries, if we invoke the above principle as an analogy, it would only be appropriate that while the courts should not apply treaties in complete disregard of our laws they should recognize the obligations incurred by the executive if no infraction of the laws results thereby. It would be highly undesirable that the courts should come to a decision which might embarrass the government with regard to the obligations which the Government of Pakistan may have incurred under a treaty. Entering into treaties with other countries falls within the ambit of the "Act of State" doctrine. Therefore, the counts can take judicial notice of such acts of State, and for this purpose, in any case of uncertainty, the courts may seek the necessary information from the appropriate governmental agencies, and the information so received should be conclusive [24].

It has never been my intention to pronounce on how our courts should act in cases where a treaty, entered into with foreign governments by the executive, has not been given statutory cover, and how the judiciary, when called upon to pronounce on the *vires* of such a treaty, should act. However, keeping in view international practice and our own limited experience in this field I may venture to briefly suggest certain guidelines on this subject.

I entirely support the principle of supremacy of our laws over any treaty obligation that we may incur in case of any inconsistency between the two. As a sovereign State our laws should prevail and, therefore, the executive, while negotiating a treaty or ratifying an international convention must first ensure that the obligations it is likely to incur thereunder must not in any manner infringe upon our laws or our legitimate national interests. However, in cases where there is no such conflict or inconsistency the treaty obligation must prevail and the judiciary should not feel shy in taking cognizance of the treaty provisions simply because there is no legal provision recognizing such an obligation.

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23. See the Civil Procedure Code.

24. See n. 16 *supra*.

DEVELOPING INTERNATIONAL REFUGEE LAW IN THE ASIAN PACIFIC REGION: SOME ISSUES AND PROGNOSES*

Patricia Hyndman**

1. INTRODUCTION

> "There are few human dramas more compelling, or more revealing of the troubled times in which we live, than the plight of millions of refugees around the glove. And there are few greater tests of the democratic and humanitarian ideals for which we stand than how we respond to the needs of the world's homeless." [1]

It is estimated that there are over 15,000,000 refugees in the world today.[2] Of this 15,000,000 approximately 6,000,000 are to be found in South and South-East Asia. There are approximately 2,350,000 Afghan refugees in Iran, 3,580,000 Afghan refugees in Pakistan, and 560,000 Indo-Chinese refugees in camps in different countries in South-East Asia.[3]

Refugees are people in particular need of international protection. By definition they are outside their own country, and, owing to fear of persecution, are either unable or unwilling to turn to its authorities for assistance. In addition they may not have complied with the entry requirements of the country to which they have fled. By the very nature of their circumstances they generally will not have obtained the relevant visas, and, most probably, will not enter the territory of the state in ques-

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** Associate Professor of Law, University of New South Wales, Sydney; Director, University of NSW Human Rights Centre; Secretary, LAWASIA Human Rights Committee.

1. Senator E. Kennedy, "Introduction" to *1980 World Refugee Survey* (U.S. Committee for Refugees, New York), p.5.

2. 1989 World Refugee Statistics in *World Refugee Survey–1989 In Review*, p.31.

3. Ibid.

Ko Swan Sik et al. (eds.), Asian Yearbook of International Law, 19–44.

tion at an authorised border point. They may not possess valid passports. As a consequence they frequently arrive in a new country illegally. Furthermore, the country in which they have arrived may, for various reasons, not welcome immigrants from the refugees' country of origin (for instance, they may be traditional enemies, as is the case with Cambodians seeking refuge in Thailand). Very often refugees may be stateless persons as well. Hence refugees are people generally in urgent need of assistance, yet there may be no State-authorities to which they are able to turn for help.

2. THE 1951 CONVENTION

Today the major international convention giving protection to refugees is the *1951 Convention Relating to the Status of Refugees*[4] as supplemented and made more relevant to modern conditions by its *1967 Protocol.*[5] As at early August 1990, 107 States were parties to either the Convention or to the Protocol, or to both instruments.

The 1951 Convention has three main functions. Firstly, it provides a general definition of the term "refugee", as contrasted with the early definitions which were related to specific events. Secondly, it contains the basic charter of rights afforded to persons who have been granted refugee status: it has been referred to as the Magna Carta for refugees. Thirdly, it contains provisions concerning the implementation of the Convention.

(i) *The definition of "refugee"*

Turning firstly to the general definition of "refugee", the Convention specifically provides that all those persons given refugee status under the earlier conventions are still be considered as refugees.[6] In addition, a general definition is provided – a refugee is a person who,

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, 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 is unable or owing to such fear, is unwilling to return to it..."[7]

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4. 189 UNTS No. 2545.

5. 606 UNTS No. 8791. The Protocol made certain provisions of the Convention more suitable to changed circumstances. Although most signatory States have acceded to both instruments, accession to the Protocol alone carries with it accession to most of the Convention Articles.

6. Article 1A(1).

It will be noted that several requirements must be met in order for a person to come within this definition. One is that the refugee must be "outside" his or her country of nationality of habitual residence. Many people may find themselves in refugee-like situations, and may have fled considerable distances, but if no border has been crossed they will not be considered to be refugees. An example of people in this situation would be the many displaced people in Vietnam during the 1970s. As long as a person is outside his or her country of nationality or habitual residence, it is not necessary that the departure was originally made for fear of persecution. It is possible to be already out of a country when the situation changes, and then, because of the changed circumstances to have a well-founded fear of persecution should a return be made to the country.

Another element in the definition is the requirement that the refugee must have a well-founded fear of "persecution". There is no generally accepted definition of persecution. This term would certainly cover loss of life or imprisonment for one of the reasons specified in the definition. To go beyond this is to enter an area of controversy. Clearly a person is not a refugee if that person is outside his or her own country simply because he or she is able to earn a better living in the new country. However, the definition may include the economic persecution of a particular class if this is done for the reason that the persons are members of that class. The persecution feared from the country of origin must be due to one, or a combination of, the causes specified in the definition – that is for reasons of race, religion, nationality, membership of a particular social group or political opinion.

In addition the fear in question must be well-founded. The decision as to whether there is a "well-founded fear" of persecution has both the subjective and an objective element.[8] The decision-maker must be satisfied that the person in question subjectively has a real fear. One person may have genuine fear when another, in similar circumstances, would not be so affected. Further, from an objective standpoint, it must be reasonable to have such fear.

Granting refugee status can be a delicate political matter. It can be seen as involving a comment upon the internal affairs of the country from which the person has fled and to amount, in effect, to a statement that

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7. Article 1A(2) of the 1951 Convention as amended by Article 1(2) of the 1967 Protocol, hereinafter referred to as the Convention definition.

8. A recent decision of the Full Court of the High Court of Australia, Chan v Minister for Immigration, 63 ALJ (1989) p.561, has altered the trend of recommendations of the Australian Determination of Refugee Status (DORS) Committee which prior to *Chan* had been to give an unduly restrictive interpretation to this phrase. See J. Crawford and P. Hyndman, "Three heresies in the application of the Refugee Convention", 1 JRL (1989) 155, and P. Hyndman, "Comment on Chan", 1 JRL (1990).

there may be reasons why people within the country fled could fear persecution on the grounds of race, religion, nationality, membership of a particular social group or political opinion. Because of the negative imputation which this carries, and the possible detrimental effect upon the relationship existing between the country of refuge and that of origin, many States, for considerations of a purely political nature, hesitate to grant refugee status to people who in fact quite clearly fall within the Convention definition. It has been said, for example, that this is why certain groups of applicants in the United States, Haitians for example, have experienced difficulties with their applications for refugee status made there.[9] Another consideration which can affect refugee status decisions is the apprehension that if this status is granted to an applicant of a particular nationality this may encourage, in anticipation of a favourable response, waves of asylum-seekers from the same country of origin to arrive at the borders of the receiving State. This may well be the reason why very few applicants from Sri Lanka have succeeded in applications for refugee status made in Australia.

The definition contained within the 1951 Convention, linked as is to specific causes, obviously does not cover everyone outside his or her country, in a situation of distress, and unable to return home. People may be unable or unwilling to return to their own country due to circumstances such as natural disasters – famines, floods or earthquakes or to man-made circumstances such as local civil disturbances and the consequent breakdown of food supplies medical assistance, transport facilities and normal civilian life. These circumstances, however, are not included within the criteria specified in the Convention definition and, without more, people in these situations will not qualify as Convention refugees

The 1951 Refugee Convention was drawn up primarily to deal with the situation of displaced people in Europe immediately after the Second World War, and to provide protection for those people. The States ratifying the Convention were anxious to make their obligations specific and to ensure that those obligations could not be extended indefinitely. Today, circumstances have changed and many people who need international protection of the kind provided by the Convention do not fall within the ambit of its definition. This can be graphically illustrated by examples from the Asian Pacific region. Hundreds of thousands have fled from Sri Lanka to escape the civil strife and the consequent disruption to normal life, thousands more are displaced within the country, many having fled from their homes in the north and east due to increased violence. People

9. See J. TENHULA, "Boat people flee Haiti to U.S.", *1980 World Refugee Survey* (U.S. Committee for Refugees, New York) p.52-54. For political reasons other applicants also, for instance El Salvadoreans, experience difficulties in establishing they are refugees.

have arrived in Australia by boat fleeing the fighting in Cambodia, not to mention of course the untold number who have left Vietnam over the last 15 years. Not all of these people would fit into the Convention definition, and many are described as economic refugees – a description easy to attach but not always easy to clearly separate from the Convention definition requirements.

Interestingly the UN Office of the High Commission for Refugees (UNHCR) has been able to extend its protection to groups which would, or may, not technically fall within either the 1951 Convention or the UNHCR Statute definition of refugee, and to persons whose refugee status has not been determined. This has been done through the utilisation of the reference in the Statute definite to "groups of refugees" and through expansion under the "good offices" function of UNHCR. By these means the UN General Assembly has effectively extended the mandate of the High Commissioner, from time to time requesting him to extend his good offices to specific groups of people who may not otherwise fall within the mandate of the Office.

An example of this occurred in the 1950s when the High Commissioner was requested to use his good offices to assist people from mainland China who were now in Hong Kong.[10] UNHCR did render assistance even though, technically, many of these people may not have been refugees, since they may have been able to rely upon the protection of either of two different countries. The good offices function has been utilised also in situations of mass influx when it has been impossible, because of the numbers involved, for questions of refugee status to be determined.

In addition to situations of the kinds outlined above, UNCHR has been asked to assist in repatriation programmes. In the early 1970s ten million people left what is now Bangladesh and fled to India. They returned to their homes under agreements made between the Bangladesh and Indian governments. UNHCR, requested to do this by the United Nations,[11] assisted in that return. Once back within the borders of their own country the people from Bangladesh were no longer outside their country and therefore were no longer refugees. Nonetheless the Office of UNHCR was authorised to provide assistance to them and, since that time, UNHCR has assisted in many repatriation programmes, particularly on the continent of Africa. Recently UNHCR has been involved in the repatriation of some Laotians to Laos from Thailand, and, after the July 1987 Peace Accord, of Sri Lankan Tamils from India back to Sri Lanka.[12] There has been an exten-

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10. UNGA Res. 1167 (XII) of 26 Nov. 1957. Another instance is UNGA Res. 167 (XVI) of 10 Dec. 1961, authorising assistance to Angolan refugees in the Congo.

11. UNGA res. 1790 (XXIV).

sive repatriation programme to Namibia and there is the new and controversial programme of return to Vietnam.

A point which needs to be emphasised in relation to the Convention definition of refugee is that its wording is in terms of individuals. An individual determination is required in each case before a State decides whether or not to grant refugee status. Obviously, the making of a determination is not always either practical or even possible, particularly in circumstances of mass exodus, where hundreds of thousands of people can pour across a border in a matter of days. Also, even without vast numbers, an individual determination may simply not be feasible because the country concerned may not possess administrative procedures that are capable of performing such a function.

There is no obligation under the Convention to set up procedures for the determination of refugee status, and many countries have not done this. Where such procedures have been established they vary widely. UNHCR does endeavour to encourage uniformity and a standard practice, but, due to the differences in the administrative structures and general circumstances of different States, this is not easy.

If a person is declared to have the status of refugee, and if the State granting that status is a party to the 1951 Convention and/or 1967 Protocol, then the refugee will fall under the protection of the Convention. It should be noted here that a person may qualify for UNHCR protection and fall within the mandate of UNHCR even though he or she is not in a country which is a party to the Convention.

(ii) *Rights conferred upon refugees by the 1951 Convention and/or 1967 Protocol*

The 1951 Convention contains a comprehensive charter of rights which signatory States agree to confer on refugees. Strictly speaking the use of the word rights here is not correct. It is used as a matter of convenience. States, not individuals, are the traditional subjects of international law and generally individuals do not have the capacity to enforce their rights before international tribunals. Consequently, although the rights and duties of refugees are often mentioned, a more accurate description would be the rights declared on behalf of refugees.

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12. For an account of this programme, see UNHCR, *Refugees Magazine*, No.63, April 1989, pp.19-33; and for a critical assessment of its desirability see *Repatriation of Tamil Asylum Seekers; Journey into Peril*, (Report No.1, Tamil Refugee Action Group, London, 1989). For a survey of the circumstances in Sri Lanka which have led to the existence of large numbers of Tamil refugees, see P. Hyndman, *Sri Lanka: Serendipity under Siege* (Bertrand Russell Press, Nottingham, 1988); and for a study of the application to them of the 1951 Refugee Conventions, see P. Hyndman, "The 1951 Convention definition of refugee: An appraisal with particular reference to the case of Sri Lankan Tamil applicants," HRQ (1987), pp.49-73.

The rights declared in the 1951 Convention include rights such as the following: freedom of association and movement; the right to acquire movable and immovable property; rights in literary, artistic and scientific works; protection of industrial property; the right of recognition of qualifications; provisions regarding welfare; housing; public education; transfer of assets; the right to freedom of religion; to naturalisation; to access to courts; to identity and travel documents, and the right to engage in self-employment or wage-earning employment.[13]

There are differing levels at which these rights are required to be conferred. In some cases the rights must be granted in a manner such that the situation for the refugee is at least favourable as the conditions granted to other aliens. In other cases[14] refugees are required to be given the most favourable treatment accorded to the national of another country.[15] In yet others the same treatment is required as that accorded to the national of the country of refuge.[16]

(iii) Implementation provisions

The third major section of the 1951 Convention contains implementation provisions. All contracting parties agree to cooperate with UNHCR, in particular facilitating its duty of supervising the application of the Convention. They also undertake to submit to the United Nations reports providing information concerning refugees.[17]

3. POSSIBLE PERMANENT SOLUTIONS

Despite the provisions outlined above, and despite the fact that in this century considerable progress has been made towards the establishment of an international system for the protection of refugees, there are, as noted above, nonetheless, an estimated 15,000,000 refugees in the world. There are various possible permanent solutions to the problems which face these people.

The fist, and most preferred by UNHCR, is voluntary (not forcible) repatriation. This is considered to be the most desirable, and the least disruptive and expensive, solution both for the refugees themselves and for the rest of the world community. As mentioned earlier, in South-East Asia there have been some cases of voluntary repatriation of refugees

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13. See Articles 3-34, 1951 Convention.
14. E.g. Articles 7, 13.
15. E.g. Article 15.
16. E.g. Articles 4, 14.
17. Articles 35 and 36, 1951 Convention.

from Thailand to Laos, of Vietnamese to Vietnam, and in South Asia UNHCR has encouraged a repatriation programme for Sri Lankan Tamils who had fled to India. However, in some cases repatriation is simply not possible. This may be for the reason, for example, that the situation from which the refugees have fled shows no sign of improvement.

The second most desirable solution is generally considered to be the absorption of the refugees into neighbouring countries where it is likely, although nor necessarily the case, that there will be similarities in such matters as culture, economic conditions, ethnic composition of the population, climate and language. However, such assimilation is not always either easy or possible. The poverty of the countries in question and the cost to them that assimilation would entail may make this solution very difficult indeed. In addition there may be other difficulties. In the case of Malaysia the problems posed by the arrival of thousands of Indo-Chinese refugees is not just one of finding them accommodation, food and employment. Malaysia is a country which has a delicate balance of races. An influx of large numbers of one of the races already present there could upset the ethnic balance and cause internal problems within the host country.

Resettlement in other countries is the third solution. This is considered to be a solution of last resort because it is disruptive, both to the refugee and to the country of resettlement, and it poses many problems of assimilation which can cause immense difficulties. The international community has responded to the problems facing refugees, and facing the countries to which they have fled, by offers of resettlement in distant lands. For instance Indo-Chinese refugees have been resettled in such diverse locations as Australia, Canada, France, New Zealand, Switzerland, the United States of America, in Caribbean and in Scandinavian States, and in some countries within the South Pacific region. Nevertheless, many refugees still remain in the countries of first arrival. In the Asian region as mentioned already there are thousands of Indo-Chinese refugees currently in camps in Hong Kong, Indonesia, Malaysia, the Philippines and Thailand. In Pakistan there are 3,500,000 refugees from Afghanistan.

4. ASIA AND THE LAW CONCERNING REFUGEES

Despite the fact that currently there are 107 States parties to the 1951 Convention and/or its 1967 Protocol, many countries which do harbour large numbers of refugees, and are vitally concerned with refugee problems are not parties to the refugee conventions. In the cases of the coun-

tries mentioned immediately above not one is a signatory. Indeed the States of the Asian region lag significantly behind those of the other regions of the world (with the exception of the countries until recently considered part of the Eastern bloc) in terms of accession to the refugee conventions. So far in Asia only China, Iran, Japan and the Philippines (and Iran, Israel and Yemen) are States parties. In the Pacific Fiji, Tonga, Western Samoa and Tuvalu are parties. Whereas States in other regions of the world have adopted binding regional instruments for the protection of refugees, there is no such instrument to protect the refugees of the Asian region.

The *Principles Concerning Treatment of Refugees*, [18] however, should be noted here. These Principles, which are not binding, were adopted by the Afro-Asian Legal Consultative Committee in Bangkok in 1966. They provide for the definition and status of a refugee and loss of that status. These provisions are similar to the corresponding ones in the 1951 Convention except that the definition in the Bangkok Principles contains no dateline, and "colour" is included as an additional reason which may give rise to fear of persecution. Article IV States that a refugee has a right to return to the country of his or her nationality, and that country has a duty to receive the refugee. Article V contains an interesting provision for a right to compensation from the country left by the refugee and to which he or she is unable to return. Article VI accords to refugees "treatment in no way less favourable than that generally accorded to aliens in similar circumstances" and Article VII proves that refugees

> "shall not engage in subversive activities endangering the national security of the country of refuge, or in activities inconsistent with or against the principles and purposes of the United Nations."

There are also provisions relating to expulsion, deportation and asylum, and a final Article preserves any higher rights granted to refugees under other arrangements.

In summary, the situation within the Asian Pacific region is that very few States have acceded to treaties, and thus very few States have expressly undertaken any binding obligations to afford specific protection to refugees. Although regional principles the treatment of refugees have been agreed upon they are not binding. Clearly then, whatever the

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18. UNHCR, *Collection of International Instruments concerning Refugees* (2nd ed., 1979), p.201. The function of the Committee under its Statute was advisory only, and the view was taken that it would be up to the government of each participating State to decide how it would give effect to the recommendations. For a further discussion of these Principles, see E. JAHN, "The Work of the Asian African Legal Consultative Committee on the Legal Status of Refugees." 27 ZaöRV (1967), p. 122; and E. JAHN, "Developments in Refugee Law in the Framework of Regional Organisations Outside Europe", 4 AWR (1966), p. 77 et pp. 79,80.

obligations of admission laid down in the various international instruments, most Asian States are not bound by them as a consequence of any specific treaty commitments.

5. THE CONCEPTS OF ASYLUM AND NON-REFOULEMENT

Different reasons are given for the reluctance of some nations to accede to the major international refugee instruments. Undoubtedly one of the most important is the fear (held by many States) that, should they accede they will be bound to accept, and offer a permanent home to, all refugees arriving at their borders. In other words that they will be undertaking obligations to grant permanent asylum to the refugees. This apprehension is due to a misunderstanding of the provisions of the international refugee instruments.

The term asylum has no universally accepted definition. Here, it is used in the sense of admission to the territory of a State, and a distinction is made between admission which is granted as an emergency measure, guaranteeing refuge of a temporary nature only, and admission which encompasses the more durable aspect involved in the grant of a permanent right to settle.

There is no right to asylum (in either of these senses) granted, in so many words, to refugees by international treaties. In fact the 1951 Convention, in the main body of its text, makes no reference to asylum at all, although there is mention of it in the Preamble and in the Final Act. Even there the mention is not made in terms which impose any obligation upon signatory States to grant asylum to refugees. The 1967 Protocol carries the situation no further.

However, there are other provisions of the 1951 Convention which do have a bearing on the problem of admission. These are Articles 31, 32 and 33. Article 31 stipulates that, even if refugees have entered a country illegally, contracting States shall not impose penalties upon them on account of their illegal entry or presence, and Article 32 States that refugees who are lawfully within the territory of a contracting State shall not be expelled by that State save on grounds of national security or public order. If any expulsion does take place, under this provision it must be carried out in pursuance of a decision reached in accordance with due process of law, and allowance should be made for a reasonable period to elapse during which the refugee might seek lawful admission to another country. Article 33 (the *non-refoulement* provision) states that:

> "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."

Whereas Article 32 requires persons to be lawfully within the state before its provisions will apply, there is no such restriction in Article 33 which applies to protect refugees even though they may be in a country illegally. [19]

Although none of these Articles gives to refugees a right to enter another country, their conjunction does provide some real protection, For, although an administrative act of ordering the expulsion of a refugee may not offend against Article 32, actual expulsion may be forbidden under Article 33 if it will result in the return of the refugee to a country where he or she fears persecution.

Other international instruments exist in which it may reasonably be expected that some provision granting a right of asylum to refugees might be found. However, on examination, it will be seen that none of these, not even the *1967 UN Declaration on Territorial Asylum*, [20] actually goes so far as to impose an obligation on States to grant asylum to refugees arriving at their borders. States the world over consistently have exhibited great reluctance to relinquish their sovereign right to decide which persons will, and which will not, be admitted to their territory and given a right to settle there. They have refused to agree to international instruments which would impose on them duties to make grants of asylum. [21]

The provisions of the Bangkok *Principles Concerning Treatment of Refugees* which are relevant in this context are as follows. Article III provides that:

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 overriding reasons of national security or safeguarding the populations, 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.

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19. Refugee (Germany) Case, 28 I.L.R., p.297 at p.298; Chim Ming *v.* Marks, (1974) 505 Fed. 2d.1170 at p.1172. The ambit of the *non-refoulement* requirements of Article 33 is dealt with in more detail in P. Hyndman, "Asylum and *Non-Refoulement:* Are these Obligations owed to Refugees under International Law?", 57 Philippine L.J. (1982), pp.43-77.

20. Adopted by UNGA Res. 2312(XXII), 14 Dec. 1967.

21. For a comprehensive description of the attempts to reach agreement on a Convention on Territorial Asylum, see A. Grahl-Madsen, *Territorial Asylum* (Oceana, London, 1980).

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 it may deem appropriate, to enable the person thus endangered to seek asylum in another country.

As can be seen, the decision as to whether or not a grant of asylum should be made to one person, or to a group of persons, is still left within the sovereign discretion of the State concerned. However, unlike the wording of Article 33 of the 1951 Convention, here non-rejection at the frontier is specifically included within the non-refoulement provision, and article III.4 adverts to a requirement of a grant of temporary asylum in certain circumstances.

The provisions of the Principles regarding expulsion are contained in Article VIII and are as follows:

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.

Though an exception is allowed in Article VIII.1 on the grounds of "national or public interest", Article VIII.3 allows no such exception, and is more stringent than Article 33 of the 1951 Convention, containing as it does an absolute prohibition of the *refoulement* of a refugee. However, as noted already, these Principles are not binding.

Today, the generally accepted position internationally would appear to be this – States consistently refuse to accept binding obligations to grant to persons who are not their nationals any rights to asylum in the sense of a permanent right to settle there. Apart from any limitations which might be imposed by specific treaties, States have been adamant in maintaining that the question of whether or not a right of entry should be afforded to an individual, or to a group of individuals, is something which falls to each nation to resolve for itself. [22]

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22. S. PRAKASH SINHA, *Asylum and International Law* (Martinus Nijhoff, The Hague, 1971), p.108. (However, it should be noted that on the municipal plane States have been willing to assume obligations which they have so far been loath to undertake on the international level, A. GRAHL-MADSEN, *Territorial Asylum*, op.cit., p.24). States' continued adherence to this position was made clear at the two recent meetings held to discuss the current situation of the people who are continuing to leave Vietnam (the first in Kuala Lumpur, held March 8, 1989, the second in Geneva, held 13 and 14 June, 1989). For the Draft Declaration and Comprehensive Plan of Action approved by the March 1989 Kuala Lumpur meeting and adopted at the June 1989 Geneva meeting, see UN Doc.A/Conf. 148/2.

This is not only the case where international instruments are concerned. It is also the position under customary international law. If obligations can be shown to exist under customary international law, those obligations will bind all nations regardless of whether there has been any explicit undertaking through accession to a treaty. In order for an obligation to become a recognised part of customary international law, there must be exhibited both a consistency of State practice and a belief on the part of those observing the practice that this observation is mandatory. [23]

Regarding *non-refoulement* also it must be acknowledged that actual and threatened behaviour of governments, i.e. State practice, does not always accord with the recognition of the existence of an obligation of *non-refoulement.* The point must of course be made that actual incidents of *refoulement* are unusual and are out-weighted by the innumerable occasions on which the principle of *non-refoulement* is scrupulously observed. A striking example is the acceptance and accommodation over several years, with no suggestion of return, of the 3,500,000 Afghans who have found refuge within Pakistan. Overwhelming and seemingly impossible numbers of refugees are constantly given shelter by host countries on the African continent. [24] However, though instances of *refoulement* are exceptional their occurrence unfortunately is undeniable. For instance Thailand sent back to Cambodia some 40,000 Cambodians in mid-1979 [25] and in mid-1987 sent back Laotians to Laos. During recent months there has been increasing talk by recipient countries, particularly by Hong Kong, of forcible repatriation to Vietnam. [26] (There are of course very recent examples within the region of States pushing boat people out to sea. Thailand did this in 1988 [27] and in 1989 Malaysia followed – pushing thousands off its coasts. Such incidents, though in some cases more dangerous for those involved than actual *refoulement* (it would be impossible to estimate how many deaths have been caused by push-offs) are not instances of *refoulement. Refoulement* is the sending back of a refugee to the terri-

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23. *North Sea Continental Shelf Cases*, (1969) I.C.J. Rep. p.3, at p.44.
24. See generally on the situation of refugees in Africa: Report of the Conference on the *Situation of Refugees in Africa*, May 1979 (UN Doc A/AC.96/INF. 158) and G. MELANDER & P. NOBEL (eds.), *African Refugees and the Law* (Scandinavian Institute of African Studies, Uppsala, 1978).
25. UN Doc A/34/627 Annex 1,p.3.
26. See, e.g.,statement by Countries of Temporary Refugee Meeting in Manila, 16 May 1990, reported in UNCHR Report of the Informal Meeting of the Steering Committee of the International Conference on Indo-Chinese Refugees, Manila, 17-18 May, 1990, p.1. Forcible repatriation of people validly determined not to be refugees is not *refoulement* as that principle protects only refugees.
27. For a comprehensive account of the situation of refugees in Thailand, see A. HELTON, "Asylum and Refugee Protection in Thailand," 1 IJRL (1989), pp.20-4.

tory of a State where he or she has a well-founded fear of persecution, push-offs do not have this consequence.)

In order to establish the existence of a rule of customary international law not only must State practice be shown to be "both extensive and virtually uniform" (including the practice "of States whose interests are specially affected") it must also be shown that there is "a general recognition that a rule of law or legal obligation is involved".[28] That is, a belief on the part of States in the binding nature of the practice in question is necessary.

In relation to this latter point it must be noted that several South-East Asian nations have made repeated assertions that they have no legal obligations to the refugees arriving at or crossing their borders, making the point that admission, where given, has been granted as a humanitarian gesture only, and not as a result of any duty owed under customary international law.[29] On several occasions these States have stressed that in the future admission will continue to be granted *only* if assurances are forthcoming to the effect that the international community will guarantee that those nations granting initial asylum will be left with no resultant long-term burdens. They have stressed also that where the refugees are unable to return to their homelands they must be given resettlement opportunities elsewhere. The government of Hong Kong has taken a very firm stand in relation to the record numbers of people arriving in the colony from Vietnam, and has clearly stated that alone it will continue to provide shelter only for those determined to be Convention refugees. In June 1988 the Hong Kong authorities introduced a new screening process to determine whether or not the boat people arriving in Vietnam after that date qualify for refugee status. According to reports by observers fro independent non-governmental organisations such as Amnesty International and US based Lawyers Committee for Human Rights this screening procedure proved to be unfair and improperly restrictive.[30] As will be covered in more detail later, in mid-1989 UNHCR embarked on a large hiring and training programme, and the screening process has been reported much

28. *North Sea Continental Shelf Cases*, (1969) I.C.J. Rep. 3 at 43.

29. See, e.g., speech by Malaysian Minister of Foreign Affairs, 12th ASEAN Foreign Ministers Meeting, Bali, Indonesia, June 29-30, 12 *Foreign Affairs Malaysia* (1979), p. 176, 177,195.

30. "From June 1988 through March 1989 only 3 out of 1,327 Vietnamese cases processed have been recognised as meeting refugee status requirements under international law... Screening is conducted with improper criteria that, for example, do not consider current country conditions or past treatment ... Although UNHCR representatives have served as observers they have been unable to ensure a reliable procedure, both because of UNHCR delay in establishing an adequate monitoring and protection presence and the intransigience of Hong Kong authorities". *Inhumane Deterrence: The Treatment of Vietnamese Boat People in Hong Kong*, (Lawyers Committee for Human Rights, New York, 1989), p.5. See also pp.36-45, 49-56. To March 1989 only a very small number (less than 1% of arrivals) of those screened were determined to be refugees. Ibid. pp.4,5.

improved. Nonetheless independent observers and NGOs continue to voice their concern that genuine refugees may be screened out – a very real danger if the consequence is to be forcible repatriation to Vietnam.

As well as stating that no legal obligations are owed to refugees arriving at or crossing their borders, on many occasions South-East Asian governments have been careful to employ terminology which ignores the fact that the people seeking refuge may be Convention definition refugees. They have applied to them instead terms such as "illegal immigrants"[31], "displaced persons", "economic migrants"[32], "boat people" and even "tourists of the unwanted kind"[33] but not "refugees". However, this, in itself, is not an argument against the existence of customary refugee law, in fact it can be an argument for its existence. It is an indication that "refugees" may be entitled to a definite standard of treatment under customary international law, even from nations under no treaty commitments, that the States which are often careful to avoid use of the term "refugee" do recognise this, and that the are endeavouring to avoid incurring these obligations by refusing to categorise the persons requesting their assistance as refugees.

In summary, the approach so far taken by States indicates that State practice and *opinio juris* has not yet given rise to any customary international law obligation to grant asylum.[34] On the other hand, despite the general impression which may have been suggested by the preceding observations, a convincing argument can be made for the proposition that *non-refoulement* has now become a rule of general customary international law (the State practice and *opinio juris* which can be cited in favour of this far outweighing that against)[35] although it has to be acknowledged that there is some dispute here, both as to the existence of any binding rule,[36] and as to its exact ambit.[37]

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31. *The Washington Post*, 10 April 1988, at A 26.

32. Press Release No. 3/2531, 25 April 1988, Permanent Mission of Thailand to the United Nations at 4, cited in A. Helton loc.cit. N.27, 3.36, fn.100.

33. See, e.g., 12 *Foreign Affairs Malaysia* (1979), p.170,178,183.

34. For a list of authorities dealing with this whole question at international law, see P. HYNDMAN, "An appraisal of the development of protection afforded to Refugees under international law", 1 *Lawasia, N.S.* (1981), p.229 at p.259, fn.73. The same principle has also been accepted in domestic courts, e.g. Nishimura Ekiu *v* U.S., (1891) 142 U.S., p.651; Musgrove *v* Chun Teeong Toy [1981] A.C., p.272.

35. See, e.g., G.S. GOODWIN-GILL, *International Law and the Movement of Persons between States*, (Clarendon Press, Oxford, 1978), p.141; G. JAEGER, op.cit., p.38.

36. A. GRAHL-MADSEN, *Territorial Asylum*, op.cit., pp.42, 43; S. PRAKASH SINHA, op.cit., pp.159,280.

37. P. HYNDMAN, *Asylum and Non-Refoulement*, 57 Philippine L.J. (1982), p.43 at pp.49-52, 59-71.

6. A DIFFERENT APPROACH

The traditional way of approaching this area of international law has been through these recognised legal concepts of asylum and *non-refoulement*. It is possible, however, to make the approach in another way.

If, for a moment the accepted legal concepts are ignored, and an inquiry is made simply as to the actual practice of States when faced with refugees at their borders, the current situation can be described in the following manner.

States insist that they will undertake no binding obligations to grant rights of permanent settlement to persons arriving at their borders, and that each nation has the sovereign right to determine for itself which persons are acceptable for such admission. Nevertheless, State practice does seem to indicate that, although some countries, particularly those within the South-East Asian region, are not prepared to admit a mass influx of refugees when they fear that they will be left to handle alone the costs and problems which such arrival must inevitably entail, they *are* prepared to admit these people, and to do their best for them *if* they have assurances that they will receive assistance from other States. For instance, although in June 1979 the government of Thailand sent back half of the 80,000 Cambodians who had crossed its borders in the first months of that year, in October, assured of international cooperation, it announced "that all the Kampuchean refugees would be granted temporary refuge in Thailand".[38] This was a considerable undertaking since some 130,000 Cambodians were at that time in the border areas and another 200,000 had just entered Thailand.[39] Furthermore, it was anticipated that the numbers would continue to increase. The present crisis regarding Vietnamese (and Cambodian) boat people may well be averted even now if clear assurances, of the kind outlined in the paragraph below, were to be provided.

The assistance required by these States of first asylum is twofold: firstly, to resolve the immediate difficulties and expenses; secondly, to provide assurances that, if temporary refuge[40] is accorded, the international community, not the State of first asylum, will assume the responsibility for the permanent resolution of the situation in question – i.e. that there will be real and effective international cooperation and burden-sharing.[41]

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38. UN Doc. A/34/627, p.14.

39. Ibid.

40. On this concept, see G.C.L. COLES, *Temporary Refuge and the Large Scale Influx*, paper submitted to UNHCR-convened group, Canberra, March 1981. See also UN Doc. A/AC.96/599.

Although governments so far have been reluctant to agree in principle to a scheme consisting of these dual obligations – a grant of temporary refuge coupled with an international assumption of responsibility for the resultant burden – and although States generally prefer to maintain that the country of first asylum has the full responsibility for any refugees on its territory, nevertheless, despite such pronouncements, the actual practice of States does indicate that both concepts do receive some acceptance in fact. This continued to be true even amid the hard-line approaches taken at the two 1989 international conferences convened (by the ASEAN governments in Kuala Lumpur in March and by the UN in Geneva in mid-June) to discuss the situation of escalating numbers of Indo-Chinese leaving Vietnam and the threats (since carried out in relation to 51 Vietnamese), particularly by Hong Kong, of the forcible repatriation[42] of those deemed not to satisfy the criteria for refugee status. At the May 1990 informal meeting of the steering committee of the international conference on Indo-Chinese refugees, despite the difficulties being faced by a number of first asylum countries and their emphasis on the need for agreement on the return of non-refugees, it was emphasised also that abandonment of first asylum could not be justified.[43]

Both temporary refuge and international burden-sharing are concepts already recognised in provisions within existing international instruments[44] and, at different stages, various cooperative schemes have been set up to provide practical international assistance in line with their dictates. For instance boat people rescued by passing ships and taken to ports within the South-East Asian region have been granted permission to disembark and afforded temporary refuge by States formerly adamant in their refusal to allow this, once those States were assured of, and confident about, an international assumption of responsibility. Often States have stressed that they will only give permission for boat people to disembark if they have assurances of international burden-sharing.[45] Differing schemes have been set up to provide these assurances and the very fact that such projects have been possible has indicated acceptance by

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41. See, e.g., speech by Malaysian Minister of Foreign Affairs, loc.cit. n.32, at pp.186, 230, 274, 398; ASEAN Joint Communique, June 26, 1980, 13 *Foreign Affairs Malaysia* (1980), pp.199, 257-264.

42. See, e.g., UN Doc. A/Conf. 148/2, paras 5,8,9,10,11.

43. See P.2 of the UNCHR report of that meeting.

44. For example: Preamble and articles 31 and 32, 1951 Convention: Articles 2.2 and 3.3 UN Declaration on Territorial Asylum: Articles 11.4 and 11.5 OAU Convention, UNTS No. 14691; Council of Europe Resolution 14 (1967) on Asylum to Persons in Danger of Persecution, adopted by the Committee of Ministers on 19 June 1967.

45. D. WILLDAY, *Resettlement of Indo-Chinese Refugees and Displaced Persons*, UNHCR Doc. 155/49/80, at pp.2,3,4; 12 *Foreign Affairs Malaysia*, (1979), pp. 185, 186, 230, 274 (1979); 13 *Foreign Affairs Malaysia* (1980), p. a199.

States of the need for an assumption of the responsibility for refugees to be undertaken at an international level – that is, that there is recognition that the States nearest to the scene of the problems must not be left to cope with them alone.[46]

From time to time international appeals have been made for States to provide opportunities of permanent resettlement for people who can have no realistic expectation of being able to return to their own country in the near future. As an example, during and after a UN convened meeting held in Geneva in July 1979 to find solutions to the problems of the rapidly increasing numbers of Indo-Chinese refugees and displaced persons within the South-East Asian region, many offers of permanent resettlement opportunities were made. In several instances offers were made by States which had never made such opportunities available to refugees before. Resettlement offers which had numbered 125,000 in May 1979 had increased to over 260,000 by the end of the meeting.[47] As a result of these offers the number of refugees awaiting resettlement in camps in Hong Kong, Indonesia, Malaysia and the Philippines, declined steadily immediately after the meeting.[48] Again such action provides recognition of the need for international burden-sharing.

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46. One such cooperative scheme was the establishment by UNHCR of a fund of resettlement offers guaranteed by participating States. The fund had the purpose of facilitating disembarkation from ships flying flags of convenience or flags of countries unable to provide settlement: see, UN Docs A/QC.96/572 PARA 124b(ii); A/AC.96/588, para 17.(Prior to this, strong suggestions had been made that a duty be imposed on the flag State of the rescuing vessel to provide resettlement places for the rescued refugees and displaced persons and several States agreed in principle to this suggestion, D. WILLDAY, op.cit. supra note 45 at p. 9). Places from the fund have been used for emergencies, in consultation with the resettlement country and with its consent. The schemes of resettlement provided in cases of rescue at sea will now be affected (and will in all probability cease) as a consequence of the agreement on screening procedures reached at the June 1989 Geneva international conference. See, e.g., statement by the Australian delegation at the International Conference on Indo-Chinese Refugees, mimeo, Geneva, 13 June 1989, at p.8. At the Informal Meeting of the Steering Committee of the International Conference on Indo-Chinese refugees held in Manila, 17-18 May 1990, several delegations observed that rescue cases should continue to be handles on an *ad hoc* basis as, in the absence of a resolution of the problem of non-refugees, consensus was not possible (Report, p.3).

47. UN Doc. A/34/627, p.7.

48. The monthly rate of departures for permanent resettlement abroad from the entire area reached 25,000 in September and October 1979. UNHCR Doc. 155/30/80 Rev. 1, p.9. Between the end of July 1979 and 30 August 1980, 269,111 Indo-Chinese were moved to over thirty resettlement countries. UN Doc. A/AC.96/580 p.2. This high rate "continued into 1980, reaching a record of 19,924 in February and averaging 24,419 over the first six months... including those travelling to Refugee Processing Centres", UN Doc. A/AC.95/580 p.4. Since that time, however, this particular situation has worsened again and in recent years boat people have been leaving Vietnam in record numbers (the 1988 arrivals by boat were more than double the 1986 figure (D. MCNAMARA, Deputy Director of Division of Refugee Doctrine, UNHCR, Geneva, "With goodwill, the UN Plan can save lives", *International Herald Tribune*, June 30, 1989, p.4) and in the last 3 days of May 1989 more than 2,300 boat people arrived in Hong Kong alone (*Inhumane Deterrence: The Treatment of Vietnamese Boat People in Hong Kong*, (Lawyers Committee for Human Rights, New York, 1989), p.7. The total arrivals in Hong Kong for 1989 were the highest ever – 34,116 (UNHCR statistics).

Another application of the dual concepts of temporary refuge and international burden-sharing can be seen in the establishment of holding centres to which refugees and displaced persons can be transferred for processing "for resettlement in an orderly way within a specific time scale, and against guarantees that there would be no residual problem".[49] These developments followed from a suggestion, first made in 1978,[50] designed to alleviate the concerns of countries of first asylum that grants of temporary asylum might lead to long-term problems for the country providing this refuge. The idea was that refugees and displaced persons granted resettlement opportunities by third countries, would be taken from the country of first refuge to the processing centres, and, after completion of the formalities prerequisite to admission by their new countries, would then proceed to take up the resettlement offers. Indonesia and the Philippines have provided territory for this purpose,[51] and camps were constructed for 10,000 persons on Galang Island on the Riau Archipelago near Singapore, and the 50,000 persons on the Bataan Peninsula in the Philippines. At the 1989 UN convened Geneva meeting proposals were made for the establishment of further holding centres: both for those determined, after screening, to be refugees pending their resettlement; and, for those determined not to have refugee status, pending their return to their country of origin.[52]

Yet another example of international cooperation and burden-sharing is the Orderly Departure Programme from Vietnam. In the Declaration and Comprehensive Plan of Action adopted at the 1989 Geneva international conference on Indo-Chinese refugees the regular departure programmes from Vietnam were seen "to offer a preferable alternative to clandestine departures" and it was resolved that these "should be fully encouraged and promoted".[53]

The Australian experience will be outlined as one example of the Orderly Departure Programme's implementation over the past few years.[54] In March 1982, the Australian and Vietnamese government signed a Memorandum of Understanding. Under the agreed scheme people are brought from Vietnam through a flexible application of the Australian fam-

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49. UN Doc. A/34/627 p.8.

50. Made first at the Consultative Meeting with Interested Governments on Refugees and Displaced Persons in S.E. Asia, held at Geneva on 11 and 12 December 1978.

51. UN Doc. A/34/627 p.9.

52. See closing statement at June 1989 Geneva international conference, UN Doc. A/Conf. 148/5 p.3. Progress on the proposed new resettlement centre in the Philippines was reported at the May 1990 informal meeting in Manila.

53. UN Doc. A/Conf 148/2 para 2.

54. In Australia this programme is now called the Family Reunion Programme for Vietnam.

ily reunion migration policy. This has been regarded strictly as a migration programme, but it has the underlying purpose of providing an alternative to departure by boat, at least for those people who have relatives who qualify to sponsor them. The first migrant under this scheme arrived in November 1982.

Sponsors in Australia who wish to bring in relatives from Vietnam apply to their local regional Department of Immigration office, which examines the level of support which will be provided towards the settlement of the potential migrant. There are delays and backlogs with the applications, and priorities have been developed. Once checked by the regional office, the application is sent to the central office in Canberra where lists are prepared of names to be presented to the Vietnamese government for it to approve departure. The initial list of 6,000 names was handed over in June 1982.[55] The number of applications has increased tremendously, as a consequence of the large numbers of refugees from Vietnam (over 100,000) who have arrived for resettlement in Australia and who wish to sponsor their relatives.

In 1984-85, 2,699 Vietnamese people received visas under the arrangements, and approximately 3,500 were expected in 1985-86, but only 2,456 migrant visas were issued in Hanoi. This was due to difficulties within Vietnam. Since then the Australian government has acted to improve the operation of the programme by relocating the processing office to Bangkok, by clearing the backlog of Australian interest cases, and by improving the medical processing system.[56]

At the May 1990 informal meeting of the Steering Committee of the International Conference on Indo-Chinese Refugees held in Manila, the measures recently taken by the government of Vietnam to reduce clandestine departures were reported, as were discussions by UNHCR, UNDP and the ILO as to further appropriate measures. Although there is no room for complacency, ODP departures have increased and clandestine departures, particularly to Hong Kong have declined.[57]

From examples such as these it is possible to argue that, albeit haltingly, and from time to time undisputedly beset with difficulties, concepts of temporary refuge, coupled with ideas of an evolving responsibility of international cooperation, may be in the course of being accepted as customary principles of international refugee law. If this is so, these principles will bind all nations, regardless of whether or not they are parties to

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55. DIEA (Dept. of Immigration) Review 1982, Canberra, pp.56-67.

56. Mr. C. HURFORD, then Minister for Immigration, in *Department of Foreign Affairs Backgrounder*, No. 515 (12.3.86), p.111. The number of persons issued visas for migrant entry in Hanoi for 1985-86 were 2,456 and from July-December 1986 were 1,447.

57. Report of Meeting at p.2.

any conventions whereby they specifically accept obligations in relation to refugees.

Today, however, it might be thought that the acceptance of these principles, as principles of customary international law, is under very real threat indeed. Countries of first asylum have been stretched to their utmost limit and, in addition, "compassion fatigue" is clearly evident in States which formerly had been ready to make available resettlement opportunities. It is argued here that reliance on the concepts of temporary refuge, access to fair determination procedures for all, and international burden-sharing have not been destroyed thereby. The consequence of course has been the crisis situation now reached in Hong Kong and in other South-East Asian States and, as indicated earlier, at the two international conferences convened in 1989 to discuss solutions to this crisis. The approach taken by several States was that the only way a solution could work would be through the forcible repatriation of all those determined not to have refugee status [58] during the new screening processes which the participating States agreed would be established. Furthermore, this approach has continued at later meetings (for example at the Third Meeting of the Steering Committee of the International Conference in Indo-Chinese Refugees held in Geneva in January 1990, and at the later informal meeting of that Committee held in Manila in May 1990.[59]

Of course, unless the screening procedures in question are fairly and properly administered and applied[60] the implementation of repatriation as a solution clearly will be very serious indeed. In an endeavour to ensure that the procedures and the criteria of the Convention definition

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58. See statements made at the conference by the representatives of the Australian and the United Kingdom governments: statement by the Australian delegation, (mimeo) 13 June 1989, Geneva, pp.3, 5, 6; Speech by British Secretary of State for Foreign and Commonwealth Affairs, (mimeo) Geneva, 13 June 1989, paras 14, 16, 20. Regarding repatriation, D. McNAMARA has stated: "The most misunderstood provision of the plan may be the possible repatriation of those found not to be refugees. The plan provides that such persons 'should return to their country of origin', and that every effort should be made to encourage this on a voluntary basis. If this fails alternatives 'recognised as being acceptable under international practices' are to be examined. Illegal immigrants are returned home regularly from Western and other countries without any international outcry. To suggest that to do so is a violation of basic refuge rights is clearly a distortion". Loc.cit. at n. 48, p.4.

59. See UNHCR report of Third Meeting, and statement by Countries of Temporary Refugee submitted to informal meeting, p.2.

60. Of the screening procedures it has been said: "This has happened at a time when the number of asylum-seekers has...soared, and the risks are also increasing. Over 100 Vietnamese were murdered in one terrifying pirate attack. Another 100 drowned on June 6 when their boat broke up off the Philippines. Screening cannot be undertaken lightly in such a context. Here are people who were prepared to risk arrest in Vietnam, mutilation and murder by pirates, drowning at sea, indefinite detention in rat-infested camps, and racism in a new home. To ask whether they have a 'well founded fear of persecution' as the screeners will do, seems almost indecent. Certainly, to be credible screening will have to be fair and consistently applied, with the UNHCR taking the lead. At present, none of this applies." I. GUEST, *The Argument Against...* (Geneva, 30 June 1989, p.2.)

would be properly understood and administered beginning in mid-1989 the UNHCR undertook an extensive training programme. The consequence hopefully will be that the screening is indeed conducted in a fair and equitable manner (and it goes without saying that this is absolutely essential) and that the Convention definition criteria will be fairly and accurately applied – and this has to be assumed to be the aim of the States reaching agreement on the comprehensive plan of action. If this is so, then despite what may have appeared to be serious backtracking, the notions of temporary refuge and international burden-sharing still do remain the solutions envisaged.[61] Despite the fact that some of the statements made during, and the outcome of, the 1989 Kuala Lumpur and Geneva conferences and the 1990 Geneva Conference were far from encouraging, nonetheless, in relation to the points of developing customary international law under discussion here the situation remains that, for those persons determined to be Convention refugees the concept of temporary refuge and international burden-sharing in the form *inter alia* of the provision of resettlement opportunities by third countries,[62] (and, for all asylum-seekers, the concept of temporary refuge and access to status determination procedures[63]) continue to be the solutions agreed upon in the comprehensive plan of action drawn up at the first, and adopted at the second, meeting [64] and re-emphasised at the January 1990 meeting and at the later informal meeting in Manila.[65] The willingness of first asylum countries to continue to abide by these principles is, however, clearly predicated upon a requirement of *real* international burden-sharing.

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61. "The plan endorsed at the recent Geneva conference on Indo-chinese refugees has been unfairly criticised. It represents the first formal agreement by all governments involved that all Indo-chinese asylum-seekers will be granted temporary refuge or asylum... The plan just adopted is an alternative to harsher bilateral measures. It reaffirms the right to temporary refuge. If respected, lives will be saved...governments have agreed to provide guaranteed resettlement for refugees in camps in the region." D. McNAMARA, loc.cit. at n.48, p.4. For a view, however, as to the likely scenario if fairly administered and applied screening procedures do not eventuate, see I. GUEST, loc.cit, at no.60, pp.1,2: "If the UNHCR fails to deliver it could find itself bullied into endorsing the forcible repatriation of boat people back to Vietnam. This would be unthinkable for an agency that was set up to protect refugees ... governments appear to view screening as a way of deterring rather than identifying refugees. This clearly has to change before those who are 'screened out' can be sent back to Vietnam ... It could prove hard for the UNHCR to turn its back on the unfortunate returnees if it considers they have been unfairly screened. The UNHCR has tacitly admitted as much by agreeing to 'monitor' their re-integration into Vietnam. This comes perilously close to endorsing forcible repatriation. Right now, the plan may look like a brave attempt to buy time, the only alternative to push-offs, and the best bay of protecting the boat people. In addition, the prospect of 'solving' the seemingly endless crisis of Vietnam's refugees is deeply appealing. This is mistaken. Once the UNHCR endorses deterrence and forcible repatriation it weakens, not strengthens, protection for all the 14 million refugees currently under its care. At some point this agency will have to have the courage to stand up to governments and say no."

7. CONCLUDING COMMENTS

One thing appears to be clear – in order to be at all effective the attempt to solve the world refugee problem must be made at the level of international cooperation. Piecemeal measures are simply not enough. "No single action, however generous, will suffice, the crisis demands coherent and closely coordinated action of the international community if further lives are not to be lost."[66]

In the wider world context there has grown an appreciation of the problems, hostilities, conflicts and wars which the human race seems incapable of avoiding in its present system of nation States, and attempts have been made to establish a community of international dimension. The creation of such bodies as the League of Nations, the United Nations, and regional organisations of States, though far from a total solution, has provided arenas which, used wisely, can facilitate discussion, joint undertaking of projects, growth of common interests, and awareness of, and appreciation for, different viewpoints, ideologies, cultures, traditions and economic and political systems and problems. Hopefully, from such

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62. UN Doc. A/Conf. 148/2, paras 8, 9, 10, 11: "Continued resettlement of Vietnamese refugees benefitting from temporary refuge in South-East Asia is a vital component of the Comprehensive Plan of Action.... The Long-Stayers Resettlement Programme includes all individuals who arrived in temporary asylum camps prior to the appropriate cut-off date and would contain the following elements: (a) A call to the international community to respond to the need for resettlement, in particular through the participation by an expanded number of countries beyond those few currently active in refugee resettlement and (b) a multi-year commitment to resettle all the Vietnamese who have arrived in temporary asylum camps prior to an agreed date, except those persons already found not to be refugees under established status-determination procedures and those who express the wish to return to Vietnam. The resettlement Programme for Newly-determined Refugees will accommodate all those who arrive after the introduction of status-determination procedures and are determined to be refugees. Within a designated period after their transfer to the resettlement area, those determined to be refugees shall receive an orientation briefing from a UNHCR representative that explains the third-country resettlement programme, the length of time current arrivals may be expected to spend in camp awaiting resettlement, and the necessity of adhering to the rules and regulations of the camp. Wherever possible, a pledge shall be sought from the resettlement countries to place all those determined to be refugees, except those expressing the wish to return to Vietnam, within a prescribed period. It shall be the responsibility of UNHCR, with the full support of all the resettlement countries and countries of asylum, to coordinate efforts to ensure that departures are effected within that time."

63. Ibid, para 5: "All those seeking asylum will be given the opportunity to do so through the implementation of the following measures: (a) Temporary refuge will be given to all asylum-seekers, who will be treated identically regardless of their mode of arrival until the status-determination process is completed. (b) UNHCR will be given full and early access to new arrivals and will retain access, following the determination of their status. (c) New arrivals will be transferred, as soon as possible, to a temporary asylum centre where they would be provided assistance and full access to the refugee status-determination process."

64. See paras 5, 8, 9, 10, 11, (and 16, 17 regarding resettlement of Laotian refugees) of the Draft Declaration and Comprehensive Plan of Action approved at the Kuala Lumpur meeting and adopted at the Geneva meeting, UN Doc. A/Conf. 148/2. The concern here is, of course, that the definition criteria will be applied inaccurately and restrictively and that Convention refugees may be forcibly repatriated as a consequence.

beginnings should spring a greater opportunity for international cooperation and a lesser likelihood of confrontation – and in view of the recent changes in Eastern Europe and the improvement of relations between the two superpowers there is increased optimism that those international structures will become increasingly able to achieve their aims.

In relation to the refugee problem, itself, the move has been from *ad hoc* national responses, and *ad hoc* responses to the problems of specific categories of refugees, to an emphasis on the need for an international assumption of responsibility and action.

Not all the examples of this trend have been covered in this paper but instances are: the drawing up of an international convention defining the legal status, rights and duties of refugees and the giving to the term "refugee" some kind of general definition; accession to this Convention (and/or its Protocol) by more than 100 nations; the establishment of an international body to protect, assist and find permanent solutions to the problems of refugees, the repeated extensions which have been made to this body's mandate, the cooperation it receives from the governments of States parties to the *1951 Convention* or the *1967 Protocol,* and from other governments also, as well as that of many other organisations all over the world; the drafting and adopting of many other international and regional instruments relating directly and indirectly to the welfare of refugees; the development of some relevant rules of customary international law which bind all nations regardless of their accession to specific treaties; the increasing recognition of the need for the promotion of humanitarian principles and the concepts of equity and burden-sharing amongst nations and the emphasis which these concepts have received both at recent international meetings and in recent instruments; the solutions advocated for the particular problems of boat refugees and the measures taken to improve their chances of rescue at sea. All these instances exhibit a concern to tackle the refugee problem at an international level and not to leave it in the lap of the States in the area of immediate geographical proximity.

These steps are encouraging and undoubtedly over the last seventy years or so significant progress has been made in the approach to the problems of refugees. But is progress of this type sufficient, or, in a wider

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65. In the general statements of delegates reported from the Informal Meeting of the Steering Committee of the International Conference on Indo-Chinese Refugees held in Manila in May 1990 the need to resolve the problems of those determined not to be refugees and for further efforts to reach consensus on their return in safety and dignity received emphasis, but it was also stressed that abandonment of first asylum could not be justified (see 2 and 3 of the report).

66. UN Doc. A/34/627 Annex 1, p.7.

context, is it a mere token gesture in a world bent on destruction? As Arthur Koestler has commented,

> "the most striking indication of the pathology of our species is the contrast between its unique technological achievements and its equally unique incompetence in the conduct of its social affairs. We can control the motions of satellites orbiting distant planets, but cannot control the situation in Northern Ireland."[67]

There could be added to these examples man's incompetence so far to deal with the narrow ideologies and human cruelty which cause people to become refugees.

The same author goes on to note:

> "For the vast majority of mankind throughout history, the system of beliefs which they accepted, for which they were prepared to live and to die, was not of their own making or choice; it was shoved down their throats by the hazards of birth. *Pro patria mori dulce et decorum est*, whichever the *patria* into which the stork happens to drop you. Critical reasoning played, if any, only a secondary part in the process of adopting a faith, a code of ethics...; of becoming a fervent Christian crusader, a fervent Moslem engages in Holy War...The continuous disasters in man's history are mainly due to his excessive capacity and urge to become identified with a tribe, nation, church or cause, and to espouse its credo uncritically and enthusiastically, even if its tenets are contrary to reason, devoid of self-interest and detrimental to the claims of self-preservation."[68]

From such a base we have created refugees, people who have a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group of political opinion"[69] and others "in refugee-like circumstances" to whom we may not be prepared to afford protection.

A world spirit of cooperation, awareness, and identification with humanity in general, as opposed to a small fraction of it, seems an essential first step to the resolution of the immense problems we have brought about by our preoccupation with, and fanatical belief in, the exclusive rightness and superiority of our own little corner of the earth, wherever and whatever that may be.

The changing response to the refugee problem, having moved as it has over the last half century from *ad hoc* local and national assistance, to an emphasis on the need for an assumption of responsibility and cooperation at an increasingly wide international level, does provide a glimmer of

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67. A. KOESTLER, *Janus: A Summing Up* (Hutchinson, Australia, 1978), p.3.
68. Ibid, at p.14.
69. Art. 1(A)/2), 1951 Convention.

hope that here at least we may finally be moving in the right direction. Nonetheless, the lack for many refugee status applicants of full and early access to determination procedures, the 1988 turning away of Vietnamese from the shores of Thailand, the 1989 push-offs of thousands of Vietnamese from the Malaysian coast, pirate attacks in 1989 almost double the number of those of 1988,[70] the lack of adequate assistant to Burmese sheltering on the Thai border, the detention of asylum seekers in many countries in camps with less than the minimum acceptable standards, the closed camps in Hong Kong, and the threats of forcible repatriation to Vietnam coupled with screening mechanisms which may result in a denial of refugee status to genuine claimants – all these are stark reminders that there is absolutely no room for complacency.

70. UNHCR statistics for 1989 were almost double those of 1988 and pirates more and more try to ensure they leave no witnesses - this may be due to the increasingly sophisticated investigation techniques and higher rates of arrest and conviction. See C. ROBINSON, *Testimony on the US, the CPA and Refugee Protection Problems in S.E. Asia*, before the Senate Appropriations Committee, US Committee for Refugees, Washington, 1990, pp. 9-10.

BALANCING WESTERN LEGAL CONCEPTS, ASIAN ATTITUDES AND PRACTICAL DIFFICULTIES – A CRITICAL EXAMINATION OF HONG KONG'S RESPONSE TO THE REFUGEE PROBLEM

Roda Mushkat*

INTRODUCTION

It is fashionable to highlight Hong Kong's unique economic and political features. This paper is not inconsistent with this trend for it aims to explore the territory's approach to the refugee issue by focusing on constraints inherent in its status as a British dependency, a would-be semi-autonomous part of the People's Republic of China (PRC) and an Asian politico-economic entity.

Such a tripartite identity is inevitably a source of conflicting demands which are not easy to reconcile in practice. The British, Chinese and Asian traditions tend to diverge rather than converge – a problem compounded by the fact that the refugee question can be tackled from multiple analytical perspectives.

There are, of course limits beyond which the three-dimensional perspective cannot legitimately be stretched. The international legal norms pertaining to the refugee issue may be characterised by a degree of ambiguity, but they offer a viable framework for assessing specific practices. An attempt will be made, therefore, to examine the Hong Kong reality in the light of generally recognised principles of international refugee law.

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* LL.B. (Jeru); LL.M. (Well), LL.D. (Pret.), Dip. Intl. Law (Man), Member of the Israel Bar, Senior Lecturer, Faculty of Law, University of Hong Kong.

Ko Swan Sik et al. (eds.), Asian Yearbook of International Law, 45–112.

1. ADMISSION OF ASYLUM SEEKERS

1.1 International Rules

The basic rule pertaining to admission of refugees is laid down in Art. 33(1) of the 1951 UN convention Relating to the Status of Refugees.[1] It stipulates that "[n]o Contracting State shall expel or return (*'refouler'*) a refugee in any manner whatsoever to the frontier 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".

The principle – which in its most restrictive interpretation was taken to mean "no return, no expulsion" – has been extended to include "no rejection at the frontiers" where the end result would be the same (i.e. compulsory return to the country where the refugee may be subjected to persecution).[2] It is further considered that as a "logical and necessary corollary" of an otherwise incomplete regime of *non-refoulement*, a duty to provide temporary refuge is also implied.[3]

The universal recognition of the principle in various multilateral instruments, General Assembly resolutions and numerous conclusions and recommendations of international conferences coupled with extensive State practice and *opinio juris* has, moreover, reinforced the view that *non-refoulement* has matured into a norm of customary international law binding on all members of the international community whether or not they are party to the Refugee Convention.[4]

Hence, Hong Kong, which is not a party to the Refugee Convention, is bound by the *non-refoulement* proscription and is legally obliged to provide temporary refuge to asylum seekers, if refusal would involve their re-

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1. 189 UNTS 137; hereafter the Refugee Convention.

2. Note commentary by A.GRAHL-MADSEN, *Territorial Asylum* (Almquist & Siksell, 1980) at p.74 that the rule of *non-refoulement* as ordinarilly formulated in Art. 33 *did* incorporate such a prohibition, in particular with regard to States sharing a common frontier with the country from which the refugees have fled. In *Grahl-Madsen's* opinion subsequent developments have simply served the function of clarifying the provision in question.

3. See G.S.GOODWIN-GILL, "Entry and Exclusion of Refugees", *Michigan Yearbook of International Legal Studies* (1982), p.306. See also International Institute of Humanitarian Law, *Report of the Round Table on the Problems Arising from Large Numbers of Asylum Seekers* (1981) para 9: "The first act of protection which the asylum-seeker needed was admission in the territory of the State of arrival, in accordance with the generally recognised principle of *non-refoulement* and, therefore, of non-rejection at the border."

4. For an analysis of the status of *non-refoulement* as a principle of customary international law, see G.S.GOODWIN-GILL, *The Refugee in International Law* (Clarendon Press, 1983), pp.97-100; P. HYNDMAN, "An appraisal of the development of the protection afforded to refugees under international law", 1 *Lawasia* N.S. (1981), p.229; P.HYNDMAN, "Asylum and *Non-Refoulement*– are these obligations owed to refugees under international law?", 55 Phil. L.J. (1982) p.43; R.MUSHKAT, "Human rights under temporary refuge", 62 *Revue de droit international* (1984), p.169.

turn to a country from which they have fled or would otherwise expose them to serious danger (e.g. on the high seas).

The territory's international obligations with respect to refugees are further reinforced by conventional undertakings in the form of (a) a pledge to maintain Hong Kong as a "country of first asylum" given at the UN Meeting on Refugees and Displaced Persons in South East Asia (Geneva, 20-21 July 1979);[5] and (b) a reaffirmation at the International Conference on Indochinese Refugees (Geneva, 13-14 June 1989) of a commitment to continue to allow safe arrival and provide temporary refuge to asylum seekers from Vietnam and Laos.[6]

No definition of "country of first asylum" has, however, been universally accepted. A widespread usage" may be said to have developed[7] for "excluding from consideration the cases of those who have found or are deemed to have found asylum or protection elsewhere, or who are considered to have spent too long in transit."[8]

Yet, to eschew the problem of "refugees in orbit"[9] States are urged to adhere to the recommendation that "asylum shall not be refused solely on the grounds that it could be requested from another State."[10] In any event, under no circumstances, is the principle of *non-refoulement* to be compromised and where there is no readmittance agreement with a purported "country of first asylum" the territory where refuge is sought should allow asylum seekers to enter provisionally pending suitable arrangements.[11]

1.2 The British Position

The UK is a party to the 1951 Refugee Convention and its 1967 Protocol.[12] However, there is not a distinct statute governing refugees and the relevant provisions form part of general immigration law which consists of

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5. See *Annual Review of UN Affairs* 1979, pp.234-5.

6. See M.KNOWLES, *The International Conference on Indochinese Refugees and its Aftermath* (Refugee Policy Group, 1989).

7. See G.FOURLANOS, *Sovereignty and the Ingress of Aliens* (Almquist & Wiksell Int'l, 1986) at p.155.

8. GOODWIN-GILL, *supra* n.4 at p.53.

9. Defined as refugees who, although not returned to a country where they are liable to persecution are referred from one State to another in a constant quest for asylum. See G.MELANDER, "Refugees in Orbit", 16 *AWR Bulletin* (1978), p.59.

10. Resolution adopted by the Round Table on "Refugees in Orbit" (Florence, Italy, 4-6 June 1979) para. 3, repr. in *Round Table on "Refugees in Orbit"* (International Institute of Humanitarian Law, HCR/120/27/79 (1979)) at pp.83-4.

11. See UNHCR recommendation that a refugee that has applied for asylum should be permitted to remain in the country pending a decision: EXCOM Conclusion No. 8 (XXVIII), Determination of Refugee Status, para (e)(vii).

12. (1954)UKTS No. 39, Cmnd. 9171; (1969) UKTS No. 15, Cmnd. 3906.

rules, regulations, procedures and policies of the Home Office (the immigration authority).

Britain's obligation of *non-refoulement* is thus given domestic effect by the Statement of Changes in Immigration Rules (1983)[13] which provides under a section entitled "asylum" that "[s]pecial considerations arise where the only country to which a person could be removed is one to which he is unwilling to go owing to well founded fear of being persecuted... Any case in which it appears to the immigration officer as a result of a claim or information given by the person seeking entry at a port that he might fall within the terms of this provision is to be referred to the Home Office for decision... Leave to enter will not be refused if removal would be contrary to the provisions of the Convention and Protocol Relating to the Status of Refugees... (Rule 73). Having entered, "[a] person may apply for asylum in the United Kingdom on the ground that, if he were required to leave, he would have to go to a country to which he is unwilling to go owing to well founded fear of being persecuted..." (Rule 134.

It appears, however, that the Secretary of State for Home Affairs takes, on the one hand, a strict view of the "*first* asylum principle" as thought to be implied by the word "directly" in Art. 31 of the Refugee Convention and, at the same time, a "liberal" approach to the "other" country to which an asylum seeker should address his request. Thus, an application for asylum from a national of Uganda who sought leave to enter the UK from Kenya was rejected by the Home Secretary on the ground that the applicant came from a "safe country" (Kenya) which, as a signatory to the 1951 Convention, would not knowingly remove a Ugandan citizen to Uganda if there was reason to believe he would be persecuted there. The House of Lords accepted the existence of a general "international practice" that a person arriving from country A claiming to be a refugee from country B, where country A is a party to the Convention, could be returned to country A whose responsibility it is to investigate his claim to refugee status. The court nevertheless emphazised that the effect of Art. 33 of the 1951 Convention was to prohibit the removal of a person who was a refugee from the State of nationality to a third country if it was likely that the third country would in turn return him to the State of his nationality. The court conceded that it was for the Secretary of State to determine whether the danger of such an eventuality occurring was sufficient to involve a potential breach of Art. 33 but held that the question had not received adequate attention by the Secretary of State in the particular case.[14]

More recently, the Home Secretary refused to consider applications

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13. H.C.169 – made under Section 3(2) of the Immigration Act 1971.

14. In *re Misisi*, [1987] 1 AC 514, pp.532-4 (per Lord BRIDGE), pp.537-8 (per Lord BRANDON).

from asylum seekers who arrived at the UK from Lebanon and directed their removal to Brazil based on the fact that the applicants had visas for admission to Brazil, held tickets for travel to Brazil and had no connection with the UK and that it was reasonable to expect them to apply for asylum in Brazil. Applications for judicial review against the decision of the Home Secretary were, however, allowed by a judge of the Queen's Bench Division in the light of the UK's obligation under the 1951 Convention and in accordance with the "principle of first asylum" laid therein and supported by international practice. The court held that the Home Secretary acted unlawfully in directing the removal to Brazil since he had no cause to believe that the applicants would, as distinct from should, be admitted to that country.[15]

The restrictive approach reflected in the Home Secretary's decisions alluded to above coupled with legislation such as the Immigration (Carriers' Liability) Act 1987 (which imposes criminal penalties on those who carry into the UK aliens without proper documentation for lawful entry) has, doubtless, had the effect of putting "substantial obstacles in the path of refugees wishing to come [into the UK]."[16]

The Government has nonetheless insisted (and, strictly speaking, correctly) that visa requirements and carrier sanctions are not inconsistent with its obligations under the Refugee Convention[17] and that it was following, on the whole, a "British tradition of taking in those fleeing persecution."[18]

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15. Regina *v.* Secretary of State for the Home Department, *Ex parte Yassime & Others, The Times*, 9 March 1990, p.4.

16. Judgement, *Ex parte Yassime*, loc.cit. As elaborated by Mr. Justice SCHIEMANN, "[o]ne could not get a visa on the basis of being a refugee in the country where one was being persecuted because at that stage one was arguably not outside the country of one's nationality and therefore did not fall within the definition of refugee and there was no provision for such a situation in the Immigration Rules. By reason of the 1987 Act, carriers were disinclined to convey those without a visa."

17. See H.C.HANSARD, Vol. 112, 711-2, 16 March 1987. See, however, the argument put forward by E Feller that while "States have a legitimate interest in controlling irregular migration and a right to do so through appropriate border measures, ... they are in breach of international obligations towards refugees where such measures hinder access both to status determination procedures and to asylum from persecution": "Carrier sanctions and international law", 1 IJRL (1989) p.48. See also A.RUFF, "The Immigration (Carrier's Liability) Act 1989: its implications for refugees and airlines", 1 IJRL (1989), p.481 – for a view that the procedural measures introduced under the Act undermined the substantive right of refugees to claim asylum and enable the UK to evade its international obligations towards refugees.

18. Home Affairs Report, cited in T.HOWLAND, "A comparative Analysis of the Changing Definition of a Refugee", 5 *Human Rights* (1987), p.33, 58n. Note also that in 1982 approximately 5000 people applied for political asylum in Britain from over 60 nations and nearly all were allowed to stay: G.S.GILBERT, "Right of asylum: A change of direction", 32 ICLQ, (1983) 633n.

1.3 Regional Attitudes

It is noteworthy that the countries in the region particularly affected by refugee influxes are not parties to the 1951 Refugee Convention or its 1967 Protocol.[19] They have nonetheless undertaken an internationally binding obligation to provide first asylum to refugees from Indochina.[20]

It should also be pointed out that while regional governments have not incorporated the principle of non-refoulement in domestic legislative enactments or appropriate administrative policies and instructions, in practice they have generally demonstrated readiness to abide by it.[21] Temporary refuge has been offered in the region to over 1.5 million Indochinese asylum seekers since 1975. Even Singapore, which made clear at the outset that it would not permit ships carrying Indochinese refugees to enter its waters, has accepted the so-called "first port of call principle" which has developed in the South East Asia region.[22] Accordingly, it allows disembarkation of asylum seekers rescued by vessels whose next scheduled port is Singapore (subject to written guarantees given by the Government of the flag state of the government of a third country of resettlement within three months of arrival).

This is not to say that the principle of *non-refoulement* has been scrupulously observed in the region. In particular, measures employed by some countries to prevent boats landing ("push-offs")[23], although by strict interpretation not a violation of the principle – if not directly effecting the return of refugees to a country in which they may be endangered – are scarcely consistent with its spirit.

Yet, on no occasion have regional governments denied the binding nature of the principle of *non-refoulement* and have been at pains to justify "push-back" practices as general protective mechanisms against foreign il-

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19. Note, however, accessions by the Philippines (on 22 July 1981), Japan (on 3 Oct. 1981) and the People's Republic of China (on 24 Sept. 1982).

20. Both in 1979 and in 1989 at the International Conferences on Indochinese Refugees and Displaced Persons.

21. See V.MUNTARBHORN, "Displaced persons in Thailand: Legal and national policy issues" in *Round Table of Asian Experts on Current Problems in the International Protection of Refugees and Displaced Persons* (International Institute of Humanitarian Law, 1980) [hereafter: "Asian Experts Report 1980"]165 ff; R.SOEROSO, "Indonesia: Refugees and displaced persons – the Asian practice", ibid. at 118 ff; Y.KAWASHIMA, "Japanese legislation with respect to the protection of refugees", ibid. at 130 ff; note that Japan in fact incorporated *non-refoulement* in a new law introduced upon Japan's accession to the Refugee Convention: the Immigration Control and Refugee Recognition Act 1982. Under Art. 18(2) it "would be appropriate to allow the person [fleeing from a territory which was feared to be harmful to the person's life, physical being, or physical liberty] temporary landing"; Art. 53 prohibits compulsory return in case of deportation to a territory with respect to which a person has a well-founded fear of persecution on account of race, religion, political opinion, etc.

22. See M.CHANG, "Refugees and displaced persons: the Singapore experience", in: *Asian Expert Report 1980, supra* n.21 at 180 ff.

legal intruders (e.g. fishermen) into territorial waters[24] or as a mere "redirection of passengers to other countries that could help them to reach their desired place of final destination."[25] The position has also been advanced that "first asylum" obligation may be discharged by supplying asylum seekers with "humanitarian aid", i.e. food, fuel, medicine and, where necessary, new vessels for ontoward journey.[26]

Generally, while not invoked as an express exception to the principle of *non-refoulement,* practical difficulties coupled with frustration over slow pace of resettlement and the unresolved issue of repatriation have given rise to more rigid admission policies[27] and to tactics undermining the principle.[28]

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23. In early 1988 the Thai authorities organised a blockade to intercept arriving Vietnamese boats, redirecting them towards Malaysia – see US Department of State Bureau for Refugee Programs, *World Refugee Report* (1989) at p.31; "confirmed reports from reliable sources revealed 10 separate incidents of push-backs [by Indonesia] involving 573 persons" – J.M. DILLER, *In Search of Asylum: Vietnamese Boat People in Hong Kong* (Indochina Resource Action Centre, 1988 [hereafter: *IRAC Report*] at p.14; according to diplomats and UNHCR officials since May 1989 more than 5000 Vietnamese refugees have been towed out to sea by the Malaysian authorities – see "US criticizes Malaysia for Viet policy", *South China Morning Post* [SCMP] 19 Aug. 1990; the numbers have shot up to 8700 at last count – see "Malaysia to send back all Viets", SCMP 16 June 1990; see also reports in SCMP 13 Aug. 1989 and 1 Sept. 1989 concerning the forcing back into international waters of Vietnamese boats by South Korean maritime police.

24. See "Major, Mahathir warn of forced repatriation soon," SCMP 16 Oct. 1989 (citing Malaysian Prime Minister).

25. See A.BOYD, "Asia Boat People on Cruise to Nowhere", SCMP 27 Apr. 1990.

26. See BOYD, ibid. See also S.AZAM & M. VATIKIOTIS, "For those in peril'", *Far Eastern Economic Review* [FEER] 3 May 1990, pp.8-9; "Malaysia denies boat people turned away", SCMP 28 June 1990.

27. For example, the stance taken by the Philippines recently in refusing entry to Vietnamese boat people rescued by American ships unless a firm US guarantee was provided that they would be resettled within a certain period of time: see "Manila refuses entry to 101 boat people", SCMP 6 June 1990; "Manila bars second US ship with Viets", SCMP 14 June 1990. The Philippine Government eventually allowed the stranded Vietnamese ashore after receiving assurances that all refugees in the Philippines would be resettled elsewhere in 3 years: "Philippines lets Viets come ashore", SCMP 15 June 1990; similar assurances were extracted from the Canadian Government prior to permission to disembark given by the Philippine Government to Vietnamese rescued by a Canadian vessel: "Refugee deal struck", SCMP 24 June 1990. Another group of Vietnamese boat people rescued by a Taiwanese ship in international waters off Thailand were not given permission to land and shuttled back and forth to "unfriendly receptions" in Taiwan, Hong Kong and Thailand (the latter two refusing to accept responsibility because they were not "first port of call"): see J.LEUNG, "Next stop Bangkok for unwanted boat people", SCMP 12 June 1990; the troup was finally allowed to disembark in Taiwan after the Philippine Government agreed to accept them following pleas from the UNHCR: "Taiwan allows Viet to land", SCMP 19 June 1990.

28. Such as the ultimatum issued by the six ASEAN countries to the US that unless Washington agrees to force repatriation of Vietnamese people screened out as non-refugees, or establishes a holding centre for them the first asylum countries of Asia will no longer offer refuge to boat people: see M. CHUGANI, "Refugee ultimatum at impasse", SCMP 16 June 1990.

1.4 The Hong Kong Approach

As noted earlier, Hong Kong is not a party to the Refugee Convention[29] nor, like other Asian countries, has it given legislative effect to its international obligations concerning admission of refugees.

The territory seems, however, to fare better than its regional counterparts in terms of practical observance of *non-refoulement*. As passionately put by the former British Minister of State, Foreign and Commonwealth Office with Responsibility for Hong Kong Affairs (Francis Maude), "since the whole process began in the 1970s no fewer than 170,000 asylum seekers from Indo-China have arrived in Hong Kong. To Hong Kong's eternal honour, that tiny territory – the most crowded part of the globe – has not turned away a single one. All have been given shelter..."[30]

Notwithstanding regional manifestations of "compassion fatigue" the Hong Kong Government has reaffirmed its commitment to act as a country of first[31] asylum, albeit not out of strong legal convictions. Pragmatic considerations seem to have largely replaced the initial humanitarian sentiments which had underlied the Government's policy of offering refuge to Indochinese boat people in the first years of the refugee influx from Vietnam.[32] Apart from highlighting logistic problems,[33] the current government is particularly concerned to maintain international goodwill both

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29. The Convention, signed and ratified by the UK, has not been extended to the territory because of constraints inherent in the UK-China relationship regarding Hong Kong. See also H.L. Debates, Vol.460, Col.968 (27 Feb. 1985) for remarks by the Parliamentary Under-Secretary of State for the Armed Forces, Lord TREFGARNE, that "it was decided not to extend the Convention to Hong Kong because of the territory's small size and geographical vulnerability to mass illegal immigrants." He added that "[t]he 1967 Protocol was applied only to those territories to which the 1951 Convention was extended" and that "[t]he Hong Kong Government nevertheless co-operates fully with the Office of the UNHCR."

30. H.C. Debates, 1505 Weekly Hansard, Col. 270 (19 Dec. 1989).

31. If it is established that the asylum seekers "settled" in the PRC prior to arrival in Hong Kong, they are classified as "illegal immigrants" and repatriated subject to the Chinese Government's agreement to receive them back.

32. See, e.g., the Governor's response to a question enquiring whether Hong Kong might "shut its doors" and "tow the refugees back to sea" if their flow became heavy: "I do not know how you can shut the doors to someone coming in a wooden boat who has made a voyage across the South China Sea. You can't shut the doors unless you shoot." Reported in SCMP 20 June 1979.

33. As stated by the Secretary for Security in a reply to a question of a Legislative Councillor, "a decision to adopt a policy which involves the pushing-off or the re-direction of Vietnamese boat people would be hard to make and difficult to implement. Anyone advocating such a policy should bear in mind the full implications as asking police officers to carry out a policy which might result in the loss of life". *Legislative Council Proceedings* [LegCo Proc] 25 Oct. 1989 at p.99.

with respect to immediate refugee issues[34] and commercial interests[35] and in an effort to promote Hong Kong as an international city, as well as further develop and reinforce the territory's reputation as a liberal and humane place in the run-up to 1997.[36]

At the same time, there has been consistent agitation locally for an end to the first asylum policy from the public at large[37] through the district board level[38] to the legislature.[39] Hong Kong representatives have also put the territory's name to a joint statement by regional first asylum countries to the effect that "[i]n the event of failure to agree on an immediate solution to the VBP (Vietnamese Boat People) problem, countries of temporary refuge must reserve the right to take such unilateral action as they deem necessary to safeguard their national interests, including the abandonment of temporary refuge."[40]

It is reasonable to assume, however, that the deterrence strategies threatened are more a plea for burden-sharing than an assertion of legal rights. It is also unlikely that the threat will be translated into practice by Hong Kong. The Government's stance remains that "ending first asylum would be a very difficult policy to implement in a humane manner; ...that it is very hard to see it working and being effective; and... that it is proba-

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34. In an exclusive "state of the nation" interview, the Chief Secretary emphasised the substantial impact an abandonment of the first asylum principle would have on Hong Kong's ability to deal with the boat people problems in any international forum – see C.DOBSON, "Army to take control of one Viet camp", SCMP 5 May 1990.

35. See Governor's Address: "[Abandoning the first asylum principle] would also affect international attitudes towards Hong Kong in other areas, such as trade, where we have important interests"LegCo Proc, 11 Oct. 1989, at p.19.

36. See M. BARROW (Legislative Councillor), "A Solution to the Exodus", SCMP 23 June 1990.

37. A signature campaign for the abolition of first asylum policy was embarked upon by Tuen Mun residents and the Federation of Civil Service Unions (FCSU) during an overnight sit-in outside Tuen Mun Town Hall after a mass rally attended by about 2000 people: see C.WONG, "Residents want policy scrapped", SCMP 13 Aug. 1989. The Joint Committee of the New Territories Societies (consisting of more than 40 community organisations) petitioned the Governor, urging him to scrap Hong Kong's status as a port of first asylum—S.Y.WAI, "Groups plan lobby against camp policy", SCMP 24 Aug. 1989. A similar petition was submitted to Government House by the Hong Kong Federation of Trade Unions: F.MACMAHON, "Unions protest at boat people", SCMP 25 Sept. 1989. See also B. FONG, "Call to scrap first asylum policy: Poll", SCMP 25 Aug. 1989, reporting on the results of a survey conducted by an independent pollster in conjunction with a Radio Television HK (RTHK) public affairs programme: 84% of 535 people interviewed said they wanted a halt to the first asylum policy.

38. See "Call to scrap port of first asylum policy", SCMP 26 Oct. 1989, concerning the petition to the Governor from the Joint Districts Concern Group on Vietnamese Refugees and Boat People. The same group also sent a letter to the British Foreign Secretary urging the review of first asylum policy: K. CHEN, "Demand for review of asylum policy", SCMP 17 Jan. 1990.

39. At a debate on "Vietnamese Boat People", held in the Legislative Council on 29 Nov. 1989, all speakers (with the exception of one member) called for the revocation of the first asylum policy: LegCo Proc, pp. 442, 443, 446, 450-1, 457-8, 467, 474-5, 483-4, 490.

40. Cited in S.GREEN, "Playing it safe over first asylum", SCMP 23 May 1990. Note, however, lobbying effort of Hong Kong at a recent ASEAN working group meeting for the continuation of first asylum policy: F.MACMAHON, "Asylum plea for ASEAN meeting", SCMP 25 July 1990.

bly not in Hong Kong's wider interests."[41] A rider is nonetheless attached to official statements on the subject to the effect that positions may change if limits on the "ability to cope" are transcended.[42]

1.5 Evaluation

While Hong Kong's practice with respect to temporary admission of asylum seekers has hitherto been in general accord with prevailing norms[43], claims to potential derogation from international rules have been raised and the degree of their validity merits assessment.

In particular arguments grounded in "inability to cope" or practical constraints[44] have brought to the fore the question "whether there is a 'tipping point' at which the influx becomes so costly and disruptive to the state of refuge that its obligations are discharged and it becomes entitled to refuse new entrants."[45]

The 1951 Refugee Convention has recognised only "danger to the security of a State" and the "conviction by a final judgment of a particularly serious crime" as legitimate exceptions to the prohibition on "*refoulement*".[46] The 1967 Declaration on Territorial Asylum adopted by the UN General Assembly[47] similarly refers to exceptions "only for overriding reasons of national security or in order to safeguard the population."[48]

Needless to say, "national security" is the "slipperiest of concepts, fre-

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41. As relayed by Hong Kong's Refugee Co-ordinator to S. GREEN, ibid.

42. See ibid.

43. Note, however, possible "indirect" violation of "*non-refoulement*" through arrangements between Hong-Kong and the PRC under which the latter intercepts boat people en route to Hong Kong. See V.WONG and J.NIP, "Beijing may intercept boat people flow at sea", SCMP 17 Feb. 1990; F.WONG, "China sent back 77,000 Vietnamese", SCMP 1 Mar. 1990.

44. See, for example, statements by Legislative Councillors, LegCo Proc 19 Nov. 1989 at p.441 ("we are stretched to our limits"), p. 445 ("it is impossible for Hong Kong to look after the Vietnamese refugees and boat people perpetually and take them indefinitely as they come in ever increasing numbers"), p.457 ("our society has been hard-pressed to the end of its tether"), p.458 ("Hong Kong is at the end of its tether in dealing with the Vietnamese boat people"), p.465 ("given our limited land resources, we are really unable to accomodate the endless influx of Vietnamese boat people"), p.474 ("with the scarcity of land, manpower and funds, the situation has become increasingly unbearable that we can hardly stand the continued presence of the boat people in the territory"), p.476 ("the Vietnamese boat people problem is becoming intolerable to Hong Kong both in terms of the material burden placed on us and the mental stress caused to the citizens at large").

45. D.PERLUSS & J.F.HARTMANN, "Temporary refuge: emergenceof a customary norm", 26 Va JIL, p.551, 621-2.

46. Art. 33(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."

47. GA Res.2312 (XXII) of 14 Dec. 1967, UN GAOR, 22nd Sess., Supp.No 16, p.81.

48. Article 3(2).

quently subject to self-serving definition."[49] Yet, as an exception to a fundamental principle it must be interpreted restrictively. Clearly, not all unilateral determinations of threats to national security are acceptable to other States or tolerated by them. Thus Malaysia's rejection of boat people in 1978 for fears of "upsetting delicate racial balance"[50] and Thailand's "push-back" policy against Kampuchean refugees in early 1979 motivated by a perceived need to control "resentment among indigenous people"[51] have provoked vigorous international protests. *A fortiori*, general claims of "exhaustion" and "resources drainage"[52] – although capable of reinforcing demands for international assistance[53] – could not justify derogations from what is widely recognised as a fundamental (even "peremptory"[54]) norm of international law.

A "balancing of interests" approach, suggested by a learned author,[55] holds considerable attraction and is consistent with general principles of international law. According to Feliciano, "the first step is to recognize that both the humanitarian claims of refuge-seekers and the claims of States to authority to protect their security interests are legitimate claims. There is no need to pretend that legitimate State interests are not engaged by the presence of refugees insistently knocking at the frontier, as it were. Neither can it be reasonably supposed that State interests must simply and always override claims made in the name of humanity."[56] The universally recognised principles of necessity and proportionality offer a conceptual vehicle for the reconciliation of conflicting interests. Thus "humanitarian claims for refugees may be denied and *refoulement* resorted to only when such measure has become indispensably necessary for the protection of an equally weighty State interest."[57] In a similar vein, "the human suffering imposed by *refoulement* must not be grossly disproportionate to the substantive value of the State interest sought to be maintained."[58]

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49. PERLUSS & HARTMAN, *supra* n.45, at p.621.

50. See XXVI *Keesing's Contemporary Archives*, Cols.30076, 30077, 30079 (1980).

51. See K.SOBHAD-VICHITR, "The Indochinese refugee problems: viewpoint from Thailand", in *Asian Experts Report 1980*, *supra* n.21, at p. 176.

52. Of the type raised by LegCo members, *supra* n.44.

53. See TEITELBAUM, "Immigration, refugees and foreign policy", 38 Int'l Org. (1980), p.429, 436.

54. See *Report on the Meeting of the Expert Group on Temporary Refuge in situations of Large-Scale Influx*, EC/SCP/16, 3 June 1981, at p.6; EXCOM, *Note on International Protection*, A/AC.96/660, 23 July 1985, at p.5; EXCOM, *Note on Internatinal Protection*, A/AC.96/694, 3 Aug. 1987, at p.7.

55. See P.F.FELICIANO, "The principle of *non-refoulement*: A note on international legal protection of refugees and displaced persons", 57 Phil.L.J., p. 598.

56. Ibid, at p.606.

57. Loc.cit.

Applying these principles in the Hong Kong context, it is apparent that the refugees have not posed a tangible threat to the territory's security. Their presence has not jeopardised Hong Kong's relationships with other parties, has not caused a sharp deterioration in public order and has not imposed an intolerable burden on the treasury and the community at large. On the other hand, the harm inflicted on asylum seekers if the principle of *non-refoulement* were to jettisoned would be substantial.

Nor can an argument be made that "since the resettlement countries have failed to fulfill their commitment which is crucial to the operation of first asylum policy, Hong Kong should no longer be obliged to take up the responsibility as a port of first asylum."[59] In accordance with a well-established rule of international law,[60] Hong Kong's unilateral declaration in 1979 – make publicly, in respect of a legal/factual situation and with intent to be bound – has had the effect of creating a legal obligation for the Government to follow a course of conduct consistent with the declaration independent of any *quid pro quo*. Thus unfulfilled expectations do not furnish a legal ground for non-compliance. Similarly, although representatives of first asylum countries at the 1989 Geneva Conference expressed their desire and hope that asylum seekers would eventually either be resettled outside the region or return to their countries of origin, the obligation to provide temporary refuge is unconditional and legally binding.[61]

Admittedly, "international solidarity and equitable burden-sharing" are generally considered as principles of international refugee law[62] and as "indispensable for satisfactorily resolving problems of refugees and displaced persons arising in situations of large-scale influx"[63] but they "should not be a precondition for compliance with basic humanitarian principles."[64] As elaborated by a UNHCR representative, "[i]t is *axiomatic* that asylum seekers should not be rejected at a frontier or expelled if this would oblige them to return or to remain in a country where their life or freedom would be threatened. Equally, asylum seekers should not be refused temporary asylum if this would involve their returning to the high

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58. Loc.cit.

59. LegCo Proc., 19 Nov. 1989, at p.447.

60. See *Nuclear Tests Case (Australia v. France*, [1974] ICJ Rep., at pp.253, 267-70.

61. See PERLUSS & HARTMANN, *supra* n.45, at p.616, for the view that temporary refugee consitutes an obligation *erga omnes*, independent of finding the responsibility by another party and not contingent on reciprocity or burden-sharing arrangements.

62. See G.COLES, "Problems at the large-scale influx" in *Report of Asian Experts 1980*, *supra* n.21, at pp.35, 42, 44.

63. Manila Declaration on the International Protection of Refugees and Protected Persons in Asia, repr. in EXCOM, *Note on the Round Table of Asian Experts on International Protection of Refugees and Displaced Persons*, UN Doc. A/AC.96/INF. 162 Annex I (1980), para 10.

64. Loc. cit.

seas where their very lives may be in danger. The observance of these principles should not vary according to the extent to which the burden-sharing arrangements are at any given moment considered to be adequate."[65]

Finally, the norms of *non-refoulement* and temporary refuge are grounded in the acceptance by the international community that the basic principles of humanity, protection of life and dignity must be granted to persons who have lost their national protection. These humanitarian-inspired duties are imposed regardless of the sovereign or otherwise status of the territory where asylum is sought. Thus Hong Kong's transition from British to Chinese rule in 1997 should not affect its compliance with international obligations under international refugee law.[66]

2. DETERMINATION OF REFUGEE STATUS

2.1 **The Screening Process**

2.1.1 International Rules

While defining the obligations of the parties towards refugees, the 1951 Refugee Convention and its 1967 Protocol are silent on the issue of method for determining who is a refugee entitled to protection. "It is therefore left to each Contracting Party to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure."[67]

Yet, by virtue of a *Grundnorm* of international law, the principle of *pacta sunt servanda*,[68] "states ratifying the 1951 Convention and the 1967 Protocol necessarily undertake to implement these instruments effectively and in good faith."[69] "While the choice of means may be left to states some such procedure [for identifying those who are to benefit] would seem es-

65. P.M.Moussalli, " Fundamental principles in the international protection of refugees and displaced persons", *Report of Asian Experts 1980*, *supra* n.21, at p.14.

66. Indeed, the territory's responsibility may derive an additional legal force should the PRC extend to the Hong Kong Special Administrative Region (HKSAR) the Refugee Convention to which it is a party (*supra*, n.19).

67. Office of the UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, Sept. 1979) [Hereafter: UNHCR Handbook], para. 189.

68. The principle is expressed in Art. 26 of the 1969 Vienna Convention on the Law of Treaties, as follows: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." UN Doc A/CONF. 39/27 (1969).

69. Good-Gill, *supra* n.4, at p.147.

sential for the effective implementation and fulfillment of convention obligations."[70]

It is equally clear that observance of the fundamental principle of *non-refoulement* (and its "temporary refuge" corollary) hinges on the institution of appropriate determination procedures. Indeed, according to one expert, if we wish to attach any meaning to the principle of *non-refoulement* we have to assume that "a person claiming to be refugee has a right to have his claim examined."[71]

The pivotal aspect of the refugee status determination process has also been recognised at the 1989 Geneva Conference on Indo-Chinese Refugees which posited as part of a Comprehensive Plan of Action (CPA)[72] the requirement that such a process be established and "take place in accordance with national legislation and internationally accepted practice." [Section D6]

Specifically, the CPA stipulates [para. (d)] that "the procedures to be followed will be in accordance with those endorsed by the Executive Committee of the Programme of the UNHCR in this area. Such procedures will include *inter alia*: (i) the provision of information to the asylum-seekers about procedures, the criteria and the presentation of their cases; (ii) prompt advice of the decision in writing within a prescribed period; (iii) a right of appeal against negative decisions and proper appeals procedures for this purpose, based upon existing laws and procedures of the individual place of asylum, with the asylum-seekers entitled to advice, if required, to be provided under UNHCR auspices."

Basic to the procedural standards thus reaffirmed is the notion of due process and the international recognition of the special need and vulnerability of asylum-seekers – a concern duly reflected in the preliminary requirement that status determination be carried out by "qualified personnel having the necessary knowledge and experience and an understanding of an applicant's particular difficulties and needs."[73]

2.1.2 The British Position

No formal refugee determination procedure is incorporated in UK law (although an informal administrative process is said to have been developed by the Home Office[74]), rendering it somewhat "difficult... to hold au-

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70. Ibid at p.148.

71. A.GRAHL-MADSEN, "Refugees and refugee law in a world of transition", 19 AWR Bulletin (1981), at p.95.

72. Repr. in 1 IJRL (1989), at p.574.

73. UNHCR Handbook, para. 190.

thorities accountable for alleged procedural malfeasance or mistaken determinations."[75]

Yet, British judges have not hesitated to review the Executive's decisions concerning asylum-seekers and uphold procedural standards, recognising that serious issues of life and liberty are inherent in refugee claims. As stated by Lord Bridge – in an oft-quoted passage from his speech – in the House of Lords Decision *R v. Secretary for the Home Department, ex parte Bugdaycan & Others and In re Musisi*,[76] "[t]he most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must sure call for the most anxious scrutiny." The same notion was echoed in Lord Templemen's speech: "In my opinion where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process."[77]

While not regarding themselves as bound by EXCOM's recommendations with respect to the determination process[78], British judges have nonetheless applied the principle of "fairness" to develop procedural guarantees consistent with the recommendations. Specifically, the courts held that the procedure adopted by the immigration authorities be revised to provide applicants with copies of the completed asylum questionnaires (each page of which has been read over to and initialed by the applicant), including the immigration officers' comments;[79] that an applicant be provided with the opportunity "to consider calmly whether there is anything which he should add or alter" and that he be reminded of previous answers and directed to considerations which are likely to defeat his/her application;[80] that individuals be allowed to address discrepancies and issues of credibility;[81] and that full reasons be given for refusal of asylum.[82]. Of particular importance is the House of Lords' decision which confirmed that the civil burden of balance of probability is not appropriate in asylum cases. As held in *R. v. Secretary of State for the Home Department*

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74. See C.L.AVERY, "Refugee status decision-making: the systems of ten countries", 19 Stan JIL (1983), at pp.235, 319.

75. Ibid., at p.326.

76. [1976] AC 514 at p.531.

77. Ibid., at p.537.

78. Note that the UK is a member of EXCOM.

79. R. *v.* Secretary of State for the Home Department *ex parte* Thirukumar and Others, [1989] 1 Imm.A.R.270.

80. Loc. cit.

81. R. *v.* Secretary of State for the Home Department *ex parte* Gaima, [1989] 2 Imm.A.R.205.

82. R. *v.* Secretary for the Home Department *ex parte* Gurmeet Singh and Others, [1987] 4 Imm. A.R.489.

ex parte Sivakumaran[83], asylum-seekers need only show a "reasonable likelihood" that they will face persecution for a "convention reason" to be recognised as refugees.

It may be concluded that, although the British status determination systems falls short of meeting all recommended standards of practice[84], administrative checks[85], judicial safeguards, and to a certain extent political control mechanisms[86] have served as a counterbalance to some of the deficiencies.

2.1.3 Regional Attitudes

Centralised[87] refugee status determination procedures have only been formally established in the region following the adoption of the CPA in June 1989 by the International Conference on Indo-Chinese Refugees.

In an attempt at uniformity and harmonisation, a Co-ordinating Committee for the International Conference on Indo-Chinese Refugees drew up the procedures it envisaged for the region's countries of first asylum following discussions with the respective governments.[88] A comprehensive regional training programme for officials involved in the determination process was also instituted by the UNHCR "with a view to ensuring the proper and consistent functioning of the procedures."[89]

Generally, the regional parties to the CPA have undertaken to follow

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83. [1982] 2 WLR 92.

84. See criticisms by AVERY of the following aspects: "...process largely controlled by immigration authorities, whose overall responsibility to 'control the borders' may condition them to be enforcement-minded and skeptical rather than impartial and sensitive to the special problems of refugees. Accurate decision making is further jeopardised by the fact that determinations at the Refugee Unit [Immigration & Nationality Department, Home Office] are based on a transcript prepared by a non-specialised officer, without the benefit of a personal appearance by the applicant before the decision-maker and usually without the benefit of UNHCR input... Furthermore, the review process is unsatisfactory. The most serious problem at that stage is that right to appeal is effectively denied to certain applicants because of their immigration status at the time of application." *Supra* n.74 at p.326. See also RUFF, *supra* n.17 for a discussion of the need for reform and in particular the establishment of a right of appeal for refugees whose application for asylum has been rejected.

85. Such as review by the Head of the Refugee Unit of all negative refugee determinations made by a unit officer, review by a UNHCR representative of every case including poissible intervention on behalf of the refugee at the appellate level. See AVERY, *supra* n.74 at p.325.

86. By informal but longstanding practice, asylum and refugee status cases may be revewed at the ministerial level of the Home Office when a Member of Parliament intervenes on behalf of the applicant. See AVERY, ibid.. at p.324-5; RUFF, *supra* n.17 at p.489.

87. A limited programme was introduced in Thailand on 1 July 1985. Designed to screen Laotian asylum-seekers, it provided an "uneven" accesss to highland and lowland Lao and was applied inconsistently by the various Thai provinces. See *World Refugee Report*, *supra* n.23 at p.33-4.

88. See *Note on National procedures for the Determination of Refugee Status* (Geneva, 23 & 26 May 1989 9 [hereafter: Note on Procedures].

89. CPA, *supra* n.72, Sec.D7.

the procedures endorsed by EXCOM. Yet, it appears that the regional screening mechanisms – installed largely as added deterrents – are outcome-oriented and do not adequately reflect the vulnerable position of refugees within an alien system. In particular, little or no pre-screening advice and assistance in presentation of cases are given to asylum seekers. Nor is a right to appeal or to court review firmly guaranteed.[90] It is also evident that while some form of UNHCR participation ("observer/adviser") is provided for, governmental control is ensured at all stages of the screening process.[91]

2.1.4 The Hong Kong Approach

Hong Kong has played a pioneering role in attempts to institute refugee status determination procedures in the region. Under a policy announced by the Government, as of 16 June 1988, all arrivals from Vietnam were to be treated as "illegal immigrants"[92] unless determined by a screening process to be refugees in accordance with the definition embodied in the 1951 Convention and its 1967 Protocol.

Although no specific legislation was adopted to reflect this shift in policy[93], in a Statement of Understanding concluded with the UNHCR on 20 September 1988, the Hong Kong Government has confirmed "its commitment to the establishment and operation of procedures for determination of refugee status which are in accordance with the UNHCR Handbook". Hong Kong authorities have further endorsed a revised[94] procedure for

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90. Based on information contained in the Note on Procedures, in Indonesia, an applicant who wishes to appeal must seek leave from an Appeal Board within a prescribed period. The Board will grant leave to appeal on the basis of the information provided, if it appears that there are new facts or that the criteria or procedures may have been misapplied. In Malaysia, applicants are informed of the "possibility" of having a negative decision reviewed and are required to submit a notice of intention and grounds for review within a prescribed period. In Thailand, the UNHCR is entitled to institute an appeal on behalf of a rejected case. Only in the Philippines does appeal seem automatic.

91. Indonesia's "screening commission" is led by an immigration officer and includes officials from P3V (the national body responsible for Vietnamese refugees); the appeal board is similarly constituted. In Malaysia, determination decisions are made by immigration officials attached to the National Task Force VII; review of negative decisions is also undertaken by officials of the National Task Force. Determination of refugee status in the Philippines is made by a CID (Commission on Immigration and Deportation) Officer but appeals will be submitted to the Inter-Agency Task Force on International Refugee Assistance and Administration. The Board of Status Determination in Thailand is chaired by an official of the Ministry of the Interior. Review of decisions is carried out by the same board consisting of more senior officials.

92. Note, however, that as a result of UNHCR's intervention, previous "warning notes" issued to arrivals upon entering Hong Kong's harbour have been revised to indicate that former residents of Vietnam are treated as asylum-seekers (not illegal immigrants) pending determination of their status. See Security Branch, "Notice of Arrival".

93. Before 16 June 1988 all Vietnamese arriving in Hong Kong were automatically deemed to be refugees.

94. See Note of Procedures, *supra* n.88.

status determination of Vietnamese asylum-seekers introduced on 1 July 1989 subsequent to the Geneva conference on Indo-Chinese Refugees. In particular, a Refugee Status Review Board (RSRB) was set up[95] to act on behalf of the Governor in council in considering applicants for review of negative determination decisions.

Further modifications were announced by the Government in February 1990 – in an attempt to address criticisms expressed by various bodies (UNHCR, Amnesty International, Indochina Resource Action Centre, Lawyers Committee for Human Rights, World's Commission for Refugee Women and Children) – including more training for interpreters and the granting to asylum seekers of access to written records of interviews with immigration officers before a decision is made on their status.[96] In addition, as part of what it regards as "a process of fine tuning", the Government "agreed" in April 1990 that RSRB should give reasons for adverse decisions.[97]

2.1.5 Assessment

Notwithstanding improvements in status determination procedures, the screening process in Hong Kong remains flawed and does not fully accord with the basic requirements for a fair and effective determination system which underlie compliance in "good faith" with international refugee norms.

Specifically, concerns persist in relation to the lack of legal advice and assistance to individual asylum-seekers at all stages of the screening process;[98] the attitude and competence of immigration officers (superficial approach, lack of familiarity with international refugee law and conditions in Vietnam);[99] the competence of interpreters;[100] and the shortcomings in the review procedure (in particular the fact that neither asylum-seekers nor their representatives are allowed to be present).[101]

In fact, not only are international standards disregarded, but Hong Kong's screening process fails to conform to general principles of natural

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95. See Immigration (Refugee Status Review Boards) (Procedure) Regulations 1989, L.N. 170/89 L.S.No. 2 to Gazette No. 24/1989.

96. See K.GRIFFIN, "Government Backdown on Screening", SCMP 25 Feb. 1990.

97. F.MACMAHON, "Board to Give Reasons for Viet Refusal", SCMP 27 Apr. 1990.

98. See *Amnesty International Memorandum to the Government of Hong Kong and the United Kingdom Regarding the Protection of Vietnamese Asylum-Seekers in Hong Kong* (January 1990) [hereafter: Amnesty Memorandum] at p.14.

99. Ibid., at pp.18-22.

100. Ibid., at p.23.

101. Ibid., at pp.24-5.

justice which form part of the territory's own legal system. Critics draw particular attention to the fact that applicants, who are not given proper or adequate notice of the hearing/interview or its importance, are denied the right to fair hearing[102]; that the interview conducted by the Immigration Officers is superficial, perfunctory and rushed; that the interpreters are insufficiently skilled, knowledgeable and articulate to fully and properly interpret applicants' answers, the immigration officers' questions and to permit applicants to fully state their case; that the applicants are not permitted to have legal or other advisers of their choice present throughout the interviews; that the applicants' answers are improperly recorded and as recorded by the immigration officers are misleading in fact, significance and context; that the interview records are never shown to the applicants nor are answers purportedly given by applicants read back to them so that the applicants could add or alter them; that the applicants are not given reasons or sufficient and proper reasons for the rejection by the immigration officers of their claim to refugee status, a factor also hindering proper preparation for appeal; that applicants are not provided with the opportunity to consider and if necessary provide further evidence about any provisional findings or reasons adverse to the applicants' claim for refugee status prior to a formal decision adverse to the applicants being made.[103]

Some external "safety-nets" are available such as UNHCR monitoring of interviews[104], post-determination representation (preparation of written submission for consideration by RSRB) by AVS (Agency for Voluntary Service) lawyers[105], and the UN mandate system (which allows asylum-seekers in special cases to qualify as refugees despite their failure to gain recognition in the screening process). However, they are not adequate to compensating for the defects in the screening process and, as stressed by Amnesty International, "it is governments that are responsible for ensuring proper, fair and just refugee determination procedures."[106]

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102. Contrary to, e.g., Kanda *v.* Government of Malaya [1962] AC 322 at p.337.

103. See D.CLARK, A.JORDAN, C.PETERSEN and H.SAMUELS, *The Flaws in the Vietnamese Refugee Screening Process in Hong Kong* (18 June 1990, unpublished) [hereafter: Lawyers Report]; see also, application for judicial review submitted to the High Court seeking to quash by *certiorari* adverse refugee determinations: *In the Matter of Nguen Ho & Others and the Director of Immigration and Refugee Status Review Board* (not yet heard).

104. Because of limited resources only a very small proportion of screening interviews are in fact monitored; there are only 3-4 UN lawyers to monitor 80 screenings taking place at any one time.

105. Again, for limited resources – only 10 lawyers – AVS legal advisers can actually take up and act on behalf of 10% of the cases they see.

106. Amnesty Memorandum, *supra* n.98, at summary 2.

2.2 Substantive Criteria

2.2.1 International Rules

While a definition of "refugee" is not universally agreed upon, the criteria incorporated in the 1951 Refugee Convention and its 1967 Protocol have been generally recognised as the basis of status determination procedures by many States, including non-parties. Decision-makers have also referred occasionally to the UNHCR Handbook as an authoritative source in interpreting relevant criteria, although the Convention's imprecise language (in particular the absence of a definition of "persecution") made way for States' own selective interpretation and restrictive application.

Basically, the key criterion in establishing refugee status under the Refugee Convention is a "well-founded fear of being persecuted." Persecution, however, has not been defined in any of the major international instruments concerning refugees, resulting in considerable divergencies in approaches. As one commentator observes, while a threat to life or freedom on one of the five cognizable grounds listed in the Convention will always constitute persecution, extending the concept beyond these parameters is a policy exercise whose outcome hinges on whether one takes a conservative or liberal approach.[107]

Arguably, a liberal approach is more consistent with both the spirit and practice of international refugee law. Thus, true to its ostensibly humanitarian objective and spirit, the Refugee Convention sets out to locate the refugee in a human rights framework by highlighting in the first paragraph of its Preamble the basic principle affirmed in the 1948 Universal Declaration of Human Rights, namely that human beings shall enjoy fundamental rights and freedoms without discrimination. A definition of "persecution" which includes serious[108] violations of human rights or discrimination (for cognizable grounds) is clearly consonant with such a principle. It is further argued[109] that a human rights orientation is implied in the "letter" of the Convention. An illustration is afforded by Art. 33(1) which speaks of threats to life *and* freedom and hence invites a broader interpretation of the notion of "persecution" which is not merely equated with deprivation of life or attacks on physical integrity.

That a humanitarian – as distinct from legalistic – attitude should be

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107. See P.HYNDMAN, "The 1951 Convention definition of Refugee: An appraisal with particular reference to the case of Sri Lankan Tamil applicants", 9 HRQ (1987), at pp.49, 60.

108. "...a degree considered unacceptable under prevailing international standards or under higher standards prevailing in the State faced with determining a claim to asylum or refugee status". See GOODWIN-GILL, *supra* n.4 at p.43.

109. See B.M. TSAMENYI, "The 'Boat People': Are they refugees?", 5 HRQ (1983), at pp.348, 364.

adopted is moreover evinced in a recommendation by the drafters of the Refugee Convention who urged States to apply the Convention beyond its strictly contractual scope to other refugees within their territory.[110]

Indeed, the main situation charged with protection of refugees, the UNHCR, has not confined itself to the legal definition of refugee and its criterion of "well-founded fear of persecution." Instead, its mandate has expanded to include "displaced persons"[111] and it has adopted much looser working categories which encompass persons who are unable to meet the technical requirements stipulated under the Convention.[112]

Support for the liberal approach to the interpretation of "persecution" may also be adduced from the practice of States. As documented by one author, "Australia, for example, has a declared policy of resettling 'people in refugee-type situations which do not fall within the UNHCR mandate or within Convention definitions.' Italy guarantees a right of asylum to aliens who are denied the practical exercise of freedoms guaranteed by the Italian Constitution... Great Britain grants asylum to 'a sizable number' of persons who do not qualify under the international definition..."[113] In the Netherlands, the law provides that persecution entails a contravention of basic rights and refers in this context to the European convention on Human Rights.[114] On a regional level, the Committee of Ministers of the Council of Europe issued a declaration calling for the recognition of asylum rights for all persons coming within the Convention's definition of refugee and to other persons whom member States "consider worthy of receiving asylum for humanitarian reasons."[115] In Africa, the Organisation of African Unity has formally expanded the definition of refugee to include also persons outside their countries of origin "owing to external aggression, occupation, foreign domination or events seriously disturbing public order."[116]

Agreement on a liberal interpretation of "persecution" will not, however, eliminate other ambiguities concerning the criteria for determining refugee status, such as the standards of evaluating the fear of persecution, the scope of recognised grounds of persecution, and the agents of perse-

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110. Conference of Plenipotentiaries, Final Act, Recommendation E, cited in GOODWIN-GILL, *supra* n.4 at p.13 n. 48.

111. See 34 UN GAOR Supp. No.46 (UN Doc. A/Res/34/60) at p.173 (1979).

112. See MAYNARD, "The legal competence of the UNHCR", 31 ICLO (1982) 415, 416-20 for a discussion of so-called "statutory", "protocol" and "mandate" refugees.

113. See D.P. GAGLIARDI, "The inadequacy of cognizable grounds of persecution as a criterion for according refugee status", 24 Stan JIL (1987), at pp.259, 262-3.

114. See R.PLENDER, *International Migration Law*, 2nd edn., (Martinus Nijhoff, 1987) at p.418 n.185.

115. Cited in GAGLIARDI, *supra* n.113 at p.262.

116. OAU Convention Governing the Spacific Aspects of Refugee Problems in Africa, 1974, 691 UNTS 14.

cution.

Again, approaches vary but certain general propositions are said to be reflected in the "best state practice" to be emulated by other States as representing the true letter and spirit of the refugee Convention.[117] Thus, with respect to the standard of fear, the UNHCR offers a *modus vivendi* involving an assessment of the applicant's subjective fear (which in turn requires both an examination of the applicant's past experiences and background as well as his future prospects if returned to his or her country of origin)[118] as "supported by an objective situation."[119] The objective element, however, does not necessitate an exacting burden of proof[120] and the examiner should assist the applicant in developing his supporting evidence.[121] Finally, "if an applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt."[122]

The UNHCR Handbook also provides guidelines concerning the five reasons of persecution specified in the Refugee Convention (i.e. race, religion, nationality, membership of a particular social group, or political opinion).[123] Of particular note are the statements pertaining to "race" – which is to be understood in its widest sense, to include all kinds of ethnic groups – "nationality" – also to be interpreted broadly to cover citizenship as well as membership of specific ethnic or linguistic groups – and "membership of a social group" – which frequently overlaps with the other categories as it pertains to persons sharing similar background, habits, economic activities or social status as well as ethnic, cultural or linguistic origin.[124]

Further counsel is to be drawn from the various international instruments relating to human rights. Such instruments are useful, for instance, in the elaboration of the ground of "religion"[125] as encompassing membership of a religious community, personal faith, private worship or religious-

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117. See discussion in T.N. Cox, "'Well-founded fear of being persecuted': the sources and application of a criterion of Refugee status", 10 Brooklyn JIL (1984) at p.333.

118. UNHCR Handbook, paras 40-1.

119. Ibid.para. 138.

120. Ibid.para. 197.

121. Ibid.para. 196.

122. Ibid.paras 196, at pp.203-4.

123. Ibid.paras 66-86.

124. Little consideration has been given by officials to treating women as a particular social group. See, however, EXCOM's conclusion (1985) that women who face persecution for engaging in acts that would be tolerated in the case of men form a "social group" within the meaning of the Convention. See reference in Plender, *supra* n.114 at pp.422-3 n.221.

125. See Art.18, 1948 Universal Declaration of Human Rights; Art. 18, 1966 International Covenant on Civil and Political Rights; 1982 Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion and Belief.

ly motivated acts such as conscientious objection to military service.

International conventions and declarations should also be used as yardsticks for the interpretation of "political opinion." Understood in this context, "political opinion" refers to any opinion on a matter on which the machinery of the state, government and policy may be engaged.[126] It is moreover not limited to active participation in groups, unions, demonstration, protests or to the persecution victim's conscious expression of conventional political belief.[127] Given the difficulty in establishing a causal link between opinions expressed and related measures suffered, the detailed instructions provided in the UNHCR Handbook should be adhered to.[128]

As a general observation regarding grounds of persecution, although the Refugee Convention recognizes only five such grounds, the list need not be exhaustive. Indeed, in line with the liberal approach to persecution mandated by the Convention's humanitarian objective, it is difficult to disagree with the arguments put forward by one scholar that "cognizable grounds focus attention on the wrong question. Precisely why an individual is persecuted is largely irrelevant – the existence of persecution is the only essential question."[129] As he further explains, "the categories are not sufficiently comprehensive to cover many of the grounds for which people are commonly persecuted. Second, since persecution need not, and frequently does not, have any articulable motivational basis, the mere existence of cognizable categories of persecution operates to restrict the common view of a refugee – a person fleeing what may reasonably be perceived as a threat of persecution. Reliance, therefore, upon cognizable categories of persecution will fail to provide relief to many aspiring refugees otherwise deserving of protection."[130]

Finally, another problematic aspect of persecution concerns the agents of persecution. Again, tendencies to confine the notion to the authorities of the country of origin have been pointed out.[131] The UNHCR interpretation, however, merits support. That is "[w]here serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable to offer effective protected."[132]

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126. See GOODWIN-GILL, *supra* n.4 at p.31.

127. UNHCR Handbook, paras 80,83.

128. Ibid., paras 80-86.

129. GAGLIARDI, *supra* n.113 at p.272.

130. Ibid., at p.273.

131. See E.FELLER, "Who is a Refugee?" in: *Refugees in the World: The European Community's Response* (Netherland's Institute of Human Rights, 1989) at 65.

132. UNHCR Handbook, para. 65.

2.2.2 The British Position

The "well-founded fear" concept is incorporated in the British Immigration Rules in relation to both asylum and deportation procedures[133] but no clear criteria are set out in the law for determination of an asylum-seeker as a "refugee."

Administratively, it is contended that the Home Office's interpretation of "well-founded fear" "is carried out in the light of the advice given in the [UNHCR] Handbook."[134] However, as transpired in the case of Sivakumaran and Others[135], the Secretary of State for the Home Department had interpreted the phrase "well-founded fear" as meaning that the applicant was required to establish not only that he in fact feared persecution on one of the specified grounds but also that those fears were objectively justified. Presumably, the Home Office will now follow the House of Lords' ruling and act upon the test of a "reasonable degree of likelihood" of persecution for Convention reason if the applicant returned to his/her own country.[136]

Yet, the Home Office appears to have the judiciary's qualified support for the proposition that refugee status was not intended to be conferred on those who faced persecution by reason of events which lay in the future and that therefore a person could not claim protection on the ground that if he/she were returned to the foreign state his/her freedom to express political views would be restricted. As held by the Court of Appeals in *ex parte mendis*[137], a person was not at risk of being persecuted for his political

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133. *Supra* n.13. Para. 134 provides: "A person may apply for asylum in the United Kingdom on the ground that, if he were required to leave, he would have to go to a country to which he is unwilling to go owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular group or political opinion. Any such claim is to be carefully considered in the light of all relevant circumstances." Para. 165 provides: " In accordance with the provisions of the Convention and Protocol relating to the Status of Refugees, a deportation order will not be made against a person if the only country to which he can be removed is one to which he is unwilling to go owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular group or political opinion."

134. Based on an interview cited in Cox, *supra* n.117 at 361.

135. *Supra* n.83.

136. The House of Lords did not accept, however, the approach favoured by the Court of Appeal that "well-founded fear" was demonstrated by proving actual fear and good reason for that fear, looking at the situation from the point of view of one of reasonable courage in like circumstances as the applicant for refugee status. [1987] 3 WLR 1047, 1053. Nor did the House of Lords agree with the interpretation put forward by a UNHCR representative that "well-founded fear" meant fearing with "good reason", i.e., that on the basis of objective facts, the applicant's fear was reasonable and plausible. [1988] 2 WLR 92, at pp.102-4.

137. *The Times Law Reports*, 18 June 1988.

opinions if no events which would attract such persecution had yet taken place.[138]

Nor have British courts questioned the Home Office's restrictive approach to the meaning of persecution in requesting applicants to show that they have been personally "singled out for persecution"[139], although a divisional judge considered as "false" an apparent presumption by the Home Office that violence to individuals flowing from a conflict between factions cannot amount to persecution (the implication of which was that oppression or violence to a racial minority would only be persecution if conducted by the authorities).[140]

To a certain extent, British decision-makers are constrained by the European convention on Human Rights to which the UK is a party. However, attempts to challenge judicially the Home Secretary for failing to take into account provisions of the Convention have been unsuccessful. The courts reaffirmed the position that "the Convention, not having been enacted by Parliament as a statute, it does not have the effect of law in this country, whatever persuasive force it may have in resolving ambiguities it certainly cannot have the effect of overriding the plain provisions of the [immigration] Act of 1971 and the rules made thereunder."[141] Furthermore, notwithstanding the ratification of the treaty by the UK Government, no legitimate expectations arise that the Secretary of State will take its provisions into account as part of the "relevant circumstances."[142]

Despite administrative and interpretive strictures that exist in British refugee status decision-making, a considerable number of persons who did not meet the formal criteria under the Refugee Convention have nonetheless been allowed to remain in the UK exceptionally "because of the

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138. The Court (*per* Lord Justice NEILL) was "unable to agree with the view" put forward in the UNHCR Handbook (para. 82) that where it could be reasonably assumed that a person's opinions would sooner or later find expression and that the applicant would as a result come into conflict with the authorities she/he could be considered to have fear of persecution for reasons of political opinion. A somewhat modified approach was presented by Lord Justice STAUGHTON who maintained that "[i]f a person had such strong convictions, whether on religious or other grounds, that he would inevitably speak out against the regime in his country of origin, and would inevitably suffer persecution in consequence, it might be that he should be treated as a refugee."

139. See *Ex parte Gurmeet Singh & Others* [1987] 4 Imm. AR 489. Lord Justice WOOLF accepted as relevant in a case of a Sikh's application for asylum a "singling out" requirement. In contrast, see decisions by the Australian Federal Court in Periaman *v.* Minister for Immigration & Ethnic Affairs (1987) and Gunaleela v. Minister for Immigration & Ethnic Affairs (1987), cited and discussed in J.CRAWFORD & P.HYNDMAN, "Three heresies in the application of the Refugee Convention", 1 IJRL (1989), p.155 at pp.159-167.

140. *Per* TAYLOR J. in *ex parte Juiakumaran* (1985), referred to in *ex parte Gurmeet, supra* n.139.

141. *Ex parte Salamat Bibi*, [1976] 1 WLR 979, 988A (*per* GEOFFREY LANE L.J.); See also Fernandes *v.* Secretary of State for the Home Department, [1981] 1 Imm. AR 1,5 (*per* WALTER L.J.).

142. Chundawadra *v.* Immigration Appeal Tribunal, [1988] 1 Imm. AR 161, 174 (*per* GLIDEWELL L.J.), 174-5 (*per* CAULFIELD J.), 176 (*per* SLADE L.J.).

particular circumstances of their case or in the light of the situation prevailing in their home country." As declared by the Parliamentary Under-Secretary of State for the Armed Forces, Lord Trefgarne, in the course of a debate on the subject of refugees in the Third World, "the situation in some countries has caused us to establish several exceptional policies for certain nationals. In recent years the countries concerned have included Afghanistan, Iran, Lebanon, Poland and Uganda. Under these policies less stringent tests than the criteria for refugees are applied in deciding whether a person should be allowed to remain here exceptionally."[143]

Be that as it may, like the criteria for asylum, the exceptions for allowing "non-convention" refugees to remain in the UK have not been formally codified. It has consequently been alleged that many refugee decisions by the British authorities are politically influenced[144], particularly since the Home Office relies heavily on information provided by the Foreign Office.[145]

2.2.3 Regional Attitudes

Prior to the adoption of the CPA in June 1989 and the introduction of formal refugee status determination procedures, the regional attitudes to "who is a refugee" might have been described as flexible. Classification of asylum-seekers varied with circumstances and terms such as "illegal entrant/migrant", "displaced person" and "refugee" were often used interchangeably.[146]

Indeed, to a large extent, the region's problem of "long-stayers"[147] is the result of the "indiscriminate" approach displayed by the countries in the region in extending temporary refuge to [all] Indo-Chinese arrivals, a considerable portion of whom were not able to meet the selective criteria applied by resettlement countries.

On the other hand, regional attempts at distinguishing "genuine refugees" when geared to resettlement, inevitably incorporated irrelevant considerations.[148]

While precise definitions of "refugee" are been discounted by scholars and human rights lawyers in favour of inquiries into "whether protection

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143. Cited in 56 *British Yearbook of International Law* (1985) at p.422.

144. HOWLAND, *supra* n.18 at p.60.

145. Ibid. at p.59.

146. See MUNTARBHORN, *supra* n.21 at pp.167-8.

147. Refugees who resided in a first-asylum camp for three years or more.

148. As illustrated in Thailand's screening of Laotian asylum-seekers. See V.MUNTARBHORN, "Trends and developments in durable solutions for refugees", in *Yearbook 1986-87* International Institute of Humanitarian Law, (San Remo, 1989) at p.185.

is needed"[149] the region's nations appear content to apply the "traditional" criteria embedded in the 1951 Refugee Convention and its Protocol in their newly instituted status determination procedures.[150]Since no information is yet available on regional attitudes as reflected in the application of the criteria, it may be assumed that UNHCR's proposed involvement in the screening process would contribute towards alleviating fears that form will be raised over substance, class over need and characterisation over purpose.[151]

2.2.4 The Hong Kong Approach

Under the Statement of Understanding reached between the Hong Kong Government and UNHCR concerning the Treatment of Asylum-Seekers Arriving from Vietnam in Hong Kong, "[t]he Hong Kong Government confirms that appropriate humanitarian criteria for determining refugee status will be applied. These criteria, based on the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol, take into account the special situation of asylum-seekers from Vietnam."[152]

Yet, it is difficult to assess Hong Kong's compliance with the international norms pertaining to refugee criteria since neither the immigration authorities – involved in the first stage of the determination process – nor the Refugee Status Review Boards – charged with reviewing negative determination decisions – have ever disclosed the criteria actually deployed or the burden of proof required to be discharged by applicants for refugee status.

Some evidence has nonetheless been adduced to the effect that – whether due to a lack of familiarity with relevant international standards and human rights situation in Vietnam[153] or because of attitudinal[154], cul-

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149. See G.GOODWIN-GILL, "Who is a Refugee?", in: *Refugees in the World: The European Community's Response*, *supra* n.131 at p.60.

150. See Note on Procedures, *supra* n.88.

151. GOODWIN-GILL, *supra* n.149 at p.60.

152. *Supra*, text at ns. 5-11.

153. It was noted that for a brief period after an intensive training session provided by the UNHCR to immigration officers involved in the screening process, "the rate of refugee recognition by immigration officers rose by a statistically significant amount. Shortly after, however, it fell to original levels." Amnesty Memorandum, *supra* n.98 at p.20.

154. Commenting on the low rate of "screening in" by the Director of Immigration, the Chairman of the Refugee Status Review Boards referred to the fact that the Director is "...a man of a 'discipline service'. A man who will be very very careful because of a very long rule not to exercise his discretion too widely because his livelihood depends on an exercise of discretion properly in the eyes of senior officers." Cited in Amnesty Memorandum, *supra* n.98 at p.21.

tural[155] or other reasons[156] – a restrictive approach, not consistent with a "humanitarian spirit" is adopted. Several cases have been cited of asylum-seekers who fell squarely within the Convention definition yet were "screened out" in the Hong Kong determination process.[157]

It is apparent that no broad "human rights inquiry" in any sort of depth is carried out nor is the likelihood and fear of human rights violations upon return to the country of origin thoroughly examined as an alternative basis for refugee status for those who do not meet narrow convention criteria. Indeed, the questionnaire currently used in the interview process is said to be deficient in this regard, particularly in view of the omission of questions relating to torture.[158]

Several misconceptions seem prevalent among determination officials. It is assumed, for instance, that "only political persecution counts as persecution"[159] although four other grounds are recognised in the Refugee Convention. "Political opinion" in turn is most narrowly construed. In a case cited by Amnesty International[160], the immigration officer, having established that the asylum-seeker criticised the Vietnamese Government, was not allowed to study and had to return to his home village for re-education, proceeded to observe that "this was in conformity with the Government policy which forbade independent criticism of the party of Government." The officer concluded that such criticism did not amount to holding political opinion and that there was no indication that the asylum-seeker had fear of persecution for holding such opinion.

Even more striking is the case of an asylum-seeker who evidently failed to convince the immigration officers that he suffered "political persecution" despite the fact that he had been tried and convicted by the Vietnamese authorities for "crimes against the state" for his political activities during a stay in Czechoslovakia for a few years earlier.[161]

Indeed, the notion of "persecution" itself seems to be associated by screening officials with the "most grotesque forms of persecution[162] while

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155. Such as showing sympathy and compassion only to members of family – see in this connection S.K. LAU & H.C.KUAN, *The Ethos of the Hong Kong Chinese* (The Chinese University Press, 1988) pp.59-62; xenophobic prejudices against non-local Chinese – see in this connection A.H.YEE, *A People Misruled, Hong Kong and the Chinese Stepping Stone Syndrome* (API Press, 1989) p.156 et seq.

156. Such as responsiveness to domestic pressures; or latent fears that refugees may secure places in the West at the expense of would-be Hong Kong emigrants.

157. See Amnesty Memorandum, *supra* n.98 at pp.20, 27.

158. See Lawyers' Report, *supra* n.103 at 22.

159. Lawyers Report, *supra* n.103 at p.23.

160. Amnesty Memorandum, *supra* n.98 atp.20.

161. Amnesty Memorandum, *supra* n.98 at p.27.

162. Lawyers' Report, *supra* n.103 at p.23.

rejecting harassment and discrimination as persecution".[163] Such a perception apparently led to the refusal of refugee status to a Catholic couple who were subjected to mandatory "re-education" sessions following attendance at Mass on Catholic Holy Days[164] or to a Catholic choir girl, repeatedly discriminated against at school and denied employment in government establishments, whose brother was shot by the police (as part of their efforts to intimidate Catholics into giving up their faith) and whose own arrest had been authorised following a discovery in her house of Catholic song books.[165]

Nor are officials open to the idea that severe economic deprivation may constitute persecution. Claims of confiscation by the Vietnamese Government of Registration Certificates or Ration Cards – and the serious economic implication which it entails (inability to support one's self or family) have been assessed as a mere "economic grievance.")[166] Of similar insignificance are considered forced relocations to New Economic Zones (NEZ)[167] although in effect such moves mean deprivation of one's right to earn a livelihood and hence "persecution".

Equally false is the view reflected in officers' comments[168] that a general policy, such as re-education, directed against "the enemies of the Communist regime" cannot be "persecution" and that in the absence of "singling out for special treatment" no fear of persecution can be established. Unappreciated, at the same time, is the fact that persecution or deprivation of economic or social rights by family members give rise to fear of persecution even before actual suffering is inflicted.

Misconceptions and wrong interpretations aside, determination of refugee claims in Hong Kong is further distorted by serious administrative flaws. Perhaps the most glaring administrative defect which has a potentially restrictive effect on refugee criteria application is the failure of the Review Board to hear claimants personally and the Board's exclusive reliance on interview transcripts (which asylum-seekers are not afforded opportunity to read or correct) compiled by examining officers lacking

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163. Note that those who experience serious discrimination resulting in substantially prejudicial consequences, such as restrictions on the right to earn a livelihood or to have access to normally available schooling, suffer persecution and are Convention refugees – UNCR Handbook, para. 54. In fact, even lesser measures of discrimination may amount to the persecution necessary for Convention refugee status if they reasonably produce an apprehension and insecurity regarding a person's future existence – UNHCR Handbook, para. 55.

164. Amnesty Memorandum, *supra* n.98 at p.20.

165. See COHEN, "A Case against Screening". SCMP 11 June 1990.

166. Lawyers Report, *supra* n.103 at p.24.

167. See Amnesty Memorandum, *supra* n.98 at p.20.

168. As *per* Lawyers' Report, *supra* n.103 at p.23.

sufficient knowledge of human rights and relevant international refugee law.

Unlike their British counterparts, however, Hong Kong decision-makers are unlikely to be provided with local authoritative jurisprudence concerning refugee criteria. As demonstrated recently in the appeal case of *Madam Lee Bun and Lee Ching Ming* v. *The Director of Immigration*[169], the Hong Kong courts would not consider arguments based on the Refugee Convention since "[i]t is common ground that although the United Kingdom has ratified the Convention and that it has been extended to many, if not most, of Her Majesty's other dominions, it has not been extended to Hong Kong." Furthermore, "the Secretary of State, when exercising statutory powers is not obliged to have regard to a Convention which has not become part of domestic law; *a fortiori* then, with respect to Hong Kong, when the Crown is not even party to the Convention.[170]

Nor are local judges amenable to arguments from customary international law[171] and, as they cautiously observed in the *Lee Bun* decision, "in some countries, including the United Kingdom, it is not open to a litigant in domestic courts to rely upon [a principle of customary international law] in the face of inconsistent legislation."[172]

In fact, the opportunity for the Hong Kong courts to pronounce on principles of refugee determination status is particularly limited in the light of Section 13F(8) of the Immigration (Amendment) (No.2) Ordinance 1989 which stipulates that "a decision of the [Refugee Status Review Board] shall not be subject to review or appeal in any court." An application for judicial review to challenge administrative irregularities, if successful, is likely to generate at best judicial statements concerning procedural proprieties as distinct from substantive refugee determination standards.

3. STANDARDS OF TREATMENT – DETENTION

3.1 International Rules

3.1.1 Legality of Detention

The right to liberty and security of the person is one of the most funda-

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169. Civil Appeal No. 54 & 55, judgment of 29 June 1990.

170. *Per* Sir DEREK CONS, V.P., ibid. at p.6.

171. See R.MUSHKAT, "International Human Rights Law and Domestic Hong Kong Law" in WACKS (ed.), *A Bill of Rights* (1990) at pp.25-28.

172. *Supra* n.169 at p.7.

mental of all human rights and is proclaimed in all major international human rights instruments.[173] Specifically, all persons are guaranteed a right not to be subjected to arbitrary arrest or detention[174] except on grounds, and by procedures, "established by law."

The freedom from arbitrary arrest and detention has been further reaffirmed by international and domestic tribunals. Most notably, the International Court of Justice in the Hostages Case stated unequivocally that "[w]rongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the UN, as well as the fundamental principles enunciated in the Universal Declaration of Human Rights."[175] The European Court of Human Rights was even more specific when pronouncing that the "purpose of the [EHR]... is to protect the freedom and security of the individual against arbitrary detention or arrest"[176] and that in a democratic society subscribing to the rule of law... no detention that is arbitrary can even be regarded as 'lawful'."[177] At the national level, particularly significant are decisions of the US court regarding aliens which recognised that arbitrary detention was a principle of customary international law.[178]

In fact, special international rules have developed with respect to detention of non-nationals, asylum-seekers and refugees. Thus, Article 5 of the 1985 UN Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live[179] reaffirms the prohibition on the arbitrary arrest and detention of non-nationals. Similarly, the 1951 Refugee Convention has recognised that the distinctive position of asylum-seekers and refugees (in flight from persecution and in search of protection) needs to be taken into account as far as penalties for illegal entry and measures of detention are concerned.[180] The Executive Committee of the UNHCR has also laid down as one of the "minimum basic human standards of treatment of refugees and asylum-seekers" the requirement that they "should not be penalised or exposed to any unfavourable treatment

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173. Universal Declaration of Human Rights [UDHR] (Art. 3); International Covenant on Civil and Political Rights [ICCPR] (Art. 9(1)); the European Convention on Human Rights [EConHR] (Art.5(1)); American Convention on Human Rights [ACHR] (Art. 7(1)); African Charter on Human and Peoples' Rights [ACHPR] (Art. 6).

174. UDHR Art. 9; ICCPR Art. 9(1); EConHR Art. 5(1); ACHR Art. 7(3); ACHPR Art. 6.

175. *US Diplomatic and Consular Staff in Tehran*, (US *v.* Iran), [1980] ICJ Rep. 3, 42.

176. *Lawless Case*, ECHR, Ser.A, Vol.3 at 52 (Judgment of 1 July 1961).

177. *Winterwerp Case*, ECHR, Ser.A, Vol.33 at 18 (Judgment of 24 October 1979).

178. See cases cited in: *Inhuman Deterrence. The Treatment of Vietnamese Boat People in Hong Kong*, Lawyers Committee for Human Rights (mimeographed, 1989) [hereafter: Inhuman Deterrence] at 62 and 63n.

179. G.A.Res.A/40/44 (13 Dec. 1985).

solely on the ground that their presence in the country is considered unlawful; and that they should not be subjected to restrictions on their movements other than those which are necessary in the interest of public health and public order."[181]

While exceptions to the prescribed rules are recognised and derogation from standards permitted under certain circumstances, the basic principle is that detention of refugees and asylum-seekers "should only be resorted to when a genuine necessity exists"[182] and, if applied, "should not be unduly prolonged" (it may last only as long as the exigencies of the situation demand).[183]

It is acknowledged, for example, that in individual cases some initial period of deprivation or limitation of freedom of movement may be necessary for administrative reasons or "solely with a view to determining the identity of the applicant, his or her background, and the basis of the claim to refugee status or asylum. Detention beyond the initial period ought to be based only on the most serious reasons, such as criminal associations or intent, or the fact that the person is likely to abscond."[184]

In situations of mass influx, which inevitably bring into play a more complex set of factors, the grounds for detention are more wide-ranging, including in addition to identity verification and eligibility determination also the protection of national security or public order.[185] However, such considerations in themselves are insufficient and must satisfy the test of "necessity" which, in turn, incorporates the principle of proportionality.[186]

Apart from the substantive restrictions imposed on resort to the exceptional measure of detention, authorities in the receiving states are also constrained by requirements of procedural justice, including the availabil-

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180. Art. 31 provides: "1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened... enter or are present in their territory without authorisation... 2.The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary..." Note also Art. 26 which prescribes such freedom of movement for refugees as is accorded to aliens generally in the same circumstances.

181. EXCOM Conclusion No. 22 (XXXII) on Protection of Asylum-Seekers in Situations of Large-Scale Influx (1981); text incorporated in the Annex, Background Documentation, *Study on Detention of Refugees and Asylum-Seekers* (Florence: International Institute of Humanitarian Law, Une 1984) at p.39.

182. See EXCOM 37th Session, Note on Accession to International Instruments and the Detention of Refugees and Asylum Seekers, EC/SCP/44, 19 Aug. 1986, para. 51(b).

183. See Working Group on the Treatment of Refugees with Particular Reference to the Problem of Detention (Florence: 3-5 June 1984), "Conclusions on the Detention of Refugees and Asylum-Seekers" [hereafter: *Working Group on Detention–Conclusions*] para.II.

184. Working Group on Detention–Conclusions, ibid. para. III.

185. EXCOM Conclusion No. 44, para. (b).

186. See P.SIEGHART, *The Lawful Rights of Mankind* (Oxford University Press, 1985) at p.94.

ity of review and appeal provisions, access to legal counsel as well as opportunity for the grant of provisional liberty on suitable conditions.[187]

Common to both the substantive and procedural strictures is the norm underlying human rights law in general, namely that the rights protected be exercised "without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin property, birth or other status."[188]

3.1.2 Conditions of Detention

International rules governing conditions of detention stem from several sources relating to both detainees in general and the particular predicament of asylum-seekers and refugees. Regardless of their source, however, the rules are underpinned by the common general norms that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment and punishment"[189] and that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[190]

Such norms are reflected in what are considered the basic international prison regulations, the UN Standard Minimum Rules for the Treatment of Prisoners[191] (as extended to persons arrested or imprisoned without charge)[192] as well as in their regional counterpart, the Standard Minimum Rules for the Treatment of Prisoners promulgated by the European Committee on Crime Problems of the Council of Europe.[193]

Similarly oriented is the Code of Conduct for Law Enforcement Officials[194] which provides that "[i]n the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain

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187. EXCOM Conclusion No. 44, para. (e); *Working Group on Detentio – Conclusions*, para. III; 1988 UN Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment, G.A.Res.A/43/173 (Dec. 1988) [hereafter: *Body of Principles*].

188. See Art. 2(1) ICCPR; Arts 5, 6 International Convention on the Elimination of All Forms of Racial Discrimination; Principle 4, *Body of Principles.* Note also the statement by the European Commission of Human Rights in the *East African Asians Cases* (Admissibility), 13 YBECHR 928, 994 (1970) that "discrimination based on race could, in certain circumstances, of itself amount to degrading treatment within the meaning of Article 3."

189. Art. 5 UDHR; Art. 7 ICCPR; Art. 3 EConHR; Art. 5(2) ACHR.

190. Art. 10(1) ICCPR; Art. 7(2) ACHR.

191. Adopted 30 Aug. 1955 by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc.A/CONF 6/1 Annex I, paras 31, 54; Adopted 31 July 1957 by the Economic and Social Council, ECOSOC Res. 663 (XXIV) C, 24 UN ECOSOC Off. Rec. Supp. (No. 1) 11 (UN Doc. E/3048) (1957).

192. ECOSOC Res. 2076, 62 UN ECOSOC Off. Rec. Supp.(No.1) 35, (UN Doc. E/5988) (1977).

193. Council of Europe, Res.73(5) (1973) adopted by the Council of Ministers on 19 Jan. 1973 at the 217th Meeting of the Ministers' Deputies.

194. Adopted by UN G.A.Res. 34/169 (17 Dec. 1979).

and uphold the human rights of all persons." A more recent reaffirmation of the right of "all persons under any form of detention or imprisonment" to "be treated with humanity and with respect for the inherent dignity of the human person" and not to "be subjected to torture or to cruel, inhuman or degrading treatment or punishment" (to be "interpreted so as to extend the widest possible protection against abuses, whether physical or mental") is contained in the comprehensive Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[195]

Needless to say, humane treatment is mandated under international rules pertaining to asylum-seekers and refugees "whose tragic plight requires special understanding and sympathy."[196] Conditions of detention should in no case fall below the "basic human standards" embodies in EXCOM Conclusion No. 22 of 1981.[197] In particular, asylum-seekers should be located by reference to their safety and well being as well as the security of the state of refuge; be provided with the basic necessities of life; their family unity be respected and assistance in tracing relatives be given; minors and unaccompanied children be adequately protected; sending and receiving mail and receipt of material assistance from friends be allowed and where possible appropriate arrangements be made for the registration of births, deaths and marriages.

3.2 The British Position

3.2.1 Legality of Detention

Under UK immigration law, "administrative detention" (as distinct from custody following an arrest for an immigration or related offence) is only authorised pending the removal of the person from the UK.[198] As held in *Re Hardial Singh*[199], the power given to the Home Secretary (as well as to immigration officers with respect to certain categories of persons) to detain should not be used for any purpose other than pending removal. Such power was further restricted to the period reasonably required for this purpose. It was also implicit that the Home Secretary should act expedi-

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195. *Supra* n.187, Principles 1 and 4.

196. See Conclusion (m) in EXCOM: Note on Detention 1986, *supra* n. 182 at p.14.

197. *Supra* n. 181.

198. Two exceptions are recognised – under Immigration Act 1971, Schedule 2, paras 2 & 16 and Schedule 3, para. 2(2) – but for specific and obvious reasons. Thus a newly arrived passenger may be detained pending further examination and detention may be imposed following a decision or recommendation to deport where no deportation order has yet been made.

199. [1983] Imm.AR 198 sb nom R *v.* Governor of Durham Prison, ex parte Singh, [1984]. 1 All ER 983, [1984] 1 WLR 704, QBD.

tiously to ensure that all necessary steps were taken for removal within a reasonable time. A failure to take the action required or to take it sufficiently promptly will render the detention unlawful.

In fact, the power to detain granted to the immigration authorities is discretionary and may be disposed with. Detention may be substituted with a temporary release or admission subject to restrictions as to residence and reporting to the police.[200]

Some provisions are also made under the Immigration Act for application for bail by new arrivals who have been detained for more than seven days pending their examination[201] and for those who have an appeal pending before an adjudicator (e.g. a "destination appeal" objecting to the country or territory to which the appellant is to be removed) or the Appeal Tribunal.[202]

In addition, as reaffirmed in *R v. Secretary for State for the Home Department ex parte Swati*[203], where an applicant is in legal custody pending examination or removal, the courts have an inherent jurisdiction to grant bail, although "in the light of the statutory powers available to the Secretary of State and to adjudicators it would be exercised only in exceptional circumstances, and only if leave to apply for judicial review had been granted."

It is clear in any event that the legality of detention can be challenged by way of *habeas corpus* or judicial review. Indeed, in cases concerning removal of "illegal entrants" (persons who obtained leave to enter the UK by practicing fraud or deception in contravention of the Immigration Act) British courts have assumed a wide power to inquire into the truth of the jurisdictional basis upon which the illegal entry decision rested.[204]

Failing to obtain redress from the UK immigration authorities or courts, aggrieved detainees alleging violations of their right to liberty and security (under Article 5(1) of the European convention on Human Rights) may also petition the European Commission of Human Rights.[205]

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200. Immigration Act 1971, Schedule 2, para. 2(1) & (2). Note the recommendation by the Home Affairs Sub-Committee on Race Relations and Immigration in its Report on Refugees and Asylum with Special Reference to the Vietnamese, 1984-5 [hereafter:SCORRI Report] para. 109 – that "in normal circumstances asylum-seekers at ports of entry who would otherwise be detained be granted temporary admission to a refugee hostel or other suitable or accepted accomodation."

201. Immigration Act 1971, Schedule 2, para. 22(1).

202. Ibid. para. 29.

203. [1986] 1 WLR 477, 485-6 (per DONALDSON M.R.).

204. See Kharwaja *v.* Secretary of State for the Home Department, [1983] 1 All ER 765 (HR); different considerations apply in cases concerning refusal of leve to enter where all relevant decisions of fact as well as the application and any necessary exercise of discretion are entrusted to immigration officers – ibid. at 790 (*per* Lord BRIDGE).

3.2.2 Conditions of Detention

Persons detained pending removal or deportation are deemed to be in "legal custody"[206] and hence subject to the law governing the prison system in the United Kingdom, namely the Prison Act 1952 and the Prison rules 1964 (as amended).

Like other prisoners they are guaranteed certain rights and recourse to institutional enforcement, including to the Parliamentary Commission for Administration through a Member of Parliament and to the European Commission of Human Rights (before which they may challenge the Prison Rules themselves as well as violations of the Rules). They could also rely on general civil and criminal law for protection by the courts.[207]

3.3 Regional Attitudes

3.3.1 Legality of Detention

No Asian country has incorporated a specific exemption from penalties for illegal entry or presence of asylum-seekers. Rather, in line with prevailing policies of "humane deterrence" Indo-Chinese arrivals have invariably been designated "illegal immigrants" and consequently exposed to the risk of prosecution, punishment, detention or deportation.

In practice, the enforcement of immigration rules in the region is to a large extent a function of the policies of the governments in power which in turn are influenced by *ad hoc* factors such as size of the influx, repatriation prospects, resettlement opportunities, availability of foreign aid and attitudes towards the country of origin.[208]

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205. See cases cited in I.A.MACDONALD, *Immigration Law and Practice in the United Kingdom*, 2nd edn. (Butterworths, 1987) at p.295-7.

206. Immigration Act 1971, Schedule 2, para. 18(4).

207. In the case of some breaches of the Prison Rules – e.g., the use of unnecessary force by a prison officer against a prisoner – there will be a remedy in tort or in criminal law.

208. Note, for example, the different treatment accorded by the Thai Government to Vietnamese, Kampucheans, Laotians and Burmese – see V.MUNTARBHORN, "Asylum in Thailand" (forthcoming). MUNTARBHORN recounts the various changes in policies by the Royal Thai Government, including the introduction in 1980 of the "humane deterrence" policy covering four basic tenets: (1) the closing of the Thai border to new arrivals; (2) detention of illegal entrants in camps characterised by harsh conditions; (3) no resettlement for new arrivals; and (4) "minimum standard of treatment" – not higher than strictly necessary for subsistence. The author also observes that the presence of international humanitarian organisations, such as the UNHCR and the ICRC, "acts as a disincentive against too strict enforcement of immigration law against asylum-seekers"

Whether founded upon the illegal entrance of the asylum-seekers or not, it is evident that detention measures implemented in the region are not predicated on legitimate reasons (such as serious threat to the community or to national security or the likelihood of abscondment). Nor are they contingent upon determination of refugee status or other specific objectives but are maintained pending a "resolution of the situation." By the same token, political realities militate against utilisation of the judicial or administrative review even if such provisions might theoretically be available under the regional constitutions or laws.

3.2.2 Conditions of Detention

Although, with the exception of the Philippines, none of the first asylum countries in the region are parties to the Refugee Convention or its Protocol, they have accepted UNHCR protective role and at least one country (Thailand) is a member of its Executive Committee. As such they may be assumed to be guided by the UNHCR conclusions concerning protection of asylum-seekers. Minimum standards of treatment are also contained in the regionally important instrument of Principles concerning the Treatment of Refugees, adopted by the Asian African Legal Consultative Committee in 1966 (as supplemented in 1970 and 1987).

Indeed, to varying degrees conditions in the region's camps adhere to the prescribed standards. It may also be noted that while some form of detention of asylum-seekers is practiced by all first asylum countries in the region, the extent of physical and psychological confinement differs according to circumstances. Thus, for example, in camps located away from major population centres and managed by voluntary relief agencies, detainees enjoy greater autonomy.[209]

3.4 The Hong Kong Approach

3.4.1 Legality of Detention

Not unlike other countries of first asylum, Hong Kong has responded to the continuing influx of Indo-Chinese boat people in a period of "compas-

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209. In Malaysia's main camp, which is located on an island and administered by the Malaysian Red Crescent Society, "the Vietnamese run their own show, they have their own government and camp committee", as reported in K.GRIFFIN & J.NIP, "HK Camps Worst in Region", SCMP 29 Oct. 1989. Freedom of movement is also enjoyed by the population of the Philippines's First Asylum Camp in the Island of Palawan (ibid.). More restrictive are Thailand's camps (not the border camps) which are managed by the Thai Ministry of the Interior (and located amongst the poorest villages in Thailand) although "much of the work in the camps was farmed out to the Vietnamese" (ibid.).

sion fatigue" with its own version of "humane deterrence." Thus, 1982 saw the introduction of detention of arrivals in closed camps to be followed by strict deterrent measures in June 1988 with the establishment of detention centres for the incarceration of asylum-seekers awaiting determination of refugee status and for those "screened out."

Yet, notwithstanding its regional "compatibility" and pragmatic inevitability, Hong Kong's policy of confining Vietnamese refugees in closed camps and asylum-seekers in detention centres deviates from the international standards outlined above.[210] To begin with, it lacks a legitimate aim; it is not predicated upon a particular conduct or omission and does not depend on the establishment of justificatory facts (such as suspected criminal intent, activity or association and the likelihood of absconding). Nor is it related to the prospect of removal to the country of origin or based on considerations of national security or public safety.

The Government's declared aim of discouraging further arrivals as part of a programme of "humane deterrence"[211] cannot be regarded as legitimate (or, for that matter, humane) and is "never justifiable under international law."[212] Indeed, it has been argued that such a policy is "wholly inconsistent with the ...international system for the protection of refugees" as it is "likely to increase the risk to individuals still in a country where they risk human rights violations by discouraging them from leaving to seek asylum in a country where they believe they will be detained indefinitely on arrival."[213] Some critics have gone even further to suggest that the detention measures employed by the Hong Kong Government breach the fundamental norm of *non-refoulement* since they constitute "constructive *refoulement* by deterring people whose life or freedom is threatened from exercising their right to seek asylum or – once arrived – effectively forcing them to abandon their claim for asylum and volunteer to return to a country where their life or freedom is in danger."[214]

In addition to the apparent illegitimacy of their aim, the Hong Kong authorities seeking to justify the detention policy would be unable to satisfy international requirements of "necessity." Thus, they would have considerable difficulty in showing a reasonable relationship between detention and the objective which it claims to underpin. The putative causal rela-

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210. The following analysis is largely a reproduction of arguments advanced by the author in her article on "Refuge in Hong Kong", 1 IJRL (1989), at pp.449, 457-466.

211. See statement by R.LUCE, (ex) Minister of State, Foreign and Commonwealth Office: "We had to have closed camps introduced as from summer 1982 as a policy of humane deterrence." SCORRI Report, *supra* n.100, Vol. II, at p.145 (Q 217).

212. Working Group on Detention – Conclusions, *supra* n.183, Sec.III at p.6.

213. Amnesty Memorandum, *supra* n.98 at p.48.

214. See IRAC Report, *supra* n.23 at pp.77n, 90, 91.

tionship might be said to exist, were there some tangible evidence that detention constituted an effective deterrence. Such evidence, however, is lacking. While the relevant figures show a marked decline in the number of arrivals – and at a faster rate than elsewhere in the region – subsequent to the introduction of closed centres[215] it is by no means clear that this reversal of trend can be attributed solely to the policy of closed centres rather than to the territory's slow rate of resettlement or other factors, particularly since other States in the region implemented detention measures as well. Indeed, an upsurge in arrivals occurred in 1988 and 1989 while the detention and deterrence policies remained in force[216] and more than 48,473 arrived since screening was introduced.[217]

In spite of the Government's extensive publicity effort which utilizes multiple channels to convey the message of detention and the remote prospect of resettlement and the fact that Vietnamese boat people arriving in Hong Kong are provided with the option of "continuing their journey" with local assistance,[218] asylum-seekers from Vietnam still find the territory attractive.

Nor can proportionality between means and ends be established by resorting to a cost-benefit calculus. The adverse psychological consequences of prolonged detention and the "danger of creating a 'hard core' who

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215. In 1983 arrivals were 53% less than those in 1982 compared with a regional decline of 36%; in 1984 and 1985 the Hong Kong decrease was 39% and 44% respectively, and that of the region 11% and 14% respectively, *per* information supplied by the Chief Executive Officer (Refugees), Refugee Division, Security Branch.

216. The number of arrivals in 1989 was almost twice the 1988 figure and ten times that of 1987: 34,116 Vietnamese reached the territory in 1989 compared with 18,328 for the whole of 1988 and 3395 in 1987. See V. LEE, "Influx of Vietnamese Double Previous Year", SCMP 30 Dec. 1989.

217. *Per* information received on 15 Aug. 1990 from Refugee Division Security Branch.

218. The following notice was despatched to the boat people in the period from July 1982 – June 1988: "All former residents of Vietnam seeking to enter Hong Kong since July 1982 are detained in special centres. If you do not leave Hong Kong now, you will be taken to a closed centre and detained there indefinitely. You will not be permitted to leave the detention during the time you remain in Hong Kong. It is extremely unlikely that any opportunity for resettlement will be forthcoming. You are free to leave Hong Kong now, and if you choose to continue your journey will be given assistance to do so." In June 1988, the "Warning Notice" given to Vietnamese entering Hong Kong waters read:"There is a new policy in force in Hong Kong. Former residents of Vietnam seeking to enter Hong Kong as economic migrants are now treated as illegal immigrants. You are free to leave Hong Kng. If you choose to continue your journey you will be given food and water and, if necessary, your boat will be repaired. If you do not leave Hong Kong and are found to be an economic migrant you will be detained as an illegal immigrant pending repatriation to Vietnam." A similar communication is contained in a revised "Notice on Arrival", introduced in September 1988 (to reflect more accurately the initial status of arrivals as "asylum-seeker" as distinct from "illegal immigrants"), as follows: "Former residents of Vietnam seeking to enter Hong Kong are now subject to a process to decide whether or not they are refugees as defined in the 1951 UN Convention Relating to the Status of Refugees. Those found not to be refugees will be treated as illegal immigrants. As an illegal immigrant you will be detained pending repatriation to Vietnam. However, you are free to leave Hong Kong if you choose to continue your journey, you will be given food, water, and if necessary, your boat will be repaired."

would be almost impossible to resettle anywhere" constitute social costs that outweigh any possible benefits. Unfortunately, the negative effects are of a long-term nature and do not lend themselves easily to quantification. Hence utilitarian policy-makers see no compelling reasons to reassess their strategy.

Finally, the Hong Kong Government would not be able to claim "necessity" by reference to internationally recognised grounds for departure from basic freedoms such as "national security", "public order" or "public safety." The large inflow of asylum-seekers

doubtless imposes some burden on the territory, but their is no solid evidence that it constitutes a serious threat to public order or to the general welfare – physical, economic or moral – of the community. The argument that in the absence of detention the number of Vietnamese arrivals would escalate and render the administration of the refugee problem unmanageable, endangering in the process the well-being of the population at large, is difficult to substantiate in view of Hong Kong's impressive record of crisis management.[219]

Legality and necessity aside, the local practice of detention of asylum-seekers and refugees fails to meet the procedural safeguards laid down by the international community seeking to protect those prone to abuse. In particular, no right to challenge the lawfulness of detention is afforded the detainees under Hong Kong's immigration law. Indeed, it is doubtful whether an application for review of a detention order is likely to succeed given that such an order is authorised under the Immigration Ordinance (Section 13A) and that the legality of duly passed legislation is not subject to review by the courts under the territory's present legal system.

Nor can a case founded on the ground of discrimination be brought before the local courts in the absence of the relevant constitutional guarantees, notwithstanding the international legal validity of the claim by Vietnamese detainees that they are victims of discrimination as other aliens under the Immigration Ordinance may not be detained unless there is a risk that they might abscond or that they constitute a threat to national security.[220]

An aggrieved asylum seeker or refugee seeking to vindicate his or her rights under the relevant conventions would likewise be unable to secure redress at the international level. This ultimate option cannot be exercised

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219. Note that Hong Kong coped reasonably well with large influxes – exceeding in one year (1980) 84,000 – notwithstanding their unrestricted movement and access to employment in Hong Kong.

220. One observer has speculated, however, that a request may be made that Vietnamese detainees be allowed the same opportunity as other aliens for release upon recognizance. See IRAC Report, *supra* n.23 at p.100.

since the United Kingdom has not signed the Optional Protocol to the International Covenant on Civil and Political Rights, has not extended the European Convention on Human Rights to Hong Kong and has not accepted the competence of the European Commission of Human Rights to receive petitions in respect of matters occurring within the territory.[221]

3.4.2 Conditions of Detention

Conditions in closed and detention centres in Hong Kong have been the subject to much criticism by international human rights and relief organisations. The territory's camps have even been said to be "the most repressive in the region" because of the "stronger security presence, the fact that "boat people have little to say over their lives, and even the children [are] treated like prisoners."[222] Critics have stopped short however of concluding that such conditions constituted cruel, inhuman or degrading treatment of the detained asylum-seekers.[223] They have nonetheless proceeded to decry the absence in general of humanity and regard to the inherent dignity of the human person as prescribed under the relevant international norms and have condemned the various departures from generally recognised international standards as well as the infringements of Hong Kong's own law.

Of particular concern have been incidents of reported abuses and mistreatment by government officers[224] which, as one observer has concluded, "violated all applicable rules" including Hong Kong's Closed Centre Rules[225] and Prison Rules[226] and were hardly in keeping with the Government's commitment[227] to treat asylum-seekers in a "humane and dignified manner."

Claims of violations of detainees' physical integrity have also been made in relation to the punitive detention measures employed against so-designated "trouble-makers" in the absence of sufficient legal safeguards. Questions have been raised as to the legality of the transfer from a deten-

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221. See decision of 12 Mar. 1990 by the European Commission of Human Rights as to admissibility of Application 16137/90 by *Bui Van Than & Others* against the United Kingdom. The application was dismissed as inadmissible on jurisdictional grounds.

222. See K.GRIFFIN & J.NIP, "HK Camps Worst in Region – Amnesty" (SCMP 29 Oct. 1989), quoting refugee relief workers with experience across Asia. Note, however, recent endorsement by the Government of a report which detailed measures aimed at vastly increasing the involvement of Vietnamese internees in the day-to-day operation of the largest detention centre in Hong Kong. See F.MACMAHON, "UNHCR Endorsement for Report on Whitehead", SCMP 16 June 1990. A seminar was also organised by the Government with a view to finding "ways to make life more tolerable for the Vietnamese boat people". See F.MACMAHON, "Seminar Called to Improve Centres", SCMP 18 June 1990.

223. One exception was identified regarding a temporary centre which has since closed. Amnesty Memorandum, *supra* n. 98 at pp.45-6.

tion centre to a maximum security camp of persons not charged with any offence against the laws of Hong Kong.[228] Critics draw a special attention to the potential[229] for abuse given that there is "no formal process whereby a determination of 'trouble-maker' status is made, nor any procedure involving a hearing for the individual concerned before such a determination is made."[230]

It appears, however, that the authorities are given wide disciplinary power under the Closed Centres Rules which also include a provision that a detainee is deemed to have committed an offence if he or she "in any way offends good order and discipline" [Rule 34(k)]. While an aggrieved asylum-seeker may be able to apply for a writ of *habeas corpus*[231], the chances of success seem remote, particularly in the light of a recent decision by a Hong Kong High Court judge to reject such an application brought by two

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224. An inquiry into an incident at Hei Ling Chau Detention Centre by two Justices of the Peace has confirmed the unnecessary use of force by Correctional Services Department Officers on many asylum-seekers who had not resisted any order and the attempts by the officers to suppress allegation of assault on the asylum-seekers. See CHANG & PETERSON, "Report of Justices of Peace on Complaints Concerning the Treatment of Vietnamese Boat People at Hei Ling Chau on 18 and 19 July 1988" (29 Sept. 1988) at pp.35-38. Amnesty Memorandum contains a detailed account pertaining to assaults by officers of the HK Royal Police Force at the Shek Kong Detention Centre on the night of 23-24 July 1989 resulting in the death of one asylum-seeker and injuries of more than one-hundred detainees: *supra* n. 98 at pp.31-39. Undue force was also alleged to have been used by members of the Tactical Response Squad of the CSD during the forcible removal of 48 "screened out" asylum-seekers from Chi Ma Wan Detention Centre to the Phoenix House Detention Centre in the early morning hours of 31 Oct. 1989: Amnesty Memorandum, *supra* n. 98 at pp.39-44. On 4 May 1990 a weapon search operation conducted by the police (1200 officers) in the territory's largest detention centre (Whitehead) has triggered fierce allegations by the Centre's inmates concerning the "inhumane acts by the Royal HK Police Force" during the operation, the "acts of oppression, barbarous beating and corporal punishment" – "in the face of no resistance" – "somewhat like the acts of the Nazis to the Jews in 1936" (a letter sent to the Governor, as cited in F. MACMAHON, "Detainees Demand Inquiry on Raid", SCMP 12 May 1990). See also protest by the UNHCR regarding the "use of tear gas (106 rounds were fired) directed in enclosed spaces at a camp population comprising large number of women and children (8,532 out of 22,294 are children under the age of 17 and 6,187 are women) and other vulnerable persons during a massive weapons search." The UNHCR further contended that "[t]he reported abuses of asylum seekers during the operation, and the wide scale destruction of personal property as well as extreme damage to education facilities can... have no result but further radicalise the centre population and increase the risk of even more tension and violence". Cited in F.MACMAHON, "UNHCR in Protest over Camp Search", SCMP 12 May 1990.

225. Immigration (Vietnamese Refugee Centre) (Closed Centre) Rules, Immigration Ordinance, Cap.115, Laws of Hong Kong (1982 edn.) Rule 36.

226. Prison Rules, Prison Ordinance, Cap.234, Laws of Hong Kong, Rule 237.

227. Statement of Understanding, *supra*, para. 1.

228. See letter sent to the Chairman of the Bar Association Human Rights Sub-Committee, cited in S. GREEN, "A Camp Heading for Trouble", SCMP 19 July 1990.

229. Some allegations have been made that those removed were in fact community leaders expressing dissent in connection with forced repatriation. See Report of the Delegatin of the Women's Commission for Refugee Women and Children to Hong Kong (Jan. 5-12, 1990) at p.10.

230. *Supra*, n.228.

231. By virtue of Sec. 13BA of the Immigration Ordinance.

asylum-seekers who had been moved to a prison after disturbance at a detention centre. The judge, accepting as valid authorisation produced by the Director of Immigration, held that the latter had properly exercised his discretion.[232]

4. SOLUTIONS

4.1 Voluntary Repatriation

4.1.1 International Rules

Ranked as a "basic or primordial solution"[233], voluntary repatriation is firmly grounded in human rights law and has as its main concern the safety and well-being of the refugees. Fundamental to this solution is the right of persons to return voluntarily to their country of origin[234] under conditions of safety and dignity.[235]

"Voluntariness" in turn has been interpreted and elaborated in numerous international forums as presupposing "freely expressed wish of the refugees themselves"[236] "based on full information [of the situation in the country of origin, including information regarding the extent to which repatriates will be assisted and protected upon return] and freedom from constrain [levels of assistance in the country of refuge must not have decreased so as to induce refugees to return to their country of origin]."[237]

It also presupposes the "elimination or at least the substantial removal of the cause of fear or danger which had led to the departure of refugees from their home country"[238] as well as the "willingness of the country of

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232. Application by TranQuoc Cuong and Khuc The Loc, as reported in SCMP 26 May 1990.

233. See Report of the Round Table on Solutions to the Problem of Refugees and the Protection of Refugees (San Remo, 12-14 July 1989) [hereafter: 1989 Round Table on Solutions]; see also, EXCOM Conclusion on Voluntary Repatriation No. 18 (XXI) 1980, regarded as reflecting international law and general international practice.

234. See Art. 13(2) UDHR; Art. 12 ICCPR; Art. 12(2) ACHPR; UN Sub-Commission of Prevention of Discrimination and Protection of Minorities Draft Declaration on the Right of Everyone to Leave any Country Including his Own and to Return to his Country, UN Doc. E/CN.4/Sub.2/1988/35 and annexes; Strassbourg Declaration on the Right to Leave and Return, adopted 9 May 1989; Principle 20, CSCE Final Act, Helsinki (1975); Vienna Follow-up Meeting (1989).

235. This element flows from basic international humanitarian principles of security and liberty and from the right of freedom of movement.

236. See, e.g., EXCOM, Note on International Protection, A/AC 96/694 (3 Aug. 1987), para. 50.

237. Ibid. para. 51.

238. EXCOM, Note on International Protection, A/AC 96/660 (23 July 1985), para. 30.

origin to readmit its national and to co-operate with the country of asylum in arranging for their safe return."[239]

Further guiding principles have been incorporated in the various studies and conclusions on voluntary repatriation regarding agreements for safe return, monitoring mechanisms and reintegration programmes. More specifically, recommendations have been made for the negotiation of written international repatriation agreements to be made available publicly and contain guarantees of safety, dignity and waiver of prosecution and persecution;[240] the institution of effective international mechanisms for monitoring compliance with the terms of agreements (including recognition of UNHCR's legitimate role in this respect, which extends beyond the immediate moment of return, and facilitation of UNHCR's direct and unhindered access to returnees);[241] and the establishment of reintegration projects to promote "durable re-insertion into the original community."[242]

It should be emphasised that the above principles, which stem from basic human rights of individuals, apply with equal force to the voluntary return of "rejected asylum-seekers."[243]

Finally, of additional relevance is perhaps the right to compensation enjoyed by refugees. As propounded under the Draft Declaration of Principles of International on Compensation to Refugees and Countries of Asylum[244], "[s]ince refugees are, by definition forced directly or indirectly out of their country, they are deprived of the full and effective enjoyment of all articles in the Universal Declaration of Human Rights that presuppose a person's ability to live in his own country if he so chooses. Accordingly, the State that turns him into a refugee is in violation of all articles of the Declaration..." [Principle 3] and hence incurs an international obligation *inter alia* to pay compensation [Principle 6]. Indeed, "[t]he annual, near unanimous reaffirmations since 1948 of General Assembly Resolution 194(III) paragraph 11 of 1 December 1948, which grounds the right of refugees to compensation on 'principle of international law or... equity', have imbued this right with the quality of customary law..."[Principle 7].

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239. Loc.cit.

240. See 1989 Round Table on Solutions, *supra* n. 233 para. 52 and conclusion 17; see also 1989 CPA, *supra* n. 72, para 13(a).

241. 1989 Round Table on Solutions, *supra* n. 233, para. 51; 1985 Note on Protection, *supra* n. 238, conclusion 14; 1987 Note on Protection, *supra* n. 236, para. 55.

242. 1989 Round Table on Solutions, *supra* n. 233, conclusion 7.

243. See discussion in G.T.L. COLES, *Solutions to the Problems of Refugees and the Protection of Refugees, a Background Study* (1989) [hereafter: Background study] at pp.318-322.

244. Adopted by the International Law Association at its 63rd Conference in Warsaw, 1988.

4.1.2 The British Position

As one of the members of the Executive Committee of the High Commissioner of Refugees [EXCOM], the UK is presumed to have endorsed its conclusions pertaining to "voluntary repatriation."[245] it has thus recognised that voluntary repatriation generally constitutes the most appropriate solution to the refugee problem , that persons enjoy the right to return voluntarily to their country of origin , that repatriation of refugees should only take place at their freely expressed will and be carried out under conditions of absolute safety, preferably to the place of residence of the refugees in their country of origin.

In practice, however, the UK Government seems more concerned with numerical targets and, as declared with reference to Indo-Chinese asylum-seekers, aims to ensure that "the rate of returns to Vietnam is sustained at 1,000 a month and that if there are fewer than 100 volunteers, the difference should be made up by non-volunteers."[246]

At the same time, on 12 October 1988, the UK concluded an agreement with the Socialist Republic of Vietnam on the "phased return to Vietnam of those who have already applied to return."[247] In addition, the British Government stated that "reintegration assistance is ... made available to help returnees settle back into their communities, with volunteers receiving slightly more generous terms. The Government is also considering financial support for NGO activities in areas of Vietnam from which boat people predominantly come."[248] The UK has further undertaken in February 1990 to help fund a new transit centre in Hanoi to house an increased number of volunteers.[249]

Yet, as pointed out by critics the UK/SRV agreement fails to satisfy one of the primary conditions for repatriation consistent with international legal standards in that it does not contain a guarantee by the SRV that none of the individuals received back will be penalised for having left the country.[250] In fact the Vietnamese Government announced at the time of the

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245. See, e.g., Conclusion No. 18 (1980); Conclusion No. 40 (1985).

246. See observations by the Government on the Second Report of the Foreign Affairs Committee (23 May 1990) para. 34. See also statement by the [ex] British Foreign Minister, FRANCIS MAUDE, that "[t]he numbers who have gone back voluntarily are miniscule compared to the numbers who have come and it is clear that at the moment it is not solving the problem... we have to look at other means." Cited in F.MACMAHON, "'Little Faith' in Voluntary Repatriation", SCMP 19 Sept. 1989.

247. See Joint Communiqué issued by the SRV, UK and HK Governments following the October talks, reproduced in IRAC Report, *supra* n. 23, Annex E.

248. Observations by the Government, *supra* n. 246, para. 36.

249. See S. MACKLIN, "Hanoi, UK to Step up Returnees", SCMP 22 Feb. 1990.

250. See IRAC Report, *supra* n. 23 at 80 et seq.

agreement that only those returning who did not act against the Government would receive no more than a warning.[251] By implication, returnees who are considered to have fled "with the intention of opposing the People's Government" or to have illegally organised or forced others to flee would be prosecuted and severely punished in accordance with the SRV Criminal Code.[252]

Nor does the repatriation agreement embody a waiver of persecution and discrimination or guarantees by the Vietnamese Government that returnees' civil rights be restored and their property recovered.

4.1.3 Regional Attitudes

Asian attitudes regarding repatriation – both voluntary and involuntary (and for that matter to the issues of "solutions" in general) are characterised by their inter-state, as distinct from human rights-based, orientations.[253] The refugee problem is perceived as one drainage of national resources, social disruption and political instability, and solutions are sought in terms of shifting burdens.

Typical in this respect is the joint communiqué issued by the Foreign Ministers of the Association of Southeast Asian Nations (ASEAN) at their meeting in July 1990 grounding their call for repatriation of Indo-Chinese asylum-seekers on the "continuing influx [that] has imposed tremendous cost and created severe socio-economic, political and security problems for the countries of temporary refuge."[254] The statement echoed the communiqué released at the Twelfth ASEAN Ministerial Meeting eleven years earlier (Bali, 30 June 1979) in which they "expressed grave concern over the deluge of illegal immigrants/displaced persons from Indochina which has reached crisis proportion and has caused severe political, socio-eco-

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251. See D.WALLEN, "Hanoi Vows not to Punish Boat People who Return", SCMP 11 Oct. 1988.

252. Articles 85 and 88; cited in IRAC Report, *supra* n. 23 at p.58. Note that the waiver from prosecution contained in the Memorandum of Understanding on the Principles and Procedures for Voluntary Repatriation concluded on 16 Dec. 1988 between the SRV and the UNHCR is confined to persons who have left the country without official permission (i.e. those violating Art. 89 – the least severe of the three SRV criminal measures relating to "illegal departures".

253. Contrast with regional attitudes as reflected in the Declaration and Concerted Plan of Action in Favour of Central American Refugees, Returnees and Displaced Persons, adopted by the International Conference on Central American Refugees (CIREFCA), UNDoc.CIREFCA/89/14 (31 May 1989), e.g., Section II, Part One, C13(c): "The Problems of refugees, returnees and displaced persons and the proposals for solutions should continue to be treated on a strictly humanitarian and non-political basis; in this context, States are guided above all by considerations of solidarity with the individuals in need and the importance of identifying humane solutions to their problems, giving priority to the preservation of life and personal safety above any other consideration."

254. Cited in the Report "US Criticised over Viets", SCMP 29 July 1990.

nomic and security problems in ASEAN countries and will have a destabilising effect the region."[255]

Emphasis on "burden borne" is invariably combined in the respective statements with demands for burden-sharing in accordance with the relevant apportionment of responsibility. Repatriation is thus viewed as an element of discharge of obligation by the State of origin bearing responsibility for the "root conditions" which caused its citizens to flee.[256]

Such was also the approach taken by the Asian-African Legal Consultative Committee in its 1985 study of "Status and Treatment of Refugees" which dealt with voluntary repatriation in a section entitled "Principles of State Responsibility."[257]

Although supporting in principle voluntary repatriation as a "durable solution", the region's representatives to the 1989 Geneva conference who urged "a swift and final solution" to the problem[258] appear to consider the involuntary repatriation of asylum-seekers determined not to be refugees as more expedient

4.1.4 The Hong Kong Approach

Although the Hong Kong Government's efforts to find "solutions" to the refugee problem have been primarily directed towards mandatory repatriation of non-refugees, it has declared its "full" and "wholehearted" support for voluntary returns.[259] Furthermore, the Government considers repatriation on a voluntary basis an inadequate measure on its own to resolve the issue of the large number of non-refugees already in the territory and as a

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255. Cited in: *Study on Human Rights and Massive Exoduses* (Report by SADRUDDIN AGA KHAN, Special Rapporteur, 38 UN ECOSOC Off. Rec., Commission on Human Rights (UNDoc.E/CN.4/1503 Annex 11) at p.19 (1981).

256. See summary of "perspectives" evident among the participants of the [1989] Geneva Conference in M. KNOWLES, "The International Conference on Indochinese Refugees and its Aftermath", Refugee Policy Group issue brief (Aug. 1989).

257. The paper is discussed in COLES, *Background Study*, *supra* n. 243 at pp.278-281.

258. KNOWLES, *supra* n. 256 at p.2.

259. See Secretary for Security's speech, Leg.Co Proc 29 Nov. 1989 at p.495. Note, however, the scathing comments by legislative Councillors describing voluntary repatriation as "ridiculous, if not deliberately contrived as a joke" ("As we are all aware, there was no way of escaping Vietnam without having to go through a lot of hardships on the rough seas, and risking one's life in the process. Unless there are special compelling reasons, it is inconceivable that they would volunteer to go home just like that") [per Miss LEUNG] LegCo Proc 29 Nov. 1989 at p.480. A recurrent theme among the Counsellors who seek a "permanent end" or an "ultimate solution" to the problem is the ineffectiveness of voluntary repatriation as a deterrent: "Not only do they know that they will not be rejected by that even though they may be determined to be non-refugees, they have no fear of leaving unless they volunteered. For many of the Vietnamese boat people, so long as they need not leave, so long would they continue to believe, however erroneaously, that there is hope to move to the West where the moon is large and brighter..." [per Mr. LAM] ibid., at p. 478.

means of deterring new arrivals.[260] The local authorities therefore have endorsed both modes – voluntary and involuntary – of return to Vietnam which are viewed as "being complementary and perfectly capable of operating alongside each other."[261]

Indeed, the Hong Kong Government "helped to engineer"[262] a voluntary repatriation programme based on the UK/SRV agreement of 12 October 1988[263] and in conjunction with the UNHCR/SRV Memorandum of Understanding of 16 December 1988.[264]

Notwithstanding the relative success of the programme,[265] observers have questioned its "voluntary" nature[266] and have expressed concerns about the failure of institutional safeguards to satisfy with international norms.[267]

4.2 Mandatory Repatriation

4.2.1 International Rules

The fundamental rule applicable to the issue of mandatory repatriation is *non-refoulement*, the status of which as a norm of customary international law is highlighted elsewhere in this paper. We also discussed the legal duty embodied in the rule to permit entry to asylum-seekers at least for the purpose of temporary refuge. In this section, emphasis is placed on the "no return, no expulsion" aspect of *non-refoulement*, proscribing the return or expulsion of asylum-seekers to the country where his/her life or freedom is threatened on account of specific circumstances.

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260. Ibid. at p.495.

261. LegCo Proc 25 Oct. 1989 at p.97.

262. LegCo Proc 29 Nov. 1989 at p.495.

263. *Supra* n. 247.

264. *Supra* n. 252.

265. Over 4,000 asylum-seekers have returned to Vietnam under the programme, compared to very few from other countries in the region.

266. See D.GALLAGHER, The Second International Conference on Indochinese Refugees: A New Humanitarian Consensus? (Refugee Policy Group, May 1989) at p.28: "If persons choose to return only when faced with indefinite detention in prison-like conditions, the term 'voluntary repatriation' cannot be used with much of a sense of integrity." See also Women's Commission Report, *supra* n. 299, at p.22.

267. See critique discussed *supra* in text corresponding to notes 250-252. Note, however, press release issued by UNHCR in Hong Kong on 20 March 1989 stating that "UNHCR is already engaged in an active process of monitoring voluntary returnees to Vietnam. It has every reason to be satisfied that the guarantees provided for those returning under the voluntary programme are being fully respected. In the very few instances in which reports to the contrary have been received, UNHCR has engaged the full co-operation of the Vietnamese authorities in looking into them and has discovered them to be unfounded. UNHCR and the Government of Vietnam remain fully committed to continue co-operation in this monitoring exercise and in the voluntary return programme as a whole.

Additional attention is accorded here to questions pertaining to the range of application of the *non-refoulement* obligation, in particular its extension to cover persons who do not necessarily meet "convention refugee criteria." The support in international instruments and State practice for a broad application of *non-refoulement* is well documented.[268] Evidence includes the 1967 Declaration on Territorial Asylum which provides: "[N]o person [who invokes the right to seek and enjoy asylum from persecution] shall be subjected to... 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;"[269] reaffirmations by UNHCR of the application of *non-refoulement* to all persons within its extended competence, persons not only in fear of persecution but also in "serious danger resulting from unsettled conditions of civil strife;"[270] the recognition in regional treaties and declarations of a wider category of persons compelled to flee their countries because of acts of external aggression, events seriously disturbing public order, generalised violence, internal conflicts or massive violations of human rights to whom protection of *non-refoulement* is owed;[271] and practices of states of granting *non-refoulement* to "non-convention refugees" such as US' "extended voluntary departure", Canada's "designated classes and special measures programmes", the UK's "exceptional admissions" or the Australian permits on "strong compassionate and humanitarian grounds."[272] To the examples of positive state practice, one should also add the denunciation by states of the breach of the norm.[273]

In fact, the application of principle of *non-refoulement* is "independent of any formal determination of refugee status by a state or an international organisation. *Non-refoulement* is applicable as soon as certain objective conditions occur."[274] An obligation is imposed on the receiving party on the basis of the objective need faced by the victim.

The general nature of the *non-refoulement* prohibition is also reinforced by another fundamental norm of customary international law, namely the

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268. See IRAC Report, *supra* n. 23 at pp.72-78.

269. Cited ibid. at p.73.

270. Cited ibid. at p.74.

271. Cited ibid. at p.75.

272. Cited ibid. at pp.75-77.

273. Such as following Hong Kong's act of repatriation of 51 asylum-seekers on 12 Dec. 1989. See P.BOWERING & E.LAU, "Furore over Forced Repatriation of Viets", FEER 21 Dec. 1989 at pp.13-14.

274. G.GOODWIN-GILL, "*Non-refoulement* and the New Asylum-Seekers", 26 Virg. JIL (1986) p.897 at p.902 and references cited therein. See also UNHCR Report, UNDoc.E/1985/62 (1985) paras 22-23, stating that *non-refoulement* "should be acknowledged and observed as a rule of *jus cogens* even absent a finding that a person is a convention refugee."

rule against torture. As stipulated in the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "no State Party shall expel, return ('*refouler*') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture" [Article 3]. Indeed, the act of '*refoulement*' in such circumstances was held to constitute itself a violation of the rule prohibiting inhuman or degrading treatment or punishment under the European Convention on Human Rights.[275] A Contracting State is thus considered to have an indirect responsibility to guarantee that the individual will not be subjected to torture and inhuman measures upon return. It is the threat not the fact of torture or related treatment, which identifies a person as an actual or potential victim.

4.2.2 The British Position

The British obligation of *non-refoulement* under the Refugee Convention is given statutory expression in the Statement of Changes in Immigration Rules.[276] A general clause [para. 153] in the section covering "deportation" sets out the special position of refugees in that "[w]here a person is a refugee full account is to be taken of the provisions of the Convention and Protocol relating to the Status of Refugees." Also contained therein is a guidance to the interpretation of the Immigration Rules which are not to be construed as requiring action contrary to the UK's obligations under the Refugee Convention.

A more specific rule is incorporated in Paragraph 165 which stipulates that "[i]n accordance with the provisions of the Convention and Protocol relating to the Status of Refugees, a deportation order will not be made if the only country to which he can be removed is one to which he is unwilling to go owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular group or political opinion."

Yet, "full account" of the Refugee Convention and Protocol *is* to be taken "where a person is a refugee" [emphasis added]. Arguably, the efficacy of the *non-refoulement* proscription embodied in the Immigration Rules is undermined given the discretion vested in non-expert border officials to determine *prima facie* validity of a refugee claim and, after minimal consultation, to return aliens whose claims are manifestly unfounded in the official's opinion. Although Paragraph 73 of the Immigration rules instructs an

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275. See *Amekrane Case*, 16 YBECHR (1973) p.356 (Decn admiss, Report of the Commission, adopted 19 July 1974).

276. *Supra* n. 13.

immigration officer to refer possible refugee cases to the Home Office for decision, the difficulty of policing aliens' applications at the border and the virtual impossibility of discovering violations through returned aliens may reduce the utility of these directives.

Apart from the possibility of instances of *non-refoulement* at the border, a potential for violations of *non-refoulement* also exists given the lack of a right of appeal from within the UK against a negative determination of a claim to refugee status (and hence against removal as an illegal entrant).

Be that as it may, as noted earlier, persons denied Convention recognition for failure to meet the technical requirements of the definition are nonetheless frequently granted asylum and consequently are protected from "*refoulement*" (although not necessarily vested with various substantive rights accorded Convention refugees). Additionally, persons denied both refugee status and asylum are occasionally allowed to remain, and are thus shielded from "*refoulement*" at least for the duration of the permit.

Special policy considerations – which are not necessarily articulated in the context of *non-refoulement* – seem to affect however the British Government's approach to mandatory repatriation of Vietnamese asylum-seekers from Hong Kong. As reflected in the "Observation by the Government on the Second Report of the Foreign Affairs Committee"[277], purely pragmatic factors underlie the decisions adopted in this regard. The Government shares the FAC's view that "in the absence of significant levels of voluntary repatriation, there is no alternative to the repatriation of those who are screened out" [para 32] and states openly that its "objective... [is] to ensure that the rate of returns to Vietnam is sustained at 1,000 a month and that if there are fewer than 1,000 volunteers, the difference should be made up by non-volunteers" [para 34].

The mandatory repatriation of 51 Vietnamese boat people who were screened out by the Hong Kong authorities was justified by the British Government with reference to the facts that (a) "[n]o force was used;" (b) it was carried out "under a bilateral agreement reached with the Vietnamese Government in June 1989 which guaranteed that returnees would not be punished by the Vietnamese authorities"; and (c) "[t]wo former Ministers... visited Vietnam in January and confirmed that no force had been used against those returned and that they had not been ill-treated in any way."[278]

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277. *Supra* n. 246.
278. Ibid. para 32.

4.2.3 Regional Attitudes

Notwithstanding the various degrees of compassion displayed by the first asylum countries in Asia, they have presented a united front on the issue of mandatory repatriation of boat people who have been "screened out" as non-refugees.[279]

Viewing the refugee problem in general as one of illegal migration, the Southeast Asian nations seek solutions within corresponding norms, including the rules of State [of origin] responsibility. They further rely for support on the Comprehensive Plan of Action agreed upon at the 1989 International Conference on Indo-Chinese Refugees which provided that "persons determined not to be refugees should return to their country of origin in accordance with international practices reflecting the responsibilities of States towards their own citizens" [Article 12].

The region's protagonists appear to overlook, however, the prerequisites implied under the CPA, namely the establishment of guarantees and diplomatic arrangements necessary to ensure the safe deportation of non-refugees to Vietnam.[280]

4.2.4 The Hong Kong Approach

Unlike its British counterpart, Hong Kong's law does not contain a formal codification of the principle of *non-refoulement*. While as a rule of customary international law *non-refoulement* has arguably the force of law in the territory through the common law, its incorporation is nonetheless contingent on the absence of clear legislation to the contrary.

Such a potentially inconsistent provision may be contained in Hong Kong's Immigration Ordinance. Specifically, under Section 13E of the Ordinance, the Director of Immigration is authorised to order "at any time" the removal from the territory of any Vietnamese refugee or person detained in Hong Kong under Section 13D (i.e. a detained person awaiting a decision to allow him of her to remain in the territory as a refugee, or a detained person who was refused such permission). No legislative constraints are imposed on the Director's exercise of discretion and no allowance made for considerations of personal circumstances or for the possibility of risk to life or ill-treatment which refugees may encounter if expelled to their country of origin.

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279. See F.MACMAHON, "United Call to Return Vietnamese", SCMP 17 May 1990.

280. At present there are no formal repatriation arrangements between Vietnam and the ASEAN countries, although discussions on the matter have taken place within Thailand, Malaysia and the Philippines.

Nor are refugees granted a right of appeal against removal orders and are unlikely to be able to avail themselves of the general appeal provisions in the Immigration Ordinance which are limited to persons who have the "right to land in Hong Kong" or the permission of the Director of Immigration to remain in Hong Kong [s. 53A]. Refugees faced with removal from Hong Kong also cannot rely on the International Covenant of Civil and Political Rights applicable in Hong Kong given the UK's reservation regarding the application of Article 13 "in so far as it confers a right of review of a decision to deport an alien and a right to be represented for this purpose before the competent court."[281]

The Hong Kong Government could have thus invoked Section 13E to justify the "legality" under domestic law of the forced repatriation to Vietnam on 12 December 1989 of 51 "screened out" asylum-seekers.[282] In fact, the Government appears to claim in respect to those determined not to be refugees under the local screening process the power generally available vis-à-vis illegal immigrants.[283]

Not that any justification was demanded domestically. The Government has the overwhelming support of legislators[284], the Hong Kong people[285] as well as the PRC Government[286] for a vigorous programme of mandatory repatriation.

In order to minimize international criticism, however, several points have been raised in defence of the policy. It has thus been portrayed as fully consistent with the Comprehensive Plan of Action endorsed in Geneva – indeed, "an intrinsic and logical part of it."[287] The Government has also emphasised that similar provisions to those applicable to voluntary returnees have been made – including arrangements for reintegration assis-

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281. At present there are no formal repatriation arrangements between Vietnam and the ASEAN countries, although discussions on the matter have taken place within Thailand, Malaysia and the Philippines.

282. It may be interesting to note that when proposing the introduction of Section 13E into local legislation, the Secretary for Security expressly declared that it "provides additional legal powers to repatriate any refugee if and when circumstances permit." LegCo Proc 30 June 1982 at p.1084.

283. Secretary for Security: "...we are fully supported by Her Majesty's Government who see the return of non-refugees to their country of origin as being in the same category as the deportation of illegal immigrants anywhere else in the world." LegCo Proc 29 Nov. 1989 at p.495.

284. See Leg.Co debate on the motion urging the British Government to "secure as soon as possible... the urgent mandatory repatriation from Hong Kong to Vietnam of all Vietnamese boat people classified as non-refugees on 29 Nov. 1989 – All members with the exception of 2 (and 2 absentions) voted in support of the motion.

285. See *supra* ns. 37 and 38.

286. See C:YEUNG, "Force Viets Home Soon, Says Zhou", SCMP 5 May 1990. Note also reports that the PRC sent back to Vietnam more than 77,000 Vietnamese boat people who tried to make their way to Hong Kong via China – F.WONG, "China Sent Back 77,000 Vietnamese", SCMP 1 Mar. 1990.

287. LegCo Proc 8 Nov. 1989 at p.337; LegCo Proc 29 Nov. 1989 at p.495.

tance, monitoring and assurances of non-persecution – and more specifically that "there was no evidence of any political persecution or official harassment of the 51 who were returned to Vietnam in December."[288]

Some critical observation are nonetheless warranted. Firstly, a repatriation of asylum-seekers as envisaged under the CPA is premised on the establishment of a fair refugee status determination process. We noted elsewhere in this paper[289] that doubts persist with respect to the fairness of the screening process in Hong Kong and that it could not, therefore, be relied upon to identify all those who would be at risk of human rights violations if returned to Vietnam.

Secondly, the assurances said to have been provided by the Vietnamese authorities fall short of required guarantees for safe return.[290] Vietnam has not revoked its laws against unauthorised departure and has signed no international agreement for the withholding of punishment from involuntary (as distinct from voluntary) returnees. In fact, Vietnam's Foreign Minister is reported to have warned that Vietnam could not be held responsible for boat people who do not volunteer to return from Hong Kong.[291] Nor has an effective system for monitoring returnees over a period of time been established and occasional visits by members of Parliament or diplomatic staff are not a viable substitute for such a system.

Thirdly, concerns over the safety of returnees have been raised in view of continued human rights abuses in Vietnam[292], the harsh treatment of people caught trying to leave that country[293] and recent acts by the Vietnamese Government to "suppress dissent."[294]

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288. LegCo Proc 17 Jan. 1990.

289. See *supra* ns. 98-106 and 153-172 and corresponding texts.

290. See discussion *supra* in text corresponding to ns. 250-252.

291. See S:MACKLIN, "Vietnam Refuses Responsibility for Forced Return, SCMP 26 Feb. 1990.

292. See F.MACMAHON, "Human Rights Abuses 'Continue in Vietnam'", SCMP 21 Feb. 1990, citing Amnesty International's report on "Vietnam: 'Renovation (Doi Moi), the Law and Human Rights in the 1980s".

293. Imprisonment or detention without trial in re-education camps from between six months and two years. See S. GREEN, "Finding Reasons to Flee", SCMP 21 Feb. 1990, citing Amnesty's report, ibid.

294. See, *Hong Kong Protection of Vietnamese Asylum Seekers: Developments Since December 1989*, (Amnesty International, mimeographed, 11 July 1990) at pp.11-12: It is suggested that "...some asylum-seekers, if returned to Vietnam, could face possible detention as priosners of conscience, including those who were formerly re-education detainees or who served in the administration of the former South Vietnamese Government, as well as people whose religious, literary or other activities are unacceptable to Vietnam Government.

4.3 Resettlement in Third Country

4.3.1 International Rules

While no enforceable right to be resettled is recognised under international law, general principles grounded on the norm of international solidarity and burden-sharing have been invoked to support demands for resettlement by third countries, reflecting the perception of the refugee problem as one affecting the international community as a whole.

Reference is made in particular to the duty prescribed under the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the UN to "co-operate in the promotion of universal respect for and observance of human rights and fundamental freedoms for all and in the elimination of all forms of racial discrimination and all forms of religious intolerance.[295] It is emphasised that this duty "was the more compelling where human rights violations led to refugee outflows and their adverse consequences for other countries.[296]

In the context of international refugee law, a general approval has been expressed for the establishment – along lines agreed upon by members of EXCOM[297] – of effective burden-sharing arrangements for assisting countries which receive large numbers of asylum-seekers, including the provision of "resettlement possibilities in third countries." That legitimate expectations have been created for third party contributions is clearly reflected in the Comprehensive Plan of Action endorsed at the June 1989 Conference on Indo-Chinese Refugees calling the international community to "respond to the need for resettlement, in particular through the participation by an expanded number of states" as well as a multi-year commitment to resettle all the Vietnamese who have arrived in temporary asylum camps prior to an agreed date" [Article 9].[298]

In fact, notwithstanding the absence of strong legal commitments on their part, developed countries have assumed responsibility for resettlement of refugees granted temporary refuge by countries of first asylum.[299] Such a commitment, moreover, has been viewed as a "vital component" of

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295. GA Res.2625(XXV) of 24 Oct. 1970.

296. Round Table on Solutions, *supra* n. 233 at p.7.

297. See Conclusion on the Protection of Asylum-Seekers in Situations of Large-scale Influx, adopted by EXCOM at its 32nd Session, 12-21 Oct. 1981, A/AC.96/601 at pp.15-18.

298. *Supra* n. 72.

299. Over 1.5 million refugees from Indo-China have been resettled in other countries since the fall of Saigon in 1975 – *per* British Secretary's speech to the Geneva Conference, repr. in SCMP 14 June 1989.

any comprehensive plan of action aimed at solving the refugee problem.[300]

Resettlement by third countries finds its normative basis also in other principles recognised by international law, such as "rescue at sea" and "family reunification." Thus, in connection with the universally accepted obligation to rescue any person in distress at sea[301], a practice of flag state responsibility for resettlement has developed in the South East Asian region.[302] Such responsibility has nonetheless been modified to allow more equitable burden-sharing through the establishment in 1980 of DISERO (Disembarkation Resettlement Offers)[303] and a complementary scheme, RASRO (Rescue at Sea Resettlement Offers)[304] in 1985.

The principle of family reunification is well recognised[305] and underlies many resettlement programmes. In the absence, however, of a generally accepted definition of the "family", states' policies and practices tend to vary, sharing nevertheless a trend of restrictive application of the concept in matters of immigration.[306]

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300. Article 8, CPA, *supra* n. 72.

301. See 1910 Brussels Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, Art. 11; 1914 Convention for the Safety of Life at Sea, Art. 13; 1958 Geneva Convention on the High Seas, Art. 12(1); 1960 Convention on Safety of Life at Sea, Ch. V, Rg. 15; 1982 Convention on the Law of the Sea, Art. 98. For specific application to refugees, see 1979 International Convention on Maritime Search and Rescue, Annex 2.1.10, 5.3.3 (8).

302. It has been observed, however, that such a practice was "based more on the practical difficulties in coping with mass influx of asylum-seekers faced by coastal states in that area than on legal principles" (as the ship does not constitute part of the flag state's territory and the latter cannot be deemed the country of first refuge for the purpose of the Refugee Convention). See Note "Rescue at Sea", *Yearbook 1984* (International Institute of Humanitarian Law) 108, at p.111.

303. A pool of resettlement offers to be utilised where a flag state could not provide the required resettlement guarantee.

304. A pool of resettlement places contributed according to a fixed criteria by any state wishing to participate, allowing flag states to confine admissions for resettlement to their contributions irrespective of number of persons rescued (as long as places remain available in the pool).

305. For a specific link between family rights and migration, see 1975 Final Act of the Conference on Security and Co-operation in Europe (Helsinki Accord): Sub-section (b) – "Reunification of Families" – in the section on Human Contacts provides: "The participating States shall deal in a positive and humanitarian spirit with the applications of persons who wish to be reunited with members of their family. The Final Act of 1951 Refugee Conference contained a recommendation stating: "The *Conference*, *Considering* that the unity of the family, the natural and fundamental group unit of society, is a essential right of the refugee, and that such unity is constantly threatened, and *Noting* with satisfaction that ...the rights granted to a refugee are extended to members of his family; *Recommends* Governments to take the necessary measures for the protection of refugee's family, with a view to (i) that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country; (ii) the protection of who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption." See also EXCOM Conclusion on Family Reunion adopted in its 28th Session 1972 and the "Body of Principles for Procedures on the Reunification of Familes", adopted on 27 Jan. 1980 by the Council of the International Institute of Humanitarian Law.

4.3.2 The British Position

Three main principles determine British resettlement policies: a) response to a specific international crisis; b) ship rescues; and c) family reunions.

Thus, in the context of the refugee crisis following the fall of Saigon in 1975, the British Government authorised the entry of 300 Indo-Chinese who "had connections with the UN."[307] In 1976, in response to international appeal by the UNHCR, the UK accepted 116 "people who had left Vietnam in small boats."[308] The quota was increased in January 1979 to 1500 and at the 1979 July Conference on Indo-Chinese Refugees, the UK pledged 10,000 resettlement places.[309] Five hundred places were allocated in May 1987 to be filled within two years, 1,000 more were announced in early 1989[310] and the recent 1989 Conference resulted in an additional promise to take 1,000 refugees.[311]

Resettlement in the UK of Indo-Chinese asylum-seekers rescued at sea by British ships also originated in specific circumstances, when in mid-1979 South East Asian countries bordering the China Sea refused to allow disembarkation of refugees in the absence of guarantees of resettlement by the country of registration of the vessel. In January 1978 the UK Government agreed that "where required to allow their disembarkation, an undertaking would normally be given to accept refugees rescued by UK registered ships for resettlement [in Britain] if no other country had agreed to do so within a period of 90 days."[312]

Its practical origin notwithstanding, a continued[313] commitment to provide resettlement guarantees has been justified also in humanitarian terms as designed "[to assist] the masters of British ships to fulfill their obligations towards those at risk at sea by facilitating their disembarkation at the first port of call."[314]

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306. See Round Table of a Group of Experts on the Reunification of Familes, Florence 4-6 Dec. 1986, Conclusions, reproduced in International Institute of Humanitarian Law, Yearbook 1986-87 at p.323 (urging States to adopt a flexible approach which takes account of cultural and social factors).

307. See Memorandum of the Home Office on "Admission and Settlement of Refugees from Vietnam", submitted as evidence to the Home Affairs Sub-Committee on Race Relations and Immigration (SCORRI) [hereafter: Home Office Memorandum], *supra* n. 200 at p.88.

308. Loc cit.

309. Loc cit.

310. See D.WALLEN, "UK Will Accept a Further Quota of Refugees", SCMP 10 June 1989.

311. Foreign Secretary's speech, repr. in SCMP 14 June 1990 at p.23.

312. Home Office Memorandum, *supra* n. 307 at p.88.

313. The UK has also agreed in July 1985 to join the RASRO scheme, ibid. at p.89.

314. Loc cit.

The third source of asylum-seekers accepted for resettlement in the UK are family reunion cases. Yet, although initially "when the number of refugees entering the UK was small, the criteria for admission of their relatives (mainly in Vietnam) were widely drawn: spouses, unmarried children under 21, parents, and unmarried brothers and sisters were admitted. However, following the completion of the 10,000 quota it was decided that given the "UK's wide ranging commitments towards refugees of many nationalities, it was not appropriate to maintain more generous criteria for the dependants of Vietnamese refugees. Accordingly, since May 1981 the same criteria have been applied to Vietnamese family reunion cases as to those involving refugees of other nationalities."[315]

In fact, admission of family members of refugees is governed under the Immigration Rules and general immigration control considerations are applied.[316] Such an "interlocking of immigration policy and refugee policy" has attracted harsh criticism of relief and welfare agencies especially in the light of an alleged "racially unequal immigration policy" and related public attitudes to immigrants.[317]

Generally, it is evident that resettlement of refugees in the UK is not endorsed by the Government as a "solution" to the refugee problem. The reasons stated by officials are that "to transfer refugees with their own strong cultural tradition to unfamiliar and remote industrialised countries does not always provide a satisfactory answer" and that resettlement may undermine the more appropriate "regional political solutions."[318]The difficulties of refugees in adapting to life in the UK have also been used by the British Government as an argument to reject requests for an increased intake from Hong Kong camps based on the UK's responsibility for Hong Kong as a dependent territory.[319] It way nonetheless be noted that the Home Office has succumbed to pressure to expand the existing criteria of resettlement to allow consideration for admission of refugees whom the Hong Kong Immigration Department regards as "able to adequately support themselves in the UK and who desire to be settled there."[320]

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315. Ibid. at pp.89-90.

316. See, however, recommendation by SCORRI for relaxation of family reunion criteria in respect of Vietnamese in camps in countries of temporary asylum. SCORRI Report, *supra* n. 200, paras 11-17.

317. See Memorandum Submitted by the Joint Council for the Welfare of Immigrants, Appendix to minutes of evidence, SCORRI Report, *supra* n. 200 at pp.209-210: "We fear that the British Government's reluctance to admit more Vietnamese refugees here from Hong Kong camps has nothing to do with refugee policy as such, but everything to do with attitudes towards Asian immigration. A good refugee policy must be free of racial discrimination and based rather on need."

318. FCO Memorandum, *SCORRI Report, supra* n. 300 at p.127.

319. Ibid. at pp.129-131.

320. See F.MACMAHON, "UK Revises Criteria on Resettlement", SCMP 24 Apr. 1990.

4.3.3 Regional Attitudes

In parallel to their "apportion of responsibility" approach, countries in the region have consistently maintained that only two "solutions" to the refugee problem are viable – repatriation to the country of origin and resettlement in the West. Such a stance was taken in 1979 when in a joint communiqué ASEAN Foreign Ministers asserted that any illegal immigrants leaving Indo-China remained the responsibility of their country of origin which must accept them back and urged resettlement countries to give definite commitments to increase their intake.[321] A similar position was presented ten years later by ASEAN representatives to the 1989 Conference who reiterated their expectation that all asylum-seekers would eventually either be resettled outside the region or returned to their country of origin.

4.3.4 The Hong Kong Approach

Resettlement in third countries, which used to be regarded by Hong Kong authorities as the only realistic alternative available for asylum-seekers residing in local camps, is now viewed as a "one-off" solution for the 10,091[322] persons with recognised refugee status currently in Hong Kong.

The Government generally considers the CPA as offering the "best prospect for an overall solution to the Vietnamese boat people problem."[323] It consequently relies – for the clearing of the backlog of Vietnamese refugees who arrived in the territory before the cutoff date of 16 June 1988 as well as others determined to be "genuine refugees" – on resettlement pledges made at the Geneva Conference and the agreement reached on relaxation of resettlement criteria of refugees.[324]

Resettlement, however, is not regarded as an option open to those "screened out", who constitute the bulk of the camp population[325] and whom the Hong Kong authorities seek to repatriate – voluntarily or involuntarily – to Vietnam.[326]

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321. *Supra* n. 325.

322. Figure quoted in S.MACKLIN, "Twice as many Vietnamese Leaving Hong Kong as Arriving", SCMP 15 July 1990.

323. LegCo Proc 25 Oct. 1989 at p.96.

324. LegCo Proc 29 Nov. 1989 at p.495.

325. 47,112 in July, figure quoted in MACKLIN, *supra* n. 322.

326. LegCo Proc 29 Nov. at p.495.

4.4 Local Integration

4.4.1 International Rules

Since solutions are to be linked with the rights of the individual refugee, the frame of reference of "integration" ought to be located within human rights law.[327]

Accordingly, local integration (and, for that matter, settlement in a third country) is accomplished when the refugee has achieved not merely physical settlement but also the "possession or enjoyment of all normal rights of settlement, including finally those in relation to nationality."[328] Furthermore, integration as a solution to the refugee problem of loss of a community means "legal integration" (full participation in political, social, economic and cultural activities as a matter of right) as well as "economic integration" and "self-sufficiency."[329]

4.4.2 The British Position

Notwithstanding elaborate reception and settlement programmes[330] – covering essential needs of refugees such as housing, education, employment and health – observers note the insecure status of refugees "admitted for permanent resettlement" due to the temporary nature of their admission permit (subject to short term renewals).[331]

Specific disadvantages have been identified, including the "difficulty, arising from their temporary status, in obtaining work, housing and credit; difficulty of obtaining funds from the DHSS [Department of Health and Social Services] in spite of real need, and the fact that any children born to them while they are on time-conditions will be born without British citizenship."[332]

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327. For a thorough discussion of the human-rights approach to solutions in general and on the specific concept of integration in such a context, see G. COLES, *Background Study*, *supra* n. 243 at pp.274-5; 284-304; see also *Round Table on Solutions*, *supra* n. 233 at pp.4-5.

328. *Round Table on Solutions*, *supra* n. 233 at p.4.

329. Ibid. at pp.5, 8

330. See Home Office memorandum, *supra* n. 307 at pp.91-105.

331. See Memorandum of Joint Council for the Welfare of Immigrants, *supra* n. 317 at p.208.

332. Loc cit. Note that under section 1 of the 1981 British Nationality Act, where refugee parents are legally stateless, the child will be stateless. Where the parents have a legal nationality, and are able theoretically under the law of the country of irigin to transmit that nationality to a child born in the UK, it will probably be the case, in practical terms, that the whild will be unable to obtain its rights from the parents' country.

4.4.3 Regional Attitudes

Generally, "local integration" as a durable solution is not espoused by the Asia's first asylum countries. Indonesian authorities have claimed that "as a matter of policy, Indonesia is not in a position to accept Indochinese refugees for permanent resettlement, because of its heavy burden in caring for its own people."[333] Malaysia is unwilling to admit any Vietnamese for permanent residence because of its "delicate racial balance" although it had accepted over the last decade some 9000 Cham.Burmese and Khmer Muslims for resettlement in Malaysia.[334] (These persons received language, cultural and religious training from a voluntary Islamic Missionary and welfare agency and became eligible for permanent residence with all rights of non-citizen aliens, including the grant of Malaysian citizenship to their locally born children). Philippine Government officials have declared that "as a matter of policy the Philippine Government does not accept refugees. Beset as it is by the attendant problems of a Third World country attempting to move forward and the high expectations of its people for a better life, the Philippines cannot afford to open its doors to refugees for resettlement."[335] No settlement – permanent or otherwise – is available to refugees in Singapore. In accordance with its immigration law, Thailand does not consider for permanent residence any person who enters the Kingdom without a visa, thus practically excluding all asylum-seekers and displaced persons (although exceptional permissions may be extended to persons with ethnic links to Thailand as determined under the Thai Nationality Act).[336]

Standing alone in this respect is the People's Republic of China which granted permanent resettlement (mostly on State farms in Southern China) to some 252,000 from Indo-China (90% of whom were ethnic Chinese) in the late 1970s. Few of these "settlers" have opted for citizenship but all enjoy the same rights and Government services as citizens.[337] It may be noted, however, that about one-third of the Indo-Chinese refugees are "not fully economically self-sufficient"[338], as is well attested by continuous attempts by "ex-Vietnamese refugees" to enter Hong Kong.[339]

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333. See SOEROSO, *supra* n. 21 at p.118.

334. See World Refugee Report, *supra* n.23 at p.40.

335. See MONTES, *supra* n. 21 at p.161.

336. See MUNTARBHORN, *supra* n.21 at pp.169-171.

337. See World Refugee Report, *supra* n. 23 at p.36.

338. Loc cit.

339. They are nonetheless considered, both by Chinese and Hong Kong authorities, to be illegal immigrants and are repatriated accordingly.

4.4.4 The Hong Kong Approach

While Hong Kong regards itself primarily as a "country of first asylum", it has accepted for permanent settlement some 14,500 refugees and displaced persons from Indo-China since 1975. About 600 Vietnamese refugees from both local and overseas centres have also been granted permission to join their relatives in Hong Kong under a family resettlement scheme. In addition, as part of a move aimed at encouraging other countries to increase their intake from the territory, the Hong Kong Government, acting on the recommendation of the British Foreign and Commonwealth Office, has approved in April 1986 the absorption of 150 refugees (at a rate of 20 per month) who are able to comply with the following requirements: (a) They would be long-stayers, i.e. must have been here since before July 1982; (b) should be ethnic Chinese; (c) should be financially independent (i.e. capable and supporting themselves or producing a suitable sponsor) ; (d) should express willingness to be resettled in Hong Kong; and (e) should not be able to meet the resettlement criteria of other resettlement countries.

It is noteworthy, however, that despite the financial incentives offered and although the refugees have been in camps for many years, they have demonstrated reluctance to volunteer for the programme (121 so far) in the hope of being offered a new home overseas.[340]

Once settled in Hong Kong, under any scheme, the refugees are considered in most respects as local residents, entitled to privileges and benefits available to native-born citizens. Indeed, full integration into Hong Kong society and economy has been the declared policy of the Government vis-à-vis any asylum-seeker granted permission to land and remain in Hong Kong.[341]

Yet, local integration as a solution to the refugee problem is not perceived as a viable option given general spatio-demographic constraints[342], a growing local resentment against Vietnamese boat people[343] as well as post-1997 considerations. With respect to the latter factor reference may be made to the 1984 Sino-British Joint Declaration (Annex I, Sec. XIV) un-

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340. See S.MACKLIN, "Refugees Rejecting Resettlement in HK", SCMP 14 Mar. 1990.

341. For further details see R.MUSHKAT, *Asylum in Hong Kong* (Raul Wallenberg Institute of Human Rights and Humanitarian Law, Sweden, 1990).

342. Hong Kong's population density is 5,192 persons per sq.Km, compared to 239 in the UK and 22 in the USA.

343. See results of poll: 84% for the abolition of first asylum policy, cited in FONG, "Call to Scrap First Asylum Policy", *supra* n.37. According to an earlier survey, 80% considered that Hong Kong should cease to be a port of first asylum and 55% supported a policy to tow newly arrived Vietnamese boat people back out to sea. See S.MACKLIN,"Poll Gives Support to Towing Boat People Back to Sea", SCMP 18 May 1989.

der which no right of abode in the Hong Kong Special Administrative Region would be accorded to Vietnamese refugees who, by definition, are unable to comply with the requirement of (seven years) "ordinary residence" in the territory couples with the intention of making Hong Kong a "permanent place of residence."

It may further be noted that officials of the People's Republic of China have reiterated on various occasions that the refugee problem should be solved before the territory reverted to Chinese sovereignty. They have also stated that Beijing would not recognize the status of Vietnamese children born here before January 1983, even though they have been given the right of abode by Hong Kong in accordance with local immigration laws.[344]

5. CONCLUSION

An examination of Hong Kong's approach to the refugee issue from a comparative perspective highlights a number of interesting features of local policies in this area:

Because of British sensitivity to Chinese claims of sovereignty vis-à-vis the territory, the UK has not extended to Hong Kong the most significant international instrument in the area of refugee law – the 1951 Refugee Convention and its 1967 Protocol.

Consequently, notwithstanding the formal British link, the territory enjoys as much latitude as other Asian countries in its quest for *ad hoc* solutions to the problems it encounters in managing the refugee influx. Most Western nations have less room for manoeuvre in this respect but the UK has felt that, given the political constraints, it would be undesirable to deny the territory its Eastern identity. Britain itself, of course, has assumed a rather flexible posture regarding the incorporation of international conventions. It has been distinctly slow in translating them into domestic law, although it has not departed from their spirit. The Refugee Convention thus forms no part of UK law and is not enforceable as such by British courts. One could argue, however, that the UK legal environment has built-in mechanisms designed to prevent blatant abuses of human rights. After all, Britain is viewed as the cradle of liberal democracy, is blessed with well-functioning parliamentary institutions, has an independent judiciary and prides itself on having a protective legal culture. The "bureaucratic polity" of Hong Kong and its Asian counterparts are not endowed with such attributes.

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344. See "Row over Refugees' Residency", SCMP 24 Mar. 1989; E.LAU, "Xu Says JLG Shall Decide Viet Rights", SCMP 29 Mar. 1989.

In the absence of formidable external and internal constraints, the territory has responded pragmatically to the challenge posed by the mass arrival of asylum-seekers from Indo-China. Pragmatism has also characterised official attitudes in other parts of the region. Yet there seems to be an intangible difference between the Hong Kong brand of pragmatism and the general Asian pattern. The UK influence and the need to cultivate international goodwill have acted as a restraining force and have combined to propel the local authorities towards a position which may be conveniently described as one of "mildly progressive pragmatism." We hasten to add, however, that the pragmatic instincts have often proved stronger than the progessive values.

The evolution of Hong Kong's policy concerning the admission of refugees is a case in point. In the early phases, it was tinged with humanitarian considerations because the arrivals – mostly ethnic Chinese – were not perceived as a potential burden on the community. Subsequently, although stopping short of abandoning the first asylum principle, the authorities have become more concerned about the escalation in negative local sentiment towards the refugees and have sought ways to actively discourage arrivals. Nonetheless, fears of international condemnation and its possible adverse effects on the territory's economic performance have prevented them from resorting to the "push-back" practices common elsewhere in the region.

The result is an uneasy balance between assumed British standards and Asian realities. Again, however, it should be emphasised that the UK does not necessarily offer an ideal model in this respect. While the rule of *non-refoulement* has been incorporated into British immigration law, the restrictive approach to the notion of "first asylum", coupled with legislation imposing penalties on aliens without proper documentation, can be viewed as a subtle attempt to dissuade asylum-seekers from heading for UK shores.

Pragmatism has clearly been the dominant factor shaping Hong Kong policies regarding the standard of treatment accorded to refugees in the territory. Indeed, the authorities have openly stated that the objective of detention is to achieve humane deterrence and have left no scope for challenging this questionable measure. The conditions in detention centres, which leave much to be desired, also reflect the intention to render the environment as unattractive as possible to would-be asylum-seekers.

This is an area in which British and local practices diverge sharply. In the UK the grounds for detention are circumscribed and its implementation is subject to careful scrutiny. Equally important is the fact that aggrieved detainees have viable avenues for redress, both in Britain and through appropriate European channels. Such safeguards are lacking in

Hong Kong.

Nor has the territory deemed it necessary to introduce UK type of safeguards into the refugee status determination process. Unlike in Britain, Hong Kong does not provide adequate administrative checks, guarantees anchored in judicial intervention and high-level political controls to counterbalance deficiencies in the screening procedures. Consequently, inexpert local immigration officials enjoy wide discretion in determining who qualifies as a refugee.

The territory can be credited with a slightly more progressive attitude with regard to the substantive criteria employed in the refugee status determination process. The local authorities have adopted the generally recognised criterion of "well-founded fear of persecution" embodied in the Refugee Convention as the yardstick for distinguishing "genuine refugees" from "illegal entrants". Unfortunately, however, the application of the criterion has been marked by a lack of humanitarian spirit, cultural biases, professional prejudices and misconceptions relating to the whole notion of human rights.

Pragmatic excesses are perhaps more apparent in Hong Kongs approach to "solutions" to the refugee problem. Local officials have defined the problem in terms of inconvenience to the territory and the need to minimize it rather than in terms of the plight of asylum-seekers fleeing from persecution. Their tactical responses therefore are geared towards securing the early departure of both refugees and non-refugees and do not directly address the question of the welfare of the individuals involved. Be that as it may, the solutions canvassed are not as extreme as those mooted by politicians elsewhere in the region.

It is reasonable to assume that at least one Hong Kong solution to the refugee problem, namely mandatory repatriation, would have found little support in the UK. Nonetheless, British policy-makers do not hesitate to promote it as appropriate for the territory. This conceptual duality cannot be easily dismissed as a crude double-standard. UK bureaucrats and their political masters apparently believe that British practices have to be modified to reflect local conditions. This quintessentially practical approach is understandable from an applied policy perspective but falls short of international legal expectations. A mildly progressive form of pragmatism is preferable to pure pragmatism of the Asian variety, yet it is contrary to the spirit and principles of human rights which Hong Kong can ill-afford to ignore.

Summer, 1990.

POSTSCRIPT

While not presented by the Hong Kong Government as a change of policy, the recent introduction of an "orderly return programme" for asylum-seekers who have been screened-out as non-refugees constitutes a departure from the *status quo* in a direction which may impinge on the territory's compliance with its international obligations. Under a Statement of Understanding concluded between the British, Hong Kong and Vietnamese Governments on 29 October 1991 "all Vietnamese asylum-seekers who were found under normal international rules to be illegal immigrants would be returned to Vietnam"; repatriation is to be carried out "in accordance with normal international practice."

No specific reference was made in the accord to the use of force but the Hong Kong authorities are inclined to interpret the relevant provisions as permitting force "if necessary."[345] To the extent that the signatories' intention may be inferred, use of force had not been envisaged by the parties. British officials are said to have admitted that no agreement would have been forged were force contemplated.[346] Vietnamese officials are quoted as stating that "Vietnam is ready to receive back the people who illegally left the country and who have not been accepted by any country as refugees in a way that respects their dignity, is orderly, safe and with the necessary financial assistance from the international organisations."[347]

The international protest which followed the repatriation "under armed escort" of 51 asylum-seekers on 12 December 1989[348] and British attempts at justification, emphasising the absence of force[349] may also suggest the existence of an international standard of "non-use of force" in like circumstances.

At the same time, Hong Kong's latest operation[350] in which "minimum force of restraint" was said to be employed[351] – while triggering some criticism from opposition politicians in the UK[352] and muted "regrets" from US

345. See S.GREEN, "How the Deal Was Struck", SCMP 2 Nov. 1991, Review 1.

346. Ibid.

347. Ibid.

348. See *supra* n. 273.

349. See *supra* n. 278.

350. The repatriation on 9 Nov. 1991 of 59 Vietnamese asylum-seekers.

351. See K.GRIFFIN, "Viet Claims of Excessive Force Denied", SCMP 12 Nov. 1991 at p.2 (citing the Government's spokesman).

352. Which the British Foreign office attempted to defuse by asserting that "[t]he repatriation was carried out with as much sensitivity as possible" and that "[a]ll over the world illegal immigrants are compelled to return routinely, usually with no publicity and in many cases they are reluctant to go back." Cited in D. WALLEN, "Foreign Office Defends Move", SCMP 11 Nov. 1991 at p.2.

officials[353] – has failed to provoke the kind of unequivocal international condemnation that engendered by the 1989 repatriation.

The milder response may be attributed to the lower level of sympathy towards the particular group of returnees involved, i.e., the so-called "double backers".[354] Given, however, current analogous practices in other parts of the world — including the forced return of Albanians by Italy, deportation of Tamils by the UK and the swift rejection of Haitians trying to land on US shores – the question arises whether relevant international standards are undergoing erosion.

It should nonetheless be emphasised that regardless of "hardening" attitudes towards asylum-seekers,[355] the prohibition against the *non-refoulement* of refugees remains a binding norm. It is therefore particularly important to provide appropriate mechanisms for the determination of refugee status and secure a "profound and equitable"[356] examination of each case. As noted earlier in this article, the screening procedures in the territory are not without flaws and should be "overhauled" if any scheme of involuntary return of "non-refugees" is to accord with "alternatives recognised as being acceptable under international practices" said to be contemplated under the Comprehensive Plan of Action of 13 June 1989.[357]

It may also be submitted that, apart from a plausible contention (based on the spirit in which the CPA was concluded) that such "alternatives" are

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353. See K. GRIFFIN and J.COOKE, "US Regrets Use of 'Force' of Boat People, SCMP 9 Nov. 1991 at p.1.

354. Vietnamese who, having accepted UN cash aid to return home voluntarily, once there turned around and came back to Hong Kong a second time.

355. See, e.g., the Asylum Bill introduced by the British Government on 1 Nov. 1991 which aims at reducing what ministers call a "tide of bogus migrants" seeking political asylum. DAWNY, "Plan to Tighten Rules of Asylum Create Stir", *Financial Times* 2-3 Nov. 1991. Note also the doubling (on 1 Aug. 1991) by Britain of fines imposed on airlines bringing migrants into the country without proper documentation: "UK Gets Tough on Asylum-Seekers", SCMP 2 Aug. 1991 at p.16. On 31 Oct. 1991, Germany gained the approval of 26 East and West European countries for its plan to tighten police control at border crossings); France endorsed tough labour measures to deal with migrants; Austria declared an end in May 1991 to automatic financial support for newly arriving Romanians and Bulgarians; Sweden uses emergency rules to keep out most migrants from Eastern Europe. T. CZUCZKA, "Hugh Migration Chills Welcome, Hasten New Walls of Division", *Bangkok Post*, 1 July 1991 at p.13. In the Asia-Pacific region, Australia announced on 13 Aug. 1991 tough new regulations for refugee applicants ["Australia Gets Tough on China Refugees", SCMP 14 Aug. 1991 at p.14]; Malaysia has reaffirmed its policy of pushing Vietnamese boat people out to sea [R.VINES, "Malaysia Firm on Viet Policy, SCMP 22 July 1991 at p.9] as well as employing harsh screening procedures (in which 75% of Boat people who fled from Vietnam were judged to be non-refugees) ["Malaysia Reveals Refugee Protests", SCMP 12 Feb. 1991]; Singapore has ceased even its limited admission policy (allowing Vietnamese boat people picked up at sea to land if third countries gave written guarantees of removal within three months) until all the asylum-seekers currently in camps in Singapore are resettled in accordance with commitments given [I.STEWART, "Singapore Issues Viet Ultimatum", SCMP 22 Oct. 1991 at p.17].

356. See Statement by the European Parliament on 22 Nov. 1991, cited in "EC Opposes HK Deal on Boat People", SCMP 22 Nov. 1991 at p.1.

357. Article 14, CPA, *supra* n. 72.

to be decided in a multilateral fashion, they are viewed as a means of last resort "if after the passage of a reasonable time it becomes clear that voluntary repatriation is not making sufficient progress towards the desired objective."[358] While this stipulation in the CPA agreement allows governments a wide scope for subjective judgments, the increasing numbers of asylum- seekers in Hong Kong volunteering to return to Vietnam[359] ought to militate against the deployment of extreme measures.[360]

It is further arguable that although no enforceable right to asylum is yet recognised by the international community, asylum-seekers who have languished for several years in refugee camps merit special consideration on humanitarian grounds not to be repatriated to a country which they fled at a great risk to their lives.[361] Perhaps some such notion underlies the Government's decision to apply the orderly return programme "initially to all new arrivals found to be illegal immigrants."[362]

Finally, whether mandatory or voluntary, repatriation must not be implemented unless there are sufficient assurances in place that no returnees would be subjected to punitive or discriminatory treatment. As restated by the Hong Kong Government, "[t]he Vietnamese Government has guaranteed that no illegal immigrant who returns to Vietnam will face persecution and that it will continue to facilitate monitoring of returnees by the UNHCR to ensure that these guarantees are fully respected."[363] Questions nonetheless have been raised concerning the compliance of provincial authorities with Central Government's undertakings[364] in a country still widely regarded as an oppressive entity. Given the nature of the regime, it is imperative that precautions be taken not to upset the delicate balance between pragmatic urges and progressive values.

25 November 1991.

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358. Ibid.

359. Over 11.000 people had already returned under the UNHCR's voluntary repatriation scheme. See Government Secretariat Press Release of 29 Oct. 1991.

360. Note, however, the Government's "placating" approach in pointing out that the "voluntary repatriation would continue" and "[e]very encouragement would be given to non-refugees to return home under this programme." See Press Release, *supra* n. 359.

361. It may be instructive to note that "elementary considerations of humanity" have been regarded by the International Court of Justice as part of "general and well recognised principles" in which international obligations may be grounded. See *Corfu Channel case*, [1949] ICJ Rep. 4, at p.22.

362. Press Release, *supra* n. 259.

363. Press Release, *supra* n. 359. It was also stated that "[t]here had been not a single substantiated case of persecution of anyone who had returned [under the UNHCR voluntary repatriation programme], Ibid.

364. See A.BOYD and F.MACMAHON, "Returnees Face Viet Retaliation", SCMP 23 Oct. 1991 at p.1 (reporting on plans by Haifong officials to punish "doublebackers").

ASEAN SOCIETY, A DYNAMIC EXPERIMENT FOR SOUTH-EAST ASIAN REGIONAL CO-OPERATION*

Sompong Sucharitkul**

1. THE PRE-DAWN OF A NEW PACIFIC ERA

For centuries preceding the advent of modern international law, transfrontier trade in the eyes of the European world was concentrated around the European Mediterranean Basin where transboundary transactions abounded. The laws and customs of external trade had developed a system of *jus commune*[1] observed and adhered to in practice by traders and merchants across and adjacent the Mediterranean costs. A kind of maritime usage grew into what was codified as *consolato del mare*[2] or a code of conduct for maritime commerce and the carrying trade. A rudimentary form of *lex mercatoria*[3] or "law merchant" appeared to have been in operation among the Hanseatic city States and the Italian city republics bordering the Mediterranean, Venice, Naples, Florence and Genoa. A network of commercial and diplomatic relations was established in the early fifteenth

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* San Francisco, August 1991. This is an introductory study of the chronological steps leading to the formation of the Association of South-East Asian Nations (ASEAN), encapsulating certain important activities undertaken by the regional organisation in the early years of its existence, and indicating progressive trends of its growth and developments up to 1990.

** B.A.Hons, B.C.L., M.A., D.Phil., D.C.L. (Oxford); Docteur en droit (Paris); LL.M. (Harvard); of the Middle Temple, Barrister-at-Law (United Kingdom); Distinguished Visiting Professor of International and Comparative Law (Golden Gate University School of Law); Member of the *Institut de droit international*; Corresponding Collaborator of UNIDROIT; Member of ICSID Panels of Conciliators and of Arbitrators (World Bank).

1. "*Jus commune*" or law common to transboundary trade was developed from the 8th century onwards to regulate international trade.

2. "*Consolato del mare*" was a private collection of rules and customs of maritime law published in the 14th century in Barcelona. An earlier collection of the Rhodian maritime laws were compiled between the 7th and 9th century.

3. For "*lex mercatoria*", see, e.g., "La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives", JDI (1979) p.106.

Ko Swan Sik et al. (eds.), Asian Yearbook of International Law, 113–148.

century over 150 trading cities and centres in Europe. Since the Treaty of Westphalia (1648), the trade centre of the world has moved from the Mediterranean to the Atlantic. Today, in the closing decade of the twentieth century, the world's trade centre is moving away from the Atlantic to the Pacific. At the turn of the nineteenth century, a US Secretary of State[4] said: "The Mediterranean is the ocean of the past, the Atlantic the ocean of the present, the Pacific the ocean of the future". These predictions have been confirmed by the current unprecedented growth and rise of the Pacific Rim. Today, the Mediterranean is the sea of historic significance. The Atlantic is the ocean of current commercial competition, of conflict of political interests and rivalry, of disintegrating military alliances and of traumatic transformation to achieve unification and harmonisation. The Pacific Rim is the rising unspoiled *terra nova* on which to receive and sustain the massive economic shift progressively taking place from the aging Atlantic Rim, especially the East and North-East Atlantic cities. This ongoing shift from the Atlantic to the Pacific is propelled by the dynamic force of sheer economics. It is also accompanied by a cultural shift as the Pacific Rim countries have proved more versatile, speaking more than a thousand languages and practising the most varied religious and cultural traditions in the world. This is being further reinforced by increasing emphasis on education and scientific research as a key to the improvement of manpower. It has been suggested that the Pacific Rim cities on the continent of North America like San Francisco and Portland, Oregon, should capitalize on the current shift into the century of the Pacific.[5] This is one of the challenges to be addressed before the close of the twentieth century.

The gentle persuasiveness of the Pacific Rim in regard to tourism, trade and investment is enhanced by the comforting assurance that the shift from the Atlantic to the Pacific does not necessarily entail any decline on the part of the West relative to the East. But even such a dichotomy of "East and West" is history today as it is devoid of tangible foundation. The contrast is unreal. Thus, San Francisco is on the West coast of the United States but it is equally a city on the Eastern seaboard of the Pacific Rim. What is West from the standpoint of Mexico, Canada or the United States is clearly East, North-East or Near East in the objective perspective of the Pacific Rim.

Apart from the sporadic existence of highly developed economies dotting the Pacific Rim in all directions, the United States, Canada, the USSR, Japan, Australia and New Zealand, there have now emerged from the Pa-

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4. The Honorable JOHN HAY was US Secretary of State who made the prophecy. The expression "ocean" when applied to the Mediterranean was used metaphorically.
5. See, e.g., *John Naisbitt* and *Patricia Aburdene*, *Mega Trends 2000* (Pan Books (1990)) at pp,158-193.

cific ocean no fewer than four giants or tigers or dragons, if such an expression is to be preferred, viz., Singapore, Taiwan (ROC), Hong Kong and Korea (ROK). These tigers have been nicknamed NIC, the Newly Industrialised Countries.[6] The next in line to become another NIC may include Thailand, Malaysia, the Philippines and Indonesia, all being founding members of ASEAN. It should be added that the sixth ASEAN member, Brunei Darussalam, has the highest GNP per capita[7] in the whole world exceeding that of Kuwait. What appears startling is the continuing growth at an unprecedented pace of the magnitude of tourism, trade and investment among the countries of the Pacific Rim. A new partnership in these fields has apparently emerged among the fast-growing economies of the Asian Pacific. According to the latest forecast of the Pacific Economic Co-operation Conference prepared by the United States National Committee for Pacific Economic Cooperation,[8] the slow growth of 5.0 percent has ended in 1990 and economic growth rate will rise again in 1991. The fastest growing economies in the Pacific are now to be found in ASEAN, whose growth leader happens to be Thailand, followed closely by Singapore and Malaysia. All ASEAN countries, with the exception of Brunei, expect faster growth than the average for the region as a whole, although somewhat less than their own 1988-89 performance. The fastest growing countries may still be expanding more than their long-term potential. Taiwan and Korea are also expected to grow faster than the average although less than their recent spectacular performance. From 1992 Taiwan will slow down on her overseas investment but will reinvest in her own national infrastructure to the tone of US$ 330 billion during the ensuing three years.

Pacific growth in tourism, trade and investment is clearly discernible in United States trade patterns. Today, the United States exports more to Korea (ROK) than to France and more to Taiwan than to Italy and Sweden combined. From 1983 onwards, the US-Pacific trade has surpassed its Atlantic trade. While in 1960 United States trade with Asia was only half its trade with Western Europe, in 1983 United States trade with Asia was 50 per cent higher than with Europe, reaching well over US$ 300 billion in 1988, not counting reciprocal investments in tourism. Today, United States trade with Asian Pacific has nearly doubled its trade with European Atlantic.

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6. It should be observed that in the European context the same acronym NIC means Newly Integrated Countries, i.e., integrated into the European Community. These include the three latest members of the EEC: Greece, Spain and Partugal. Not unlike the Pacific Rim Tigers, the extension is likely to grow in Europe.

7. GNP par capita of Brunei is more than US$ 26,000. This is twice that of Japan, but may be slightly lower than that of Nauru, a Pacific Island nation or the Falkland Islands.

8. *Pacific Economic Outlook 1990-91* (Pacific Economic Co-operation Conference, The Pacific Rim Forum, San Francisco, 9-12 September 1990).

Pacific Rim partnership in trade, investment and tourism appears to be achieving the fastest growing rate of expansion. Being astride the Atlantic and the Pacific, American and Canadian traders and investors are expected to be pragmatic and flexible enough to capitalize on the ideal ambivalent position of the United States and Canada. For these reasons, global attention is now being turned to the phenomenal increase and expansion of trade, investment and tourism among the partners around the Pacific Basin. It is not the purpose of this study to identify the major causes of such growth which are to be found in the economic driving forces, in the practical commercial dexterity of the Asian Pacific traders, in their resourcefulness and resilience. Let us endeavour to observe at closer range the concept of ASEAN partnership at work and then examine the ever-tightening co-operation between ASEAN and its trading partners on the Pacific Rim and yonder.

2. ASEAN COOPERATION: AN ALTERNATIVE TO SECREGATED CO-EXISTENCE

Having established an impressive record of the fastest economic growth rate among the fast growing economies of the Pacific Rim, we should invite ourselves to visit ASEAN and to watch the Association of South-East Asian Nations at work. The success story of ASEAN deserves to be told by someone closely associated with the Organisation, although this is not to suppose as a matter of course that all commentaries and studies conducted by outsiders are at best necessarily inaccurate and at worst dangerously misleading in the extreme[9].

2.1 The Birth of the Association of South-East Asian Nations

We may all have a vague notion of ASEAN. For instance, it is no secret that ASEAN is an association for economic co-operation among the countries of the South-East Asian region founded on August 8, 1967. It is also common knowledge that ASEAN consists of five founding members: Thailand, Malaysia, Singapore, Indonesia and the Philippines, while the sixth member, Brunei Darussalam has acceded to the ASEAN Declaration in 1984.

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9. See, e.g., a study entitled *ASEAN and the United Nations System* by JUN NISHIKA (UNITAR 1983).

2.1.1 Economic Background

Further facts and statistics are readily available which tend to confirm the economic strength and potentials of the Association. By way of comparative analysis, for instance, ASEAN in 1991 has a population of well over 300 million, comparable to the enlarged European Economic Communities with unified Germany. As a market, in terms of the size measured by numerical strength of consumers, ASEAN and EEC belong to the same classification. Not unlike the EEC whose smallest member in terms of territory and population, Luxembourg, is probably the richest in GNP per capita and the strongest in industrial development, Brunei and Singapore could share each qualification of Luxembourg. Thailand and the Philippines, each with a population close to sixty million, are comparable to the Federal Republic of Germany, France and Italy in size and population, while Indonesia with a population of more than 170 million has no counterpart unless we lump the United Kingdom together with the South European members of the EEC, Italy, Greece, Spain and Portugal. Malaysia is the approximate size of the Netherlands in terms of population and size of England for acreage of farmland.

Other outstanding statistics concern the over-abundance of identical products rather than complementarity of products to boost intra-ASEAN trade. Three or four members of ASEAN produce as much as 70 to 80 per cent of world production of such as tin (Malaysia, Thailand, Indonesia and Singapore) and natural rubber (Malaysia, Indonesia, Thailand and Singapore), while coconut oil and palm oil (mainly Malaysia and Philippines) and tapioca or manioc (mainly Thailand and Indonesia) are common export items from ASEAN countries. Energy resources such as gas and petroleum products are exported from Indonesia, Malaysia and the Philippines and to some extent refined and exported from Singapore. Rice is exported mainly by Thailand and marginally also by the Philippines. Reciprocal trade exists on sea-food products, foodstuff and textile including silk, batik and handicraft. In the industrial sectors of late, automobiles, electronics, television sets, VCRs, computers, etc., have begun to constitute significant export items from Singapore, Thailand and Malaysia.

There is thus not much incentive to induce intra-regional trade among ASEAN countries, and regional co-operation will have to be based on other economic considerations. The objectives of ASEAN had been economic from the start and should continue to remain so in the foreseeable future. Yet, what has bound up the destinies of ASEAN closely together initially may not be as much economic as social, cultural and political or, indeed, security reasons. South-East Asian Nations must learn individually as well as collectively to survive as independent sovereign nations.

2.1.2 Political Motivation

Economic considerations may have provided the initial reasons for ASEAN to pool their resources together, but it is to a greater degree the necessity to survive as free and independent sovereign nations that has brought ASEAN together. There can be no divorce between political stability and economic growth and development. ASEAN leaders were well aware that their combined economic strength could be marshaled to reinforce their collective political will. Before the establishment of ASEAN, member countries had examined their previous experience with the existing regional organisations for co-operation in trade and development. A quick glance at these forerunners might be in order.

(a) The Asian-African Conference

The first question to be addressed relates to the national policies of the ASEAN nations which shared some common ideals or principles. The Joint Communiqué of the First Asian Conference in Bandung, Indonesia, in 1955 offered an attractive indication of some unity of approach. At least three of the ASEAN countries were participants at Bandung: Indonesia, Thailand and the Philippines. Malaysia and Singapore were still in the process of being born. The principles of friendly relations, good-neighbourliness and economic co-operation were declared to be the chosen path of the newly emerged Asian-African world, where freedom, independence, the decolonisation process as well as the Rule of Law remained on the top of the list of priorities. Bandung was, for that matter, by no means the meeting place of exclusively newly emerged countries of Asia and Africa. The oldest Asian nations, Thailand, China and Japan, were active participants, although by that time the last two played no part in the United Nations.

(b) The United Nations Regional Commission (ESCAP)

Mutual co-operation would appear to be a normal instinct among the nascent Asian-African world. But instinct alone did not lead to concrete results as both Asia and Africa individually and intercontinentally were quite divided for innumerable reasons of a religious and cultural nature. Efforts to create a regional organisation for Asia have not met with great success due to the extreme vastness of the area, its diversity and the lack of driving forces in support of a regional organisation for economic co-operation. The regional UN Economic Commission for Asia and the Far East (ECAFE, now ESCAP for: Economic and Social Commission for Asia and the Pacific) served as a task force to foster co-operation within the greater Asian Pacific region. Ministerial Conferences were held and the Council of Ministers for Asian Economic Co-operation was set up to map

out strategies for economic development and co-operation. The regional UN Commission produced useful and concrete results in certain areas such as the establishment of the Asian Development Bank and the Committee for Co-ordination and Investigation of the Lower Mekong Basin (Thailand, Laos, Cambodia and Vietnam). The Council of Ministers also considered a programme of trade co-operation in Asia and the Pacific, a programme for regional monetary co-operation and other supporting trade development and commercial infra-structures.

(c) Asian Pacific Council (ASPAC)

Other regional economic co-operation initiatives had been taken by the regional countries in the Pacific Rim. Thus, the Asian Pacific Council (ASPAC) was created in 1966 following the Summit of Seoul, ROK, consisting of some ten countries, namely, Korea (ROK), Japan, the Philippines, China (ROC), Thailand, Laos, Vietnam (South), Malaysia, Australia and New Zealand. When seemingly out of nowhere the wind of political change swept across the South China Sea with the change of Chinese representation in the United Nations in 1971 and the fall of Saigon in 1975, ASPAC could not endure the frontal onslaught of the insidious political storm. Gracefully, the Asian Pacific Council played down its profile and slowly dismantled the regional centres it had carefully planned for each country. For instance, Thailand had set up ECOCEN, an Economic Co-operation Centre, China (ROC) a Fertilizer Centre, and Korea (ROK) a Social and Cultural Centre. With the exception of the Social and Cultural Centre in Seoul which retains its *raison d'être*, other offsprings of ASPAC appear to have fallen into *desuetude ratione cessante*. Nevertheless, while it lasted, each of the centres created under the auspices of ASPAC did inure for the benefit of the host country as well as all other ASPAC members.

(d) Ministerial Conference for the Economic Development of South-East Asia (MCEDSEA)

Another regional conference worth mentioning is the Ministerial Conference for the Economic Development of South-East Asia which became functional in 1966. It consists of economic assistance and technical co-operation projects between Japan as donor country and nine or ten South-East Asian nations as recipients of Japanese aid. Japan is now flanked by Australia and New Zealand, and occasionally the recipient countries also count Burma among the participants. Notable examples of projects under MCEDSEA include the South-East Asia Fisheries Centre with a Training Section in Thailand and a Research Section in Singapore.

(e) Association of South-east Asian States (ASA)

Although "co-operation" is a natural and instinctive inclination of human behaviour, intercourse between States within the Asian Pacific Community was not possible until after Bandung. Once given the opportunity it would not be unnatural for neighbouring States to foster closer co-operation in economic as well as in other fields. While regional co-operation in Europe was free and unencumbered, Asia had for centuries been a continent of war-torn pieces of territorial possessions, a hunting ground for outside powers without being altogether free from intra-regional struggles. The earliest form of co-operation and association in the region was bilateral between two like-minded neighbours. Such were the cases between Thailand and the Federation of Malaya, between Burma and Thailand and between Pakistan and Indonesia. It was not until 1961 that a sub-regional grouping could be formed from a series of closely knit bilateral co-operation. The formation of ASA, the Association of South-east Asian States, was the first regional co-operation of like-minded nations in the economic, social and cultural fields. Malaysia, the Philippines and Thailand were founding members of ASA, which was the predecessor of ASEAN, a larger Association with which it was finally merged. A number of existing ASA projects have become ASEAN.

2.1.3 The labour pain preceding the birth of ASEAN

The two years following the celebration of the tenth anniversary of the Bandung Conference in 1965 were trying times not only for the unsuccessful attempts by Algeria to convene a Second Asian-African Conference in Algiers, but more particularly for the States that were to become partners in the ASEAN venture. Indonesia, under President SUKARNO and Foreign Minister SUBANDRIO, was outwardly very powerful, especially within the Non-Aligned Group, and was flirting with Socialist countries. The PKI (Partai Komunis Indonesia) was the largest Communist Party in the world outside of the USSR An axis was formed linking together Pyong Yang (North Korea), Peking (China), Hanoi (North Vietnam), Phnom Penh (Cambodia) and Jakarta (Indonesia. There was troubled water everywhere from Hanoi, Vientiane, Pnom Penh through Jakarta.

At this juncture, the United Kingdom, for reasons of her own, decided to create Malaysia by adding the territories of Sarawak and Sabah to the Federation of Malaya. Malaysia was born as an extension of an existing State. SUKARNO was not pleased with Greater Malaysia. As if to add insult to injury, the United Nations not only recognised Malaysia as successor State to the Malay Federation but also the new State was elected member of the Security Council. SUBANDRIO adopted the policy of "Konfrontasi" or

"Confrontation against Malaysia". Before the latter took its seat in the Security Council, Indonesia withdrew from the United Nations altogether and intensified her "Confrontation" policy, opposing Malaysia's admission to the Asian-African Conference in Algeria. Paratroopers were dropped inside Malaysian territory in Sarawak and Malacca, and there were sporadic disturbances in Singapore.

The Philippines also protested against the addition of Sabah to Malaysia as it had a long-standing claim to Sabah traceable back to the Sultanate of Sulu. The discord between the Philippines and Malaysia disrupted the progress of ASA which during this critical period continued to subsist in a state of suspended animation.

The Philippines, supported by Japan, offered to resolve the problem through the creation of another association called MAPHILINDO, consisting of Malaysia, the Philippines and Indonesia. The proposal never got off the ground since it was tainted with religious overtones. Meanwhile, Thailand was requested to look after the interests of Malaysia in Indonesia and the Philippines, and vice-versa.

A break occurred when Colonel UNTUNG staged an unsuccessful coup d'Etat in Indonesia. A number of Indonesian generals in active service were captured, tortured, assassinated and mutilated. Those that escaped capture headed a new government under General Suharto and from that time on, the tide turned in favour of regional co-operation upon the sudden disavowal of the policy of confrontation. Thailand, through her skilled Foreign Minister, Dr. THANAT KHOMAN, managed to provide good offices which not only restored diplomatic relations among the nations of the region but also inspired regional confidence among all leaders concerned.

Normalisation of relations meant revitalisation if not indeed resuscitation of ASA which resumed the activities it had suspended since the advent of Greater Malaysia. Indonesia was invited to attend the Third ASPAC Ministerial Meeting in Kawana, Japan, and sent an Ambassador[10] as its observer. Singapore seceded from Malaysia and virtually remained an informal member of ASA.

Thailand, perceiving the precious moment, swiftly took the lead to propose a new regional organisation for economic co-operation which would include the ASA countries and Indonesia. Singapore was privy to the negotiation. The draft proposal was first discussed between Thailand with the mandate from other ASA members and Indonesia. It would not seem right to ask Indonesia, by far the largest country, to join the existing association, ASA. Thus instead of enlarging ASA to include Indonesia, ASA was merged

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10. General ROEKMITO was then Indonesian ambassador to Japan.

into a new organisation called: Association of South-East Asian Nations (ASEAN).

2.2 The Principles and Objectives of ASEAN

Born with intense labour pain, ASEAN had its traumatic experience upon delivery. Before its birth it was nurtured in Thailand's soil with utmost pre-natal care. Its draft constituent instrument was discussed at Laem Taen, Bangsaen. Finally, the Press Communiqué released in Bangkok following the meeting of Ministers who signed the Bangkok Declaration on 8 August 1967, launched into orbit the infant association called ASEAN.

The *reasons which inspired* the member States to create ASEAN are contained in the preamble of the Bangkok Declaration which includes the following:

> The need to strengthen further the existing bonds of regional solidarity and *co-operation* and the existence of mutual interests and common problems;
>
> The desire to establish a firm foundation for common action to promote regional co-operation in South-East Asia in the spirit of *equality* and *partnership* and thereby contribute towards peace, progress and prosperity in the region;
>
> The awareness that the cherished ideals of peace, freedom, social justice and economic well-being are best attained by fostering *good understanding, good neighbourliness* and *meaningful co-operation* among the countries of the region already bound together by ties of history and culture;
>
> The primary responsibility shared by the countries of South-East Asia for strengthening the economic and social stability of the region and ensuring their peaceful and progressive national development;
>
> The determination of the countries of the region to ensure their stability and security from external interference in any form or manifestation in order to preserve their national identities in accordance with the ideals and aspirations of their peoples;
>
> The affirmation that all foreign bases are temporary and remain only with the expressed concurrence of the countries concerned and are not intended to be used directly or indirectly to subvert the national independence and freedom of States in the area or prejudice the orderly processes of their national development.

The *aims* and *purposes* of the Association are:

> 1. To accelerate the economic growth, social progress and cultural development in the region through joint endeavours in the spirit

of *equality* and *partnership* in order to strengthen the foundation for a prosperous and peaceful community of South-East Asian Nations;

2. To promote regional peace and stability through abiding respect for *justice* and the *rule of law* in the relationship among countries of the region and adherence to the principles of the United Nations Charter;

3. To promote active *collaboration* and mutual assistance on matters of common interest in the *economic, social, cultural, technical, scientific* and *administrative fields*;

4. To provide *assistance* to each other in the form of *training* and *research* facilities in the *educational, professional, technical* and *administrative spheres*;

5. To collaborate more effectively for the greater utilisation of their *agriculture* and *industries*, the expansion of their *trade*, including the study of the problems of the international commodity trade, the improvement of their transportation and communication facilities and the raising of the living standards of their peoples;

6. To promote South-East Asian studies;

7. To maintain close and beneficial *co-operation* with existing *international* and *regional organisations* with similar aims and purposes, and explore all avenues of even closer co-operation among themselves.

These aims and purposes have been vigorously pursued by ASEAN from the day it was born. The emphasis is unmistakably placed on *equal partnership* which underlies all ASEAN undertakings and activities to date.

3. COLLECTIVE ASEAN ENDEAVOURS

There are several ways of classifying activities of a regional organisation for economic co-operation. ASEAN activities cover at lease two principal areas: (1) Intra-ASEAN activities pertaining mainly, if not exclusively, to mutual co-operation in trade, investment or tourism; and (2) ASEAN relations of active co-operation with the outside world, or with non-ASEAN countries, which in turn could be further subdivided into relations with immediate neighbours, with Pacific Rim partners and with other nations from other regions of the world such as West and Central Asia, Africa, Latin America and Europe.

3.1 Intra-Asian Co-operation

It may be beyond the scope of a study of ASEAN activities to attempt even a simple outline of the organisational aspects of the Association which truly deserves a separate treatment showing a gradual progress from a modest start with multiple national secretariats to the establishment of a common general secretariat with a regular annual budget and an international staff. Suffice it to state that the Association has been growing from strength to strength with regard to its internal organisation and staffing pattern and the funds provided by member States. ASEAN meets at various levels: the Summit, the Annual Ministerial Meetings, the Economic Ministers' Meetings, the Meetings of other Ministers, of Senior Officials, of the Standing Committee and the meetings of various permanent and *ad hoc* committees. The private sector also organised their ASEAN meetings, such as the ASEAN Chambers of Commerce and Industry which had met even before the official launching of ASEAN. A Special Co-ordinating Committee was also established to streamline pending projects and minimize overlapping activities of various committees and bodies.

At various levels of official and private-sector meetings, the Association has undertaken a great number of ASEAN projects. With leaps and bounds, ASEAN has expanded or contracted in response to the need to concentrate on the development of certain areas requiring special attention. Thus, at the outset ASEAN inherited all ASA programs and pending projects and added a considerable number to the list of possible areas of co-operation among its members. An ASEAN study was conducted with the assistance of a team of technical experts attributable to the United Nations which did help member States in deciding the future direction of ASEAN co-operation.[11]

ASEAN activities covered a great many areas of experimentation which subsequently either flourished or faded into oblivion. In all of the fields listed in its objectives, ASEAN has ventured with greater or lesser degree of success. Specifically, ASEAN has reached several important agreements and concluded significant and far-reaching treaties in various forms, ranging from the Treaty of Amity and Co-operation in South-East Asia of 24 February 1976 and the Protocol Amending the Treaty, following the Manila Declaration of 15 December 1987; the Kuala Lumpur Declaration of 27 November 1971 on the Zone of Peace, Freedom and Neutrality; the Declaration of ASEAN Concord following the Bali Summit of 24 June 1976; the Agreement for the Establishment of a Fund for ASEAN on 17 December 1969 and the Agreement for the Establishment of the ASEAN Secretariat of

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11. See *infra*, n. 46.

24 February 1975. In the substantive areas of economic co-operation, special attention may be paid to the Agreement on ASEAN Preferential Trading Arrangements of 16 February 1977 which has since been in force with increasing measure of success, the Basic Agreement on ASEAN Industrial Projects of 6 March 1980 in order to co-operate in establishing large-scale ASEAN Industrial Projects, particularly to meet regional requirements for essential products (utilising available resources in the region and contributing to the increase in food production), and the Basic Agreement on ASEAN Industrial Complementation of 18 June 1981.

From the very start, ASEAN leaders never had the illusion that ASEAN would become a Common Market. They fully realised the diversities and contrasts in their countries' economic structures and national legal frameworks. Even a more modest goal like a Free Trade Area appeared to be out of reach for reasons of existing divergencies in the fiscal structures and policies. But that should not deter ASEAN determination to continue to co-operate. The programme closest to the establishment of a Free Trade Area was the adoption of Preferential Trading Arrangements which ASEAN in fact launched. It also intensified its tightening efforts to encourage intra-ASEAN trade by creating complementarity where none had existed in the past.[12]

Intra-ASEAN activities may be grouped under a variety of headings, notably among which include co-operation, co-ordination and harmonisation in the fields that appear of practical importance to the peoples and Governments of ASEAN.

3.1.1 Economic Co-operation

This is contained in the aims and purposes as specified in the ASEAN Declaration. As such, economic co-operation requires primary attention. It may take almost any form, but must be practical and mutually beneficial consistent with the underlying concept of "equal partnership". ASEAN leaders have been pragmatic in their approach. Every conceivable measure having been thoroughly examined, the common economic policies appear now to include the promotion of intra-ASEAN trade, joint-venture in industrial investment and development and intra-ASEAN tourism.

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12. As will be seen in the pages that follow, no formal proposal was made by any member State before 1991 for ASEAN to become a free trade association. A modest practical start began with the transfer of existing ASA projects to ASEAN, and proposals for ASEAN projects were assigned by the Second ASEAN Ministerial Meeting in Jakarta, 16-18 August 1968, for further study by the ASEAN Standing Committee and the ASEAN Secretary-General. This is borne out in the joint communiqués of subsequent Ministerial Meetings. Even reduction of tariff barriers under the ASEAN Preferential Trading Agreements (PTA) has taken many years to bear some fruits. See also *infra*, n. 13.

(a) Promotion of Intra-ASEAN Trade

This policy is basically sound but requires sufficient incentives for increasing interchanges of commodities among the ASEAN countries. There should be complementarity of products, which in the agricultural field appear to be difficult to achieve. In the newly created industries, however, co-ordination and harmonisation could create a more united ASEAN market with evenly distributed suppliers from various parts of the region. Some improvements are visible after the latest across-the-board reduction of tariff in the form of ASEAN Preferential Trading Agreements[13] designed to encourage trading within the region. The success might, of course, be regarded as minimal compared to the growth of intra-Community trade within the European Economic Community.

(b) Promotion of Intra-ASEAN Investments

This policy requires the co-operation of ASEAN governments as well as that of the private sectors within the region. Joint-ventures have taken place in various industrial investments and developments and there appears to have been a freer flow of goods, services and capitals within ASEAN as a result of various agreements concluded by ASEAN countries. Relaxation of immigration regulations, exemptions from visa requirements, exemptions from fiscal restrictions and partial exemptions from duties and other forms of taxation have encouraged the movement of skilled and unskilled labour forces from one ASEAN country to another.

(c) Promotion in Intra-ASEAN Tourism

This is partly economic co-operation and partly cultural exchange. Movements of people, not only investors and traders but also visitors and tourists, have been encouraged across ASEAN national frontiers. Facilities have been established at border posts to allow crossing with only border passes, while travel by air hardly requires advanced visas for ASEAN nationals. Although this is nowhere close to the facilities afforded by a member of the European Community to other nations of the Community, the facilities granted have eased, if not accelerated, the movement of tourists within the ASEAN region. Not unlike the facilities available within the European Community, ASEAN has rotated their "Visit ASEAN Year", highlighting places of interest in each of the ASEAN nations. At the same time, package tours of all kinds have been available to enable tourists, intra-

13. This is an area that requires a separate in-depth study. An enquiry may begin with the practice of ASEAN since its adoption of the Agreement on ASEAN Preferential Trading Arrangements of 16 February 1977, see *Multilateral Treaties between ASEAN Countries* (ASEAN Law Series, Butterworth, hereafter: ASEAN Multilateral Treaties), pp.113-119, 120-123, Annex I: Rules of Origin for the ASEAN Preferential Trading Arrangements.

ASEAN as well as extra-ASEAN tourists, to visit one or two other beauty spots of another ASEAN country without extra cost.

3.1.2 Co-operation in infra-structural development planning

ASEAN activities classified as co-operation in infra-structural development planning cover very wide areas of facilitating intra-ASEAN transportation and communications. This is not at all surprising as an instinctive reaction to the separation to which member States of ASEAN had been subjected prior to Bandung. Now that each has been liberated from the yoke of ex-communication with the other ASEAN member States, the way is open for restructuring of means of mutual contacts and of continuance of direct and uninterrupted communications.

a. Promotion of Telecommunication

Every possible means of intra-ASEAN telecommunication has been considered and structured to permit direct communication links such as by submarine cables across the sea-bed connecting all the member States separated by any expanse of water. Satellite communications have also been established, as many of ASEAN ground-stations lie within direct reach of satellites in geostationary orbits.[14] Ground stations have been established in several spots within ASEAN countries. Thus, many ASEAN countries share the services of Indonesia's Palapa Communication Satellite for their respective internal communications.[15] Television broadcast can also be relayed through satellite communication channels. Remote sensing is another possible use of artificial satellites to survey and manage natural resources on earth.

b. Promotion of Safety and Security at Sea

ASEAN States are without exception sea-faring nations. With the exception of Singapore which is a geographically disadvantaged State, other ASEAN nations have very extended coastlines. In fact, Indonesia and the Philippines are archipelagic States[16] with archipelagic waters and sea-lanes. To ensure the safety and security at sea, several measures have

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14. A "geostationary" orbit is a narrow orbital ring around the earth appromately 22,300 miles (35,800 km.) above the equator. Satellites in these orbits rotate in the same directional movement and at the same speed as the earth rotation, thereby maintaining their locations in space on approximately the same spots.

15. See, in particular, PRIYATNA ABDURRASYID, "Developing Countries and Use of the Geostationary Orbit", *Proceedings of the Thirteenth Colloquium on the Law of Outer Space* (1987, pp.375, 379-80).

16. Indonesia was the first to propose the concept of "archipelagic State" as early as 1957 during UNCLOS I. The Philippines also claimed "historic waters". Under the UN Convention on the Law of the Sea 1982, Indonesia and the Philippines were both recognised as "Archipelagic States" for the purpose of a new law of the sea.

been adopted to facilitate the search for ships in distress and rescue of survivors of ship accidents.[17] The benefits of this agreement are not limited to ASEAN flags. The duties and obligations have been undertaken by ASEAN member States to provide such measures of assistance as may be necessitated by the circumstances to ships in distress in their territories and neighbouring seas as they may find practicable. In this connection, Search and Rescue (SAR) required the identification and designation of Rescue Co-ordination Centre (RCC) and Local Rescue Co-ordination Centres (LRCC) in all ASEAN member countries.

By the same token, since the oil spill accident befalling the Japanese tanker *Showa Maru* in the mid-seventies, Malaysia, Singapore and Indonesia, the three ASEAN riparians of the Malacca Strait[18] have established a traffic separation scheme to ensure the safety of navigation through the Malacca Strait. This might have spurred some excitement and even opposition from the protagonists of "freedom of navigation" in the context of an "international strait". The controversy was pre-empted by the strait States' submission of their traffic separation scheme to the Inter-Maritime Consultative Organisation (now IMO) for approval. Thus, ASEAN nations in practice, as well as in law, continue to exercise effective and undisputed control over the passage through the Malacca Strait, primarily an intra-ASEAN affair, but with far-reaching strategic implications for ASEAN as a whole. It should be added that while merchant shipping is a relatively novel enterprise in some ASEAN countries such as Thailand, Malaysia and Indonesia, it has long played an important role in the external trade of Singapore and the Philippines. ASEAN countries have spared no effort to co-operation in the field of intra-regional shipping.[19]

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17. See, in particular, the Agreement for the Facilitation of Search for Ships in Distress and Rescue of Survivors of Ship Accidents, 15 May 1975 (citing Chapter V: Safety of Life at Sea, annex to the International Convention for the Safety of Life at Sea), in: ASEAN Multilateral Treaties, pp.97-101, with annexes.

18. In February 1975, the *Showa Maru*, a Japanese super-tanker of 237,698 deadweight tons, ran aground in the Malacca-Singapore Straits, south of Singapore, causing three out of the twelve tanks to split and more than 3,380 tonnes of crude oil spilled into the waters. Malaysia claimed US$10 million damages from the owners of the tanker for the cost of cleaning up and pollution damage to the beaches and the fish culture; Singapore claimed US$ 1.6 million for the expenses of clearing up the oil slick, and Indonesia claimed over US$ 15 million for anti-pollution measures and ecological damage to the marine environment. Several collisions occured in the straits in June 1985 and later in 1976 with the result that the strait States had to take more stringent measures, such as devising the traffic separation scheme to ensure the safety of navigation. For a more detailed study of the régime of the straits, see K.L. KOH, *Straits in International Navigation, Contemporary Issues* (Oceana, 1982) pp.78-82.

19. Thus, an integrated Work Programme on Shipping was drawn up for the period 1982-1986 (IWPS) to co-ordinate implementation of ASEAN common policy in shipping as enunciated in the Resolution on Shipping. This Resolution aimed at attaining greater efficiency and economy in the carriage of ASEAN trade by promoting and strengthening self-reliance and co-operation in shipping..

c. Promotion of Safety and Security in Air-Traffic

Although relatively new-comers to the business of carrying trade by air, ASEAN countries have become regional and even global carriers. Without exception, every member State has its own international and domestic airlines. Most ASEAN airlines have started with some external technical co-operation, but are now completely independent of outside assistance and are operational on their own strength. Among them co-operation has begun on pooling of services, traffic-sharing and mutual promotion. A multilateral Agreement was concluded granting commercial rights of non-scheduled air-services among the ASEAN nations in 1971.[20] These rights are initially limited to third and fourth freedom traffic.[21]

An agreement similar to the one on maritime navigation was concluded by ASEAN States as early as 14 April 1972 in Singapore, for the facilitation of search for aircraft in distress and rescue of survivors of aircraft accidents.[22]

The ASEAN Committee on Transportation and Communications has adopted various projects. Among these activities should be mentioned the publications on climatic data and the AIREP (Air-Reports) programme which have been compiled on a routine basis by the meteorological services of individual ASEAN countries. These two projects entail elaborate efforts of data processing, analysis and the production of uniform presentation using the latest scientific techniques. Greater skills have thus been developed in the collation and treatment of climatological information and air-reports in each ASEAN country.[23]

The ASEAN International Airport Association was established in 1982 to develop regional co-operation among ASEAN international airports on airport development, operation and management. Centres of excellence for meteorological training and for aviation security training were set up in the Philippines and Malaysia respectively.[24]

3.1.3 Intensification of cultural exchanges and development

It has become apparent that out of the apparent differences in national

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20. See Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services among the Association of South-East Asian Nations, 13 March 1971, in ASEAN Multilateral Treaties, pp.86-90, with the annex, in which several airports have been designated for the purpose.

21. Article 2 (1), see ibid. at p.87.

22. See Agreement on the Facilitation of Search of Aircraft in Distress and Rescue of Survivors of Aircraft Accident, 14 April 1971, ibid., pp.92-96.

23. See *Statement by Chairman of the Standing Committee, 15th ASEAN Ministerial meeting, Singapore, 14-18 June 1982*, pp.36-37.

24. See the *Report of the Committee on Transport and Communications, Annual Report of the* ASEAN *Standing Committee, 1981-82* (published by ASEAN Secretariat) pp.34-35.

history, ASEAN countries retain their common cultural heritage from ancient times before their contact with the Western world. Although each of the member States of ASEAN is a pluralistic society with varying components of different ethnic groups, the variations in the composition of the population appear to follow a similar pattern with several common languages and basic religions that are commonly practiced in all the countries of the region. Linguistically, Malay is principally used in at least three or four out of the six ASEAN States and is also the language of a minority group in the other two countries. Religiously, Islam is prevalent among the Malay-speaking population of ASEAN although Buddhism is practiced in Thailand and among the Chinese in Singapore, and there are Buddhist temples in Malaysia as well as in Java. Catholicism is predominant in the Philippines but widely followed in other ASEAN countries where other Christian sects are also known. Against a similar background of diversities of their pluriform societies, the member countries of ASEAN have been able to establish a common identity through their community of national interests. Thus, although English is only one of the official languages of the Philippines, Malaysia and Singapore, the ASEAN States have resorted to English as the official language among themselves.

a. Co-operation in Social Development.

ASEAN is committed to intensify active co-operation in the field of social development with emphasis on the well-being of the low-income groups and of the rural population, through the expansion of opportunities for productive employment with fair remuneration, and on development efforts relating to women and youth. Intra-ASEAN co-operation to meet the challenges of population growth and, where possible to formulate new strategies in collaboration with appropriate international agencies has been further intensified and expanded. Co-operation in the social field is further intensified in regard to the prevention and eradication of the abuse of narcotics and the illegal trafficking of drugs.[25]

b. Co-operation in Cultural and Mass Media Activities

The study of ASEAN as well as its member States and their national languages has been introduced as part of the curricula of schools and other institutions of learning in the member States. ASEAN countries have firmly supported the exchange of scholars, writers, artists and teachers to enable them to play an active role in fostering a sense of regional identity and fellowship. Not only are national and regional resilience being encouraged within ASEAN nations, the community is now also developing a collective will, an ASEAN consciousness. South-East Asian studies have been promot-

25. As evidenced in the Declaration of ASEAN Concord on 24 February 1976, ASEAN Multilateral Treaties, pp.24-29.

ed through closer collaboration among national institutions. Several cultural projects are pursued on a continuing basis under the auspices of the ASEAN Committee on Culture and Information,[26] and an ASEAN Cultural Fund has been established in 1978.[27] Pursuant to an earlier Agreement for the Promotion of Co-operation in Mass Media and Cultural Activities 1969,[28] ASEAN countries have been promoting mass media activities by broadcasting regular programmes to reflect the aims, purposes and activities of ASEAN by radio and television , by organising film festivals, exchange of film artists and undertaking of joint film production, and by organising seminars, symposia and other activities on mass media.

3.1.4 Co-operation on Food, Agriculture and Forestry

(a) Common Agricultural Policies

Member States co-operate closely to ensure self-sufficiency in basic food commodities. Common agricultural policies have been developed in a manner not unlike the European Economic Community in its initial stages, and there has been extensive pooling of research and technology.

(b) The ASEAN Food Security Project (AFSP)

This has been one of the most important and successful project and was adopted by ASEAN in 1981. A good information and early warning system has been implemented. An Emergency Rice Reserve, in line with the FAO Food Reserve Programme, has been set at 50,000 tons with contributions from each member country. Its size is kept under review by the ASEAN Agricultural Development Planning Centre (ADPC). This Centre also plays a role in the case of possible inclusion of other basic food commodities in the Reserve.[29]

(c) Production and Supply of Fertilizers, Pesticides and other Agricultural Inputs.

At the directions of the Committee on Food, Agriculture and Forestry, the ASEAN Agricultural and Forestry Ministers met and assigned the Co-ordinating Group on Crops to undertake a study on the supply and demand

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26. See the Declaration of ASEAN Concord, ibid., p.27. Performances, exhibitions and related cultural activities include, *inter alia*, an ASEAN travelling exhibition of paintings and photographs in ASEAN countries, an exhibition of photographs on ASEAN cultural heritage, radio and TV exchange programmes, performances by ASEAN artists, ASEAN song festivals, ASEAN film frstivals, ASEAN film weeks, the production and distribution of ASEAN prints and audio visual materials, ASEAN traditional games and sports.

27. Ibid, at pp.124-129.

28. Ibid., at pp.82-85.

29. See, e.g., ASEAN Agreement on Food Security Reserve, 4 October 1979, ASEAN Multilateral Treaties, pp.138-145.

of non-urea fertilizer in ASEAN. A pre-feasibility study was prepared with the help of the United States Trade and Development Programme.[30]

(d) ASEAN Quarantine Ring.

ASEAN Plant Quarantine Centre and Training Institute (PLANTI) provides a focal-pointed co-ordinating mechanism to improve all plant quarantine activities through training, research and information exchange. A proposed ASEAN Common Regional Animal Quarantine Centre (ACRAQC) was, however, replaced by strengthening of ASEAN national quarantine stations.[31]

(e) Food Handling

The ASEAN Food Handling Bureau serves as the main communication link between the Sub-Committee on Food Handling and its various working groups on grains, livestock, fish and horticulture. The co-operation covers several aspects of the processing, packing, transportation and quality control of grains, vegetables, fruit, horticultural produce, livestock and fish as well as man-power development and abattoir designing. It is also aimed to cut cost harvest spoilage and wastage in the ASEAN region.

(f) Co-operation in Forestry

The Jakarta Consensus on ASEAN Tropical Forestry sets out a comprehensive programme of co-operation that covers the adoption of a common forestry policy, the promotion of technical co-operation, the establishment of a suitable institution, co-operation in timber-trade, and an ASEAN common stand on international issues. Four ad hoc Export Groups were set up: Forestry resources conservation and management, timber production and processing, timber marketing and trade and forest environment and wildlife were assigned to the Groups led by, respectively, Malaysia, the Philippines, Thailand and Indonesia.[32]

(g) New Proposals

Several projects have been in the pipeline for possible third country funding. These include the ASEAN Agricultural Project Formulation, the ASEAN Fish Quarantine Project and the ASEAN Food Handling Programme.

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30. See ibid., Agreements No. 12 (Indonesia) and No. 13 (Malaysia), pp.164-169 and pp.170-175.

31. See ASEAN Declaration to Eradicate Foot and Mouth Diseases, ibid., pp.54-56, and ASEAN Delcaration on Specific Animal Diseases Free Zone, ibid., pp.57-59. The national quarantine stations are at Kepala Jernih (Indonesia), Kuantan (Malaysia), Alabang (Philippines), Jurong (Singapore) and Bangkok (Thailand).

32. See Manila Declaration on the ASEAN Environment, ibid., pp.50-53.

3.1.5 Co-operation in Industrial Projects, Minerals and Energy

(a) ASEAN Industrial Projects (AIP)

Significant ASEAN industrial projects have been planned and undertaken, including the ASEAN UREA Project (Indonesia), ASEAN UREA Project (Malaysia), ASEAN Copper Fabrication Project (Philippines), and ASEAN Rock Salt-soda Ash Project (Thailand). These AIPs have been allocated to host country proponents with each of the other ASEAN member countries having an option to own a minimum of 10 per cent of equity. A substantial margin of preferences have been extended to products of the first five AIPs for the first five years from the date of commercial operation. The Indonesian project was the first to be operational.

(b) ASEAN Industrial Complementation (AIC)

Bilateral negotiations on non-tariff preferences were initiated even before the Basic Agreement came into force. The Basic Agreement was concluded in 1981[33] when the First Package of Existing Automotive Components under the AIC Scheme was formally implemented. A Second Package of New Automotive Components has been adopted.[34]

(c) ASEAN Industrial Joint-Ventures (AIJVS)

These are private sector equivalents enjoying exclusive privileges similar to AIC products. There was also the question of the extent of non-ASEAN equity participation and the nature of preferential trading arrangements to be thrashed out. Many of these ventures are now operational.

(d) ASEAN Co-operation on Minerals

Various proposals have been put into effect within the ASEAN Minerals Co-operation Plan, including:

(i) beneficiation and marketing of kaolin;

(ii) beneficiation of low grade barite; and

(iii) the establishment of an ASEAN Training Centre for Mine Safety and Health.

(e) ASEAN Co-operation on Energy

A Coal Information Centre was created as part of the ASEAN Co-operation on Energy.

(f) ASEAN Co-operation in Power Utilities/Automatics

Working groups have been established each of the following projects:

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33. Basic Agreement on ASEAN Industrial Complementation, 18 June 1981, ibid., pp.195-200.

34. The Second Package includes the following disbribution: Indonesia: steering systems; Malaysia: headlights for motor vehicles; Philippines: heavy duty rear axles for commercial vehicles; Singapore: fuel injection pumps; Thailand: carburettors.

microhydro development; computer applications; interconnection; research, development and engineering; training; geothermal development; nuclear power for electric power generation; rural and urban electrification; standardisation and the development of an electric power information centre.

3.1.6 Co-operation in Finance and Banking

Extensive co-operation exists among ASEAN countries on matters relating to finance and banking. The following projects now in operation need be mentioned:

a. ASEAN Bankers Acceptance (ABA), resulting from the meeting of an Expert Group of ASEAN Central Banks and Monetary Authorities.
b. Customs and Insurance Matters: An ASEAN Customs Code of Conduct was adopted, covering basic principles and standards on customs valuation, classification, techniques and related matters. ASEAN insurance commissioners have proposed measures for co-operation in the field of reinsurance, marine cargo insurance and export credit insurance.
c. ASEAN Swap Arrangement, designed to alleviate temporary shortage of international liquidity among member countries, providing each member country with a credit line of US$ 80 million.
d. Access to capital markets: Various projects have been implemented and new avenues of promise pursued, including access to capital markets in the EEC, in the United States, Japan and West Asia.
e. Avoidance of double taxation: Continuing progress has been achieved as between member States.

3.1.7 Co-operation in Science and Technology

ASEAN co-operation in science and technology covers extensive grounds, many of which have been considered under other headings. Suffice it to mention that in addition there has been active co-operation within ASEAN in the following projects: (a) ASEAN Trust Fund, to finance an ASEAN Plan of Action on Science and Technology; (b) Management and Utilisation of Food-waste Materials; (c) Food Technology Research and Development Project; (d) Non-conventional Energy Research; (e) Action Plan on the East-Asian Seas; (f) ASEAN Co–operative Programme on Marine Sciences; (g) ASEAN Co-operation in the Field of Corrosion; (h) ASEAN Co-operation in Materials Processing; and (i) Science and Technology Infra-

structure Development.

3.1.8 Asian Co-operation in Political and Security Matters

Without collective political will, ASEAN solidarity could not endure the harsh realities of regional economic co-operation. Without political consciousness and national resilience, ASEAN could not weather and survive the storm of dissensions left over by departing external powers. Co-operation in the political field is absolutely vital to the very existence of ASEAN as a regional association. External and intra-regional security is the lifeline of the organisation. Co-operation in the six areas outlined above inevitably and irreversibly led to ASEAN co-operation in political and security matters. The transition from economics to politics was only a matter of time. With ASEAN, as it has been with the EEC, the process has taken no more than a decade or a cycle of twelve years to reach the transformation ASEAN now enjoys, notwithstanding the absence of a permanent ASEAN military force to ensure the collective defence and maintain the peace and security of the region. Military co-operation exists in practice on a bilateral rather than regional basis. Joint border patrols are periodically in operation between Thailand and Malaysia as well as between Malaysia and Indonesia. Thai-Indonesian combined forces have been engaged in military and naval exercises as well as in active combat operation, as on one occasion in the rescue operation of a hijacked Garuda Indonesian aircraft in Bangkok in the early eighties.

A number of areas of political co-operation deserve mention:

(a) The Practice of Regional Tolerance

To tolerate and accept the existing differences within ASEAN was the first step towards closer understanding and deeper appreciation of one another within the ASEAN community. To a large extent the ASEAN studies and cultural exchange programmes have done much to foster ASEAN consciousness, resilience and solidarity. The expressions "ASEAN Consciousness", "ASEAN Solidarity" and "ASEAN Resilience" have become "catch phrases" in the day-to-day vocabulary of ASEAN parlance.

For "ASEAN Consciousness", attention has been increasingly concentrated on the youth and grassroots of the population, in the human resources and their social and cultural developments, to instill an awareness of "ASEAN" in every national of a member State.

"ASEAN Solidarity" requires little additional explanation. It implies that ASEAN nations will stick together, will vote together after close consultations, and at times, in spite of differences that may exist in their respective positions as in the Law of the Sea, a dissenter would remain silent or ab-

stain rather than express pro forma dissent.

"ASEAN Resilience" has acquired special meanings. For instance, para. 9 of the Joint Communiqué of the Fifth ASEAN Ministerial Meeting in Singapore, 13-14 April 1972, reads, in part, "They [the ASEAN Ministers] agreed that for greater self-reliance and more effective co-operation, a co-ordinated and well-planned strategy was needed on the national as well as regional levels. It was necessary for member countries to develop national resilience which would enable them to face the present changes and challenges of the future with great confidence." (emphasis added). The meaning of "national resilience" in the ASEAN phraseology is thus much clarified. Again, at the Seventh ASEAN Ministerial Meeting in Jakarta on 7 May 1974, para. 5 of the Joint Communiqué carried a statement by President Soeharto who expressed his pleasure to note "that ASEAN member countries had been successfully directing their efforts to the establishment of economic stabilisation and the furtherance of development in their respective countries which would both give substance to national independence of each member country and contribute to the joint efforts of strengthening of the regional resilience, so much needed to put ASEAN in a better position and increasingly gain the recognition and respect of the major powers." (emphasis added).

Finally, another use of "resilience" as a term of endearment in the ASEAN context can be found in para. 46 of the Joint Communiqué of the Nineteenth Ministerial Meeting in Manila, 23-28 June 1986, as follows:

> "The Foreign Ministers stressed the imperative of tapping ASEAN's vast potential for regional economic co-operation to ensure ASEAN dynamism and resilience in the face of challenges to its development and growth ..." *(emphasis added).*

A new phrase is coined "ASEAN dynamism" as part and parcel of "ASEAN resilience", a term frequently used to indicate ASEAN strength and capacity for self-improvements and adaptation to the prevailing conditions of the world, be it world market, world politics or world peace.

(b) The Principles of Non-Use of Force and Good-Neighbourliness

The practice by ASEAN of non-use of force and good-neighbourliness towards one another within the region, time-honoured principles traceable back to Bandung and to the Charter of the United Nations, have contributed to the burial of the hatchet and the shelving of bilateral and sub-regional differences. The ASEAN spirit of give-and-take must replace national superiority, as equality of partnership has replaced domination and hegemony in the region. It was in this broader perspective and for longer term peace and security of the region that the nations of ASEAN have been able to put

aside whatever differences might have existed or continued to subsist among themselves.

(c) The Creation of ASEAN Mechanism for Conflict Resolution

As a corollary to the principles of non-use of force and non-interference or non-intervention in internal affairs, a machinery has been set up to facilitate the settlement of disputes that require attention. The Treaty of Amity and Co-operation in South-East Asia[35] concluded on 24 February 1976, following the Bali Summit, contains provisions requiring ASEAN member States to refrain from the threat or use of force and at all time to settle disputes among themselves through friendly negotiations, failing which regional processes are available for settlement by a High Council comprising a representative at ministerial level from each of the ASEAN member States. The High Council is designed "to take cognizance of the existence of disputes or situations likely to disturb regional peace and harmony". Appropriate means of settlement by the Council include good offices, mediation, inquiry and conciliation. A committee may be set up for this purpose and the High Council may also recommend appropriate measures for the prevention of deterioration of the dispute or situation. It should be noted that by the Protocol Amending the Treaty of Amity and Co-operation in South-East Asia adopted on 15 December 1987 following the Manila Summit[36], Article 14 of the Treaty may also "apply to any of the States outside South-East Asia which have acceded to the Treaty, only in cases where that State is directly involved in the dispute to be settled through the regional processes."

(d) Adoption of an Intra-ASEAN Standard for the Promotion and Protection of Regional Investments

Within the Group of 77, each of the ASEAN nations has followed the majority view approaching consensus of opinion with regard to the measure of compensation in the event of expropriation of foreign investment in general. A standard not dissimilar from that proposed by Secretary Hull in the Mexican treatment of American investments appears to have been adopted for ASEAN investments within ASEAN. Thus, Article VI (1) of the ASEAN Agreement for the Promotion and Protection of Investments of 15 December 1987,[37] provides:

> "Investments of national and companies of any Contracting Party shall not be subject to expropriation or nationalisation or any measure equivalent

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35. See, in particular, Articles 13, 14 and 15, text in ASEAN Multilateral Treaties, pp.67-74.

36. See Article 1 of the Protocol of December 1987, 27 ILM (1988), pp.597-624, at p.609.

37. Ibid., at p.613. See also M. SORNARAJAH, "The New International Economic Order, Investment Treaties and Foreign Investment Laws in ASEAN", 27 *Malaya Law Review* (1985), pp.440-458.

> thereto, except for public use, or public purpose, or in the public interest and under due process of law, on a non-discriminatory basis and upon payment of adequate compensation. Such compensation shall amount to the market value of the investment affected immediately before the measure of dispossession became public knowledge, and it shall be freely transferable in freely-usable currencies from the host country. The compensation shall be settled and paid without undue delay..."

The treatment thus accorded intra-ASEAN investments appears therefore to be more attractive than normally agreed upon between an individual ASEAN country and a non-ASEAN partner. This is more political than the economic standard ordinarily adhered to by developing countries, and constitutes an exception to the most-favoured-nation standard

(e) Internal Structural and Administrative Changes

Coinciding more or less with the shift from national ASEAN secretariats to an international permanent secretariat in Jakarta,[38] parallel transformation has taken place in the national secretariats within ASEAN member States. Structurally, ASEAN affairs initially came under the economic department within the Foreign Ministry of member countries while in some States the Political Department might have a small role to play. Today, each national ASEAN department is independent from the traditional department of economic affairs, with a separate Director General. Furthermore, the deputy head of mission accredited to an ASEAN country has been upgraded to the rank of Minister. Initially the annual Ministerial Meetings were attended by Ministers of Foreign Affairs assisted by their national ASEAN Secretary-General, subsequently senior officials in political affairs also accompanied the Foreign Ministers with the result that the annual Joint Communiqués now consist of two combined components, one on economic co-operation and development and the other on matters of common political concern relating to international situations or foreign affairs of the region,[39] such as Cambodia, the Arab-Israel conflict, Lebanon and East Timor. Special Meetings of ASEAN Foreign Ministers have also been held to consider Political matters and to formulate an ASEAN position on the issue.

(f) Restatement of Common ASEAN Posture

Reiterating ASEAN commitment to the principle of the Bangkok Declaration of 1967 that "the countries of South-East Asia share a primary responsibility for strengthening the economic and social stability of the

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38. See *infra*, section 3.2.1.

39. See, e.g., the Joint Press Release, First ASEAN Ministerial Meeting and the Second, Third, Fourth, Fifth, Sixth and Seventh Joint Communiqués, and compare the Eighth and subsequent communiqués in: ASEAN Documents (Ministry of Foreign Affairs, Bangkok, Thailand).

region and ensuring their peaceful and progressive national development, and that they are determined to ensure their stability and security from external interference in any form or manifestation in order to preserve their national identity in accordance with the ideals and aspirations of their peoples", the ASEAN Ministers of Foreign Affairs at their Special Meeting in Kuala Lumpur on 27 November 1971 adopted the Zone of Peace, Freedom, and neutrality (ZOPFAN) Declaration, known as Kuala Lumpur ZOPFAN Declaration, agreeing that "the neutralisation of South-East Asia is a desirable objective and that ASEAN Ministers should explore ways and means of bringing about its realisation".[40] This Declaration was warmly welcomed by China and subsequently by Japan, while developed countries in the West have shown no enthusiasm in their response, in spite of the Nixon Doctrine of Vietnamisation of the Vietnam War.[41] In a subsequent Declaration of ASEAN Concord adopted by the Heads of Government of ASEAN at their Bali Summit on 24 February 1976, the ASEAN Heads of Government agreed to meet as and when necessary, signed the Treaty of Amity and Co-operation in South-East Asia, agreed to settle intra-regional disputes by peaceful means, to take steps towards recognition of and respect for ZOPFAN, to improve ASEAN machinery to strengthen political co-operation, including judicial co-operation, e.g. by way of extradition treaties, and to strengthen political solidarity by promoting harmonisation of views, co-ordinating positions and, wherever possible and desirable, taking common actions. They also agreed to continue ASEAN co-operation between member States in security matters in accordance with their mutual needs and interests on a non-ASEAN basis.[42]

3.2 Co-operation with non-ASEAN Entities

ASEAN was never conceived nor was ASEAN ever designed to function in isolation as an inward-looking association or exclusive club of South-

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40. See Zone of Peace, Freedom and Neutrality Declaration, ASEAN Multilateral Treaties, Declaration No. 2, pp.18-21.

41. The Nixon doctrine was designed to pave the way for the Republican Administration to disengage US forces from Vietnam, then a *hereditas jacens* from the predecessor Democratic Administration. Both ZOPFAN and the Nixon doctrine could see eye to eye in that there should be no interference in South-East Asia from any outside Power, whether China, the Soviet Union or the United States. From the US standpoint, "non-involvement in Vietnamese affairs" or "let the Vietnamese fight their own wars" would be consistent with the concept of the Zone of Peace, Freedom and Neutrality, proclaimed by ASEAN in Kuala Lumpur. While non-involvement is not inconsistent with neutrality, neutralisation carries a different connotation.

42. See Declaration of ASEAN Concord, ASEAN Multilateral Treaties (Declaration No. 4), pp.24-29.

East Asian nations. On the contrary, ASEAN is an open community to which outsiders are welcome without exception. Neighbouring South-East Asian States have attended ASEAN meetings as observers and gradually may consider it opportune to participate as full members as did indeed the rich island sultanate, Brunei Darussalam, which became the sixth member of ASEAN on 7 January 1984.[43] The accession process has been as smooth as it was informal.

Informality is indeed a noteworthy characteristic of ASEAN from its very inception and in living reality, from the conception of ASEAN itself. A question which needs to be addressed is that relating to the legitimacy and constitutionality of the international personality of ASEAN without which in the eyes of international law governing international organisations ASEAN may not have come into being.

3.2.1 International Legal Personality of ASEAN

Specialists of the international law on international organisations may disagree with regard to the vital necessity for an international organisation to be born and blessed with an international legal personality. There is nevertheless a common ground that legal capacity to conclude treaties or international agreements is a strong evidence if not an attribute of international legal personality. An international organisation by definition must be inter-governmental, and that is all that it needs to be. There is no additional requirement that it has to have a sizable membership or population, so long as there is a constituent instrument with clear and unequivocal intention on the part of the States agreeing to its establishment. Such clear intention is discernible from the Charter of the United Nations which is the constituent instrument of the United Nations Organisation as well as a Treaty among its signatories. So also was the Bangkok (ASEAN) Declaration of 1967, regardless of its form or the lack of formality, with regard to ASEAN, notwithstanding non-registration with the United Nations Secretariat. As an accomplished "international organisation" within the meaning of the Vienna Convention on the Law of Treaties, 1969, and the Vienna Convention on Representation of States in their Relations with International Organisations..., 1975, each and every question concerning the status of ASEAN deserves a separate and in-depth study.

As part of ASEAN's legal status, the privileges and immunities in respect of ASEAN have occupied the attention of Member governments of the Association since its inception. The bottom line in practice has always

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43. See Declaration on Admission of Brunei Darussalam in the Association of South-East Asian Nations, ASEAN Multilateral Treaties (Declaration No. 13), pp.64-67.

been that the host country agrees to accord whatever privileges and immunities are customarily accorded to international organisations such as the United Nations. In other words, the extent of the immunities and privileges granted is circumscribed by the functional necessities of the organisation or the performance of its official functions. Not unlike other more established international organisations, ASEAN was not born with a ready-made Convention on Privileges and Immunities. Such a treaty has to be proposed, negotiated, accepted, concluded, ratified and come into force, like any other formal international agreement. ASEAN was not even born with a unified single secretariat but with five national Secretary-Generals, comparable in some respects to the Canadian-US Free Trade Association with its Bilateral Secretariat. Almost ten years after its birth, ASEAN was blessed with a central ASEAN Secretariat.[44]

The privileges and immunities are not contained in a general convention but in an agreement which is more like a combination of the United Nations Convention on Privileges and Immunities of 1946 and the Headquarters Agreement between the United States and the United Nations. It is concluded as an Agreement between the Government of Indonesia and ASEAN [the Organisation] relating to the Privileges and Immunities of the ASEAN Secretariat, Jakarta, 20 January 1979.[45] Clearly, ASEAN privileges and immunities extend also to other offsprings, organs and centres association with the Organisation, such as the ASEAN Centre for Trade, Investment and Tourism in Tokyo, or the ASEAN Trade Centre in Rotterdam. Further study deserves to be undertaken on these aspects.

3.2.2 Co-operation with other International Organisations

ASEAN member States clearly recognize ASEAN as a regional organisation from the very start. Within the legal system of each of the ASEAN founding members, the Association has received tacit, if not express, recognition by the establishment of official relations with each member country and the preparation of studies, documents, etc., for various ASEAN meetings at different levels in compliance with obligations under the ASEAN constituent instrument. What was urgently needed was the facility to conduct relations with the outside, i.e., non-ASEAN, world, and particularly with the many pre-existing regional bodies, commissions and organisations. Contact with these organisations would imply recognition by

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44. See Agreement on the Establishment of the ASEAN Secretariat, 24 Feb. 1976 (Bali Summit), and Joint Communiqué of the ASEAN Ministerial Meeting, Manila, 24-26 June 1976, para. 20. The Agreement has so far been amended by two Protocols, in 1903 and 1905.

45. ASEAN Document Series 1967-1988 (third edition, published by ASEAN Secretariat, Jakarta, 1988), pp.165-176.

them. The first such contact came in 1968 from the then United Nations Economic Commission for Asia and the Far East (ECAFE, now ESCAP) relating to an offer of assistance from an EEC member, Belgium, for an ASEAN study.[46] Negotiation and conclusion of an agreement with the United Nations were the first acts of mutual recognition and the first relations with the outside world. ASEAN was represented by the Chairman of its Standing Committee in Jakarta, then Minister ADAM MALIK. It was in fact a break-through to countless contacts and fruitful relations with the outside world. Within the United Nations, ASEAN has established ASEAN Committees of Accredited Representatives in New York as well as in Geneva.

It should be recalled that ASEAN was conceived through the indigenous efforts of its founding members, unassisted and unattended by outsiders. By that time, the UN Economic Commission for Asia and the Far-East (ECAFE) had been actively urging its regional members to create regional groupings for economic co-operation. Thus the Mekong Committee, consisting of Laos, Cambodia, Thailand and Vietnam came into existence under its auspices and still functions as such until these days and the Asian Development Bank (ADB) in Manila could be considered as an offspring of ECAFE although quite independent of the regional Commission. ECAFE was anxious to woe ASEAN, and the first opportunity came at the Second Ministerial Meeting in Jakarta, 16-18 August 1968 in connection with the Belgian-sponsored ASEAN study (see *supra*). When the preliminary report was submitted and reviewed by the ASEAN Ministers at its fourth meeting in Manila, 12-13 March 1971, the Ministers directed that sectoral studies be pursued (para. 9 of the Joint Communiqué). Again, at the Fifth Ministerial meeting in Singapore in 1972, the ASEAN Ministers expressed appreciation of the United Nations Study Team and urged Member Governments to study the Team's recommendations with a view to identifying areas in which ASEAN could co-operate more meaningfully, seeking continued United Nations technical assistance vital for the implementation of the recommendations by the United Nations Team. This task of identifying the areas of fruitful ASEAN co-operation was then assigned to a newly formed Special Co-ordinating Committee for ASEAN (SCCAN), chaired by Dr. SOEMITRO, the Co-ordinating Economic Minister of Indonesia. Relations with the United Nations through its regional Commission have been thorough and extensive, covering activities of the Specialised Agencies of the United Nations, such as FAO, WHO and WMO, as well as other subsidiary organs of the United Nations such as UNDP and UNHCR. Even non-governmental organisations such as ICRC (International Com-

46. See Joint Communiqué, Second ASEAN Ministerial Meeting, Jakarta, August 6-7, 1968, para 6, welcoming the offer of services made by ECAFE to carry out an economic survey, ASEAN Documents (Ministry of Foreign Affairs, Bangkok), pp.120-121, also in op.cit. n.42 at p.69.

mittee of the Red Cross) have maintained contacts and active relations with ASEAN. ASEAN has from its birth been showered with invitations to maintain relations with existing international organisations, and has itself created or generated subsidiary organs, offices and centres within and outside ASEAN member countries. It has concluded countless international agreements, not all of which have been registered with the United Nations, and its co-operation with other international organisations and non-governmental organisations (NGOs) has generated sufficient materials for a separate volume beside the present study.

3.2.3 Co-operation with EEC

Since the establishment of the ASEAN Brussels (EEC) Committee [ABC] in 1972, relations between ASEAN (and its member States) and EEC (and its member States) have grown by leaps and bounds, culminating in the Co-operation Agreement between the member countries of ASEAN and the EEC on 7 March 1980,[47] following successive ASEAN-EEC Ministerial Meetings in Brussels (1975)[48] and Kuala Lumpur (1980)[49]. The ASEAN-EEC Co-operation Agreement set out the basic principles of most-favoured-nation treatment, co-operation in trade and development and economic co-operation, and a joint co-operation committee was set up. EEC now maintains an office in Bangkok, an ASEAN capital, for its relations with countries in Asia, except Japan.[50] ASEAN-EEC co-operation forms a subject of intense cultivation from the very early years of ASEAN's existence. The EEC has been willing and prepared to conduct negotiations with ASEAN, both as between regional bodies or communities and with the member States individually. Collective as well as several arrangements have been concluded between EEC and ASEAN and between their respective member States.

3.2.4 Co-operation with Countries in South-East Asia

ASEAN continues to play an active role in its co-operation with neighbouring States in South-East Asia including Laos, Cambodia and Myanmar (Burma). Relations with Vietnam have undergone some fluctuations but appear to have improved since the withdrawal of Vietnamese forces from

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47. See ASEAN-EEC Co-operation Agreement, 7 March 1980, ASEAN Multilateral Treaties (Agreement No. 14), pp.176-182.

48. See ASEAN Documents, op.cit. n.37, pp.235-240.

49. Ibid., pp.240-245; see also the Meetings in London, 1981, ibid., pp.145-247, and in Bangkok, 1983, ibid., pp.247-252.

50. It should be noted that the EEC maintains only three permanent missions of ambassadorial rank, viz., Washington, Tokyo and Bangkok.

Cambodia. It should be recalled that one of the ASEAN founding members, Thailand is inextricably linked with Myanmar and the former French Indo-Chinese States, Laos, Vietnam and Cambodia, the last three through the United Nations Committee of the Co-ordination and Investigation of the Lower Mekong Basin. With the South-East Asian States adjacent to Thailand ASEAN as a whole maintains close relations through Thailand. It should be remembered that Papua New Guinea has been invited to attend ASEAN Ministerial Meetings since the early 1980s, even before the admission of Brunei Darussalam.

3.2.5 Co-operation with Dialogue Partners

The expression "dialogue countries" or "dialogue partners" has been used in the context of ASEAN co-operation with third countries to which special attention has been given, because of their regional significance in economic or political terms. More precisely, the dialogue countries collectively are referred to occasionally as the "ASEAN PLUS". They are the "Plus" or extension of ASEAN co-operation, not exactly third countries, but more close "Trading Partners".

It is most intriguing to examine the relationship between ASEAN and each of its dialogue partners, with which ASEAN maintains the closest connections. Each year after the Annual Ministerial Meeting, the ASEAN Ministers meet with the Ministers of its dialogue partners, one by one, or as a collectivity such as the EEC. It is beyond the scope of this preliminary study to cover exhaustively all of the dialogues that have taken place between ASEAN and each of the ASEAN PLUS partners. Suffice it, in an introduction to ASEAN, to give but a brief sample survey of the productive co-operation with some of them.

(a) ASEAN-Japan

In spite of Japan's invasion and occupation of large portions of ASEAN territory during World War II and the ensuing blood-bath in the Philippines, Indonesia, Singapore and Malaysia, ASEAN countries stand ready to co-operate with Japan on the understanding that the latter adheres to a code of conduct prescribed by ASEAN, especially "Equality of Partnership" and not "Domination or Hegemony" or anything reminiscent of the unforgettable "Co-Prosperity Sphere"[51] under which Japan indiscriminately invaded her Asian neighbours. ASEAN-Japan dialogue started in 1977

51. Japan needs an occasional reminder. Thus, Prime Minister KAIFU proposed the *Kaifu Doctrine* declaring the intention to propose a Free Trade Area between Japan and East-Asia, including ASEAN, knowing full well that Japan remains closed to ASEAN agricultural products but wishes to exploit still further the open ASEAN market.

with a summit meeting. A half-hearted measure is Japan's hosting the ASEAN Promotion Centre on Trade, Investment and Tourism in Tokyo since 1980.[52] Several obstacles remain to be overcome for the opening of Japan's market to products from ASEAN. Unlike the unique Centre for the Promotion of Import from South-East Asia in Rotterdam, the Netherlands, which has been beneficial to ASEAN, Japan maintains an active and aggressive export policy through its export Trade Organisation (JETRO). Trade problems with Japan continue to exist. Japan needs to be constantly reminded not only of her past misdeed from which each ASEAN State has suffered, but, more significantly, of her dependence on ASEAN for the supply of basic raw materials, and of ASEAN's strategic position. Japan cannot afford any posture that appears hostile to ASEAN, and must suppress anti-ASEAN sentiments at any cost and at all time. To provoke ASEAN's unfriendly reactions may spell the collapse of Japan's economy. Japan would cease to be an economic power within a short time if no crude could flow through the Malacca, Lombok, or Sunda straits. Perhaps a pipeline could be laid across the Kra Isthmus in Southern Thailand, but again, Thailand is part and parcel of ASEAN which Japan should refrain from antagonising.

On the other hand, it should equally be recalled that since the predawn of the new Pacific Era, Japan has found great comfort in ASEAN surroundings. In spite of past bitter experience, Japan has found a way, in her own unskilled manner, to made amends. Since ASEAN has always been Japan's closest and natural market, a healthy and rather up-coming market of 300 million population, Japan has invested more heavily in ASEAN countries than any of the other ASEAN dialogue partners. Whatever Japan's shortcomings in her own cultural developments, Japan has contributed no less than five billion yen to the ASEAN Cultural Fund in 1979 and 1980, in addition to the scholarship grants for ASEAN youth and the 'Friendship Youth Boat' launched by Prime Minister Tanaka in 1974, following his tour of ASEAN countries.[53]

(b) ASEAN – Canada

ASEAN-Canadian dialogue may have started somewhat late after ASEAN dialogue with Japan, Australia and New Zealand, but since the Summit of 1977 Canada has been much faster on the uptake. Thus an agreement between the member countries of ASEAN and Canada on economic

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52. See the Agreement Establishing the ASEAN Promotion Centre on Trade, Investment and Tourism in Tokyo, ASEAN Multilateral Treaties (Agreement No. 14), pp.184-194.

53. The "Friedship Youth Boat was a floating experiement to put, origianlly, ten young boys and girls from each of the ASEAN countries and from Japan afloat the Pacific Ocean and off Japanese and ASEAN shores and to monitor the reactions among the young persons. Greater mutual understanding has been made possible the tensions between ASEAN and Japanese youth somewhat reduced if not relaxed and dormant but ambulatory.

co-operation was signed on 25 September 1981,[54] setting out broad principles and guidelines for co-operation in all fields including industrial (Articles I-IV), commercial (Articles V-IX) and development (Articles IX-XIV), and the establishment of institutional arrangements. A Joint Co-operation Committee was set up to review the various co-operation activities envisaged in this agreement which has in fact proved mutually beneficial for all parties.

(c) ASEAN-Australia

ASEAN-Australian dialogue started in 1974, even before the ASEAN-Japan Summit. Co-operation with Australia has been fruitful and several ASEAN projects were implemented. Six fora existed by 1981 for ASEAN-Australia Economic Co-operation Projects (AAECP), many of which have now come to fruition. The list of pending projects gives an accurate notion of how intense and wide-ranging ASEAN-Australian co-operation has evolved, including contracts to explore and exploit mineral resources in East Timor.[55]

(d) ASEAN-New Zealand

ASEAN-New Zealand co-operation began in 1975, followed by the Summit Dialogue in 1977. Not dissimilar from Australia, New Zealand has maintained the position of a friendly and beneficial partner of ASEAN in trade as well as in development promotion.

(e) ASEAN-USA

The co-operation between the United States and ASEAN started on political issues. The United States supported the ASEAN position and draft resolutions on Cambodia since 1979. Since 1981 a dialogue between the United States and ASEAN has taken place on a regular basis. In 1982, six ASEAN projects were approved in agriculture, public health, and academic training. Now the United States ranks as one of ASEAN's closest trading partners, with whom ASEAN countries maintain annual ministerial dialogues in the same manner as Japan, Canada, Australia and New Zealand.[56]

(f) ASEAN-USSR[57]

The next candidate on the list of future ASEAN partners in trade and economic co-operation could be the Soviet Union. Since the operation of

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54. See ASEAN Multilateral Treaties (Agreement No. 17), pp.201-210.

55. See, generally, Annual Report of the ASEAN Standing Committee for the years 1989 and 1990.

56. For an interesting analysis of US-ASEAN Relations in Thai-American Relations in Contemporary Affairs (Executive Publications PTE Ltd., Singapore, 1982).

57. Editorial note: The present paper was completed before the recent developments of November-December 1991.

Glasnost and Perestroika and with the withdrawal of Soviet support of the Vietnamese occupation of Cambodia, the timing is right. The obstacle to meaningful relations with the USSR has been removed. There might be a more balanced peace and harmony in the region with more active participation by the USSR.

(g) Co-operation with other Asian Nations

China, Hong Kong, Taiwan, Korea and India may be next in line for closer bilateral relations with ASEAN. A more complete and balanced series of co-operation will than take shape for ASEAN.

4. CONCLUDING OBSERVATIONS

The foregoing survey of ASEAN activities in various fields of co-operation among the member States themselves as well as with the outside world may not lend itself to a readily discernible conclusion. Whatever criticism outsiders may have levelled against ASEAN, whether it relates to slowness, lack of aggressiveness, insufficiency in the degree of integration, or even absence of outward signs of more democratic institutions from a Westerner's perspective, ASEAN must be gratified by its glaring achievements. In the first place, since ASEAN was launched into orbit, the Association has managed to retain the fullest measure of sovereignty, political independence and territorial integrity of each of its member States. Its membership has increased which reflects on the nature of ASEAN's continuing growth. ASEAN credibility remains intact. Secondly, ASEAN has succeeded in putting aside whatever internal differences or conflicts it has encountered between its members, thereby reducing tensions in the region and strengthening regional stability and solidarity. Thirdly, notwithstanding its imperfections, ASEAN has received universal recognition and is known throughout in every international and regional forum, where friendly relations and fruitful co-operation have been assured. ASEAN's strength is appreciated in a political organisation such as the United Nations, and in the Specialised Agencies such as GATT, or other bodies such as UNCTAD and the Group of 77, as well as in its relations with the EEC with which it has established a firm and sound relationship. Fourthly, ASEAN resilience has been recognised and continues to play a stabilising role in the political development in the region of South-East Asia in regard to Cambodia and Vietnam as well as in other areas of conflict such as the Arab-Israel conflict and the conflict in Lebanon. Lastly, but not least, whatever its shortcomings, the Association has steered its way through several storms of world-wide economic recession, and each time ASEAN has come out stronger with renewed vigour. Admittedly, the expansion of trade, in-

vestment and tourism in each and every country of ASEAN has been and continues to be phenomenal even in the height of global recession or stagflation. Due to its inherent outward-looking character, ASEAN not only promotes co-operation within the region of South-East Asia but has demonstrated its capacity and desire to co-operate meaningfully with the rest of the world.

As ASEAN is steadily progressing as an association for regional economic co-operation and as a viable regional organisation expanding its trade, investment and tourism, it has looked beyond national and regional confines. It has found the various agencies of the UN such as its regional commission and UNDP, as well as the EEC to be its natural partners for fruitful collective negotiations and co-operation. Other natural trading partners of ASEAN are inevitably Japan, Australia, New Zealand, Canada and the United States. This by no means detracts from the growing trade expansion ASEAN countries enjoy with other trading partners, namely, the other three Asian tigers, Korea (ROK), Taiwan and Hong Kong, all of which have heavily invested in development projects in ASEAN countries. The relations with China and the USSR continue unabated both on the economic and political fronts. The future of the former Indo-Chinese States, regardless of their economic or political structure, is tied up with one of the ASEAN members, Thailand, in the Lower Mekong Basin, which also touches Myanmar and Southern China. The largest Socialist countries, both China and the USSR have paid special attention to bilateral co-operation with ASEAN during the frequent visits of their leaders to each ASEAN nation.

The lesson to be drawn from this preliminary introduction to the Association of South-East Asian Nations is that the unity of purpose, solidarity, consciousness, resilience and dynamism of ASEAN partnership have brought ASEAN nations together on a collective road to peace and stability, to progress and prosperity. The fact that each of the six ASEAN nations has achieved wonders in its outstanding economic growth and industrial development should provide living testimony to the success of the principles and objectives of ASEAN, enshrined in the oft-cited Bangkok Declaration of 8 August 1967, based on the practice of equality of partnership, mutuality of benefits and complementarity in energy and industrial production.

NOTES

IMPLEMENTING REGULATIONS FOR THE 1958 NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN INDONESIA

HENRI GUNANTO*

After the abortive coup attempt of 1965, and the emergence of a more pragmatic 'new order' government, Indonesia opened up its gates to foreign investors. As early as 1967, a new Act on Foreign Investments was promulgated (Law No. 1, 1967[1]), and in 1968, Indonesia acceded to the 1965 World Bank Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention).[2]

As to arbitration of commercial disputes, Indonesia was not as prompt. It was not until 3 August 1981 that Indonesia acceded to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[3] Even after its ratification, however, the Supreme Court remained reluctant to apply the terms of the Convention. In *Navigation Maritime Bulgare* v. *PT. Nizwar*[4], the Supreme Court held, in *'obiter dicta'*, that the Convention is not self-executing and that, consequently, implementing regulations were needed before it could be actually applied. The subject of the action was a petition of a foreign plaintiff before the Central District Court of Jakarta to obtain *exequatur* for an award rendered in 1978 by a London arbitration tribunal in its favor against an Indonesian company. Counsel for the foreign plaintiff pleaded applicability of the 1923 Geneva

*Gunanto, Prasasto, & Co., Jakarta.

1. *Lembaran Negara* [State Gazette] 1967 No. 1.
2. Act No. 5/1968, *Lembaran Negara* 1968 No. 32.
3. Convention of 10 June 1958, 330 UNTS 3; Presidential Decree No. 34/1981, *Lembaran Negara* 1981 No. 40.
4. Decision of 29 Nov. 1984, case No. 2944 K/Pdt/1983.

Ko Swan Sik et al. (eds.), Asian Yearbook of International Law, 151–155.

Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards by virtue of the applicability of the Protocol and the Convention in the former Netherlands East Indies[5] in conjunction with transitory constitutional provisions.[6] On 10 June 1981, i.e., before the Indonesian accession to the 1958 New York Convention, the District Court granted the *exequatur*. In accordance with the relevant provisions[7] of the Code of Civil Procedure[8], the original defendant appealed for cassation to the Supreme Court.[9]

The panel of three Justices of the Supreme Court[10] under the chairmanship of Justice ASIKIN[7] dismissed the petition for cassation on the formal ground that the defendant-petitioner had not submitted the necessary pleadings, whereupon the Supreme Court did not consider the merits of the case. Instead, it considered necessary to state its opinion regarding the enforceability of foreign judgments and arbitral awards in Indonesia "for the sake of legal security and the development of law in Indonesia".

The Court held that:

(i) in accordance with previous decisions of Indonesian courts in similar actions (*"Yurisprudensi"*), in principle no foreign judgment or arbitral award is enforceable in Indonesia unless a treaty to that effect has been concluded between Indonesia and the other country concerned;

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5. Stb.N.I. 1933 Nos. 131 and 132.
6. Transitory Provisions, Art. II, of the 1945 Constitution: "All existing State institutions and laws shall remain in force until replaced in accordance with this Constitution."
7. Article 641.
8. The Code of Civil Procedure (Dutch: *Rechtsvordering*, 'RV') was applicable to actions before the pre-Independence courts for European litigants, called '*Raad van Justitie*'. For the segregated courts for Indonesians at that time a set of simplified 'Rules of Procedure' applied. After independence Indonesia established a system of unified courts which apply these simplified Rules of Procedure. However, in respect of causes of actions not provided for in these Rules, the courts still apply the relevant provisions of the 'European' Code of Civil Procedure. This is also the case where the Rules of Procedure specifically refer to pertinent provisions of the Code. Among these 'borrowed' provisions of the Code of Civil Procedure are those of its Title 3, Chapter 1, concerning arbitration procedures and the execution of arbitral awards, including specific provisions for appellate review (Article 641 et seq.). Art. 377 of the Rules of Procedure reads: "Insofar as Indonesians and other Asians intend to submit their disputes to the decision of arbitrators, they shall act in accordance with the relevant provisions for Europeans".
9. Article 641 of the Code of Civil Procedure actually provided for '*de novo*' appeal from the courts of first instance to the highest court of the colony. In the republican court system the Supreme Court is a court of cassation.
10. All Indonesian courts sit with 3 judges or justices.
11. Within the internal organization of the Supreme Court, Justice Asikin is the Vice-President of the Supreme Court for Codified Law Affairs.

(ii) notwithstanding Article 5 of the Agreement on Transitional Measures [as part] of the Round Table Conference Agreements[12], providing for the continued applicability to the Indonesian Republic of treaties which applied to the Indonesian territory, yet the Republic of Indonesia is not absolutely bound by the aforementioned Round Table Conference Agreement, nor by international agreements which have been concluded in the past by the government of the Kingdom of the Netherlands. This is so since these international agreements (specifically those referred to in the State Gazette of 1933 No. 32 [i.e., the Geneva Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 26 Sep. 1927]) were concluded at a time when the world was completely controlled by Colonial Powers, and since, as a consequence, the international law principle of state succession too was affected by the prevailing situation, to the effect that colonies, upon attaining independence, would (in accordance with the so-called Passive System) be automatically bound by the international agreements concluded by its Colonial Power;

(iii) that since the Second World War the constellation of the world has changed because of the emergence of new forces such as the developing countries, and by the current conception of interdependence which essentially refers to the common concern of the family of nations for the state of the world;

(iv) in accordance with obtaining legal practice, [the enforcement of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – which has been ratified] must still await implementing regulations on such matters as whether exequatur may be applied for directly from the District Court, and if so, at which venue, or whether the application should be addressed to the Supreme Court in order to have the arbitral award tested on whether or not it is in conflict with Indonesian 'public policy'.

Indonesians may have no difficulty in accepting that the RTC Agreements are obsolete and that Indonesia does not necessarily succeed the Netherlands Indies in treaties acceded to by the Netherlands for its colony in the past. In respect of the 1958 New York Convention, which is ratified by Indonesia itself, however, the question arose whether any special implementing regulation was at all necessary. According to one opinion, the Code of Civil Procedure, which the Indonesian district courts apply in actions regarding the enforcement of arbitration award pursuant to its own Rules of Procedures (*supra*), lends itself with no difficulty for application to *foreign* arbitral awards. As a matter of fact, Article 634 of the Code of Civil Procedure provides that any one of the arbitrators or an attorney with proper power shall within certain time limits present the original or authenticated copy of 'the award' to the Registrar's Office of the court of first

12. By which the Netherlands and Indonesia arranged the formal transfer of sovereignty over the Indonesian archipelago.

instance in whose district the award was rendered for the filing of the judgment. Article 639 further provides that the award shall then be enforced by order of the President of the court in an 'ordinary manner'. This could be construed to mean that the execution shall be carried out in the manner provided by the Rules of Procedure. Admittedly, this argument is an indirect approach: neither the Code of Civil Procedure nor the Rules of Procedure contain specific provisions on the enforcement of foreign arbitral awards.[13]

Underlying the criticism against the 'obiter dicta' considerations of the Supreme Court was the concern of business circles that they may harm the national interests in international economic relations. Under consistent community pressure, the Supreme Court made a surprise decision on 1 March 1990, by issuing its own rules to fill the gap which it had found to exist.

The *Supreme Court Rules No. 1/1990* concerning Procedures for the Enforcement of Foreign Arbitral Awards are basically meant as supplementary rules of procedure to be observed by the lower courts, and provide for the Central District Court of Jakarta to have exclusive jurisdiction over matters affecting the recognition and enforcement of foreign arbitral awards.[14] Recognition and enforcement shall only be granted on basis of reciprocity with the forum country of the award [15] and shall be restricted to awards in respect of causes of action which according to Indonesian law would fall within the scope of commercial law [16] and which are not contrary to 'public policy'.[17] Enforcement shall furthermore be subject to prior exequatur from the Supreme Court[18]. Power to grant such exequatur is vested in the President of the Supreme Court but may be delegated to the Deputy President or the Vice-President of the Court for Codified Law Affairs.[19,20]

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13. *Note* the second preamble of the new Rules No. 1/1990, *infra*, considering that these implementing regulations for the 1958 New York Convention are necessary because the existing Rules of Procedure as well as the Code of Civil Procedure do not provide for the enforcement of foreign arbitral awards, although in its substantive provisions the Rules refer the lower court to the relevant articles of the Rules of Procedure, which articles in turn refer to the Code of Civil Procedure.
14. See Art. 1.
15. See Art. 3 para. (1).
16. See Art. 3 para. (2).
17. Art. 3 para. (3); Art. 4 para. (2).
18. Art. 3 para. (4).
19. Art. 4 para. (1).
20. Indonesia is a bilegal system where codified or written law exists side by side with unwritten or customary law (*'adat'* law).

The exequatur procedure calls for the filing of the arbitral award with the Office of the Registrar of the Central Jakarta District Court in accordance with (Article 377 of) the Rules of Procedure which essentially provides that arbitration is subject to the provisions of the Code of Civil Procedure.[21] Under these provisions the foreign award, together with the letters of appointment of the arbitrators, would have to be filed with the Central District Court of Jakarta within 3 months from the rendering of the award. Awards which were rendered after the entry into force for Indonesia of the 1958 New York Convention but before the promulgation of the Rules would generally be more than three months old towards the effective date of the Rules so that a strict construction of the time bar would exclude these awards from exequatur. The relevant provision of the Code of Civil Procedure may therefore have to be interpreted so as not to lead to such unsatisfactory results.

Article 5 of the Supreme Court Rules No. 1/1990 provides that the President of the Central District Court of Jakarta must transmit the file of the case to the Secretary General of the Supreme Court within 14 days after receipt of the application in order to obtain the necessary exequatur. The file must include a statement of the Indonesian diplomatic representative in the country where the award has been rendered to the effect that the state of the petitioner and Indonesia are both parties to a convention on the recognition and enforcement of foreign arbitral awards or that the two States are bound by a similar bilateral treaty. This latter part of the provision is inconsistent with Article 3 para.(1) of the Rules which requires reciprocity with the forum country of the award, not the state of the petitioner. These may be two different countries.

The foreign award shall not be recognized and the Supreme Court shall not grant exequatur for the execution if it would be contrary to 'public policy'. Article 4 para. (2) of the Supreme Court Rules defines such 'public policy' as 'fundamental principles of the entire legal system and society in Indonesia'.[22]

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21. See *supra*, the discussion on Art. 634 of the Code.

22. Although not mathematically tight, this definition distinguishes 'public policy' in international relationships from 'public order' in domestic transactions. The latter is referred to in article 23 of the 'General Principles of Legislation' ('*Algemene Bepalingen van Wetgeving*', Stb.N.I. 1847 No. 23, still applicable by virtue of Art. II of the Transitory Provisions of the 1945 Constitution.) which may be construed as referring to all mandatory laws such as criminal law, administrative law and contract law provisions affecting 'public order and morals'.

LEGAL MATERIALS

STATE PRACTICE OF ASIAN COUNTRIES IN THE FIELD OF INTERNATIONAL LAW

JAPAN

Contributed by Professor KOTERA AKIRA, Department of Social and International Relations, University of Tokyo, Komaba.

Extradition; Hijacking

The "Chang Chên Hai Incident"

On 16 December 1989, a Chinese national, CHANH CHÊN HAI, hijacked an airplane of China Airlines during its flight from Beijing via Shanghai to New York. The airplane landed at Fukuoka in Japan, where the hijacker asked for political asylum, arguing that he had participated in a political movement and was involved in the Tienanmen incident in 1989, but the Japanese police detained him. On 23 December the Chinese Government issued a warrant for his arrest and on 22 February 1990 it requested his extradition. In accordance with the Law on Extradition of Criminal Offenders [Tobohanzinin Hikiwatashi Ho], the Tokyo High Public Prosecutor's Office submitted the case to the Tokyo High Court. Article 2 of the Extradition Law stipulates that a criminal offender shall not be extradited: (a) when the offence for which extradition is requested is a political crime; (b) when the purpose of the request is regarded to be the trial or the execution of a sentence concerning a political crime. Government, arguing that X should be regarded as a refugee.

On 3 April 1990, the Chinese Government announced, in a *note verbale*, that it did not recognize the political purpose of the act and that it would not prosecute the person for other crimes committed before the hijacking.

On 20 April 1990, the Tokyo High Court rendered its decision according to which the requested person could be extradited, considering that the hijacking could not be regarded as a political crime within the meaning of the Extradition Law and that the person would not be punished for other offences than the hijacking.

Ko Swan Sik et al. (eds.), Asian Yearbook of International Law, 159–182.

On 23 April 1990, the Minister of Justice ordered the extradition and on 28 April the person was handed over to officials of the Chinese Government.

MALAYSIA

Prepared and contributed by MYINT ZAN, lecturer, and WAN ARFAH HAMZAH, Dean of the Faculty of Law, University of Malaya, Kuala Lumpur.

Legislation

Malaysia-Thailand Joint Authority Act 1990 (Act 440 (1990))

The Act is divided into thirteen parts. The preamble states that the Act was made pursuant to the memorandum of understanding of 21 February 1979 between Malaysia and Thailand on the Establishment of a Joint Authority for the Exploitation of the Resources of the Sea-bed in a Defined Area of the Continental Shelf of the Two Countries, and also pursuant to the Agreement of 30 May 1990 on the Constitution and Other Matters relating to the Establishment of the Malaysia-Thailand Joint Authority.

Part II deals with the Malaysia-Thailand Joint Authority.

Section 3(2) states that '[t]he Joint Authority shall have a juristic personality and shall be domiciled in Malaysia and the Kingdom of Thailand'. Section 3(3) further states that '[t]he Joint Authority shall be a body corporate' and could (among others) 'enter into contracts, and may acquire, purchase, take, hold and enjoy any movable and immovable property of every description, excluding land'. Section 3(5) states that '[t]he Joint Authority is vested with and assumes the exclusive rights, powers, liberties and privileges of exploring and exploiting the natural resources, in particular petroleum, in the Joint Development Area'.[1]

Concurrent with the conferral of privileges in Section 5 is the provision in Section 7 that the Joint Authority 'shall pay to each of the Governments royalty in the amount of five per centum of gross production of petroleum, in the manner and at such times as may be prescribed by regulations'.

Section 13 of the Act states that liability of the Joint Authority shall not be construed as creating any responsibility whatsoever for the Government of Malaysia or the Government of Thailand.

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1. The Joint Development Area is defined in Part III, Section 6 of the Act and is demarcated by straight lines joining certain 'coordinated points' stated in Section 6 and forming relevant part of British Admiralty Chart – No. 2414, Edition 1967 a reproduction of which was attached in the Schedule.

Section 14(1) concerns the general prohibition on exploration or exploitation of natural resources without contract. Indeed the prohibition on exploration or exploitation of natural resources without contract is reinforced by Part XII of the Act and specifically by Section 20 which states, amongst others, that any person contravening Section 14(1) 'shall be guilty of an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or to a fine not exceeding fifty thousand ringgit or to both...' Section 14(2) states prior approval is required from the Governments (of Malaysia and Thailand) before a contract is entered into between the Joint Authority and other persons (granting them the right) to explore and exploit natural resources, including petroleum in the Joint Development area under Section 14(1).

Section 14(3) [in conjunction with Section 14(4)] states in detail the terms and conditions to be adhered to in the contract referred to in Subsection (1) and 'for the purpose of the exploration and exploitation of petroleum' in 'a production sharing contract'. One interesting provision of Section 14(3) is Section 14(3)(h) which, in effect, states that any disputes or differences arising out of or in connection with the contract shall be settled by an arbitration panel of three arbitrators – one arbitrator appointed by each party and the third to be jointly appointed by both parties. If parties are unable to concur on a third arbitrator within a specified period, the third arbitrator shall be appointed upon application to the United Nations Commission of International Trade Law (UNCITRAL). The arbitration proceedings shall be conducted according to the UNCITRAL Rules.

Part X of the Act deals with 'Jurisdiction'. Section 18(2)(a) stipulates the area where the exercise of civil and criminal jurisdiction of Malaysia shall extend and Section 18(2)(b) stipulates the area where Thailand exercises civil and criminal jurisdiction. Section 18(4) expresses the contingent nature of the consent by Malaysia to Thailand's exercise of jurisdiction under Section 18(2)(b). It is contingent upon a 'reciprocal recognition' by Thailand or Malaysia exercising 'its rights' (civil and criminal jurisdiction) under Section 18(2)(a).

Section 18(5) states the '[a]ny jurisdiction that may be vested in Malaysia or the Kingdom of Thailand under this section in respect of the Joint Development Area shall only be over matters and to the extent provided for in any law relating to the continental shelf and as recognized under international law'.

It is submitted in this context that the relevant – conventional as well as customary – international law would be, among others, the pertinent provisions of the Geneva Convention on the Continental Shelf 1958[2] and

2. 499 UNTS 311.

possibly also the relevant provisions of the 1982 Law of the Sea Convention.[3] The provisions of both Article 8 of the Geneva Convention and Article 77 of the 1982 Convention, in effect, state that the coastal state exercises sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources. Part II of the Act, and especially Section 5, puts into effect these sovereign rights of Malaysia and Thailand in exercising their authority over their joint continental shelf areas.[4]

No date was specified in Act 440 (1990) as to its entry into force. Date of Royal Assent was 22 August 1990 and the date of publication in the Gazette was 30 August 1990.

Judicial decisions

Application of the doctrine of sovereign immunity in Malaysia

Commonwealth of Australia v. *Midford (Malaysia) Sdn. Bhd. & Anor.*[5]

In this case officers from the Australian Customs Service [the appellant] with the assistance of an officer of the Royal Customs, Malaysia had seized certain documents and files and copies of documents belonging to the respondent [Midford (Malaysia)]. The respondents applied for an order that the documents seized be returned to them and that the Commonwealth of Australia and their servants/agents be restrained from conducting any further illegal searches or seizures on the premises of the respondents. The High Court made the orders, holding that the Commonwealth of Australia was not entitled to pure absolute immunity from the jurisdiction of the Malaysian courts.

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3. It is realized that though both Malaysia and Thailand have signed the 1982 Law of the Sea Convention, it has (as of 1991) not yet come into force. Inasmuch as at least some provisions of the 1982 Law of Sea Convention can be said to 'reflect' customary international law since it 'crystallises' established or emergent state practice it could, at the theoretical level in any case, provide a useful frame of reference in analysing issues dealing with the international law of the sea.

4. Since Act 440 (1990) is partly based on the Memorandum of Understanding between Malaysia and Thailand concerning the continental shelf of the two countries in the Gulf of Thailand, it can be said that Act 440 (1990) puts into effect the joint exercise of authority over the resources of the continental shelf of Malaysia and Thailand with the establishment of the Joint Authority and the joint development areas.

5. [1990] 1 MLJ 475 et seq.

The Commonwealth of Australia made an application to the Supreme Court that it be granted leave to appear in this action under protest, without prejudice to an application by it to set aside the original application [by the respondents] and all its subsequent proceedings on the grounds, *inter alia*, that the Commonwealth of Australia is not subject to the jurisdiction of the Court by reason of the fact that it is a foreign state recognized by the Supreme Head of State of Malaysia.

The issues that arose in this case, as far as the doctrine and practice of the international law of sovereign immunity as it applies in Malaysia is concerned, can be classified as follows:

1. Whether the 'absolute' or 'restrictive' version of sovereign immunity applies in Malaysia.
2. If the restrictive theory of sovereign immunity applies in Malaysia, whether the actions of the two Australian customs officers (acting on behalf of the Commonwealth of Australia) can be considered as falling within the ambit of *acta jure gestionis* (act of a trading or commercial nature);
3. Whether Section 3 of the Civil Law Act 1956 requires that Malaysian courts follow 'the law of England [as of] 7 April 1956 [the date in which the Civil Law Act came into force in Malaysia]' or whether the Malaysian courts should take into consideration developments of the common law in England since 1956 concerning the subject of sovereign immunity; and
4. The legal status and conclusiveness of the certificate issued by *Wisma Putra* [the Ministry of Foreign Affairs] stating that the *Yang di Pertuan Agong* has recognized the Commonwealth of Australia as a foreign state.

On the first issue the Supreme Court, in a judgment delivered by GUNN CHIT TUAN SCJ, held that the restrictive doctrine of sovereign immunity as developed in the common law after 1956 should apply in Malaysia.

However, his Lordship held on the second issue that 'the actions of the two Australian customs officers considered in the whole context of this case could not be classified as "trading and commercial"... and... that the exercise of functions of the customs arm of the Australian Government in the peculiar circumstances of this case could *not* be classed as *acta jure gestionis*, i.e., commercial in accordance with accepted international standards.'[6] Therefore, the court held that the action of the Commonwealth of

6. Case citation omitted. Emphasis added.

Australia in this case is *acta jure imperii*.[7] Since even under the restrictive theory of sovereign immunity acts in exercise of sovereign authority of a foreign state (as opposed to acts of a commercial nature) are entitled to full sovereign immunity, it follows that the appeal by the Commonwealth of Australia succeeds.

The third issue of whether Section 3 of the Civil Law Act 1956 would 'pre-empt' the Malaysian courts from taking into account the developments in the common law in the area of sovereign immunity was categorically answered in the negative by the Court:

> 'Section 3 of the Civil Law Act 1956 only requires any court in West Malaysia to apply the common law and rules of equity as administered in England on 7 April 1956. That does not mean that the common law and rules of equity as applies in this country must remain static and not develop.'[8]

Indeed the finding by his Lordship that the Malaysian courts can and should[9] take into consideration post-1956 developments in the common law in England (and hence decisions of English courts indicating a 'swing' towards the restrictive theory of sovereign immunity) would appear to be the main rationale for the decision of the court that the restrictive theory of sovereign immunity applies in Malaysia. It is quite evident that in 1990 the general international law practice of many nations, including that of the United Kingdom, leans towards the application of the doctrine of restrictive sovereign immunity.[10] Even counsel for the appellant acknowledged this fact when he cited in detail cases such as *The 'I Congress Del Partido'* which subscribed to the restrictive theory. However, the contention of appellant's counsel was that because of Section 3 of the Civil Law Act

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7. *Acta jure imperii* is explained, in the judgment, by his Lordship as 'state like activities of foreign nations or individual sovereigns' (*ibid* p. 477) and 'acts in exercise of the sovereign authority' (at p. 478). His Lordship did not further elaborate the holding that the two customs officers' action is *acta jure imperii* but would appear to have accepted the submission of counsel for the appellant that the 'discharge of functions by the customs arm of a particular government is well-recognized incident of the governance of states in general' (p. 477).

8. *Ibid.* at p. 480.

9. Indeed at one point the court specifically states that 'when the judgment in [subscribing to the restrictive theory of sovereign immunity] was delivered by the Privy Council in November 1975 it was *binding authority* in so far as our courts are concerned' (*ibid* at p. 480). (Emphasis added.)

10. See for example, the following excerpt from the judgment: 'Since the Second World War, several European countries such as Italy, Belgium, Austria, West Germany and also the United States of America broke with the absolute immunity and accepted the restrictive theory. In recent times, the beginning to the end of the absolute doctrine of immunity in the United Kingdom law came in November 1975 when the Privy Council gave judgment in *The Philippines Admiral...*'(*ibid* at p. 478, footnote omitted).

1956, the law applicable in Malaysia (in 1990) was 'the law in England on sovereign immunity' as declared in cases such as the *The Parlement Belge*.[11] The court rejected this submission.

The court also rejected, in the context of this case, the contention of appellant's counsel that for the Malaysian courts to apply the restrictive sovereign immunity an Act of Parliament [to that effect] would have to be passed. However, it was stated that 'the common law position of this country (applying the restrictive view of sovereign immunity) could well be superseded and changed by an Act of Parliament later on should our legislature decide to define and embody in a statute the limits and extent of sovereign immunity in this country'.[12]

The final issue that could be extrapolated is the conclusiveness of the certificate of recognition (of the Commonwealth of Australia by the *Yang di Pertuan Agong*) provided by the Malaysian Ministry of Foreign Affairs (*Wisma Putra*). Appellant's counsel contended that the 'certificate would be... conclusive evidence of the status of the Commonwealth of Australia as a sovereign state' – a point which was not in dispute. The 'issue' – if there is one – and as contended by respondent's counsel – is whether the certificate by *Wisma Putra* stating that the Commonwealth of Australia is a sovereign state would necessarily entail that all its (the Commonwealth of Australia and its agents) actions would always be covered by sovereign immunity. In other words, once *Wisma Putra* has issued the certificate of recognition of a foreign country, should the Malaysian courts automatically disqualify themselves from delving any further into the (arguably additional) issue of sovereign immunity notwithstanding the fact that the certificate does not specifically state that the foreign country recognized by Malaysia is entitled to sovereign immunity?

The issue was addressed by respondent's counsel who contended that whenever the Ministry of Foreign Affairs leaves the question of immunity open, it falls upon the courts of the country to decide whether a foreign state has any sovereign immunity and the type and extent of such immunity. The Supreme Court appeared to have rejected the submission of respondent's counsel that the mere production of a certificate of recognition of a foreign country – without the certificate specially mentioning that *all* its actions and that of its agents are entitled to full immunity – would not automatically disqualify the courts from considering such issues.

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11. *Ibid* at p. 476 (footnote omitted). The 'Parlement Belge' (1880) 5PD 197 ruled that the doctrine of absolute sovereign immunity applies in Britain.
12. *Ibid* at p. 480.

> 'In applying the doctrine of sovereign immunity, our courts, whether in the exercise of its civil or criminal jurisdiction, should have by international comity disclaimed jurisdiction in this case especially after the production of the certificate from Wisma Putra stating that the Yang di Pertuan Agung has recognized the Commonwealth of Australia as a foreign state'.[13]

It is submitted, with respect, that there is considerable merit in the submission of respondent's counsel relating to the role of the courts in determining whether to accord sovereign immunity or not – and to what extent – for acts attributable to a foreign country recognized by Malaysia. This would be so especially when the certificate issued by *Wisma Putra* does not specifically state whether the recognized foreign country(ies) are entitled to sovereign immunity.

Note: **Midford and Village Holding cases compared**

The *Midford* case can be instructively compared with relevant portions of the decision in *Village Holdings Sdn. Bhd.* v. *Her Majesty The Queen in Right of Canada*,[14] a Supreme Court decision of 1987, to discern whether a different approach was taken – and a different decision arrived at – by the nation's highest court on the issue of sovereign immunity in Malaysia. Needless to say there are different facts and backgrounds to each case. Certain aspects of both cases, however, generally deal with the doctrine of sovereign immunity in Malaysia and more particularly on the issue of whether the absolute or restrictive doctrine of sovereign immunity applies in Malaysia.

To briefly outline the main factual differences between the two cases: *Midford* deals with the actions and status (vis-à-vis the doctrine of sovereign immunity) of two custom officers who are (agents) of the Commonwealth of Australia whereas *Village Holdings* deals with (as far as the issue of sovereign immunity is concerned) the transactions relating to the land building of the Canadian High Commission in Kuala Lumpur the property of which 'was owned by Her Majesty the Queen herself'.[15]

Yet despite this and other factual differences the court in both cases dealt with the issue of whether by virtue of Section 3 of the Civil Law Act 1956, Malaysia subscribes to the absolute or restrictive doctrine of sov-

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13. *Ibid* at p. 480.
14. [1988] 2 MLJ 656 et seq.
15. *Ibid* at p. 656. Also compare the statement made by SHANKAR J, in *Village Holdings* that 'there is an important distinction to be drawn between the immunity accorded to a sovereign and a sovereign's diplomats'.

ereign immunity.[16] Secondly, both courts considered whether the actions on which sovereign immunity was claimed in each case were 'governmental acts' or 'commercial acts' without letting the determination on this point 'prejudge' the paramount issue of the applicability of the absolute or restrictive doctrine of sovereign immunity.[17]

On the primary issue of whether the absolute or restrictive doctrine of sovereign immunity applies in Malaysia the *Village Holdings* court and *Midford* court could hardly have held more different views. In *Village Holdings*, SHANKAR (OCJ) categorically ruled that:

> 'So far as a foreign sovereign is concerned, I hold that Section 3 of our Civil Law Act 1956 leaves no room for any doubt that we in Malaysia continue to adhere to a pure absolute doctrine of state immunity when it comes to the question of impleading a foreign sovereign who declines to submit'.[18]

The decision of the court in *Midford* was also very clear:

> 'The restrictive doctrine of sovereign immunity as developed in the common law after 1956 should apply in Malaysia'.[19]

It also follows that the approach of the court in the two cases in discerning the impact of Section 3 of the Civil Law Act as it relates to the application of the absolute or restrictive doctrine of sovereign immunity in Malaysia is also different. Whereas the *Village Holdings* court, taking a restrictive and literal view of Section 3 of the Civil Law Act in ruling that '[t]he common law of England on 7 April 1956 was that the immunity from legal process accorded to a foreign sovereign was absolute',[20] the *Midford* court takes an

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16. See, for example, *Midford* case, loc. cit. pp.476, 479 *par tim* and especially at p. 480. In *Village Holdings* this issue was considered in loc. cit. pp. 661–663 *par tim* and especially at 664.
17. In the *Village Holdings* case, since a prior determination was made by SHANKAR J, that the absolute doctrine of sovereign immunity applies in Malaysia, the 'secondary' question becomes moot. His Lordship, however, strongly indicates that even if such an issue was considered, he would have held that 'a one-off transaction where a sovereign mission is disposing mission property which it holds in another jurisdiction...was a governmental transaction and that even if the restrictive theory of immunity applied the defendant [Her Majesty the Queen in Right of Canada] would have been immune anyway'.

Midford on the other hand, decides initially that the restrictive doctrine of sovereign immunity applies in Malaysia but finds – after the determination that the restrictive doctrine of sovereign immunity applies in Malaysia – that the acts of the two customs officers in the context of the case could not be classified as 'trading or commercial'.

Hence even though in both cases sovereign immunity was accorded to the parties which claimed it, the rationale for according sovereign immunity in each case was wholly different.
18. *Village Holdings* case, loc. cit. p. 664.
19. *Midford* case loc. cit. p.475. See also p. 484.
20. *Village Holdings* loc. cit. p. 662.

expanded and liberal view when it states that (the application of Section 3 of the Civil Law Act in Malaysia) 'does not mean that the common law and rules of equity as applied in this country must remain static and do not develop.'[21]

Hence, in conclusion, one could state that on the subject of sovereign immunity divergent viewpoints were enunciated by the Supreme Court of Malaysia in the *Village Holdings* and *Midford* cases which were respectively decided in 1987 and 1990. With respect, it is submitted, that in the *Midford* case the court takes a more realistic approach reflecting modern practices and trends on the subject of sovereign immunity. It is further submitted that the later (in time) decision of *Midford* should supersede any inconsistent pronouncements on the subject of sovereign immunity in earlier cases and that in the absence of any amending legislation Malaysian courts should follow the exposition of the law concerning sovereign immunity as laid down by the Supreme Court in the *Midford* case.

THE PHILIPPINES

Prepared and contributed by staff members of the Institute of International Legal Studies, University of the Philippines, under the supervision of Professor RAPHAEL PERPETUO M. LOTILLA, director. The support and contribution of Mr. JORGE R. COQUIA, Legal Adviser of the Department of Foreign Affairs, Manila, is gratefully acknowledged.

Decisions of courts and tribunals

State Immunity

U.S. v. *Guinto* (G.R. Nos. 76607, 79470, 80018, 80258, 26 February 1990, 182 SCRA 644, J. CRUZ)

In this consolidation of four related suits, the Supreme Court ruled that the doctrine of state immunity is not absolute. The doctrine does not provide that a state may not be sued under any circumstances; on the contrary, the rule says that the state may not be sued without its consent, which clearly imports that it may be sued if it consents.

As a general rule, the consent of the state to be sued may be manifested expressly or implied. Express consent may be embodied in a general law or a special law. Implied consent to be sued is given when the state enters into a contract or commences litigation against a private property.

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21. *Midford* case loc. cit. p. 480.

However, these rules are subject to qualifications. Firstly, express consent is effected only by the will of the legislature through a duly enacted statute. In the case of the United States of America, the customary rule of international law on state immunity is expressed with more specificity in the R.P. [Republic of the Philippines] – U.S. Bases Treaty. Secondly, not all contracts entered into by the government will operate as a waiver of its non-suability. The court ruled that:

> '... distinction must be made between...sovereign and proprietary acts. The rule is that state immunity now extends only to sovereign and governmental acts and not to private, commercial and proprietary acts.'

No plea of immunity, therefore, can be availed of by U.S. Air Force officers in relation to the bidding of contracts for the operation of barbershops inside the U.S. Armed Forces nor are the facilities demandable as a matter of right by American servicemen. The same ruling holds true for club restaurants in John Hay Air Station. However, the plea of state immunity is available to U.S. Air Force officials in a suit related with the exercise of their official functions. The court ruled that a buy-bust operation undertaken by U.S. servicemen charged with the prevention of the distribution, possession and use of prohibited drugs is an exercise of their official functions. Hence,

> 'for discharging their duties as agents of the United States, the petitioners cannot be directly impleaded for acts imputable to their principal which has not given its consent to be sued.'

Immunity of international organizations

In two cases consolidated for decision, the Supreme Court's Second Division ruled that the grant of diplomatic immunity by the executive branch is conclusive upon the judicial branch. The court relied on a previous case where it stated the following:

> '[A] categorical recognition made by the Executive Branch of the Government that certain entities should enjoy immunities accorded to international organizations is a determination that has been held to be a political question conclusive upon the courts in order not to embarrass a political department of Government. [*World Health Organization and Dr. Leonce Verstuyft* v. *Hon. Benjamin Aquino, et al.*, L–35131, 29 November 1972, 48 SCRA 242].

The *raison d'être* for these immunities according to the court is "the assurance of unimpeded performance of their functions by the agencies concerned."

The two cases are discussed further below.

1. *International Catholic Migration Commission (ICMC)* v. *Pura Calleja* (G.R. No. 85750, 28 September 1990)

The Philippine Supreme Court ruled that the grant of diplomatic privileges and immunities to the International Catholic Migration Commission (ICMC), a non-profit agency engaged in international humanitarian and voluntary work "extends to immunity from the application of Philippine labor laws" requiring the conduct of certification election for the purpose of establishing a labor union in the ICMC.

Article II of the Memorandum of Agreement between the Philippine Government and ICMC provides that the ICMC shall have a status "*similar to that of a specialized agency*".

The Convention on the Privileges and Immunities of Specialized Agencies adopted by the U.N. General Assembly on 21 November 1947 and concurred in by the Philippine Senate through Resolution No. 19, on 17 May 1949 provides that specialized agencies shall "enjoy immunity from every form of legal process." [Article II, Section 4]. According to the Supreme Court:

> 'The grant of immunity from local jurisdiction to ICMC is clearly necessitated by their international character and respective purposes. The objective is to avoid the danger of partiality and interference by the host country in their internal workings. The exercise of jurisdiction by the Department of Labor in these instances, therefore, would defeat the very purpose of immunity which is to shield the affairs of international organizations, in accordance with international practice, from political pressure or control by the host country to the prejudice of member states of the organization, and to ensure the unhampered performance of their functions.
>
> . . .
>
> 'A certification election cannot be viewed as an independent or isolated process. It could trigger off a series of events in the collective bargaining process together with related incidents and/or concerted activities which could inevitably involve ICMC in the "legal process", which includes "any penal, civil and administrative proceedings." '

Nonetheless, the diplomatic immunity granted to ICMC does not deprive laborers of their basic rights guaranteed under the Constitution since the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations mandates that "each specialized agency shall make provision for appropriate modes of settlement of ... disputes arising out of contracts or other disputes of private character to which the specialized agency is a party."

2. *Kapisanan Ng Manggagawa AT Tac Sa IRRI* v. *Secretary of Labor and Employment* (G.R No. 89331, 28 September 1990)

The Supreme Court ruled that the International Rice Research Institute (IRRI), an autonomous, philanthropic, tax-free, non-profit, non-stock organization designed to conduct research on rice and its production, management, distribution and utilization, and granted the status, prerogatives, privileges and immunities of an international organization by virtue of Presidential Decree No. 1620, enjoys diplomatic immunity which includes exemption from the coverage of Philippine labor laws requiring the conduct of certification election.

The grant of immunity to the IRRI is explicit under Presidential Decree No. 1620:

> 'Article 3. Immunity from Legal Process. – The Institute shall enjoy *immunity from any penal, civil and administrative proceedings*, except insofar as that immunity has been expressly waived by the Director-General of the Institute or his authorized representatives.' [Underscoring supplied]

Nonetheless, the Council of IRRI Employees and Management (CIEM) was formed "for purposes of maintaining mutual and beneficial cooperation between IRRI and its employees." Therefore, the employees of IRRI are not without remedy in cases of disputes with the management.

Choice- of- law and choice- of- venue not absolute

Pakistan International Airlines Corp. v. *Ople* (G.R. No. 61594, 28 September 1990)

The Supreme Court ruled that the principle of party autonomy in contracts is not absolute. The rule in Article 1306 of the Civil Code is that the contracting parties may establish such stipulations as they deem convenient "provided, they are not contrary to law, morals, good customs, public order and public policy." Accordingly, parties may not contract away applicable provisions of law, especially peremptory provisions, dealing with matters heavily impressed with public interest.

Under Philippine law, the parties cannot stipulate, in contracts of labor and employment, that the respondent employees could be terminated at the will of the employer.

The Supreme Court ruled that, in the present case, the employer cannot take refuge in choice-of-law and choice-of-venue provisions which specify foreign law and foreign venues. These provisions cannot be invoked to prevent the application of Philippine labor laws and regulations to the

employer-employee relationship existing between an employer which is a resident foreign corporation doing business in the Philippines and its employees who are citizens and residents of the Philippines. The relationship is much affected with public interest and the otherwise applicable Philippine laws cannot be rendered illusory by the parties agreeing upon some other law to govern their relationship.

Moreover, the specific circumstances present in this employer-employee relationship point to the Philippine courts and administrative agencies as the proper forum for the resolution of contractual disputes between the parties. Under these circumstances, the choice-of-venue provision in the agreements cannot be given effect so as to oust Philippine agencies and courts of the jurisdiction vested upon them by Philippine law.

In any event, the failure to plead and prove the contents of the foreign law on the matter results in the application of the presumption that the applicable provisions of the Pakistan law are the same as the applicable provisions of Philippine law.

Citizenship: Acquisition and loss; rights and duties

Frivaldo v. *COMELEC* (G.R. No. 87193, 23 June 1989, 174 SCRA 244, J. Cruz)

The Philippine Constitution provides that all public officials and employees owe the State and the Constitution "allegiance at all times". Under the Local Government Code, a candidate for local elective office must be, *inter alia*, "a citizen of the Philippines and a qualified voter of the constituency where he is running". Accordingly, a Filipino citizen who acquires U.S. citizenship by naturalization and who is consequently deemed to have renounced his Philippine citizenship, is therefore not qualified to run for the office of provincial governor.

His having taken part in Philippine elections does not result in the forfeiture of his U.S. citizenship because such forfeiture is a matter between him and that foreign state.

Assuming that forfeiture of foreign citizenship results from a person's having taken part in Philippine elections, such loss of citizenship does not automatically result in the reacquisition of Philippine citizenship. Under Commonwealth Act No. 63, as amended, Philippine citizenship may be reacquired only by three methods: by direct act of Congress, by naturalization or by repatriation. The petitioner's case does not fall in any of these methods.

Labo v. *COMELEC* (G.R. No. 86564, 1 August 1989, 176 SCRA 1)

The Supreme Court held that a Filipino citizen who lost his citizenship by seeking naturalization in another country, by taking an oath of allegiance to a foreign state and by expressly renouncing his Philippine citizenship is disqualified from running for public office unless he reacquires his Philippine citizenship by a direct act of Congress, by naturalization or by repatriation under Commonwealth Act No. 63.

The fact that the marriage which served as the basis for his naturalization in another state was subsequently annulled does not automatically restore his Filipino citizenship. Neither does his election into public office automatically restore his citizenship.

> 'The electorate had no power to permit a foreigner owing his total allegiance to (a foreign state), or at least a stateless individual owing no allegiance to the Republic of the Philippines, to preside over them as an elected local official.'

Balanquit v. *Jose Ong Chuan Jr.* (House of Representatives Electoral Tribunal Case Nos. 13 and 15, 6 November 1989)

The House Electoral Tribunal ruled that a person born of a Filipino mother and alien father and thus entitled to elect Filipino citizenship upon reaching the age of majority under the 1935 Constitution but failed to make such election since his father was naturalized while the child was a minor should still be considered a natural-born Filipino citizen. The Court stated:

> '... one's failure to comply with the *formal requirements* of electing Philippine citizenship is NOT NECESSARILY FATAL to one's acquisition of Filipino citizenship through election.
>
> Where a person, born to a Filipino mother and alien father, had exercised the right of suffrage when he came of age, the same *constitutes a positive act of election of Philippine citizenship. (In Re: Florencio Mallare* 59 SCRA 45). The acts of the petitioner in registering as a voter, participating in elections, and campaigning for certain candidates were held by the Supreme Court as SUFFICIENT TO SHOW HIS PREFERENCE FOR PHILIPPINE CITIZENSHIP...'

Moreover, when his father was naturalized while he was still a minor, the Revised Naturalization Act under Section 15 extended its benefits of Filipino citizenship to his minor children residing in the country. Therefore, JOSE ONG CHUAN Jr. "may even be declared a natural-born citizen of the Philippines under the first sentence of Section 2 Article IV of the 1987 Constitution." Accordingly, he possessed the qualification of being a natural-born Filipino citizen at the time he ran for a seat in the House of Representatives.

Three Justices of the Supreme Court and a Member of the House of Representatives who are all members of the House Electoral Tribunal dissented from the majority opinion and challenged the proposition that election of Philippine citizenship need not be by affirmative act.

> 'The Constitution requires the positive act of election as a condition for acquiring Philippine citizenship. It does not say that the child born of a Philippine mother is deemed possessed of Philippine citizenship unless he *rejects* it upon attaining the majority age. What it says is that he will acquire Philippine citizenship only if he *elects* it upon attaining majority age. Moreover, judicial doctrine requires that he make the election within a reasonable time or he forfeits the right forever.' [CRUZ, J., dissenting]

They also questioned the wisdom of validating "derivative" naturalization on JOSE ONG CHUAN Jr.

> '[I]t becomes readily apparent that the naturalization proceedings initiated by [Jose Ong Chuan, protestee's father] were fatally defective and hence not effective to confer Philippine citizenship upon Ong Chuan nor upon his then minor son, [Jose Ong Chuan Jr., protestee herein]. Protestee Ong Chuan Jr, is not a Philippine citizen at all, let alone a natural-born Philippine citizen.' [Rep. CERILLES, dissenting opinion].

Under Article VI Section 17 of the Philippine Constitution, "[t]he Senate and the House of Representatives shall each have an Electoral Tribunal which shall be the sole judge of all contests relating to the election, returns, and qualifications of their respective Members." The House of Representatives Electoral Tribunal is composed of three Justices of the Supreme Court and six Members of the House of Representatives chosen on the basis of proportional representation from the political parties.

In the exercise of this constitutional authority, the House Electoral Tribunal resolved two *quo warranto* election contests involving disqualification from holding office for lack of a natural-born citizenship as required under Article VI Section 6 of the Constitution.

Aznar v. *COMELEC* (G.R. No. 83820, 25 May 1990)

The Supreme Court ruled that the loss of Philippine citizenship cannot be presumed. It is incumbent upon anybody assailing a person's Philippine citizenship to prove otherwise. Therefore, a person who was born of a Filipino father, and who vehemently denies having taken the oath of allegiance to a foreign state, holds a valid and subsisting Filipino passport and has participated in the electoral process in the Philippines since 1963 both as a voter and as a candidate for election, enjoys the presumption that he is a citizen of the Philippines. According to the Court, that person's act

of registering as an alien in the Philippines did not constitute renunciation of his Filipino citizenship.

> '[T]he fact that (a Filipino citizen) has a certificate which states that he is (a citizen of another state) does not mean that he is not *still* a Filipino.
>
> . . .
>
> When we consider that the renunciation needed to lose Philippine citizenship must be "express", it stands to reason that there can be no such loss of Philippine citizenship *when there is no renunciation, either "express" or "implied"*.
>
> Parenthetically, the statement in the 1987 Constitution that "dual allegiance of citizens is inimical to the national interest and shall be dealt with by law" (Article VI Section 5) has no retroactive effect.'

Three members of the Court dissented, pointing out, among other things, that renunciation of Philippine citizenship may be made even without applying for naturalization in a foreign state, and that applying with the Philippine Government for registration as an alien right here in the Philippines is an express and unequivocal renunciation of Philippine citizenship.

Opinions of the Secretary of Justice

Relations with Taiwan

Opinion No. 112 Series 1989 – Certificate of legal capacity to contract marriage for Taiwanese nationals

Article 21 of Executive Order No. 209 (The Family Code of the Philippines) requires citizens of a foreign country applying for a marriage license to submit a certificate of legal capacity to contract marriage issued by their respective diplomatic or consular officials.

In view of the absence of diplomatic relations between the Republic of the Philippines and Taiwan, the latter has no diplomatic or consular office in the Philippines. Taiwan extends assistance to its nationals in the Philippines through the Pacific Economic and Cultural Center.

The Secretary of Justice, however, held that a certificate of legal capacity to contract marriage issued by the Pacific Economic and Cultural Center would be sufficient compliance with the requirements of the Family Code.

Citizenship

Opinion No. 34 Series 1990 – Citizenship of Filipino children adopted by aliens

The Secretary of Justice has ruled on several occasions that in the Philippines, adoption does not operate to change the nationality of the

adopted child. A Filipino child adopted by an alien retains his Filipino citizenship. [Opinions of the Secretary of Justice No. 4, S. 1961; No. 269, S. 1954; No. 334, S. 1951; No. 102, S. 1941 and No. 332, S. 1940]

Treaty- making power

Opinion No. 84 Series 1990 – Senate concurrence to an agreement between the Department of Tourism of the Republic of the Philippines and the National Tourism Administration of the People's Republic of China

A query was posed on whether the Department of Tourism of the Republic of the Philippines and the National Tourism Administration of the People's Republic of China could upgrade an existing tourism cooperation agreement without Senate concurrence as required under Article VII, Section 21 of the Philippine Constitution.

The Secretary considered the agreement as a mere executive agreement not requiring Senate concurrence inasmuch as the phrase "international agreement" contemplates agreements of a permanent nature [Secretary of Justice Opinion No. 70 and 71 Series 1987]. The Secretary noted the distinction made by the Supreme Court between a treaty and an executive agreement, to wit:

> 'International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. But international agreements embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements.' [*Commissioner of Customs* v. *Eastern Sea Trading*, 3 SCRA 356].

The upgraded agreement between the Republic of the Philippines and the People's Republic of China does not contain political issues or constitute deviations from existing national policies. A comparison between the upgraded version and the original agreement shows little difference in substance and the upgrading was more on the form. Clearly, such change does not alter the original character of the Memorandum of Understanding as an executive agreement.

Choice of law

Opinion No. 166 Series 1990 – Philippine Airlines/ J.P. Morgan letter of agreement

The Philippine Airlines (PAL), a government owned and controlled corporation sought the opinion of the Secretary of Justice on a proposed

Letter of Agreement it intends to conclude with J.P. MORGAN, a foreign corporation based in New York, on the former's privatization program.

The Secretary of Justice ruled that the stipulation of New York law as the governing law of the agreement was not legally objectionable since it is not contrary to law, morals, good customs, public order, or public policy [Article 1306, Civil Code] or the mandatory or prohibitory laws of the Philippines [Article 5, Id.].

Moreover, the Secretary of Justice cited a Philippine Supreme Court decision which held that matters bearing upon the execution, interpretation, and validity of contracts are governed by the law of the place where the contract is made and matters connected with its performance are governed by the law prevailing at the place of its performance [*Insular* v. *Frank*, 13 Phil. 236]. "Since it appears that PAL's preferred investors for its privatization program are foreign companies, that the place of execution or performance of the agreement is outside the Philippines and that the payment of the obligations thereunder is denominated in U.S. dollars", the foregoing principle should govern such agreement.

Clausula rebus sic stantibus

Opinion No. 196 Series 1990 – Effect of the unification of Germany on the trade agreement between the German Democratic Republic and the Republic of the Philippines

As a result of the German unification in 1990, the German Democratic Republic (GDR) proposed the termination of a 1977 trade agreement with the Republic of the Philippines. The Foreign Affairs Ministry of the GDR invoked Article 62 of the Vienna Convention on the Law of Treaties on fundamental change of circumstances as a ground for termination.

The Secretary conceded to the application of Article 62. The abolition of the German Democratic Republic constituted a fundamental change of circumstances within the Article's contemplation. Moreover, the subject trade agreement contained the following clause:

> 'Article 15: The present Agreement shall enter into force on the date of the exchange of notes confirming that it has been ratified or approved in conformity with the respective laws of the Contracting Parties. It shall remain in force for one year and shall be automatically renewed for periods of one year, unless either Contracting Party expresses its intention in writing to terminate this Agreement three months before the expiry of its validity.'

It is clear from the aforequoted provision that either the Philippines or the German Democratic Republic has the option to terminate the trade agreement not later than three months before its expiration. Since said

agreement is valid until 27 December 1990, the same can be declared terminated three months prior thereto or as of 27 October 1990.

Treaties

Extradition treaties entered into by the Philippines

Extradition treaty – Republic of the Philippines and Australia

The Senate of the Republic of the Philippines expressed its concurrence to the ratification of an extradition treaty between the Philippines and Australia through Resolution No. 133 on 10 September 1990. The treaty was signed in Manila on 7 March 1988.

The treaty adopts the "non-list double criminality" principle, thus bringing within its coverage of extraditable offenses all crimes punishable in both Contracting States by imprisonment for a period of at least one (1) year.

Excluded from the treaty's scope are political offenses; offenses against military law which is not an offense under ordinary law; and all prescribed penalties or offenses for which final judgment has been passed by the Requesting State.

The Requested State has the option to refuse extradition if (a) the person whose extradition is requested is a national of the Requested State; (b) the courts of the Requested State are competent and will prosecute the offense; c) the offense for which extradition is requested is punishable by death or a punishment of the kind referred to in Article VII of the International Covenant on Civil and Political Rights.

The treaty provides for provisional arrests "in case[s] of urgency" by means of the facilities of INTERPOL or by other means. [Article 9].

In cases of conflicting requests for extradition from two or more States, the Requested State is given the power to determine to which of the Requesting States the offender is to be extradited. The treaty provides for the procedure in processing these requests for extradition which takes into consideration the laws of the Requested State.

Extradition treaty – Republic of the Philippines and Canada

The Senate of the Republic of the Philippines expressed its concurrence to the ratification of an extradition treaty between the Philippines and Canada through Resolution No. 114 on 10 September 1990. The treaty was signed on 7 November 1989 in Ottawa, Canada.

The treaty was "spurred by the desire of the Philippine Government to facilitate the return of Filipino criminal offenders in Canada." [Senate Resolution No. 114].

The treaty adopts the "non-list dual criminality" principle in defining extraditable offenses.

Excluded from the treaty's scope are political offenses; offenses against military law which are not offenses under ordinary law; and all prescribed penalties or offenses for which final judgment has been passed by the Requesting State. But, the treaty applies to "any request presented after its entry into force, even if the offense for which extradition is requested, was committed before that date." [Article 23].

The treaty also provides that extradition may be refused if it would be "unjust or incompatible with humanitarian considerations." [Article 4].

The treaty provides for mutual legal assistance in extradition and mandates that the procedure in processing requests for extradition must take into account the laws of the Requested State. Properties found in the Requested State that has been acquired as a result of the extraditable offense or which may be required as evidence are to be surrendered to the Requesting State upon request.

SINGAPORE

Contributed by FOO KIM BOON, Attorney General's Chambers, Singapore.

Investment and cooperation agreements in the framework of the Indonesian-Malaysia-Singapore growth triangle

The idea of a "growth triangle" between Singapore, Malaysia and Indonesia was first publicly mooted by Mr GOH CHOK TONG (now Prime Minister of Singapore) in December 1989. The concept entails that Singapore would contribute its capital and management expertise, while the Malaysian State of Johore to her north and the Indonesian Riau Islands of Batam and Bintan to her south would contribute the land and labour. A synergistic association is envisaged; all three countries in the "growth triangle" (Fig. 1) would be able to develop economically at a faster pace.[22] The following two agreements were concluded in 1990 between Singapore and Indonesia.

I. On 28 August 1990 Singapore and Indonesia signed the Agreement for the Promotion and Protection of Investments (hereinafter the "Investment

22. See Singapore Government Press Releases No. 06/Jun 08-2/90/06/05 and No. 34/Jun, 05-1/90/06/13; also in 32 *Malaya Law Review* (1990) at pp. 374 to 378.

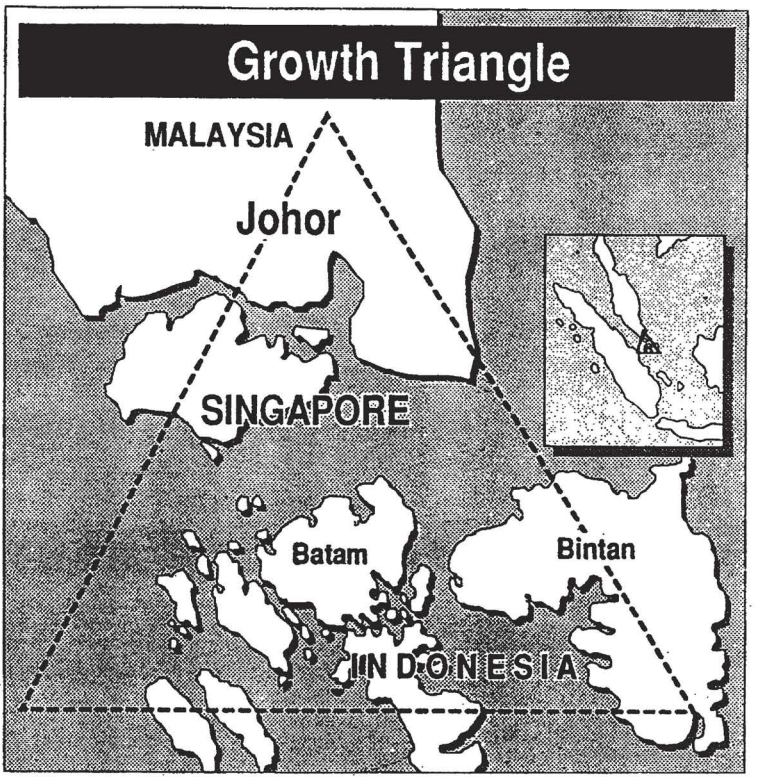

Fig. 1. "Growth triangle" (Source: *The Strait Times*, 2 March 1991).

Protection Agreement" at Batam, Indonesia.[23] As is clear from the preamble, its intention is to create favourable conditions for greater economic cooperation and investments by the nationals and companies of both countries. The Agreement is set within the framework of four other agreements, namely:

(1) the Basic Agreement on Economic and Technical Cooperation between Singapore and Indonesia of 29 August 1974;[24]

(2) the Agreement between Indonesia and Singapore on Economic Cooperation in the framework of the development of Batam, signed on 31 October 1980 (hereinafter "the Batam Agreement");

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23. Singapore Government Gazette, Treaty Supplement, No. T2, 31 August 1990.

24. By Article 6, the 'Basic Agreement' shall "definitely come into force" after an exchange of diplomatic notes.

(3) the agreement between Indonesia and Singapore on Economic Co-operation in the framework of the Development of Riau Province, of 28 August 1990 (hereinafter "the Riau Agreement");[25]

(4) the Agreement among the ASEAN Member States for the Promotion and Protection of Investment, of 15 December 1987 (hereinafter "the Asean Agreement").[26]

A key difference between the Investment Protection Agreement and the ASEAN Agreement exists in the definition accorded to "companies" in both agreements. Under Article I(2) of the ASEAN Agreement, a company shall mean "a corporation, partnership or other business association, incorporated or constituted under the laws in force in the territory of any Contracting Party *wherein the place of effective management is situated.*" (emphasis added). This definition is expanded somewhat in the Investment Protection Agreement. Its Article 1 states that the term "companies" in the ASEAN Agreement shall mean:

> (i) in respect of the Republic of Indonesia, any company, with a limited liability incorporated in the territory of the Republic of Indonesia, cooperatives or any juridical person constituted in accordance with its legislation;
> (ii) in respect of the Republic of Singapore, corporations, cooperative societies, firms or associations incorporated or registered under the law in force in Singapore or any juridical person constituted in accordance with its legislation in their respective country.

Foreign companies which are *registered* in Singapore or in Indonesia would thus be granted protection, notwithstanding their effective seat of management is somewhere else. Many multi-national corporations based in Singapore (who are potential investors), will find this an incentive to invest in Indonesia, and *vice versa.*

Another difference is that under the Investment Protection Agreement projects undertaken in Batam and Riau Province by Singapore companies under the auspices of the bilateral cooperation agreements will be given automatic protection under the ASEAN Agreement without the need to obtain specific approval under Indonesia's Foreign Capital Law 1967 (as subsequently amended). Such approval is required by Article II(1) of the ASEAN Agreement:

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25. Singapore Government Gazette, Treaty Supplement, No. T1, 31 August 1990.
26. ASEAN Documents Series 1967–1988, third edition, at p. 288.

"This Agreement shall apply only to investments brought into, derived from or directly connected with investments brought in the territory of any Contracting Party by nationals or companies of any other Contracting Party and which are specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purpose of the Agreement." "Nationals" shall be "as defined in the respective Constitutions and laws of each of the Contracting Parties." (Article II(1) of the ASEAN Agreement).

II. On the same date, 28 August 1990, the two states concluded a second agreement, on Economic Cooperation in the Framework of the Development of Riau Province.[27] This Riau Agreement covers various areas, like Trade of Goods and Services (Article 2); Tourism and Resort Development (Article 3); Investments (Article 4); Water (Article 5); Infra Structure and Spatial Development (Article 6); and Industry (Article 7). The Agreement will remain in force for a period of 10 years and shall thereafter be in force until terminated by either party by giving not less than six months notice in writing to the other party. The first project to be launched under the framework of the Riau Agreement is a S$ 3.5 billion (approx. US$ 2.03 billion) mega-beach resort of 10,000 hectares being built on Bintan Island under joint venture by consortiums of both countries.

27. See *supra*, n. 25.

PARTICIPATION IN MULTILATERAL TREATIES

KO SWAN SIK*

Editorial introduction

In emphasizing the actual practice of Asian States in the field of international law it has been considered useful to record their participation in open, multilateral law-making treaties which by their nature aim at world-wide adherence. The determination of the priority in which treaties qualify for inclusion is admittedly subjectively prescribed. In view of the limited space available a choice has been made among the great number of treaties included in the sources of information, which were at the Editors' disposal, preparing the manuscript of the present volume. As to the countries included in the survey it has been considered preferable not to include for the time being the Arab countries, Turkey, and Cyprus, despite the fact that these countries are often considered to belong to Asia, either in general or for specific purposes. Similarly, it has been decided not to include the Pacific States east of Papua New Guinea and the Philippines.

It is the Editors' intention to include tables on the status of other treaties in following volumes of the Yearbook, and to record new developments with respect to treaties on which a full table has been published previously. After the publication of a full cycle of tables of chosen treaties a new updated series may be contemplated.

Note:

- Data are mainly derived from *Multilateral Treaties deposited with the Secretary General – Status as at 31 December 1990* (ST/LEG/SER.9). Additional sources are mentioned separately at the relevant place.
- No indication is given of reservations and declarations made.
- Sig. = signature; Cons. = consent to be bound.

LAW OF TREATIES

Convention on the Law of Treaties
Vienna, 1969
Entry into force: 27 Jan. 1980

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	23 May 69		Mongolia		16 May 88
Cambodia	23 May 69		Nepal	23 May 69	
Iran	23 May 69		Pakistan	29 Apr 70	
Japan		2 Jul 81	Philippines	23 May 69	15 Nov 72
Korea (Rep)	27 Nov 69	27 Apr 77			

* General Editor

Ko Swan Sik et al. (eds.), Asian Yearbook of International Law, 183–196.

LAW OF THE SEA

United Nations Convention on the Law of the Sea
Montego Bay, Jamaica, 1982
Entry into force: –
(1991 data courtesy of Netherlands Ministry of Foreign Affairs)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	18 Mar 83		Malaysia	10 Dec 82	
Bangladesh	10 Dec 82		Maldives	10 Dec 82	
Bhutan	10 Dec 82		Mongolia	10 Dec 82	
Brunei	5 Dec 84		Myanmar	10 Dec 82	
Cambodia	1 Jul 83		Nepal	10 Dec 82	
China	10 Dec 82		Pakistan	10 Dec 82	
India	10 Dec 82		Papua New Guinea	10 Dec 82	
Indonesia	10 Dec 82	3 Feb 86	Philippines	10 Dec 82	8 May 84
Iran	10 Dec 82		Seychelles	10 Dec 82	16 Sep 91
Japan	7 Feb 83		Singapore	10 Dec 82	
Korea (DPR)	10 Dec 82		Sri Lanka	10 Dec 82	
Korea (Rep)	14 Mar 83		Thailand	10 Dec 82	
Laos	10 Dec 82		Vietnam	10 Dec 82	

INTERNATIONAL TRADE LAW AND COMMERCIAL ARBITRATION
(Data also from A/CN.9/353 – 5 Jun. 1991)

Convention on the Recognition and Enforcement of Foreign Arbitral Awards
New York, 1958
Entry into force: 7 Jun. 1959

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Cambodia		5 Jan 60	Malaysia		5 Nov 85
China		22 Jan 87	Pakistan	30 Dec 58	
India	10 Jun 58	13 Jul 60	Philippines	10 Jun 58	6 Jul 67
Indonesia		7 Oct 81	Singapore		21 Aug 86
Japan		20 Jun 61	Sri Lanka	30 Dec 58	9 Apr 62
Korea (Rep.)		8 Feb 73	Thailand		21 Dec 59

Convention on the Limitation Period in the International Sale of Goods
New York, 1974
Entry into force: 1 Aug. 1988

State	*Sig.*	*Cons.*
Mongolia	14 Jun 74	

United Nations Convention on the Carriage of Goods by Sea
Hamburg, 1978
Entry into force: –

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Pakistan	8 Mar 79		Singapore	31 Mar 78	
Philippines	14 Jun 78				

United Nations Convention on Contracts for the International Sale of Goods
Vienna, 1980
Entry into force: 1 Jan. 1988

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
China	30 Sep 81	11 Dec 86	Singapore	11 Apr 80	

United Nations Convention on the Liability of Operators of Transport Terminals in International Trade
Vienna, 1991
Entry into force: –

State	*Sig.*	*Cons.*
Philippines	19 Apr 91	

PROTECTION OF THE ENVIRONMENT

Convention for the Protection of the Ozone Layer
Vienna, 1985
Entry into force: 22 Sep. 1988
(Status as at 31 Jan. 1992, from UNEP)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Bangladesh		2 Aug 90	Malaysia		29 Aug 89
Brunei		26 Jul 90	Maldives		26 Apr 88
China		11 Sep 89	Philippines		17 Jul 91
India		18 Mar 91	Singapore		5 Jan 89
Iran		3 Oct 90	Sri Lanka		15 Dec 89
Japan		30 Sep 88	Thailand		7 Jul 89

Protocol on Substances that Deplete the Ozone Layer

Montreal, 1987
Entry into force: 1 Jan. 1989
(Status as at 31 Jan. 1992, from UNEP)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Bangladesh		2 Aug 90	Maldives	12 Jul 88	16 May 89
China		14 Jun 91	Philippines	14 Sep 88	
Indonesia	21 Jul 88		Singapore		5 Jan 89
Iran		3 Oct 90	Sri Lanka		15 Dec 89
Japan	16 Sep 87	30 Sep 88	Thailand	15 Sep 88	7 Jul 89
Malaysia		29 Aug 89			

Asian States operating under Article 5 paragraph 1 of the Montreal Protocol: Bangladesh, China, Iran, Malaysia, Maldives, Philippines, Sri Lanka, Thailand.

Amendment to the Montreal Protocol

London, 1990
(Status as at 31 Jan. 1992, from UNEP)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
China		14 Jun 91	Maldives		31 Jul 91
Japan		4 Sep 91			

HUMAN RIGHTS

International Convention on the Elimination of All Forms of Racial Discrimination

New York, 1966
Entry into force: 4 Jan. 1969

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan		6 Jul 83	Maldives		24 Apr 84
Bangladesh		11 Jun 79	Mongolia	3 May 66	6 Aug 69
Bhutan	26 Mar 73		Nepal		30 Jan 71
Cambodia	12 Apr 66	28 Nov 83	Pakistan	19 Sep 66	21 Sep 66
China		29 Dec 81	Papua New Guinea		27 Jan 82
India	2 Mar 67	3 Dec 68	Philippines	7 Mar 66	15 Sep 67
Iran	8 Mar 67	29 Aug 68	Seychelles		7 Mar 78
Iraq	18 Feb 69	14 Jan 70	Sri Lanka		18 Feb 82
Korea (Rep.)	8 Aug 78	5 Dec 78	Vietnam		9 Jun 82
Laos		22 Feb 74			

International Covenant on Economic, Social and Cultural Rights
New York, 1966
Entry into force: 3 Jan. 1976

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan		24 Jan 83	Korea (Rep.)		10 Apr 90
Cambodia	17 Oct 80		Mongolia	5 Jun 68	18 Nov 74
India		10 Apr 79	Philippines	19 Dec 66	7 Jun 74
Iran	4 Apr 68	24 Jun 75	Sri Lanka		11 Jun 80
Japan	30 May 78	21 Jun 79	Vietnam		24 Sep 82
Korea (DPR)		14 Sep 81			

International Covenant on Civil and Political Rights
New York, 1966
Entry into force: 23 Mar. 1976

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan		24 Jan 83	Korea (Rep.)		10 Apr 90
Cambodia	17 Oct 80		Mongolia	5 Jun 68	18 Nov 74
India		10 Apr 79	Philippines	19 Dec 66	23 Oct 86
Iran	4 Apr 68	24 Jun 75	Sri Lanka		11 Jun 80
Japan	30 May 78	21 Jun 79	Vietnam		24 Sep 82
Korea (DPR)		14 Sep 81			

Optional Protocol to the International Covenant on Civil and Political Rights
New York, 1966
Entry into force: 23 Mar. 1976

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Korea (Rep.)		10 Apr 90	Philippines	19 Dec 66	22 Aug 89

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
New York, 1984
Entry into force: 26 Jun. 1987
(Status as at 10 Dec. 1991, from E/CN.4/1992/15)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	4 Feb 85	1 Apr 87	Nepal		14 May 91
China	12 Dec 86	4 Oct 88	Philippines		18 Jun 86
Indonesia	23 Oct 85				

WOMEN AND CHILDREN

Convention on the Political Rights of Women
New York, 1953
Entry into force: 7 Jul. 1954

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan		16 Nov 66	Myanmar	14 Sep 54	
India	29 Apr 53	1 Nov 61	Nepal		25 Apr 65
Indonesia	31 Mar 53	16 Dec 58	Pakistan	18 May 54	7 Dec 54
Japan	1 Apr 55	13 Jul 55	Papua New Guinea		27 Jan 82
Korea (Rep.)		23 Jun 59	Philippines	23 Sep 53	12 Sep 57
Laos		28 Jan 69	Thailand	5 Mar 54	30 Nov 54
Mongolia		18 Aug 65			

Convention on the Nationality of Married Women
New York, 1957
Entry into force: 11 Aug. 1958

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
India	15 May 57		Singapore		18 Mar 66
Malaysia		24 Feb 59	Sri Lanka		30 May 58
Pakistan	10 Apr 58				

Convention on the Elimination of All Forms of Discrimination Against Women
New York, 1980
Entry into force: 3 Sep. 1981

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	14 Aug 80		Korea (Rep.)	25 May 83	27 Dec 84
Bangladesh		6 Nov 84	Laos	17 Jul 80	14 Aug 81
Bhutan	17 Jul 80	31 Aug 81	Mongolia	17 Jul 80	20 Jul 81
Cambodia	17 Oct 80		Philippines	15 Jul 80	5 Aug 81
China	17 Jul 80	4 Nov 80	Sri Lanka	17 Jul 80	5 Oct 81
India	30 Jul 80		Thailand		9 Aug 85
Indonesia	29 Jul 80	13 Sep 84	Vietnam	29 Jul 80	17 Feb 82
Japan	17 Jul 80	25 Jun 85			

Convention on the Rights of the Child
New York, 1989
Entry into force: 2 Sep. 1990
(Status as at 16 Dec. 1991, from E/CN.4/1992/54)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	27 Sep 90		Mongolia	26 Jan 90	5 Jul 90
Bangladesh	26 Jan 90	3 Aug 90	Myanmar		15 Jul 91
Bhutan	4 Jun 90	1 Aug 90	Nepal	26 Jan 90	14 Sep 90
China	29 Aug 90		Pakistan	20 Sep 90	12 Nov 90
Indonesia	25 Jan 90	5 Sep 90	Papua New Guinea	30 Sep 90	
Japan	21 Sep 90		Philippines	26 Jan 90	21 Aug 90
Korea (DPR)	23 Aug 90	21 Sep 90	Seychelles		7 Sep 90
Korea (Rep.)	25 Sep 90	20 Nov 91	Sri Lanka	26 Jan 90	12 Jul 91
Laos		8 May 91	Vietnam	26 Jan 90	28 Feb 90
Maldives	21 Aug 90	11 Feb 91			

REFUGEES

Convention Relating to the Status of Refugees
Geneva, 1951
Entry into force: 22 Apr. 1954

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
China		24 Sep 82	Papua New Guinea		17 Jul 86
Iran		28 Jul 76	Philippines		22 Jul 81
Japan		3 Oct 81	Seychelles		23 Apr 80

Protocol Relating to the Status of Refugees
New York, 1967
Entry into force: 4 Oct. 1967

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
China		24 Sep 82	Papua New Guinea		17 Jul 86
Iran		28 Jul 76	Philippines		22 Jul 81
Japan		1 Jan 82	Seychelles		23 Apr 80

HUMANITARIAN LAW IN ARMED CONFLICT

International Conventions for the Protection of Victims of War, I–IV

Geneva, 1949

Entry into force: 21 Oct. 1950

(Dates refer to the day on which the official deed was received by the Swiss Federal Department of Foreign Affairs. Data as at 30 June 1990 from DDM/JUR 90/823 – CPS/4 (Comité International de la Croix-Rouge); data as at 21 June 1991 courtesy of Netherlands Red Cross Society)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan		25 Sep 56	Malaysia		24 Aug 62
Bangladesh		4 Apr 72	Mongolia		20 Dec 58
Bhutan		10 Jan 91	Nepal		7 Feb 64
Cambodia		8 Dec 58	Pakistan		12 Jun 51
China		28 Dec 56	Papua New Guinea		26 May 76
India		9 Nov 50	Philippines		6 Oct 52
Indonesia		30 Sep 58	Seychelles		8 Nov 84
Iran		20 Feb 57	Singapore		27 Apr 73
Japan		21 Apr 53	Sri Lanka		28 Feb 59
Korea (DPR)		27 Aug 57	Thailand		29 Dec 54
Korea (Rep.)		16 Aug 66	Vietnam		28 Jun 57
Laos		29 Oct 56			

Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts

Geneva, 1977

Entry into force: 7 Dec. 1978

(Dates refer to the day on which the official deed was received by the Swiss Federal Department of Foreign Affairs. Data as at 30 June 1990 from DDM/JUR 90/823 – CPS/4 (Comité International de la Croix-Rouge); data as at 21 June 1991 courtesy of Netherlands Red Cross Society; data as at 17 July 1991 from A/INF/46/3)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Bangladesh		8 Sep 80	Laos		18 Nov 80
China		14 Sep 83	Seychelles		8 Nov 84
Korea (DPR)		9 Mar 88	Vietnam		19 Nov 81
Korea (Rep.)		15 Jan 82			

Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts
Geneva, 1977
Entry into force: 7 Dec. 1978
(Dates refer to the day on which the official deed was received by the Swiss Federal Department of Foreign Affairs. Data as at 30 June 1990 from DDM/JUR 90/823 – CPS/4 (Comité International de la Croix-Rouge); data as at 21 June 1991 courtesy of Netherlands Red Cross Society; data as at 17 July 1991 from A/INF/46/3)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Bangladesh		8 Sep 80	Laos		18 Nov 80
China		14 Sep 83	Philippines		11 Dec 86
Korea (Rep.)		15 Jan 82	Seychelles		8 Nov 84

INTERNATIONAL CRIMES

Convention on the Prevention and Punishment of the Crime of Genocide
New York, 1948
Entry into force: 12 Jan. 1951

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan		22 Mar 56	Mongolia		5 Jan 67
Cambodia		14 Oct 50	Myanmar	30 Dec 49	14 Mar 56
China	20 Jul 49	18 Apr 83	Nepal		17 Jan 69
India	29 Nov 49	27 Aug 59	Pakistan	11 Dec 48	12 Oct 57
Iran	8 Dec 49	14 Aug 56	Papua New Guinea		27 Jan 82
Korea (DPR)		31 Jan 89	Philippines	11 Dec 48	7 Jul 50
Korea (Rep.)		14 Oct 50	Sri Lanka		12 Oct 50
Laos		8 Dec 50	Vietnam		9 Jun 81
Maldives		24 Apr 84			

Convention on Offences and Certain Other Acts Committed on Board Aircraft
Tokyo, 1963
Entry into force: 4 Dec. 1969
(Information furnished on 16 July 1991 by the Secretariat of ICAO and reproduced in A/46/346)

State	*Cons.*	*Effective date*	*State*	*Cons.*	*Effective date*
Afghanistan	15 Apr 77	14 Jul 77	China	14 Nov 78	12 Feb 79
Bangladesh	25 Jul 78	23 Oct 78	India	22 Jul 75	20 Oct 75
Bhutan	25 Jan 89	25 Apr 89	Indonesia	7 Sep 76	6 Dec 76
Brunei	23 May 86	21 Aug 86		(sig. 14 Sep 63)	

State	*Cons.*	*Effective date*	*State*	*Cons.*	*Effective date*
Iran	28 Jun 76	29 Sep 76	Pakistan	11 Sep 73 (sig. 6 Aug 65)	10 Dec 73
Japan	26 May 70 (sig. 14 Sep 63)	24 Aug 70	Papua New Guinea	– ? –	16 Sep 75
Korea (DPR)	9 May 83	7 Aug 83	Philippines	26 Nov 65 (sig. 14 Sep 63)	4 Dec 69
Korea (Rep.)	19 Feb 71 (sig. 8 Dec 65)	20 May 71	Seychelles	4 Jan 79	4 Apr 79
Laos	23 Oct 72	21 Jan 73	Singapore	1 Mar 71	30 May 71
Malaysia	5 Mar 85	3 Jun 85	Sri Lanka	30 May 78	28 Aug 78
Maldives	28 Sep 87	21 Dec 87	Thailand	6 Mar 72	4 Jun 72
Mongolia	24 Jul 90	22 Oct 90	Vietnam	10 Oct 79	8 Jan 80
Nepal	15 Jan 79	15 Apr 79			

Convention for the Suppression of Unlawful Seizure of Aircraft

The Hague, 1970

Entry into force: 14 Oct. 1971

(Information furnished on 16 July 1991 by the Secretariat of ICAO and reproduced in A/46/346)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	16 Dec 70	29 Aug 79	Malaysia	16 Dec 70	4 May 85
Bangladesh		28 Jun 78	Maldives		1 Sep 87
Bhutan		28 Dec 88	Mongolia	18 Jan 71	8 Oct 71
Brunei		16 Apr 86	Nepal		11 Jan 79
Cambodia	16 Dec 70		Pakistan	12 Aug 71	28 Nov 73
China		10 Sep 80	Papua New Guinea		15 Dec 75
India	14 Jul 71	12 Nov 82	Philippines	16 Dec 70	26 Mar 73
Indonesia	16 Dec 70	27 Aug 76	Seychelles		29 Dec 78
Iran	16 Dec 70	25 Jan 72	Singapore	8 Sep 71	12 Apr 78
Japan	16 Dec 70	19 Apr 71	Sri Lanka		30 May 78
Korea (DPR)		28 Apr 83	Thailand	16 Dec 70	16 May 78
Korea (Rep.)		18 Jan 73	Vietnam		17 Sep 79
Laos	16 Feb 71	6 Apr 89			

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation

Montreal, 1971

Entry into force: 26 Jan 1973

(Information furnished on 16 July 1991 by the Secretariat of the ICAO and reproduced in A/46/346)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan		26 Sep 84	India	11 Dec 72	12 Nov 82
Bangladesh		28 Jun 78	Indonesia		27 Aug 76
Bhutan		28 Dec 88	Iran		10 Jul 73
Brunei		16 Apr 86	Japan		12 Jun 74
China		10 Sep 80	Korea (DPR)		13 Aug 80

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Korea (Rep.)		2 Aug 73	Philippines	23 Sep 71	26 Mar 73
Laos	1 Nov 72	6 Apr 89	Seychelles		29 Dec 78
Maldives		1 Sep 87	Singapore	21 Nov 72	12 Apr 78
Mongolia	19 Feb 72	14 Sep 72	Sri Lanka		30 May 78
Nepal		11 Jan 79	Thailand		16 May 78
Pakistan		24 Jan 74	Vietnam		17 Sep 79
Papua New Guinea		15 Dec 75			

International Convention Against the Taking of Hostages
New York, 1979
Entry into force: 3 Jun. 1983

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Bhutan		31 Aug 81	Korea (Rep.)		4 May 83
Brunei		18 Oct 88	Philippines	2 May 80	14 Oct 80
Japan	22 Dec 80	8 Jun 87			

Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation
Rome, 1988
(Information furnished on 16 July 1991 by the Secretariat of IMO and reproduced in A/46/346)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Brunei	3 Feb 88		Philippines	10 Mar 88	
China	25 Oct 88		Seychelles	24 Jan 89	24 Jan 89

Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf
Rome, 1988
(Information furnished on 16 July 1991 by the Secretariat of IMO and reproduced in A/46/346)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Brunei	3 Feb 89		Philippines	10 Mar 88	
China	25 Oct 88		Seychelles	24 Jan 89	24 Jan 89

Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation
Montreal, 1988
Entry into force: 6 Aug. 1989
(Information is reproduced below as furnished on 16 July 1991 by the Secretariat of the ICAO and reproduced in A/46/346)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
China	24 Feb 88		Malaysia	24 Feb 88	
Indonesia	24 Feb 88		Pakistan	24 Feb 88	
Korea (DPR)	11 Apr 89		Philippines	25 Jan 89	
Korea (Rep.)	24 Feb 88	27 Jun 90 (effective: 27 Jul 90)	Sri Lanka	28 Oct 88	

Convention on the Marking of Plastic Explosives for the Purpose of Detection
Montreal, 1991
(Information furnished on 16 July 1991 by the Secretariat of ICAO and reproduced in A/46/346)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Pakistan	1 Mar 91		Korea (Rep.)	1 Mar 91	

NARCOTIC DRUGS

Convention for the Suppression of the Illicit Traffic in Dangerous Drugs
Geneva, 1936, amended by Protocol, Lake Success, New York, 1946.
Entry into force: 10 Oct. 1947

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Cambodia		3 Oct 51	Japan		7 Sep 55
China	11 Dec 46		Laos		13 Jul 51
India	11 Dec 46		Sri Lanka		4 Dec 57
Indonesia		3 Apr 58			

Single Convention on Narcotic Drugs
New York, 1961
Entry into force: 13 Dec. 1964

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	30 Mar 61	19 Mar 63	Malaysia		11 Jul 67
Bangladesh		25 Apr 75	Myanmar	30 Mar 61	29 Jul 63
Brunei		25 Nov 87	Nepal		29 Sep 87
Cambodia	30 Mar 61		Pakistan	30 Mar 61	9 Jul 65
India	30 Mar 61	13 Dec 64	Papua New Guinea		28 Oct 80
Indonesia	28 Jul 61	3 Sep 76	Philippines	30 Mar 61	2 Oct 67
Iran	30 Mar 61	30 Aug 72	Singapore		15 Mar 73
Japan	26 Jul 61	13 Jul 64	Sri Lanka		11 Jul 63
Korea (Rep.)	30 Mar 61	13 Feb 62	Thailand	24 Jul 61	31 Oct 61
Laos		22 Jun 73			

Single Convention on Narcotic Drugs, 1961, as Amended by the Protocol of 25 March 1972 Amending the Single Convention on Narcotic Drugs, 1961
New York, 1975
Entry into force: 8 Aug. 1975

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Bangladesh	9 May 80		Philippines	7 Jun 74	
Brunei	25 Nov 87		Singapore	9 Jul 75	
Malaysia	20 Apr 78		Sri Lanka	29 Jun 81	
Nepal		29 Jun 87	Thailand	9 Jan 75	
Papua New Guinea	28 Oct 80				

United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
Vienna, 1988
Entry into force: 11 Nov. 1990

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	20 Dec 88		Iran	20 Dec 88	
Bangladesh	14 Apr 89	11 Oct 90	Japan	19 Dec 89	
Bhutan		27 Aug 90	Malaysia	20 Dec 88	
Brunei	26 Oct 89		Maldives	5 Dec 89	
China	20 Dec 88	25 Oct 89	Myanmar		11 Jun 91
India		27 Mar 90	Pakistan	20 Dec 89	
Indonesia	27 Mar 89		Philippines	20 Dec 88	

NUCLEAR MATERIAL

Convention on the Physical Protection of Nuclear Material

Vienna, 1980

Entry into force: 8 Feb. 1987

(Information furnished on 17 July 1991 by the Secretariat of IAEA and reproduced in A/46/346)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
China		10 Jan 89	Korea (Rep.)	29 Dec 81	7 Apr 82
Indonesia	3 Jul 86	5 Nov 86	Mongolia	23 Jan 86	28 May 86
Japan		28 Oct 88	Philippines	19 May 80	22 Sep 81

ASIA AND INTERNATIONAL ORGANIZATIONS

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE ANNUAL SURVEY OF ACTIVITIES: 1990-1991, INCLUDING THE THIRTIETH SESSION HELD IN CAIRO, 22-27 APRIL, 1991

INTRODUCTORY NOTE

The Asian-African Legal Consultative Committee, an inter-governmental organization, was constituted in November 1956 as a tangible outcome of the historic Bandung Conference held in April 1955.

The purposes of the Committee, as originally envisaged, were to serve as an advisory body to its member governments in the field of international law and as a forum for Asian-African co-operation in legal matters of common concern. Its activities have, however, been broadened from time to time to keep pace with the needs and requirements of its member governments and this has been especially so in recent years in the field of economic relations.

The Committee as the only organization at governmental level embracing the two continents of Asia and Africa had also oriented its activities to complement the work of the United Nations in several areas. In the light of the Committee's growing involvement in this field, the UN General Assembly by a Resolution, adopted at its thirty-fifth Session in 1980 decided to accord the Committee Permanent Observer Status with the United Nations, a distinction which it shares with ten other inter-governmental organizations.

The Committee's Secretariat is located in New Delhi and is headed by an elected Secretary General. He is assisted by Deputy Secretaries General and Assistant Secretaries General who are senior officers of member governments sent on secondment besides the regular staff of the Secretariat in professional and administrative categories. The Committee also maintains Permanent Observer Missions to the United Nations.

Membership of the Committee is open to Asian and African governments which have been admitted to participate in the Committee in accordance with its Statutes and Statutory Rules. An application for full or associate membership is circulated among member governments with a request for submission of their comments within a period of six weeks.

Ko Swan Sik et al. (eds.), Asian Yearbook of International Law, 199–239.

Unless objections are received from not less than one-third of the total membership of the Committee, the government concerned is thereafter declared admitted as a member. The only distinction between full members and associate members is that the associate members pay a fixed contribution and do not participate in the policy or organisational matters.

The Committee has at present a membership of forty-two states: Arab Republic of Egypt; Bangladesh; China; Cyprus; Gambia; Ghana; India; Indonesia; Islamic Republic of Iran; Iraq; Japan; Jordan; Kenya; Democratic People's Republic of Korea; Republic of Korea; Kuwait; Libya; Malaysia; Mauritius; Mongolia; Nepal; Nigeria; Oman; Pakistan; Palestine; Philippines; Qatar; Saudi Arabia; Senegal; Sierra Leone; Singapore; Somalia; Sri Lanka; Sudan; Syria; Tanzania; Thailand; Turkey; Uganda; United Arab Emirates and Yemen Arab Republic. Botswana is an Associate Member.

Among the Asian states which have not yet become members are: Afghanistan, Vietnam, Laos, Cambodia, and Myanmar. Burma—as it was then—was among the original participating states but withdrew from membership effective 1 January 1974.

The original Statutes of the AALCC were drawn up in 1956. In 1981, action was initiated to revise the Statutes. A revised text prepared by an inter-sessional meeting held in 1985 was approved at the twenty-sixth (Bangkok) session of the Committee in 1987 and adopted on 12 January, 1987. For the text of the Statutes, see *infra*.

The Statutory Rules were originally drawn up in 1957. After a decision in 1981 to revise them, a long process finally resulted in revised Rules which were adopted in 1989 and became effective on 1 May 1989.

The Committee normally meets once annually, in regular session, by rotation in its member countries on the basis of invitations received. In addition, inter-sessional meetings, special meetings related to specific topics, as well as meetings of Sub-Committees, Working Groups or Expert Groups are held incidentally. In this context, meetings of the Legal Advisors of the member states are sometimes held during the annual session of the UN General Assembly in New York ("Legal Advisors Meeting").

MEMBERSHIP

The latest modifications took place when Saudi Arabia and Palestine became full members and the Philippines rejoined the Committee as a full member in 1990 (*Report of the Twenty-ninth Session*, p. 83) bringing the membership to forty-two.

AGENDA

The agenda of the AALCC sessions normally comprises four categories of items. *First,* organizational matters. *Second,* matters under Article 4(a) of the Statutes, i.e. questions that are under consideration by the UN International Law Commission. The *third* category are matters under Article 4(c) of the Statutes, i.e. legal problems referred to the Committee by the participating states. Finally, the *fourth* category are matters under Article 4(d) of the Statutes which refers to matters of common concern having legal implications.

CO-OPERATION BETWEEN THE UNITED NATIONS AND THE AALCC

A co-operation programme was drawn up in 1987. The latest summary of the co-operation activities is to be found in the report of the UN Secretary General on the matter, UN doc. A/45/504 of 21 September 1990.

REPORT OF THE INTERNATIONAL LAW COMMISSION

The Cairo session held its discussion on the basis of the ILC report on the work at its 42nd session (1990) and a note prepared by the Secretary-General on "Jurisdictional immunities of states and their property" (doc. AALCC/XXX/Cairo/91/2) which contained a detailed survey of the involvement of the Committee with the subject from 1983 onwards.

Among the statements made during the discussion (*Report of the Thirtieth Session*, p. 151 et seq.), the *Cyprian* delegate urged that work should proceed with the requisite degree of priority on the *draft code of crimes against the peace and security of mankind* and on the subject of *state responsibility.* He drew attention to two areas which could be made *new topics* for the ILC, *viz.* the question of implementation of UN resolutions and the legal consequences arising out of their non-implementation, and the question of the decisive nature of Security Council resolutions in the context of Article 25 of the UN Charter and of the advisory opinion on Namibia. The *Japanese* delegate elaborated on the subject of *jurisdictional immunities of states and their property.* He noted the absence of a uniform position by the international community and saw as a task before the Committee the establishment of rules concerning the extent to which state immunity should or could be limited. With respect to Article 5 (original Art. 6) of the ILC draft, his delegation would wish to delete the reference to "the relevant rules of general international law 'since such a

provision would make the scope of immunity quite unclear'". The *Turkish* delegate had some difficulty with Articles II and II *bis* of the *draft articles on state immunity* as, according to the law of some states, a state enterprise does not engage in a commercial transaction on behalf of a state if it is a separate legal entity. As to the *draft articles on non-navigational uses of international watercourses,* it appeared that they do not sufficiently consider the balance of interests of the co-riparian states. On the topic of *international liability for injurious consequences arising out of acts not prohibited by international law,* his delegation was of the opinion that it would be useful to formulate a general regime regarding this kind of liability, and harm to the environment should be considered separately from harm to persons or private property. The *Libyan* delegate drew attention to the freezing of the financial assets of a foreign state enterprise by a state.

The Committee decided to direct the Secretariat to prepare a detailed analysis of the draft articles on jurisdictional immunities of states and their property, and of the draft articles on the non-navigational uses of international watercourses *(Report of the Thirtieth Session, pp. 110-111, 165-166).*

STATUS AND TREATMENT OF REFUGEES

As a paper for the Cairo session, the Committee had at its disposal a study prepared by the Secretariat on "Status and treatment of refugees; rights and duties of a refugee in the first country of asylum: a preliminary study" (doc. AALCC/XXX/Cairo/91/8). Reference was also made to an earlier (1986) study by the Secretariat on "Establishment of safety zones for the displaced persons in their country of origin" (doc. AALCC/XXVI/4 sect. IV). Many delegates, as well as the Secretariat, expressed the opinion that the latter subject was most topical, and suggested putting it on the agenda of the next session.

The Secretariat study is the result of a recommendation made by the Committee at its 29th session in 1990. It aims at an analysis of the rights and duties of the refugee, especially under the 1951 Convention. The study limits itself to 'rights' in the legal sense of the term, and observes that an alien, including a refugee, is normally not entitled to enjoy political rights in the state of residence. They are, however, entitled to enjoy the right to have a decent civic life, i.e., civil rights, although sometimes not to the same extent as citizens. These minimum civil rights are enshrined in the 1951 Convention.

In order to understand the "rights and duties" which a refugee enjoys in the first country of asylum, the study refers to the definition of "refugee" in Article 1A(2) of the 1951 Convention as modified by the 1967 Protocol. When a person, due to fear of persecution, moves out from the protection of the state of his nationality or habitual residence and seeks asylum elsewhere, the state which grants him asylum and recognizes his first status as a refugee is required to provide him minimum protection, i.e., the basic civil rights which are enshrined in the 1951 Convention, but are also prescribed by customary international law and the general principles recognized by civilized nations. The first country of asylum is required to provide two basic strategies for the protection of the refugees: (i) It is to provide adequate protection and a sense of security to the refugee and his dependents, and (ii) it is to adhere strictly to the principle of *non-refoulement.* The refugee's repatriation must depend on his voluntary decision to do so.

The study continues by referring to a number of obligations prescribed by the 1951 Convention, such as Article 32 (no expulsion except on grounds of national security or public order), Article 3 (non-discrimination), Article 7 (exemption from reciprocity), Article 8 (exemption from exceptional measures), Article 25 (administrative assistance), and Articles 27 and 28 (issue of identity and travel documents). As to specific rights for refugees, the study refers to the following standards of treatment established under the 1951 Convention: National treatment (Arts. 4; 16 paras 1 and 2; 17 para 2; 20; 22 para 1; 23; 24; and 29), treatment as accorded to nationals of the country of habitual residence (Arts. 14 and 16 para 3), most-favoured-nation treatment (Arts. 15 and 17 para 1), and treatment as favourable as possible and in any event not less favourable than that accorded to aliens generally (Arts. 13, 18, 19, 21, 22 para 2).

The study continues by referring to the right to repatriation and the right to indemnification recognized by the "Principles concerning the status and treatment of refugees" (*the Bangkok Principles*) which were adopted by the AALCC at its eighth session in 1966 and elaborated by an addendum adopted during its eleventh session (1970). The study suggests that with regard to these two rights, there is need for improvement of the 1951 Convention. It notes that although the 1951 Convention and its 1967 Protocol do not provide for a right to repatriation, the UNHCR derives the authority to organize voluntary repatriation from paragraphs 1 and 8(c) of the Statute of the Office of the UNHCR.

As to the right to indemnification, the study, except recalling Article V of the Bangkok Principles and paragraph 4 of the 1970 Addendum, refers to UN General Assembly resolutions 194 (III) of 11 December 1948, resolution 36/148 of 16 December 1981, and the report of the Group of Govern-

mental Experts on *International Co-operation to Avert New Flows of Refugees* (UN doc. A/41/324 para 66).

When dealing with the "duties of a refugee", the study refers to Article 1F of the 1951 Convention (requirement of not having committed certain crimes or acts), Article 2 (to conform to the laws of the country of refuge) and Articles 32 and 33 (expulsion on grounds of national security). With reference to these and other sources, the study concludes that it is the duty of the refugee not to participate in any political or subversive activity from the soil of the country of residence, and that under international law, refugees should not be permitted to engage in political or subversive activities against the state of their former nationality or residence (para 56). Reference is here made to the preamble to the 1951 Convention, calling on states to do everything within their power to prevent the problem (of the refugee's constraint from participating in political or subversive activities) from becoming a cause of tensions between states, and also to Article 4 of the 1967 Declaration on Territorial Asylum, Article III No. 5 of the OAU Charter, and Article III of the 1969 OAU Convention governing the Specific Aspects of Refugees Problems in Africa.

The study notes "that in some cases in Asia, Africa and Latin America, the refugees have been involved in political activities including subversive activities, as well as armed struggle against their country of origin. It has happened in a number of cases that the country of asylum has covertly trained and supplied arms to the refugees and encouraged them to carry on subversive activities against their country of origin" (para 59). Here the refugees, willingly or unwillingly, have been used as a tool by the country of residence to gain political leverage. The study then cites the 1970 UN Friendly Relations Declaration (GA res. 2625 (XXV)), particularly its first, third and fifth principles, and the 1960 UN Decolonization Declaration (GA res. 1514 (XV)).

During the *discussion* (*Report of the Thirtieth Session,* p. 247 et seq.), the remark was made that Iraq should respect the principle of the right to return of the Kurdish refugees. It was regretted that with respect to the Kuwaiti refugees, the UNHCR failed to provide assistance because the persons did not fall within the 1951 definition of "refugees". There was some objection to the distinction made in the Secretariat study between first and other countries of asylum, as the rights and duties ought to be the same for every country.

The Committee *decided*:

(1) that the Secretariat should continue its study on the question of rights and duties of a refugee in the first country of asylum with particular emphasis on the principle of non-refoulement;

(2) to place the item of safety zones for refugees on the agenda of the 31st session, directing the Secretariat to up-date the earlier study on the topic *(Report of the Thirtieth Session* pp. 114-115).

THE LAW OF INTERNATIONAL RIVERS

This subject was first taken up by the AALCC at its ninth session (New Delhi 1967) when the delegates of Iraq and Pakistan in their introductory statements indicated the topics and issues which they wished the Committee to consider. After some preliminary discussions at the subsequent sessions, a Sub-Committee was appointed at the twelfth session (Colombo 1971). During the fourteenth session (New Delhi 1973) the Sub-Committee felt in no position to reach conclusions and recommended that the subject be taken up at one of the future sessions of the Committee. When the subject came under discussion at the twenty-third session (Tokyo 1983), the UN International Law Commission had already proceeded with its work on the subject. It was decided that the Secretariat would prepare a preliminary study on a programme of work. The preliminary report was submitted and considered at the twenty-fourth session (Katmandu 1985). It indicated the areas not covered by the work of the ILC where work might be undertaken by the AALCC. Pending a final decision, the Secretariat from 1986 on monitored the progress of work in the ILC. The subject was placed on the agenda of the thirtieth session for full discussion as a result of a Bangladesh proposal, and in spite of an Indian objection, during a meeting of liaison officers.

The Secretariat had submitted a Note on the Law of International Rivers (Doc. AALCC/XXX/Cairo/91/25) which primarily reports on the progress of work in the ILC. However, Chapter III of the Note deals with "Possible work that might be undertaken by the AALCC". It recalls that at the thirteenth session (Lagos 1972) views were expressed that it is difficult to deal with non-navigational uses of international watercourses without taking into account navigation, since the latter affects the quantity or quality of the water available for other uses. In view thereof, the Note mentions navigation, timber floating, development and management of fishery resources and flood control as topics which could be studied by the AALCC.

During the *discussions* (*Report of the Thirtieth Session,* p. 166 et seq.), the *Syrian* delegate said it would be preferable that the sharing of resources be based on the criteria of economic and social requirements of a country instead of on reference to equitable criteria. Consequently, a less developed country should have more rights to the utilization of

resources. The *Egyptian* delegate stressed the desirability of consultation before any project on watercourses were to be implemented. The delegate of *Bangladesh* pointed out that the miseries caused to Bangladesh are due to the acts of the upper riparian states, and suggested that there should be adequate provisions in the law for determination of responsibilities of upper riparian states, and some mechanism to compensate and check interferences with watercourses.

The Committee *decided, inter alia,* that the Secretariat would prepare a detailed analysis of the draft articles adopted by the ILC on first reading (*Report of the Thirtieth Session,* p. 115).

THE LAW OF THE SEA

At the instigation of the AALCC at its twenty-ninth session (Beijing 1990), the Secretariat, jointly with the International Ocean Institute (IOI) and the Law of the Sea Institute (Rhode Island), convened a seminar on "alternative cost-effective models for pioneer co-operation in exploration, technology development and training". At the seminar that was held at the UN Office in New York in August 1990, it was suggested that the AALCC could be instrumental in dispelling the exaggerated scare that had been created concerning the financial burden of state parties to the 1982 Law of the Sea Convention. There was also a widely shared concern about efforts aimed at premature amendment of the Convention even before it would come into force. It was against this backdrop that the Secretariat prepared a study on "The significance and cost of ratification of the Law of the Sea Convention, 1982" (Doc. AALCC/XXX/Cairo/91/7) which served as one of the discussion papers at the thirtieth session of the Committee.

The Secretariat's Note reads, *inter alia*:

"6. It is in vogue today to classify the numerous provisions of the Convention under two broad headings viz., those that are said to have passed into the realm of the customary international law and those that are deemed to be non-customary having been developed and incorporated in the process of negotiations in the UNCLOS III. Such categorization of norms thus, while attractive, is in many respects misleading and could contribute to fragmentation of the Convention. According to this approach, the territorial limits of 12 nautical miles, transit through straits, the 200 nautical mile exclusive economic zone, the regime of continental shelf and the freedom of high seas are now part of customary international law. In this context it is our view that the principle of common heritage of mankind has also entered into the realm of customary international law *due to its nearly universal acceptance.* But without the guarantees provided by the provi-

sions of the Convention each State will be free to interpret these concepts unilaterally, particularly vis-a-vis the States not parties to the Convention."

8. One of the basic canons of interpretations of statutes is the principle that a statute must be read as a whole. The Convention, therefore, must be read as a whole and applied in its entirety. States cannot and should not be allowed or encouraged to pick and choose bits and parts of the provisions of the Convention on the grounds that they have been or have become part of customary international law. It should always be borne in mind that the Convention as a whole is a delicate blend of rights and obligations – and it is common knowledge that all rights are subject to the fulfillment of their concomitant obligations.

11. The crux of the foregoing is that while it is true that the Convention *inter alia* embodies several concepts of customary international law such as those of the territorial seas, contiguous zone, the continental shelf, the regime of the high seas, innocent passage, etc., these have in the process of negotiations undergone significant changes. These concepts can today be, strictly speaking, deemed customary only in that the legal concepts themselves can be traced back to some date or event in the past. In their present content and substance, these concepts differ substantially from their customary counterparts. Besides, the concepts, irrespective of their present day content and substance, the mechanisms and systems incorporated in the Convention of computing for the implementation of some of these 'Customary principles' such as those of territorial waters, contiguous zone, exclusive economic zone and continental shelf are to be found, not in customary law, but in the provisions of the Convention.

12. Thus, claims and determination of the extent of the rights and obligations within these maritime zones and the regime of transit passage are to be found in the provisions of the Convention. Similarly, though the concept of the Exclusive Economic Zone may be deemed to have become part of customary international law, the *details of rights and obligations in it can only be invoked* within the 1982 Convention. As such, ratification of the Convention is a *sine qua non* in the claiming of these maritime zones including the claim and exercise of the right of transit passage. There is no denying in any case that the right of transit passage never has, in the past, been a part of customary international law.

21. As stated earlier, the Convention must be read as a whole and enforced and applied in its entirety as it was adopted. It is therefore necessary to urge all States, who have not already done so, to ratify or accede to the Convention to enable them to claim and exercise the rights stipulated in the Convention. The process of ratification leading to early entry into force would contribute to lending to the Convention the legal and moral authority of the Law which is so necessary to guarantee the rights of developing countries *vis-à-vis* the encroachment from the maritime powers which have in the past been the hallmark of the regime of the oceans.

23. The Secretariat is of the view that in light of the provisions of Resolutions I and II of UNCLOS III, it is neither permissible nor within the mandate of the PREPCOM, as had recently been mooted, to make substantive changes to the 1982 Convention to be incorporated in a protocol which can come into force simultaneously with the Convention. This is not to suggest that the Convention is

sacrosanct and immutable. The Convention itself admits of amendments of the provisions thereof, amongst which are amendments relating exclusively to the activities in the 'Area'. But the procedure for doing so – amending – is very clearly spelt out and can only be applied subsequent to the entry into force of the Convention.

24. It has been argued that the Convention can and must be amended to remove certain reservations of a number of industrialized countries. These reservations relate namely to:

(i) The obligation on the contractors to sell technology to the Authority (Annex II, Article 5 of the Convention);

(ii) The production policy provisions (Article 151 of the Convention);

(iii) A guaranteed seat in the Council for the United States of America (Article 161 of the Convention);

(iv) Decision-making procedures (Article 162 of the Convention); and

(v) The procedure for the adoption of amendments by the Review Conference (Article 155 of the Convention).

26. In some instances, the MARPOL Convention, adopted under the auspices of the International Maritime Organization (IMO), has been cited as a precedent of an international instrument having been amended before its coming into force. This in itself is insufficient justification or rationale for amending the 'Social Contract' for the oceans. Besides, one of the provisions sought to be amended is the very procedure for amendment to be followed by the review Conference which is to be convened 15 years after the commencement of commercial exploitation in accordance with Article 155 of the Convention.

Financial Obligations and Cost of Ratification

30. Many developing countries have been cautioned by some quarters that the accession to or ratification of the Convention would entail colossal increased financial obligations for them. It is important that such misconceptions be clarified and where necessary categorically refuted.

Ratification of the Convention by the developing Coastal States by itself entails and involves no financial obligation on the part of the ratifying States. Any significant financial obligations which may devolve on the States Parties to the Convention would arise only when the deep sea-bed mining arm of the International Seabed Authority – the Enterprise – undertakes a venture for the exploration and exploitation of the polymetallic nodules in the Area.

31. As the Chairman of the Group of 77 observed during the course of the Summer meeting of the Seventh Session of the PREPCOM, a 'false impression has been conveyed and perpetuated, despite repeated statements by Members of the Group of 77 to the contrary, that the Group of 77 contemplated the establishment of a large bureaucratic organization unrelated to the activities which the Authority is legitimately required to perform under the Convention from time to time. *Nothing could be further from the truth. The Group of 77 is desirous of establishing an Authority which would be efficient and cost effective, the size of which would be no*

larger or smaller than is required to enable the Authority to carry out its functions efficiently.'

32. It is now generally accepted that such an undertaking or venture is not likely in the foreseeable future. It should also be pointed out that there is nothing in the Convention which obligates States Parties to the Convention to bring into being the entire machinery and bureaucracy foreseen in Part XI on the exploration and exploitation of the Area of the Convention before commencement of commercial exploitation. A modest Secretariat, such as the one already existing within the United Nations Secretariat, could be charged with the necessary functions of implementing whatever needs to be done before the Enterprise becomes fully operational.

34. Therefore, pending such time until the entire machinery as envisaged in the Convention is actually established, the developing States of Asia and Africa need have no reason to worry with respect to increased financial obligations.

37. Insofar as implementation involves a range of activities to be undertaken by a government, certain costs are involved, such as the allocation of human resources, funds and other material resources, and time. For instance, in the case of zones of national jurisdiction, insofar as the conservation of living resources and marine environment protection are concerned, the measures which a coastal State is required to take are, at a minimum, of a scientific, legislative, administrative and judicial nature, including surveillance and monitoring. Every single one of these measures entails economic costs. In the case of small States, these costs can be reduced through regional co-operation."

[The Note refers in its paragraphs 35 and 38-43 to a study of the costs of ratification of the Convention made by the International Ocean Institute, and to a background note by the UN Office on the Law of the Sea and Ocean Affairs on the administrative arrangements, structure and financial implications of the International Seabed Authority.]

44. From the foregoing, the cost of ratification would not be of the astronomical proportions that it has been made to sound, and the cost for most developing countries is likely to range between US$2,000 and US$8,000, depending on the policy choices made. Clearly, joint ventures would also significantly help in reducing the costs and in promoting economy and minimizing financial obligations of States."

As to the concern about the efforts to amend the 1982 Convention on the Law of the Sea even before its entry into force, the Secretary General of the AALCC devoted part of his statement at the meeting of the eighth session of the Preparatory Commission [for the International Seabed Authority and for the International Tribunal for the Law of the Sea] in August 1990. He stated *inter alia:*

"I am dismayed at the efforts in some quarters to amend the Convention – even before it has entered into force. You can well appreciate the feeling of frustration and betrayal that the developing countries and almost all the members of the

AALCC nurse at the reluctance on the part of the industrialized countries to ratify the Convention or become bound by it, despite all the concessions made at the Conference to accommodate their then expressed concerns. Those who have hitherto advocated and lobbied for premature amendment of the LOS Convention have not only ignored the feelings and aspirations of the peoples of the developing countries in general, and of the peoples of the States members of the AALCC, but have come perilously close to stultifying and trampling upon those aspirations.

Mr. Chairman, the proponents of the 'amendment of the Convention before its enforcement', to coin a phrase, forget first and foremost that the new order of the Seas is but one component of the New International Legal Order. We at the Secretariat of the AALCC are of the firm conviction that not only is the principle of the Common Heritage of Mankind a necessary element of the new Legal Order for the Seas and Oceans but also is a part and parcel of contemporary international legal order. Besides, the international community has to progressively develop and codify the principles and rules of other sub-legal orders as that of the New International Economic Order (NIEO); New Environmental Order (NEO); and the like.

We, in the developing countries, have good reasons and grounds for opposing any premature amendments. The Secretariat of the AALCC is of the view that in light of the provisions of Resolutions I and II of UNCLOS III, it is neither permissible nor within the mandate of the PREPCOM to, as has been recently mooted, make substantive changes to the 1982 Convention to be incorporated in a protocol which can come into force simultaneously with the Convention. This is not to say that the Convention is sacrosanct and immutable. The Convention itself admits of amendments of the provisions thereof amongst which are amendments relating to the provisions of the Convention relating to activities in the Area in Part XI. But the procedure for doing so is very clearly spelt out.

Mr. Chairman, the AALCC is of the view that it is a misconception that the LOS Convention, 1982, can and must be amended to do away with and remove certain reservations of a number of industrialized countries. The importance of a globally binding Law of the Sea Convention to the entire international community has always been the underlying basis of the unique, and in many ways, peculiar negotiating procedures which characterized the Third United Nations Conference on the Law of the Sea. If it were a question of necessary majorities, the Group of 77 – the developing countries – could have wrapped up the Convention in 1974 in Caracas. But realizing the need for a consensus, comprehensive package deal convention, they seriously engaged in evolving compromise solutions with the maritime powers and other industrialized countries, and the result was the 1982 Convention. This convention indeed involved numerous concessions from the developing countries to meet the then expressed fears and concerns of the developed countries.

In the view of the Secretariat of the AALCC, nothing new has emerged since 1982 to justify further tinkering with the above provisions.

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(Doc. AALCC/XXX/Cairo/91/6)

A second Secretariat Note prepared for the thirtieth session dealt with "Matters relatable to the work of the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea" (Doc. AALCC/XXX/Cairo/91/6). The item had been on the agenda since the twenty-fourth session (Katmandu 1985) of the Committee. The Note in essence contained a brief report on the progress of work in the PrepCom during its eighth and resumed eighth session (March and August 1990).

In the *discussions* (*Report of the Thirtieth Session,* pp. 227-247) the delegate of *Sri Lanka* said that besides the financial consequences there is also the question of implementing national legislation that together generally delay the process of ratification of international conventions. The delegate of *Kenya*, while observing that a number of developing countries had begun to lose interest in the work of the PrepCom, cautioned that unless the developing countries continue to actively participate in its work, whatever concessions and benefits the UN Convention of the Law of the Sea, 1982 offered to the developing countries might be lost.

The Committee finally took, *inter alia,* the following *decisions*:

– Urges the Secretariat to continue its efforts to ensure the entry into force of the Convention at an early date, particularly by Member States of the Committee.

– Urges the full and effective participation of the Member States in the PrepCom so as to ensure the safeguarding of the interests of the developing countries.

– Rejects all efforts aimed at effecting a premature amendment of the Convention (*Report of the Thirtieth Session,* p. 112-113).

LEGAL CRITERIA FOR THE DISTINCTION BETWEEN TERRORISM AND PEOPLE'S STRUGGLE FOR LIBERATION

The item was introduced by Syria during the twenty-seventh session (Singapore 1988) of the AALCC. Keeping in mind that the Committee should not duplicate the work already being done by the UN General Assembly's Sixth (Legal) Committee, the Secretariat prepared a preliminary study on the matter (Doc. AALCC/XXVIII/89/14).

The thirtieth session of the Committee had before it a Note prepared by the Secretariat recapitulating the activities undertaken by the UN, the Non-Aligned Movement, and the AALCC itself in the past few years (Doc. AALCC/XXX/Cairo/91/10).

Among the UN activities, the Note referred to the inclusion of the item in the provisional agenda of the 46th session of the UN General Assembly

(1991), and the adoption of the General Assembly resolution 44/29 of 4 December 1989 which called for an international conference on the subject under UN auspices. According to its name, the resolution concerned "Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedom, and the study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes".

The Note recalled the preliminary study of the AALCC Secretariat referred to earlier, and quoted the draft definition of terrorism in that study:

> "...[a] violent act or acts, [or] attempts of such acts, perpetrated by States, or individuals, or groups of individuals, against innocent civilians or nationals of States not involved in an on-going conflict, calculated to cause fear and panic to coerce a state or an institution to conform to a course of conduct dictated by political consideration of the perpetrators."

In the *discussion* during the thirtieth session (*Report of the Thirtieth Session*, p. 251 et seq.) emphasis was laid by the delegate of *Syria* on the distinction between individual and state terrorism on the one hand, and the distinction between terrorism and people's struggle for liberation and self-determination, on the other hand. The delegate of *India* felt that it would be difficult to apply the definition of terrorism enunciated in the AALCC study uniformly at this stage. Against the background of the Gulf crisis, the delegate of *Jordan* focused on the question of the threat of terrorism by the big countries on the small countries. The delegate of *Libya* also referred to this kind of terrorism, recalled the American bombing of Libya in 1986 and the American aggression against Panama and Grenada, and stated that the freezing of Libyan assets in American banks is illegal and could be considered as a form of terrorism. The delegate of *Saudi Arabia* referred to activities of some organizations indulging in terrorist activities, denigrating the credibility of genuine liberation movements. According to him, it would be difficult to define terrorism as it would be necessary to draw a clear-cut distinction between legitimate use of force and terrorism. He noted that the Secretariat's (preliminary) study overlooked the legal criteria relating to the use of force and deterrent activities which are legally accepted and which are enshrined in the UN Charter.

In taking *decisions*, the Committee *inter alia* directed the Secretariat to update its study and recommended the convening of an inter-sessional

meeting to finalize the study on the topic (*Report of the Thirtieth Session*, p.116).

DEPORTATION OF PALESTINIANS IN VIOLATION OF INTERNATIONAL LAW, PARTICULARLY THE GENEVA CONVENTIONS OF 1949

The subject was first taken up by the AALCC consequent to a reference made by Iran at the twenty-seventh session (Singapore 1988), under the heading "Deportation of Palestinians in violation of international law, particularly the Geneva Conventions of 1949". A preliminary study was prepared by the Secretariat and considered at the twenty-eighth session (Nairobi 1989). The Secretariat prepared a brief for the twenty-ninth session (Beijing 1990) in which it endeavoured to establish that payment of compensation for deportation is both a matter of the customary international law of state responsibility as well as an explicit stipulation of contemporary conventional international humanitarian law. During the twenty-ninth session, the discussion on the subject by and large revolved around the massive immigration of Jews from the Soviet Union and the Israeli practice of settlement of the Jews in occupied Palestinian territories.

The brief prepared by the Secretariat for the thirtieth session is an updated version of the one prepared for the twenty-ninth session and carries the title: "Deportation of Palestinians in violation of international law, particularly the Geneva Conventions of 1949, and the massive immigration and settlement of Jews for the Soviet Union in the occupied territories" (Doc. AALCC/XXX/91/Cairo/11). The brief examined the Israeli settlement policy in occupied territories as well as the question of massive emigration of Jews to Israel, and the question of the right to return of the Palestinian people to their home and hearth.

At the end of the discussion (*Report of the Thirtieth Session*, pp. 195-202), the Committee *decided, inter alia*, to include the subject in the agenda of the next session, and *requested* the Secretary-General to continue to monitor the events and developments in the occupied territories of Palestine (ibid., p. 115-116).

TRANSBOUNDARY MOVEMENT OF HAZARDOUS WASTES AND THEIR DISPOSAL[1]

During the twenty-eighth session (Nairobi 1989), it was strongly felt that the AALCC should play an active role on the question of the control and the disposal of hazardous wastes in the territories of member states, and in that connection the Secretary-General was directed to participate in the Conference on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes in Basel, March 1989. A brief analytical review of the convention was prepared by the Secretariat (Doc. AALCC/XXIX/90/2) and considered at the Legal Advisers Meeting in October 1989 (report of the meeting in Doc. AALCC/XXIX/90/2), and a report was made by the Secretary-General on his participation in the OAU Group of Legal and Technical Experts (Doc. AALCC/XXIX/90/2A) which drafted what was eventually to become the OAU Convention on the Ban of Import into Africa and the Control of Transboundary Movement of Hazardous Wastes within Africa (Bamako, 30 January 1991, text in Doc. AALCC/XXX/Cairo/91/3A/Revision). Meanwhile a UNEP Ad Hoc Working Group of legal and technical experts had started preparing a draft-protocol to complement the Basel Convention with rules and procedures in the field of liability and compensation for damage resulting from transboundary movement and disposal of hazardous and other wastes. The Working Group met in July 1990 and March 1991 and produced a report. This report is annexed to the Secretary-General's report on his participation in the second meeting of the UNEP Working Group (Doc. AALCC/XXX/Cairo/91/27). Finally the thirtieth session of the AALCC had at its disposal a Secretariat's note on the subject (Doc. AALCC/XXX/Cairo/91/3).

The Note recalls that the Basel Convention was signed by only 35 out of the 110 participating states at the conference, and that the majority of the AALCC member states favour the banning of the traffic of hazardous wastes, while the Basel Convention aims at regulating rather than banning movement from one jurisdiction to another. Further it does not address itself to possible transfer or transit problems across borders or to the marine environment. The Note recalls that the Committee in its twenty-ninth session (Beijing 1990) had urged the Secretariat "to co-operate in the formulation of regional and sub-regional conventions on banning the dumping of toxic and other wastes" and "to make a study on co-operation between Asian and African countries to ban the dumping of

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1. At the seventh plenary meeting of the thirtieth session this agenda item was discussed together with the item "Preparations for the United Nations Conference on Environment and Development", *see Report of the Thirtieth Session,* p.203 et seq.

toxic and other wastes into their countries". It then proceeds by offering an analysis of the (then draft) OAU Convention. The Note concludes:

"The African Convention does not signify the rejection of the Basel Convention. Rather it manifests an instance of multilateral, regional agreement and arrangement which Article 15 of the Basel Convention envisages and provides for. The OAU Convention is, however, broad enough to be implemented within the region independently of the Basel Convention. The OAU Convention may therefore be seen as an outline for planning similar international instruments by such other regional organizations as the ACP, ASEAN, Gulf Co-operation Council, SAARC, South Pacific Forum and others.

The draft Convention most clearly complements and supplements the Basel Convention, which instrument in the opinion of the AALCC Secretariat should continue to be viewed as a useful instrument in the endeavours to control the consequences of transboundary movement and disposal of hazardous wastes at the global level.

The conclusion, adoption and ratification of the African Convention, or such other regional instruments as may be drawn and ratified would not preclude the ratification of the global Convention. The ratification of the two Conventions – global and regional – must be seen as complementary for they are sub-systems of the larger universal system of environmental protection and preservation."

During the *discussions* at the plenary meeting (*Report of the Thirtieth Session,* p. 203 et seq.), the *Turkish* delegate noticed that under the Bamako Convention, in contradistinction to the Basel Convention, the dumping of hazardous wastes is accepted to be a form of "illegal traffic" and its control will have to be consistent with the international conventions concerning dumping. He also drew special attention to the data pool that is to be set up by the OAU Secretariat under Article 13 of the Convention which is evaluated by the delegate as a most advanced contribution of the African Convention. The delegate of *Egypt* pointed out that with the adoption of the Bamako Convention, the ratification of the Basel Convention needed to be considered, and the African states could now place some reliance on the provisions of Articles 4 (General obligations) and 13 (Transmission of information) of the Basel Convention.

In its *decisions* at the end of the discussions, the Committee *urged* member states concerned to consider ratifying the Bamako Convention and the Basel Convention (*Report of the Thirtieth Session*, p. 113-114).

PREPARATION FOR THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT

The topic of Environmental Protection has been under consideration of the Committee for the past 15 years. After a preliminary exchange of views at the Committee's sessions held in Tehran (1975), Kuala Lumpur (1976), Baghdad (1977) and Doha (1978), an Expert Group Meeting was convened in New Delhi in December 1978. The Expert Group identified the areas and issues where efforts were most needed for protection of the environment especially in the developing countries of the Asian-African region. It drew up a programme of work, which could be usefully undertaken by the Committee to assist its member governments. At its Seoul Session, held in 1979, the Committee while endorsing the recommendations of the Expert Group, decided that in view of the vastness of the areas to be covered, the work should be undertaken in stages.

Following the decision of the Seoul Session, another Expert Group Meeting was convened in December 1979 which recommended that priority should be given to the question of protection of the marine environment. At the Jakarta Session held in 1980, views were expressed that the Committee's work should be so organized as to complement and harmonize the work of the organizations engaged in this field and thus avoid duplication. The Colombo Session held in 1981 specifically recommended that the Committee should accord priority to two matters, namely: (i) Promotion of ratification of or accession to some of the major conventions in the field of marine environment, and (ii) Regional seas programmes co-ordinated by the UNEP which were relatable to the Asian-African region.

At an Expert Group Meeting of the AALCC held in July 1982, the focus of deliberations was on the IMO Conventions dealing with marine pollution control. This was followed by further consultation in Jakarta in 1984 specifically on the International Convention on Civil Liability for Oil Pollution Damage (CLC Convention) 1969 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (Fund Convention). The Jakarta Meeting was devoted to considering the revision of both the Conventions as contemplated under the IMO auspices.

At the Arusha Session held in 1986, the topic was discussed in conjunction with the item of Nuclear Free Zone in Africa. During the Bangkok Session (1987), the Committee considered two draft IMO Conventions, one on salvage and the other on liability and compensation arising in connection with the carriage of hazardous and noxious substances by sea (HNS Convention).

Following a decision taken at the twenty-eighth session of the Committee held at Nairobi in 1989, an item "Transboundary Movement of Hazardous Wastes and Their Disposal" was included in the work programme of the Committee.

At the Beijing Session, in the course of the discussions on this topic, it was recommended that the Committee should actively participate in the work of the United Nations Conference on the Environment and Development which is scheduled to be held in Brazil in 1992. The AALCC's Permanent Observer at New York attended the organizational session of the Preparatory Committee of the United Nations Conference on Environment and Development held in New York in March 1990. The Secretary-General participated at the first substantive session of the Preparatory Committee convened in Nairobi from 6th to 21st August 1990 and also attended the subsequent sessions. The AALCC was also represented at the ESCAP Ministerial Level Conference on Environment and Development in Asia and the Pacific held in Bangkok in October 1990.

The thirtieth session of the AALCC had two documents on the agenda item at its disposal. The first Secretariat Note, "Preparation for the United Nations Conference on Environment and Development" was presented together with a report of the first substantive session of the Preparatory Committee for the UNCED, a report of the Group of Legal Experts meeting (under UNEP auspices) to examine the implications of the concept of "common concern of mankind" on global environmental issues, at Malta, December 1990, and a report on AALCC participation at the ESCAP ministerial level conference at Bangkok, 16 October 1990 (Doc. AALCC/XXX/Cairo/91/2).

With regard to the preparation of a framework convention of climate change, the Secretariat's Note stated, *inter alia*:

> "In the opinion of the Secretariat of the AALCC, States have a duty to prevent any change in the climate and must desist from introducing any matter – solid, liquid or gaseous – which could result in a change of the environment. Similarly, it is the duty of every State to take remedial steps towards the reversal of damage to the environment already caused, so as to prevent climate change. It is imperative that a delicate and fragile matter of "common concern of mankind" be governed by rules of strict and absolute liability and not be left to amorphous norms of moral obligation.
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> .....
>
> The industrialized world is primarily responsible for the production of greenhouse gases
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> .....
>
> Unlike the distribution of responsibility for greenhouse gases, the distribution of impacts from greenhouse warming will be global in extent and delayed in time.

.....

There is thus a need to forge, develop and strengthen international co-operation to protect global climate, as it involves all States. The developed countries, in particular, cannot wish or shy away their obligations to render assistance to the developing countries in the safeguarding and prevention of climate change. The developed countries have both a moral and a legal obligation to render such assistance as transfer of clean technologies at affordable prices to the developing countries because none can deny that the roots of the current concern lie in the industrial technologies and current practices of the developed States.

.....

The development of international co-operation and the rendering of assistance to the developing countries by the industrialized States, as an obligation, derives also from the obligation of the international community to assist. The developed countries must assist developing countries not only in preventing irreversible changes to global climate but also in adopting and taking remedial measures including the identification and enforcement of legal principles.

....."

The second document before the thirtieth session consisted of (1) a report of the Secretary-General on the second meeting of the Group of Legal Experts on the implications of the "common concern of mankind" concept, (2) a report of the Secretary-General on the second session of the UNCED PrepCom, and (3) a Note of the Secretary-General on the UNCED (Doc. AALCC/XXX/Cairo/91/12A).

The Note of the Secretary-General, written on the recommendation of a Legal Advisers Meeting in New York in October 1990 to the effect that the AALCC Secretariat should assist the member states in enabling them to participate actively and effectively in the proposed UN Conference, contained the following passages:

" 7. The nexus between development and environment is now well recognized and accepted. Development, or lack of it, and environmental degradation bear a cause effect relationship which are a matter of concern for both – the developed and the developing countries alike. In the industrialized countries, on the one hand, the major cause of the continuing deterioration of the global environment is the unsustainable pattern of production and consumption. On the other hand, the developing countries are faced with the Gordian knot of poverty, contributing to the severe degradation of the environment.

14. The chief objective of the proposed "Social Contract" for Environment and Development would be to ensure that economic, social, scientific and technological development should not be at the cost of a steady and progressive degradation of the environment and the inalienable human right of development should not be exercised at the expense of an equally fundamental human right to a clean and salubrious environment.

15. A focused enquiry into the rights and duties of States – or an environmental code of conduct – implies an examination of the concept of sovereignty and its attributes. Hitherto, the concept of sovereignty has, in certain instances, proved to be as much of a bane as it has been a boon. In the context of the environment and development, States would require, in the interest of inter-generation equity, to subordinate their sovereignty in favour of the common good of all mankind.

16. Contemporary international law while recognizing the sovereign right of States to explore and exploit their natural resources pursuant to their social, economic and development policies, requires/obligates them to ensure that the activities within their jurisdictions or control do not degrade the environment of other States or of areas beyond the limits of national jurisdictions – the global commons.

17. The attainment of sustainable development would require the environmental policies of States to be based on the preventive or precautionary principles. States would have the duty to protect and preserve the environment and be obligated to ensure that their development policies in the fields of industry, agriculture, shipping, tourism, urban development, etc. do not cause likely damage to the environment in the future. In this, the burden will, most certainly, be heavier on the developing countries who may want or be required to preserve and safeguard the pristine environment of certain areas within their jurisdiction and control. It is for consideration whether developing countries which may be required to protect and preserve the pristine environment of certain areas and parcels of land, must not be assured of adequate assistance – both material and technical – and co-operation from their fellow members of the international community. It may be stated that it is important to view this not in the context of existing developmental aid, but in the context of discharging mutual common responsibility.

18. Preventive, or precautionary, international action as a strategy for protection of the environment would need to be supplemented by responsive action to deal with existing or expected danger. The threat posed by the depletion of the ozone layer and the objective of conserving the biodiversity of the planet, for example, would require responsive or restorative measures to be adopted. The preservation, for all the peoples of spaceship earth, and for the future generations of a world no less habitable, would require the international community to make available to the developing countries clean production methods and technology suited to environmentally sound management of wastes at affordable costs and allied technical knowhow. The responsibilities of large industrial houses, in particular, the multinational corporations who are the main repositories of technical skills required for the preservation and restoration of the environment must be considered.

19. The question of transferring and making available the requisite technology to the developing countries would involve just more than transferring or licensing of intellectual property rights. Here too there is conflict of interests, for while the developing countries and environmentally sound management of wastes should be transferred cost-free, the private enterprises in whom the rights to such intellectual property rest, are reluctant to do so.

20. The question is whether an international institution specifically mandated to oversee, coordinate and implement the principles and programmes of the proposed Charter of Nature would need to be created/established or whether existing ones are adequate. The Secretariat of the AALCC is of the view that the common interest in the preservation of the environment would need for its fulfilment the creation of new bodies both multinationally on a global scale, and regionally not only for the supervision and coordination of the implementation of the policies and principles of conduct endorsed by the UN Conference on Environment and Development but also for the future formulation of rules of conduct relating to the protection of preservation of the environment and enforcement thereof. Such new institutions need not create any huge new bureaucracies as they should neither supplant nor encroach upon the mandate of existing institutions.

21. Having said that, it may be necessary to say a few words about the composition of the proposed body of persons. It is a matter of consideration whether the international multilateral institution to be established should be of the nature of a 'World Assembly on Nature and Environment' or be a representative group of legal and technical experts drawn and elected from the various regions of the globe so as to ensure equitable geographical distribution.

22. A Code of Conduct aimed at ensuring that future development is environmentally benign would be incomplete if it did not address itself to the question of international funding mechanisms in order to reconcile the developing world's need for continuing development with the global need to protect and preserve the earth's environment. This body may consider establishing a World Environment Fund. It may be stated in this regard that without substantial funding and effective technology transfer from developed countries to developing countries, reconciliation of conflicting interests and forging international co-operation will be difficult to accomplish. Developing nations are not inclined to defer development in the face of predictions of environmental threats, since they know that it is the developed countries that have been and continue to be the prime authors of the environmental degradation including the climate change. Their own populations are now entitled to the benefits of development and the wealthy developed world, the major contributors to the greenhouse effect, should pay the due share to ensure that their own development is environmentally benign. The establishment and operation of a World Environment Fund and the initial substantive contributions which may be required by the prime authors of environmental degradation need to be considered.

23. Realistic and practical solutions are urgently required in the creation of such an Environmental Fund. Mention has been made on tax to be levied on polluting industries and activities. Consideration needs to be given to converting some or all of the debts owed by the developing countries to Environmental Bonds, to be utilized in the countries concerned solely on environmental projects.

24. The future may well witness a need for the working out of mechanisms for assessing State liability for damage to the environment, whether domestic or in the global commons, with questions arising about the enforcement of payment, the character of the recipients of compensation and the mode of application of compensation received. Each of these issues would be complex and require multi-

disciplinary skills for their resolution. An allied issuewould be that of settlement of disputes. The Working Group would need to inquire into these and other related matters." [2]

In introducing the subject at the plenary meeting during the thirtieth session of the Committee *(Report of the Thirtieth Session*, p. 203 et seq.), the Secretary-General made a statement in which parts of the Note referred to above were repeated. He also said that:

"The Secretariat of the AALCC is of the view that the PrepCom of the UNCED should avoid the proliferation of new conventions without making concrete arrangements for their realistic implementation."

When envisaging the possible desirability of establishing a new institution, he suggested that "since the UN Trusteeship Council has almost completed its task, it could be transformed and restructured as a global forum for policy formulation as well as coordinating the activities of development and environment now being performed by several UN agencies."

As to the question of how the vicious circle of poverty and destruction of the environment could be broken, the *Japanese* delegate said that, "by expanding the assistance of developed countries in the financial, technical and personnel fields, this task is not insurmountable." In order to facilitate transfer of technology to the developing countries in the environment field, Japan has been positively promoting the idea of establishing the UNEP Technological Centre for the Global Environment in Japan. According to the delegate of *Iran*, the 1992 Conference should not put any obstacles in the way of economic growth and development of the developing countries who are facing serious difficulties in servicing their external debt, unfair terms of trade and other similar problems. The *Chinese* delegate said that as far as the developing countries in the Asian-African region are concerned, most environmental problems stem from underdevelopment. The delegate of the *Republic of Korea* referred specifically to those developing countries which are beginning to make significant progress in the process of industrialization, as they are expected to face double difficulties as a result of growing restrictions by the environmental legislations. The delegate of *Libya* found that the large naval fleets of super powers in the Mediterranean Sea also play havoc with the marine environment.

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2. Most of the passages of the Secretary-General's Note quoted here coincide with passages in the Statement made by the Secretary General in Working Group III of the UNCED Preparatory Committee on 3 April 1991. The text of this Statement is also included in Doc. AALCC/XXX/Cairo/91/12A.

The Committee *decided* at the end of the discussion, *inter alia*, to convene an inter-sessional meeting at ministerial level to consider subject matters relating to the UN Conference on Environment and Development (*Report of the Thirtieth Session*, p. 114).

UNITED NATIONS DECADE OF INTERNATIONAL LAW

Consequent to resolution 44/23 of 17 November 1989, of the UN General Assembly, declaring the Decade, the item was inscribed on the agenda of the twenty-ninth session (Beijing 1990) of the Committee. At that session, the Committee considered a preliminary note submitted by the Secretary-General (Doc. AALCC/XXIX/90/24) and mandated the preparation of a more comprehensive study. In fulfilment of that mandate, the Secretariat updated the preliminary Note, which was then forwarded to the UN Secretary-General by way of reply to the latter's request for the views of the AALCC. The updated note may be seen as the initial proposal of the AALCC on the Decade. It spells out the role which the AALCC could play during the decade in respect to the four elements which the UN General Assembly had identified (promote acceptance of and respect for the principles of international law; promote means and methods for the peaceful settlement of disputes; encourage the progressive development and codification of international law; encourage the teaching, study, dissemination and wider application). This "updated note" was presented as an annex to a new Secretary-General's Note which was submitted for consideration by the thirtieth session of the AALCC (Doc. AALCC/XXX/Cairo/91/4, with Annexes). The main part of this Note furnished an overview of the views expressed at the twenty-ninth session and enumerated some initiatives undertaken by the Secretariat.

The "updated note" contains, *inter alia*, the following suggestions:

(1) Member states which have not already done so, might consider ratifying or acceding to multilateral codification conventions.

(2) Member states, while declaring their willingness to be bound by the provisions of an international instrument, might simultaneously take steps to ensure its enforcement as part of the law of the land. This would help put an end to the time-long debate on the question of primacy of municipal law vis-a-vis international law.

(3) Member states might consider strengthening and fortifying the role of international law by abiding by the principle of *pacta sunt servanda*.

(4) Member states might consider instituting international law fellowships as part of the programme of Technical Co-operation among Developing Countries (TCDC).

(5) Member states having a separate "Legal and Treaties Division" might consider providing "in-house" training to junior and medium ranking officials of fellow member states who are in the process of developing and establishing such a division.

(6) Member states and the UN might consider contributing material and human resources to, and being affiliated with, the training programme of the (AALCC) Secretariat.

(7) The Secretariat could liaise with the UN and its specialized agencies in convening meetings in the Afro-Asian region on various international law themes, which meetings could contribute to the promotion of the acceptance and respect for the principles of international law.

(8) The Secretariat endorses the view expressed at the 44th session of the UN General Assembly that an international convention on the peaceful settlement of disputes be drawn up, embodying the full range of legal obligations from conflict prevention, direct negotiation, and reporting to the UN organs, to third party adjudication and binding decisions.

During the discussions at the plenary meetings of the Committee's thirtieth session (*Report of the Thirtieth Session*, p. 171 et seq.), the delegate of *China* said the Chinese government believed that the study and scientific cognition of the role, status and effect of developing countries in contemporary international law will be conducive to enhancing the understanding of international law itself. He proposed the consideration of the possibility of adopting a "Declaration on Principles of International Law concerning Peace and Development" in which the five Principles of Peaceful Coexistence and the ten Principles of the Bandung Conference should constitute an important component. Among the initial considerations of the Chinese government on strengthening the role of the International Court of Justice, the delegate mentioned that a wider resort to the ICJ for advisory jurisdiction should be encouraged, and the appropriate use of *ad hoc* chambers of the Court should be encouraged.

The delegate of *Iran* referred to the growing conviction among states that in a highly interdependent world everyone's interests are best served by a more principled just and orderly international system based on law. Pointing out the importance of the newly independent states of Asia and Africa in the law-making process he emphasized that the Third World states did not press for radical changes in international law but sought its re-examination and codification with their participation. Unfortunately their efforts to change some aspects of international law have not yet proved successful.

According to the delegate of *Sri Lanka* the current international political environment demanded the focus of the Decade to be on the promotions of peaceful settlement of disputes. The formulations of specific legal

obligations on peaceful settlement, including the identifications and prevention of disputes and interim measures for their containment would contribute to preventing the escalation into major international conflicts of disputes of a local character amenable to peaceful settlement through negotiation and compromise. The nucleus of a proposed convention was contained in the Manila Declaration on the Peaceful Settlement of International Disputes.

The *Japanese* delegate was convinced of the great significance for the United Nations as a whole to promote the rule of law by focusing on, and setting as theses of the Decade, "the teaching, study, dissemination and wider appreciations of international law" and the peaceful settlement of disputes. Although there are but a few cases in which an individual can be a subject of international law, nevertheless in promoting respect for international law by states, it is essential to enhance understanding of the importance of respect for international law with respect to the nationals of states. In strengthening public awareness and understanding of the UN Charter which contains the most fundamental international principles governing international society, he proposed that the UN should produce a manual on fundamental points of international law.

The *Indonesian* delegate proposed that the AALCC should consider expanding its work on the subject of codification and progressive development of international law, and endeavour to codify regional customary and treaty law. He proposed a review of the existing principles with a view to building upon the principles adopted by the Bandung Conference.

The delegate of *Kenya* advocated the adoptions of a conceptual approach, and argued that the Decade and its objectives must be evaluated in the context of existing imbalances among the members of the international community.

At the end of the discussions the Committee *decided, inter alia,* to direct the Secretariat to continue its efforts towards its contributions to the success of the UN Decade of International Law.

SUB-COMMITTEE ON INTERNATIONAL TRADE LAW MATTERS

The Sub-Committee held meetings during the thirtieth session of the Committee. After discussing the Secretariat report on "Legislative activities of the United Nations and other international organizations concerned with international trade law" (Doc. AALCC/XXX/Cairo/91/16) the Sub-Committee directed the Secretariat also to focus its attention on the work of the UNCTAD in the field of international shipping legislations, and to prepare analytical studies.

The second item taken up by the Sub-Committee was the draft "Guide on legal Aspects of Industrial Joint Ventures in Asia and Africa" (Doc. AALCC/XXX/Cairo/91/18) prepared by the Secretariat. The Guide includes in its last chapter (V) the prototype structure of a joint venture contract along with the necessary guidelines as to the provisions that should be included in the joint venture contract and related agreements. The Sub-Committee decided to adopt the Guide in its present form (*Report of the Thirtieth Session*, p. 100).

HEADQUARTERS AGREEMENT[3]

During the discussions among the Heads of delegation the *Indian* delegate confirmed that the Indian government had issued a notification under which diplomatic privileges and immunities applicable to the Secretary-General, Deputy Secretaries-General and Assistant Secretaries-General of the AALCC have been provided for. With respect to the only outstanding issue, the premises for the Committee Headquarters, he stated that his government might consider allocating land for the premises but the cost of the construction of the building would have to be borne by the Committee.

The Committee mandated the Secretary-General to pursue the matter with the Indian government and report back to the thirty-first session.

RESEARCH AND DEVELOPMENT OF LEGAL REGIMES APPLICABLE TO ECONOMIC ACTIVITIES IN DEVELOPING COUNTRIES

At the twenty-eighth session (Nairobi 1989) of the Committee the South Korean delegate suggested that the AALCC should formulate and carry out a comprehensive strategy to promote finance, trade, technology and industrial growth in the Afro-Asian region through research and exchange of information on the legal regimes and practices of the countries concerned in the economic fields. He felt it would be desirable to establish a Centre for Research and Development of Legal Regimes applicable to Economic Activities and Changing Situations of the Asian-African Countries and offered the collaboration of his government.

At the Nairobi session the Committee authorized the Secretary-General to appoint a consultant to prepare a feasibility study. Professor K.

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3. This and the following items were not subjects of discussion in the plenary meetings of the thirtieth session of the Committee.

Sono (Japan) was thereupon appointed consultant. At the twenty-ninth session (Beijing 1990) the Committee discussed the topic on the basis of the preliminary report from the consultant. At the end of the deliberations the Committee decided, *inter alia*, that the Secretariat should submit a study on the ways and means of concretizing the ideas in the South Korean proposal. The relevant report from the Secretary-General (Doc. AALCC/XXX/Cairo/91/17) was submitted for discussions at the thirtieth session of the Committee. In his report the Secretary General saw the establishment of the proposed Centre as an ideal long-term objective because such a project would require not only substantial finance but preparations of considerable groundwork and development of a certain degree of expertise. The report therefore suggested that as a first practical step towards implementing the aforesaid objective, the AALCC should set up a data collecting unit as an integral part of the Secretariat.

At the thirtieth session the *South Korean* delegate informed the Korean willingness to finance the initial cost of establishing a data collecting unit, but the running cost would have to be made from the regular budget of the Committee.

The Committee directed the Secretariat to furnish further detailed information on the financial implications to the Committee of running such a Centre.

INDIAN OCEAN AS A ZONE OF PEACE

This topic was inscribed on the Committee's agenda at the twenty-eighth session (Nairobi 1989). A preliminary study that was prepared by the Secretariat focused on the work of the UN *Ad Hoc* Committee on the Indian Ocean (Doc AALCC/XXIX/90/7) but no detailed discussion was devoted to the subject at the twenty-ninth session (Beijing 1990). The Secretariat updated its study for discussion at the thirtieth session (Doc. AALCC/XXX/Cairo/91/15).

Meanwhile there has been a continuing deadlock in the work of the UN *Ad Hoc* Committee since the withdrawal of the US, the UK, France and some other Western States from that Committee. Consequently the

AALCC *decided* in its thirtieth session to defer consideration of the item (*Report of the Thirtieth Session* p. 106).[4]

DEBT BURDEN OF DEVELOPING COUNTRIES

The item has been on the agenda of the Committee since its twenty-fourth session (Kathmandu 1985). During the succeeding years the matter was under consideration by an Expert Group Meeting at New Delhi (November 1986) as well as by the successive sessions of the Committee. Among the studies produced by the Secretariat was "Legal Aspects of the International Loan Agreements" (Doc. AALCC/XXVIII/88/9-A). At the request of the twenty-eighth session (Nairobi 1989) the Secretariat prepared a preliminary study dealing with the legal aspects of rescheduling of loans and debt relief with a view to formulating workable legal guidelines (Doc. AALCC/XXIX/90/12), and at the request of the twenty-ninth session (Beijing 1990) the Secretariat updated the study and commenced the formulation of a set of legal guidelines (Doc. AALCC/XXX/Cairo/91/14). Chapter II of the study deals with various aspects of rescheduling (Definitions; Evolution; Imminent Default; Adjustment programme with the IMF), Chapter III describes the rescheduling agreements, and Chapter IV offers legal guidelines for rescheduling. This chapter presents a brief account of the various steps to be taken while rescheduling or renegotiating debts, specially keeping in view the interests of developing countries. This account reads as follows:

"A. First of all, the sovereign debtors may consider the necessity for employing an expert legal counsel to assist in the preparation of a renegotiating/rescheduling plan. Such a decision may be necessary on the following counts: (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.

B.(i) 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. (There are, however, going

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4. *See*, for the UN Declaration of the Indian Ocean as a Zone of Peace, GA res. 2832 (XXVI) of 16 Dec. 1971, and subsequent resolutions as referred to in UN doc. A/RES/45/77. *See also*: report of the Meeting of the Littoral and Hinterland States of the Indian Ocean, UN doc. A/34/45 and Corr. 1; and the report of the *Ad Hoc* Committee on the Indian Ocean, GAOR 45th session, Suppl. No. 29 (A/45/29). The Sri Lankan government has offered to host the Conference on the Indian Ocean at Colombo, in 1992. See also the results of the work of the Working Group of the *Ad Hoc* Committee in UN doc. A/AC/59/L.93, annex.

to be difficulties in obtaining accurate data which eventually will have to be accepted and appreciated by all parties concerned).

(ii) Investigate sovereign's borrowing structure and debt registration system. It is important to determine who are the borrowers of external debt; for example, the sovereign itself, Government entities, private sector companies. If the sovereign 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.

(iii) 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.

(iv) Review should also be made of the sovereign's payment and exchange control systems to determine the most practical way to structure future payments under, and promote internal compliance with the plan.

C. To prepare a comprehensive a proposal as possible before approaching the different groups of creditors. 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:

(a) Classes of Affected Debtors: This will depend on the review of available data. Sovereign 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.

(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 commercial bank debt), 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.

(D) Negotiating the Agreements: 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, is not completely acceptable 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.

Initial negotiations will focus on the basic terms of the rescheduling plan. Subsequently, as 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 repayment schedule. Briefly, following three are the important provisions that are negotiated:

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. Gross 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 reached after thorough consultations. All these modifications, however, will have to meet the domestic requirements of both sovereign debtors and creditors so as to legalize renegotiated plan."

The item could not be considered at the thirtieth session due to lack of time, and the Secretariat was directed to again update the study (*Report of the Thirtieth Session* p. 106).

RESPONSIBILITY AND ACCOUNTABILITY OF FORMER COLONIAL POWERS

On 28 September 1989 Libya requested the inclusion of four items on the agenda of the next, twenty-ninth, session. The four items were the accountability of the colonial powers (1) for the losses caused to the Libyan people due to the left over mines and other vestiges of the Second World War on Libyan soil; (2) for losses caused to colonized countries in general by, *inter alia*, the looting of their resources and subjugation of their peoples; (3) for freezing the assets of developing countries in their banks which resulted in loss to those countries and amounted to the violation of international law; and (4) the responsibility of the colonial pow-

ers to give compensation and provide information on the fate of those who were exiled during the period of colonial domination.

A preliminary report was prepared by the Secretariat for consideration at the twenty-ninth session (Beijing 1990), focusing on items (1) and (3) (Doc. AALCC/XXIX/90/8). The Beijing session devoted a short discussion to the agenda item and directed the Secretariat to prepare a study of the legal principles governing the four issues (*Report of the Twenty-Ninth Session* p. 152).

The topic was an agenda item for the thirtieth session, and the Secretariat had prepared a study entitled "Responsibility and accountability of former colonial powers." (Doc.AALCC/XXX/Cairo/91/9). The matter was, however, not discussed.

MUTUAL CO-OPERATION ON JUDICIAL ASSISTANCE

This item, while on the agenda of the thirtieth session, was not discussed due to lack of time.

Soon after the establishment of the Committee in November 1956, the Government of the Union of Burma by a reference made under the Article 3(b)[5] of the Committee's Statutes had requested consideration of the topic "Extradition of Fugitive Offenders".

The Committee, having considered the subject at its first to fourth sessions, presented its final report in February 1961. It contained a set of articles on the principles concerning extradition of fugitive offenders together with commentaries without expressing any opinion on whether extradition should take place under a multilateral convention or a bilateral treaty.[6]

Since 1961 a number of new developments have taken place, such as the conclusion of some multilateral arrangements between neighbouring and closely knit countries, though the general pattern of extradition arrangements on a bilateral basis continues to be the prevailing practice. According to the AALCC Secretariat the same considerations which have weighed in favour of bilateral judicial cooperation in other areas among Asian and African countries would also apply in the area of extradition, so that any multilateral arrangement might not be workable in practice, except with respect of certain specific offences or classes of offences such as terrorism, aircraft hijacking, crimes against internationally protected persons and taking of hostages.

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5. Art. 4(b) of the present Statutes.
6. *Report of the Fourth Session*, p.18 et seq.

Other developments include the rendition of fugitive offenders within the Commonwealth. Finally, some States have adopted laws providing for voluntary surrender of persons even outside extradition treaty arrangements.

At its twenty-fifth session (Arusha 1986) the Committee expressed the view that the current problems and issues concerning extradition should be taken up for study again. Since that Session the Secretariat of the Committee has been working on the question of extradition of fugitive offenders with a view to reformulating the Committee's 1961 principles in the light of the aforesaid developments. Thus, the Secretariat prepared the preliminary brief for the Bangkok Session (1987)[7] demarcating the broad parameters for the proposed reformulation of the 1961 principles. For the Singapore Session (1988) a detailed analysis of the 1961 principles was undertaken by examining each article in the overall context of the new developments. An attempt was made to focus on certain issues such as what are extraditable crimes, political offence exception, the requirement of *prima facie* evidence, the principle of double jeopardy and the rule of speciality.[8]

The Singapore Session suggested that before undertaking a reformulation of 1961 principles, it would be worthwhile to study the developments within the Commonwealth, especially the 1966 Commonwealth Scheme Relating to the Rendition of Fugitive Offenders as Reviewed in 1983 and 1986.

Pursuant to the above suggestion the Secretariat prepared a study "Extradition of Fugitive Offenders: A Brief Comment on the Commonwealth Scheme for the Rendition of Fugitive Offenders As Reviewed in 1983 and 1986".[9]

A Secretariat report including draft articles was accordingly prepared[10] and briefly discussed at the twenty-ninth session (Beijing 1990). The report consists of three Parts: (I) Background, (II) Methodology, and (III) Draft articles and commentary. The second and third Parts are reproduced below.

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7. Doc. AALCC/XXVI/15(87).

8. *Extradition of fugitive offenders: the need to review the Committee's 1961 Articles containing the principles concerning the extradition of fugitive offenders* (doc. AALCC/XXVII/88/7).

9. Doc. AALCC/XXVIII/89/3.

10. Doc. AALCC/XXIX/90/11. The report has been reproduced in doc. AALCC/XXX/91/13 prepared for the thirtieth session.

Draft Articles on the Extradition of Fugitive Offenders[11]

Part I: Background

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Part II: Methodology

The Secretariat, while preparing the brief over the years undertook firstly a survey of developments regarding various aspects of the law of extradition as evolved by both common law and civil law systems. This was justified by the fact that the fugitive may while fleeing from one jurisdiction to another jurisdiction bring into conflict the legal systems of different jurisdictions. The law, developed over the past two decades have seen a convergence of values of different legal systems. This development has effectively been illustrated by the 1986 Commonwealth Scheme Relating to the Rendition of Fugitive Offenders which has abandoned its list/enumerative method and adopted the no list/eliminative method of the civil law system. Such major developments has been taken note of within the draft articles.

In view of the fact that membership of the Committee comprises States from all major legal systems (common law, civil law, socialist law and Islamic Law), the Secretariat has attempted to take note of the legal nuances of these systems to the extent possible by referring to various multilateral, regional, bilateral and municipal extradition arrangements. Thus account has been taken of the European Convention on Extradition 1967; the 1986 Commonwealth Scheme Relating to the Rendition of Fugitive Offenders; and the Inter-American Extradition Convention, 1981. A major source of reference as well as inspiration was, however, the UN Publication, "Extradition for Drug Related Offences: *A Study of existing extradition practices and suggested guidelines for use in concluding extradition treaties*" which proves a veritable rich source material for any serious analysis of the practice relating to the law of extradition. The draft articles seek to reflect these sources at relevant places.

While reformulating the 1961 principles relating to extradition the Secretariat has not only reflected the new developments as evidenced by major regional extradition arrangements but has also retained many of the 1961 principles in view of their continued validity. The Secretariat has in the study discerned a definite trend at the world level towards adopting similar provisions for an effective extradition process, notwithstand-

11. The 1961 draft articles are indicated in square brackets following the corresponding 1989 draft articles. Articles 5, 8 and 10 of the 1961 draft have no corresponding provisions in the new draft.

ing the existence of various legal systems. The present set of draft articles seek to establish a basis for further elaboration and consolidation of the contents of the articles previously adopted by the Committee

It is suggested that the present articles could be formulated as a model framework containing the harmonized and unified trends on the contemporary law of extradition as evidenced by State practice. In that sense these articles could form a sound basis for any regional convention on extradition.

Part III: Draft Articles

Article 1 (Obligation)

The Contracting Parties undertake to surrender to each other under the present Treaty-Convention, persons who are within the jurisdiction of one party and are being prosecuted or have been convicted by the judicial authorities of other parties.

[1961: art. 1]

Article 2 (Extraditable Offences)

1. Extradition shall not be granted unless the act constituting the offence for which the person sought is being prosecuted or has been convicted is punishable at least by two years of imprisonment under the laws of both the requested and requesting States.

2. Where the extradition of a person is sought for the execution of a sentence involving deprivation of liberty, the duration of the sentence still to be served shall be at least six months.

3. The principle of retroactivity of crimes shall not be applicable for the purposes of extradition.

[1961: art. 2]

Article 3 (Political Offence Exception)

1. Extradition shall not be granted for political offences. The requested State shall determine whether the offence is political.

2. The requested State has the right to seek information and clarification from the requesting State as to the nature of the offence which extradition has been requested in order to determine whether the offence is of a political character or not.

[1961: art.7]

3. Notwithstanding the provisions of clauses (1) and (2) the following offences shall not be regarded as political offence or offences of a political character:

(a) an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft signed at the Hague on December 16, 1970;
(b) an offence within the scope of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on September 23, 1971;
(c) an offence within the scope of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, signed at New York on December 14, 1973; any offence within the scope of recent IMO Convention against hijacking of ships:
(d) an offence within the scope of any Convention to which both contracting parties are party and which obligates the parties to prosecute for grant extradition if the requested State is not willing to prosecute.
(e) an offence related to terrorism; which are as follows:
(i) murder, manslaughter, assault causing bodily harm, kidnapping, hostage taking and offences involving serious damage to property or disruption of public facilities and offences relating to firearms, weapons, explosives or dangerous substances; (when used as a means to perpetrate indiscriminate evidence involving death or serious bodily injury or serious damage to property);
(ii) at attempt or conspiracy to commit an offence described in subparagraphs (a) through (f) or counseling the Commission of such an offence or participation as an accomplice in the offences so described;
(iii) an offence against the life or person of a Head State or a member of his immediate family or any related offence (i.e. aiding and abetting, or counseling or procuring the Commission of, or being an accessory before or after the fact to, or attempting or conspiring to commit such an offence);
(iv) an offence against the life or person of a Head of Government, or of a Minister of a Government, or any, related offence as aforesaid.
[1961: art. 3, art.7]

Article 4 (Extradition of a National)

1. Extradition of a national of the requested State shall be a matter of discretion for the requested State.

2. In the event of refusing to extradite the fugitive who is a national, the requested State shall submit the case to the competent authorities for prosecution and inform the requesting State of the result.

3. In case a national of the requested State is prosecuted and is being punished by the requesting State, the States Parties shall negotiate to the effect that the fugitive may serve his sentence in the State of which the fugitive is a national.

[1961: art. 4]

Article 5 (Grounds for Non-Extradition other than Political Offence Exception)

Extradition may be denied in the following circumstances:

1. Extradition shall not be granted for purely military offences.

[1961: art. 6]

2. When the prosecution or punishment is barred by the Statute of limitations according to the laws of the requesting State or the requested State (Prior to the presentation of the request for extradition).

[1961: art. 13]

3. When the person sought (is to be tried) before an extraordinary or *ad hoc* tribunal of the requesting State.

4. When there is reason to believe that extradition is sought in fact for the purpose of prosecuting or punishing the person on account of his race, religion, nationality or political opinions.

5. If the offence for which extradition is sought is of a trivial nature.

6. If the allegation against the fugitive is not made in good faith or in the interests of justice.

7. Any other sufficient humanitarian consideration that warrant the denial of extradition such as acute ill-health, physical frailty, etc. (In this case the requesting State could postpone the request until such time as required for the fitness of the fugitive).

Article 6 (Speciality Rule)

(a) The requesting State shall not try or punish the fugitive extradited except for the offence for which he was extradited.

(b) In the event of requesting State trying or punishing the fugitive for other offences that are likely to be directly related, it shall do so only with the consent of the requested State.

[1961: art. 9]

Article 7 (Double Jeopardy (*Non bis in idem*)

Extradition shall be refused if the offence in respect of which extradition is sought is under investigation in the requested State or the person sought to be extradited has already been tried and discharged or pun-

ished or is still under trial in the requested State for the offence for which extradition is sought.

[1961: art. 11]

Article 8 (Capital Punishment)

If the offence for which extradition is requested is punishable by death under the law of the requesting State and the law of the requested State does not provide such penalty, the requested State has the discretion to refuse extradition, unless the requesting State gives such guarantee which the requested State considers sufficient that the death penalty will not be carried out.

Article 9 (Pre-requisites of a Request)

The requisition for extraditions shall be made through Diplomatic Channel or any other appropriate channel in writing and accompanied by:

(a) Information concerning the identity, description, nationality and location of the person sought;

(b) a statement of the offences for which extradition is sought, the time and place of commission, their legal descriptions, probable punishment and a reference to the relevant legal provisions with utmost accuracy;

(c) the original or authenticated copy of the conviction and sentence or detention order passed by competent judicial authority and immediately enforceable or of the warrant of arrest or other having the same effect and issued in accordance with the procedure laid down in the law of the requesting State;

(d) a copy of the Statute of limitations governing prosecution and punishment.

[1961: art. 14, art. 15]

Article 10 (Evidential Requirement)

(a) Extradition shall not be granted unless the competent authorities of the requested State are satisfied that the material furnished before them establishes (sufficient evidence) (*prima facie* case) that the fugitive has committed an offence in the requesting State.

(b) When the person sought is already convicted for an offence in the requesting State the requesting State shall establish that he was convicted by competent judicial authorities in respect of an extraditable offence within the jurisdiction of the requesting State and that he has not served his sentence in accordance with the laws of the requesting State.

[1961: art. 16]

Article 11 (Surrender)

1. The competent authorities of the requested State shall take the necessary steps to enable the requesting State to take away the accused.

2. The requesting State shall be informed of the place and date of surrender and of the length of time for which the fugitive will be detained for the purposes of surrender.

3. The requested State may release the fugitive in question, if the requesting State fails to take custody of the fugitive within the prescribed time from the day of notification to the requesting State.

4. If circumstances beyond their control prevent either State from surrendering or taking over the fugitive within the time, the States shall agree on a new date for surrender.

[1961: article 20]

Article 12 (Reply by the Requested State)

The requested State shall inform the requesting State through Diplomatic Channel or other appropriate channel, in writing of its decision on the request for extradition. If the request for extradition is rejected, the reasons shall be stated.

[1961: art. 19]

Article 13 (Concurrent Requests)

1. If there are concurrent requests for extradition in respect of the same person the requested State shall have the discretion to decide upon the priority of requests.

2. The requested State while doing so shall take into account all the circumstances and especially the relative gratuity of the offences, place of commission, order of requests, penalty to be imposed and the nationality of the person claimed.

[1961: art. 18]

Article 14 (Seizure of Property, Articles, etc.)

Articles seized which were in the possession of the fugitive, at the time of his arrest, and which may be used as proof of the offence shall be delivered to the requesting State at the time of the actual extradition.

[1961: art. 25]

Article 15 (Abduction of the Fugitive)

If the fugitive is abducted from the requested State by the agents of requesting State, the requested State shall be entitled to demand the return of the fugitive.

[1961: art. 21]

Article 16 (Deferral of Surrender)

When the fugitive is being tried or is serving a sentence in the requested State for an offence other than the one for which extradition is requested, surrender may be postponed until he is set free either through acquittal, completed service or commutation of sentence, dismissal, pardon or grace. Civil suit that may be pending against the fugitive in the requested State would not however defer his surrender.

[1961: art. 12]

Article 17 (Provisional Arrest)

In case of urgency the requesting State may request the provisional arrest of the fugitive and the requested State may do so and keep the fugitive in custody.

[1961: art. 23]

Article 18 (Urgent Requests)

1. In urgent cases requests for extradition may be made by post, telegram, or telephone, provided that requests include a short account of the offence, a notification that a warrant of arrest has been issued by the competent authority and that extradition shall be requested through diplomatic channel or other appropriate channels.

2. The requested State may, if necessary, arrest and detain the fugitive for a period not exceeding thirty days, after which he shall be released unless the written request accompanied by the necessary is received.

3. If the request is made by post, telegram or telephone the requested State shall have the right to ascertain the request by seeking a written request from the requesting State.

[1961: art. 24]

Article 19 (Extradition of a Third States National)

If the fugitive whose extradition is requested is not a national of the requesting State, the requested State may notify the State of which the fugitive is a national, of that request as soon as it is received in order to enable the said State to defend him if necessary.

[1961: art. 22]

Article 20 (Re-extradition)

The requesting State shall not without the consent of the requesting State, surrender the fugitive to a third State in respect of offence committed before the surrender.

Article 21 (Procedural Law)

The procedure with regard to extradition, provisional arrest or committal before the judicial authorities shall be in accordance with the law of the requested State.

Article 22 (Simplified Extraction)

(Waiver of Committal Proceedings)

The requested State may grant extradition without a formal extradition proceeding if: the fugitive sought irrevocably consents in writing to the extradition after being advised by a judge or other competent authority of his right to a formal extradition proceeding and the protection afforded by such a proceeding.

Article 23 (Rights of the Fugitive)

The fugitive sought shall during the process of extradition, enjoy all the legal rights and guarantees granted by the law of that State.

The fugitive shall be assisted by legal counsel and if the official language of the requested State is other than of his mother tongue, he shall also be assisted by an interpreter free of cost.

Article 24 (Costs of Extradition)

The requesting State shall bear all expenses incurred in the execution of the request, and if the fugitive is discharged or acquitted, the said State shall bear the expenses necessary for his return to the requested State.

UNITED NATIONS ACTIVITIES WITH SPECIAL RELEVANCE TO ASIA*

LEE SHIH-GUANG**

1. AFGHANISTAN

By its resolution 45/12 entitled "The Situation in Afghanistan and its implications for international peace and security" adopted on 7 March 1990 without a vote, the General Assembly called for the scrupulous respect for and faithful implementation of the Agreements on the Settlement of the Situation Relating to Afghanistan concluded at Geneva on 14 April 1988 under UN auspices (Geneva Agreements) by all parties concerned; reiterated that the preservation of the sovereignty, territorial integrity, political independence and non-alignment and Islamic character of Afghanistan was essential for a peaceful solution of the Afghanistan problem; reaffirmed the right of the Afghan people to determine their own form of government and to choose their economic, political and social system free from outside intervention, subversion, coercion or constraint of any kind whatsoever.

2. NUCLEAR-WEAPON-FREE ZONE (NWFZ) IN SOUTH ASIA[1]

At its 45th session, the General Assembly adopted on 4 December 1990

* The coverage of this Section is necessarily selective and can only include those topics of special relevance to Asian countries.

** Office of the Legal Counsel, UN Office of Legal Affairs. The present contribution is prepared in a personal capacity.

1. This question was first introduced to the General Assembly by Pakistan in 1974 (see A/9706). At its 45th session, a report on the question was submitted by the Secretary-General (A/45/462) and was considered by the First Committee A/C.1/45/PV.3-23 and 35) and by the Plenary (A/45/PV.54).

Ko Swan Sik et al. (eds.), Asian Yearbook of International Law, 241–261.

resolution 45/53 on the subject[2] in which the Assembly reaffirmed its endorsement, in principle, of the concept of a nuclear-weapon-free zone in South Asia; urged once again the States of South Asia to continue to make all possible efforts to establish a NWFZ in South Asia and to refrain, in the meantime, from any action contrary to that objective; called upon those nuclear-weapons States which had not done so to respond positively to this proposal and to extend the necessary cooperation in the efforts to do so.

3. INDIAN OCEAN AS A ZONE OF PEACE[3]

In 1990, the General Assembly reiterated and emphasized its decision to convene the Conference on the Indian Ocean at Colombo as a necessary step for the implementation of the Declaration of the Indian Ocean as a Zone of Peace adopted in 1971 in resolution 2832 (XXVI). Two preparatory sessions were planned for 1991 to complete the remaining preparatory work relating to the Conference to enable the convening of the conference at Colombo in 1992 (GA resolution 45/77).

The Ad hoc Committee at its 1991 session adopted a list of 17 "Substantive elements for consideration at the UN Conference on the Indian Ocean", among which were the following:

11. Halting –
12. Halting –
13. Promotion
14. Withdrawal
15. Assurance
16. Non-prolif.
17. Promotion –[4]

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2. It was adopted by a recorded vote, 114 for, 3 against (Bhutan, India and Mauritius) and 28 abstentions including Afghanistan, Cyprus, Indonesia, Laos, Mongolia, Myanmar, Seychelles, Vietnam and Yemen.

3. This question was introduced in 1971 to the General Assembly at the request of Sri Lanka later joined by Tanzania. An Ad hoc Committee on the Indian Ocean was created a year later (resolution 3259B (XXIX) and was subsequently enlarged in 1980 and 1987. In 1990, France, UK and USA withdrew from the Ad hoc Committee. At present, the Committee is composed of 45 members.

4. Report of the Ad hoc Committee on the Indian Ocean, GAOR 46th sess., Suppl. 29 (A/46/29), Annex III.

4. CAMBODIA[5]

1. The Security Council adopted resolution 668 (1990) on the Situation of Cambodia on 20 September 1990, which *inter alia* endorsed the framework for a comprehensive political settlement of the Cambodia conflict (A/45/472 – S/21689, Annex, Appendix).

2. The General Assembly welcomed (i) the acceptance of this framework in its entirety by all the Cambodian parties, as the basis for settling the Cambodia conflict, at the informal meeting of the Cambodian parties in Jakarta on 10 September 1990, and their commitment to it (GA res. 45/3 adopted on 15 October 1990 without a vote); (ii) the agreement reached by all Cambodian parties in Jakarta (A/45/490 – S/21732, Annex) forming a Supreme National Council "as the unique legitimate body and source of authority in which, throughout the transitional period, the independence, national sovereignty and unity of Cambodia is embodied" (GA res. 45/3).

3. The General Assembly decided that the Supreme National Council would represent Cambodia externally and occupy the seat of Cambodia at the United Nations, in the United Nations specialized agencies and in other international institutions and international conferences (GA res. 45/3). (Cambodia was, however, not represented at the 45th session of the General Assembly.)

4. The General Assembly stressed that an enhanced role for the United Nations in Cambodia, charged with a clear and practical mandate, would help achieve the goal of the exercise of the right to self-determination for the Cambodian people through free and fair elections organized and conducted by the United Nations in a neutral political environment with full respect for the national sovereignty of Cambodia (GA res. 45/3).

5. HUMAN RIGHTS

(a) *Regional arrangements for the promotion and protection of human rights in the Asian and Pacific Region*[6]

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5. See Secretary-General's Report A/45/605.

6. In 1982, a seminar on National, Local and Regional Arrangements for the Promotion and Protection of Human Rights in the Asian Region was held in Colombo (A/37/422, Annex). For background, see Commission on Human Rights res. 1990/71 (7 March 1990) and res. 1989/50 (7 March 1989), GA res. 43/140 (8 December 1988) and A/45/210 and E/1990/2.

1. The General Assembly continued to invite those States members of ESCAP, that have not done so to communicate their comments on the Report of the Colombo Seminar to the Secretary-General, in particular, to address themselves to the conclusions and recommendations in the report concerning the development of regional arrangements in Asia and the Pacific. In so doing, the Assembly, bearing in mind that intergovernmental arrangements for the promotion and protection of human rights have been established in other regions, recognized that regional arrangements make a major contribution to the promotion and protection of human rights and that non-governmental organizations may have a valuable role to play in this process.

2. The Library of the ESCAP has been designated as a depository centre for United Nations human rights materials within the Commission at Bangkok.

3. The General Assembly, in its resolution 45/168 of 18 December 1990, encouraged UN development agencies in the region to coordinate with the ESCAP their efforts to promote the human rights dimension in their activities.

(b) *Afghanistan*[7]

1. By its resolution 45/174, the General Assembly welcomed the cooperation of the Afghan authorities with the Special Rapporteur on the situation of human rights in Afghanistan [8] and other UN officials and institutions, and the fact that the Special Rapporteur was able to visit areas in Afghanistan not under government control.

2. The Assembly urged all parties concerned to work for the achievement of a comprehensive political solution based on the free exercise of the right to self-determination by the people of Afghanistan through democratic procedures acceptable to the Afghan people, including free and fair elec-

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7. See also *supra*, sec. 1.

8. In 1984, the Economic and Social Council requested the Chairman of the Commission on Human Rights to appoint a special rapporteur to examine the situation of human rights in Afghanistan with a view to formulating proposals that could continue to ensure full protection of the human rights of the inhabitants of the country before, during and after the withdrawal of all foreign forces (ECOSOC resolution 1984/37 of 24 May 1986). In 1988, the Agreements on the Settlement of the Situation Relating to Afghanistan was concluded in Geneva by all parties concerned (S/19835, Annex 1).

tions, and the creation of conditions conducive to the return of refugees to their homeland in safety and honour, and the full enjoyment of human rights and fundamental freedoms of all Afghans. All parties to the conflict were urged to respect the Geneva Conventions of 12 August 1949 (UN *Treaty Series*, vol. 75, Nos. 970–973) and the Additional Protocols thereto, of 1977, (UN *Treaty Series*, vol. 1125, Nos. 17512 and 17513), to halt the use of weapons against the civilian population, to protect all prisoners from acts of reprisals and violence, including ill-treatment, torture and summary execution, to transmit to the ICRC the names of all prisoners as well as to grant to the ICRC unrestricted access to all parts of the country and the right to visit all prisoners in accordance with its established criteria.

3. The General Assembly further called upon the Afghan authorities to investigate thoroughly the fate of disappeared persons, to apply amnesty decrees equally to foreign detainees, to reduce the period during which prisoners await trial, to treat all prisoners, especially those awaiting trial or in custody in juvenile rehabilitation centres, in accordance with the Standard Minimum Rules for the Treatment of Prisoners, and to apply to all convicted persons Article 14, paragraphs 3 (d) and 5 of the International Covenant on Civil and Political Rights.

4. The General Assembly also appealed to all Member States, humanitarian organizations and all parties concerned to cooperate fully in order to facilitate the return of refugees and displaced persons to their homes in conformity with the Agreements on the Settlement of the Situation Relating to Afghanistan, and to promote the implementation of projects relating to repatriation of refugees.

(c) *Iran*[9]

1. During the course of 1990, the Special Representative of the Commission on Human Rights paid two visits to Iran and presented two reports pursuant to those visits (E/CN.4/1990/24 and A/45/697), which, according to the General Assembly, "provided useful information and clarified a number of allegations" about the situation of human rights in Iran.

2. The Commission on Human Rights also adopted at its 1990 session resolutions 1990/79 and 1990/76 of 7 March 1990 relative to this topic; so did the Economic and Social Council resolution 1990/48 of 25 May 1990.

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9. On 15 December 1989 the General Assembly adopted without a vote resolution 44/163 entitled "Situation of Human Rights in the Islamic Republic of Iran", following the interim report of the Special Representative of the UN Commission on Human Rights on this question (E/CN.4/1989/26) and Iran's invitation to the Special Representative to visit Iran (A/C.3/44/19).

3. The General Assembly, in its resolution 45/173 of 18 December 1990, called upon Iran to intensify its efforts to investigate and rectify the human rights issues raised by the Special Representative in his observations, in particular, as regards the administration of justice and due process of law in order to comply with international instruments on human rights, including the International Covenant on Civil and Political Rights (to which Iran is a party). The Assembly, while noting that the cooperation of Iran with the Special Representative had improved and had replied to allegations transmitted to it by the latter, urged the Government of Iran to reply in detail to all allegations referred to by the Special Representative.

6. IRAQ INVASION OF KUWAIT

1. Between 2 August 1990, the date of the invasion of Kuwait by Iraq, and 29 November 1990, the Security Council adopted 12 resolutions relating to the situation between Iraq and Kuwait. With the exception of resolutions 660, 662, 665 and 669[10], it was specified in all these resolutions that the Security Council was acting under Chapter VII of the UN Charter when those decisions were taken.

2. By *resolution 660* of 2 August 1990[11], the Security Council, determining that there existed "a breach of international peace and security" as regards the Iraqi invasion of Kuwait, and acting under Articles 39 and 40 of the Charter of the United Nations, condemned the Iraqi invasion of Kuwait and demanded that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990.

3. By *resolution 661* of 6 August 1990[12], the Security Council decided to impose a comprehensive set of mandatory sanctions on Iraq and Kuwait: All States "shall prevent" (i) the import of all commodities and products originating in Iraq and Kuwait; (ii) the sale or supply of any commodities or products to any person or body in Iraq or Kuwait; (iii) any activities by nationals of all States which would promote or could be calculated to promote the export or trans-shipment of any commodities or products from or to Iraq or Kuwait, as well as the prohibition of the transfer of any funds

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10. Resolution 660 referred specifically to Articles 39 and 40 which are under Chapter VII of the Charter; Resolution 669 referred specifically to Article 50 of Chapter VII.
11. Adopted by a vote of 14 in favour and none against; Yemen did not participate in the vote.
12. Adopted by a vote of 13 in favour, none against and two abstentions (Cuba and Yemen).

or any other financial or economic resources to Iraq or occupied Kuwait. A Committee of the Security Council was established thereunder to examine reports on the implementation of the resolution, and to seek from all States further information regarding the action taken by them. The imposed sanctions were further complemented and reinforced in subsequent resolutions including *resolution 665* of 25 August 1990[12], which provided for the enforcement at sea of the trade embargo; *resolution 666*[12] of 13 September 1990, which related to the delivery of medical supplies and foodstuffs in humanitarian circumstances; *resolution 670* of 25 September 1990[13], which contained a cargo-related air embargo.

4. By *resolution 662* of 9 August 1990[14], the Security Council decided that annexation of Kuwait by Iraq under any form and whatsoever pretext had no legal validity, and was considered null and void, and called upon all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation.

5. By its *resolution 664* of 18 August 1990[14], the Security Council demanded that Iraq permit and facilitate the immediate departure from Kuwait and Iraq of the nationals of third countries and grant immediate and continuing access of consular officials to such nationals; also demanded that Iraq take no action to jeopardise the safety, security or health of such nationals.

6. By its *resolution 667* of 16 September 1990[14], the Council *inter alia* strongly condemned aggressive acts perpetrated by Iraq against diplomatic premises and personnel in Kuwait, including the abduction of foreign nationals who were present in those premises; and further demanded that Iraq immediately protect the safety and well-being of diplomatic and consular personnel and premises in Kuwait and in Iraq and take no action to hinder the diplomatic and consular missions in the performance of their functions, including access to their nationals and the protection of their persons and interests.

7. By its *resolution 669* of 26 September 1990[14], the Council entrusted the Sanctions Committee established under resolution 661 (1990), with the task of examining requests for assistance under the provisions of Article 50 of the Charter and making recommendations to the President of the Security Council for appropriate action.

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13. Adopted by a vote of 14 in favour and one against (Cuba).
14. Adopted by unanimous vote.

8. By its *resolution 674* of 29 October 1990[15], the Council *inter alia* demanded that Iraq cease and desist from taking third-State nationals hostage, mistreating and oppressing Kuwait and third-State nationals and any other actions that violate the decisions of the Council, the UN Charter, the Fourth Geneva Convention, the Vienna Conventions on Diplomatic and Consular Relations and international law. It invited States to collate information on the "grave breaches" by Iraq as per above; demanded that Iraq ensure access to food, water and basic services to Kuwaiti nationals and nationals of third States in Kuwait and Iraq. The Security Council reminded Iraq that the latter was liable for any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq; invited States to collect relevant information regarding their claims, and those of their nationals and corporations, for restitution or financial compensation by Iraq with a view to such arrangements as may be established in connection with international law.

9. By its *resolution 677* of 28 November 1990[16], the Security Council condemned the attempts by Iraq to alter the demographic composition of the population of Kuwait and to destroy the civil records maintained by Kuwait; and mandated the Secretary-General of the United Nations to take custody of a copy of the authenticated population register of Kuwait as of 1 August 1990.

10. By its *resolution 678* of 29 November 1990[17], the Security Council decided, while maintaining all its decisions, to allow Iraq one final opportunity, as a pause of goodwill, to comply with all its relevant resolutions, and authorized Member States cooperating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implemented all relevant Council resolutions, to "use all necessary measures" to uphold and implement all such resolutions and to restore international peace and security in the area. All States were requested to provide support for the actions undertaken in pursuance of the above provisions of the Council.

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15. Adopted by a vote of 13 in favour, none against and two abstentions (Cuba and Yemen).
16. Adopted by unanimous vote.
17. Adopted by a vote of 12 in favour, two against (Cuba and Yemen) and one abstention (China).

7. LAW OF THE SEA[18]

1. The 1982 United Nations Convention on the Law of the Sea, which was signed by 159 States and entities (Niue and the European Economic Community), have been ratified or acceded to (as of August 1991) by some forty States.

2. The Secretary-General has initiated consultations amongst interested States to promote dialogue aimed at achieving universal participation in the Convention.

3. The General Assembly, in its resolution 45/145 adopted on 14 December 1990[19], called upon States to ratify or accede to the 1982 Convention to allow the effective entry into force of the new legal regime and also to safeguard the unified character of the Convention and related resolutions adopted therewith and apply them in a manner consistent with that character and with their object and purpose, and also called upon States to observe the provisions of the Convention when enacting their national legislation.

8. FISHERIES

1. The General Assembly adopted without a vote resolution 45/197 entitled "Large-scale pelagic driftnet fishing and its impact on the living marine resources of the world's oceans and seas" on 21 December 1990. The Assembly reaffirmed its resolution 44/225 and called for its full implementation by all members of the international community, in accordance with the measures and time-frame elaborated in paragraph 4 of that resolution concerning large-scale pelagic driftnet fishing on the high seas of all the world's oceans and seas, including enclosed or semi-enclosed seas[20]. It also reaffirmed the importance of all members of the international community taking such measures as may be necessary to ensure compliance with paragraph 4(c) of resolution 44/225.

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18. Each year the Secretary-General prepares a report which provides a survey of all relevant activities in the field. The 1990 report is contained in A/45/721.

19. In a recorded vote, 140 in favour, no objection with six abstentions.

20. Paragraph 4 of resolution 44/255 recommended that all members of the international community agree to: (a) under certain specific conditions specified therein, moratoria on all large-scale pelagic driftnet fishing in the high seas by 30 June 1992; (b) take immediate action to reduce progressively large-scale pelagic driftnet fishing activities in the South Pacific region leading to the cessation of such activities by no later than 1 July 1991; (c) an immediate cessation to further expansion of large-scale pelagic driftnet fishing on the high seas of the North Pacific and all the other high seas outside the Pacific Ocean.

9. ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES

1. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 came into force on 11 November 1990 after receiving the necessary number of acceptances.

2. In its resolution 45/146 the General Assembly urged States that have not yet done so to proceed as soon as possible to ratify or to accede to the Convention, and also urged States to establish the necessary legislative and administrative measures so that their internal juridical regulations may be compatible with the spirit and the scope of the Convention. States were also invited, to the extent that they are able to do so, to apply provisionally, the measures set forth in the Convention, pending its entry into force for each of them, and in particular, to bear in mind the advisory services available for this purpose from the United Nations Secretariat (Division of Narcotic Drugs).

10. INTERNATIONAL MUTUAL ASSISTANCE IN CRIMINAL MATTERS: MODEL TREATIES

1. The General Assembly, on 14 December 1990, adopted the following model treaties in the field of international criminal law: (i) Model Treaty on Extradition; (ii) Model Treaty on Mutual Assistance in Criminal Matters; (iii) Model Treaty on the Transfer of Proceedings in Criminal Matters; (iv) Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released. (The text of the model Treaty is annexed respectively to General Assembly resolution 45/116, 45/117, 45/118, 45/119). In adopting these model instruments, the General Assembly was convinced that the establishment of bilateral and multilateral agreements on these matters would greatly contribute to developing more effective international cooperation in the relevant area.

11. PRINCIPLE OF PERIODIC AND GENUINE ELECTIONS

1. By its resolution 45/150 on enhancing the effectiveness of the principle of periodic and genuine elections [21] the General Assembly underscored

21. The resolution was adopted on 18 December 1990 by the General Assembly by a recorded vote of 129 in favour, eight against (Angola, China, Colombia, Cuba, Iran, Myanmar, Sudan, Vietnam) and nine abstentions.

the significance of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which established that the authority to govern should be based on the will of the people, as expressed in periodic and genuine elections.

2. The Assembly stressed the conviction that periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that, as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms, embracing political, economic, social and cultural rights.

3. The Assembly further declared that determining the will of the people required an electoral process that would provide an equal opportunity for all citizens to become candidates, and put forward their political views, individually and in cooperation with others, as provided in national constitutions and laws.

4. At the same time, the Assembly recognized that the efforts of the international community to enhance the effectiveness of the principle of periodic and genuine election should not call into question each State's sovereign rights freely to choose and develop its political, social, economic and cultural systems, whether or not they conform to the preferences of other States. The Assembly also expressed the view that the international community should continue to give serious consideration to ways in which the United Nations can respond to the requests of Member States as they seek to promote and strengthen their electoral institutions and procedures.

12. RIGHTS OF THE CHILD[22]

1. The Convention entered into force on 2 September 1990.

2. In its resolution 45/104 adopted on 14 December 1990 the General Assembly called upon all States that have not done so to sign, ratify or accede to the Convention as a matter of priority; emphasized the importance of the strictest compliance of State parties with their obligations under the Convention; recognized the importance of the establishment of the Committee on the Rights of the Child as an essential mechanism for

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22. Adopted by General Assembly resolution 44/25 of 20 November 1989.

overseeing the effective implementation of the provisions of the Convention.

13. ANTARCTICA[23]

1. At its 45th session, the General Assembly adopted resolution 45/78 on 12 December 1990[24], in which it expressed regret that, despite the numerous resolutions it had adopted, the Secretary-General or his representative had not been invited to the meetings of the Antarctic Treaty Consultative Parties (ATCP) and urged again the Consultative Parties to invite the Secretary-General to their future meetings; and called upon the ATCP to deposit information and documents covering all aspects of Antarctica with the Secretary-General.

2. The General Assembly also expressed the conviction that any move to draw up a comprehensive environmental convention on the conservation and protection of Antarctica and its dependent and associated ecosystems as well as establishing a nature reserve or world park must be negotiated with the full participation of the international community and in the context of the UN system, including the UN Conference on Environment and Development (UNCED); urged all members of the international community to support all efforts to ban prospecting and mining in and around Antarctica and to ensure that all activities are carried out exclusively for the purpose of peaceful scientific investigation and that all such activities ensure the maintenance of international peace and security in Antarctica and that protection of its environment is for the benefit of all mankind.

14. RIGHTS OF MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES

1. The General Assembly on 18 December 1990 adopted the International Convention on the Protection of the Rights of All Migrant Workers and

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23. This issue was included in the General Assembly's agenda item in 1983 at the request of Malaysia and Antigua and Barbuda. A "comprehensive, factual and objective" study on all aspects of Antarctica was prepared by the Secretary-General in 1984. The relevant General Assembly decisions are as follows: resolutions 38/77; 39/152; 40/156 A to C; 41/88C; 42/46B; 43/83B; 44/124B.

24. Part A of the resolution was adopted by 98 in favour, no objection with seven abstentions and Part B was adopted by 107 in favour, no objection with seven abstentions.

Members of their Families[25] (the text of the Convention was annexed to GA resolution 45/158).

2. The Convention contains nine parts: Part I, scope and definition (articles 1 to 6); Part II, non-discrimination with respect to rights (article 7); Part III, human rights of all migrant workers and members of their families (articles 8 to 35); Part IV, other rights of migrant workers and members of their families (articles 36 to 56); Part V, provisions applicable to particular categories of migrant workers and members of their families (articles 57 to 63); Part VI, promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families (articles 64 to 71); Part VII, application of the Convention (articles 72 to 78); Part VIII, general provisions (articles 79 to 84); Part IX, final provisions.

3. For the purpose of reviewing the application of the Convention, the establishment of a Committee of 14 experts is envisaged under the Convention. The Committee is empowered under the Convention to examine the reports submitted by States parties and to transmit such comments it may consider appropriate to the State party concerned which may then submit to the Committee observations on any comment made by the Committee.

4. Under Article 76, a State party may, at any time, declare that it recognizes the competence of the Committee to receive and consider communications to the effect that a State party declares that another State party is not fulfilling its obligations under the Convention. The provisions of Article 76 come into force when ten State parties have made the necessary declaration.

15. CONSULAR FUNCTIONS

1. In April 1990, Austria and Czechoslovakia proposed the elaboration of an additional protocol on consular functions to the 1963 Vienna Convention on Consular Relations (A/45/141). They were of the view that the 1963 Convention concentrated on consular privileges and immunities and lacked precise rules regarding consular functions, and that this lacuna was filled by a large number of bilateral consular agreements. It was therefore

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25. In 1979, the General Assembly established a working group open to all Member States to establish an international instrument on the subject. It held nine inter-sessional meetings to complete its work (its formal report is contained in A/C.3/45/1).

timely to address the question of supplementing the provisions of the 1963 Convention in the light of the practice. They suggested that the new instrument might address such issues as communication and contact with nationals of the sending States; issuance of passports, visas and travel documents; acting as notary and civil registrar; safeguarding interests of activities in cases of succession; representing nationals before tribunals and other authorities, etc.

2. At its 45th session, the General Assembly took note with interest of the proposal and requested the Secretary-General to seek the views of Member States as well as of other States parties to the 1963 Convention on the proposal, and to prepare a report for its 46th session in 1991.

16. UNITED NATIONS DECADE OF INTERNATIONAL LAW [26]

1. The Sixth Committee established a Working Group with a view to preparing generally acceptable recommendations for the Decade.

2. The Working Group adopted a report (A/C.61/45/L.5). On the basis of the report, the Sixth Committee adopted the program for the activities to be commenced during the first term (1990–1992) of the Decade (which was annexed to GA resolution 45/40 of 28 November 1990).

3. The General Assembly, *inter alia*, appealed to States, international organizations and non-government organizations working in this field and to the private sector to make financial contributions or contributions in kind for the purpose of facilitating the implementation of the Programme for the activities of the Decade.

17. INTERNATIONAL CRIMINAL JURISDICTION

1. The International Law Commission considered this question at its 42nd session in 1990 in the context of the draft Code of Crimes against the

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26. By its resolution 44/23 of 17 November 1989, the General Assembly declared the period 1990–1999 the UN Decade of International Law. The main purpose of the Decade, according to resolution 44/23, should be: (a) to promote acceptance of and respect for the principles of international law; (b) 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; (c) to encourage the progressive development of international law and its codification; (d) to encourage the teaching, study, dissemination and wider appreciation of international law.

peace and security of mankind. The possible creation of an international criminal jurisdiction to enforce the provisions of the draft Code has been the Commission's concern and has come up in the discussions during its previous sessions since 1986. In 1989, the General Assembly by its resolution 44/39 entitled "International criminal responsibility of individuals and entities engaged in illicit trafficking in narcotic drugs across international frontiers and other jurisdictional criminal activities: establishment of an international criminal court with jurisdiction over such cases", requested the ILC to address the question of establishing an international criminal court or other international criminal trial mechanisms with jurisdiction over persons alleged to have committed crimes which may be covered under such a Code of Crimes, including persons engaged in illicit trafficking of narcotic drugs across national frontiers.

2. At its 42nd session, the Commission adopted provisionally an article to be included in the draft Code. In its report (ILC *Report* on the work of its forty-second session, 1990, paras. 103–156), the ILC included a summary of previous UN efforts in the field of international criminal jurisdiction and the views of the Commission on the question posed. The Commission gave its views on (a) the advantages and disadvantages, for the trial of crimes against the peace and security of mankind, of the possible establishment of an international criminal court as compared, in particular, to the system of universal jurisdiction used on prosecution before national tribunals; (b) the possible options and main trends evidenced in the Commission with regard to certain areas related to the creation of an international criminal court (e.g., jurisdiction and competence, structure, legal force of judgements, etc.). The Commission concluded that its examination of the question reflected a broad agreement, in principle, on the desirability of the establishment of a permanent international criminal court to be brought into relationship with the UN system. Different views were, however, expressed as to the structure and scope of jurisdiction of such a court. The Commission gave the view that such a court would be successful only if widely supported by the international community.

3. Three possible models were mentioned by the Commission, which were as follows:

A. International Criminal Court with exclusive jurisdiction

(a) States would need to cede their criminal jurisdiction as regards crimes coming under the jurisdiction of the court.

(b) It may raise problems in relation to existing treaty obligations establishing universal jurisdiction under national tribunals.

(c) Recourse to a review procedure within the court's system has to be provided for, e.g., Article 14, paragraph 5 of the International Covenant on Civil and Political Rights.

(d) The establishment of a system of pre-trial examination and of a public prosecutor would be needed. It also needs rules for the handing over of the accused to the court as well as an agreement on the establishment of an international detention facility and rules on enforcing the judgement.

(e) It also raises the question of reciprocity (States parties to the statute of the court, States not parties) and the question that the jurisdiction of the court may depend on the consent of the States concerned (territorial State, States whose national is accused, State where the accused is found).

B. Concurrent jurisdiction between an international criminal court and national courts

(a) States parties would not have to cede their national criminal jurisdiction but could decide on a case-by-case basis whether to submit a case to the international criminal court or exercise national jurisdiction. For instance, according to this model, some States may choose to exercise national jurisdiction in cases where their own nationals are involved, where the crime was directed against them or where the crime was committed in their territory.

(b) Such a system could lead to conflicts of jurisdiction between the States concerned.

(c) All the other aspects of model A will apply to model B (prosecution, appeal, handing over of the accused, implementation of judgements, reciprocity).

C. An international criminal court having only a review competence

(a) States parties would not have to cede their national criminal jurisdiction.

(b) They would have to accept that judgements of their courts on crimes

coming under the Code could be brought for review to the international criminal court.

(c) In addition to those who could bring a case before the court under the other two models, namely, other States concerned (territorial State, State whose national has been tried, States against which the crime was directed) or all States parties to the court's statute, this model could allow for the possibility of the convicted individual bringing a case.

(d) This model would not interfere with existing international obligations on universal jurisdiction; it would not require the consent of other States.

(e) It would not require a further procedure for appeal.

(f) It would establish a permanent international criminal court, the scope of which could be extended if States have gained some experience with the court and agree to do so.

4. The Sixth Committee considered this question in connection with the work of the Commission and the draft Code of Crimes against the peace and security of mankind (agenda item 140). The following paragraphs summarize the main divergent views expressed by members of the Sixth Committee.

5. Some representatives were of the view that the establishment of a standing international criminal court would be of great importance at the legal, political and practical levels marking a significant step forward (A/C.6/45/SR.35, para. 28). International criminal law should, in their view, embrace all three elements: crime, penalties and jurisdiction. It would not therefore make sense to elaborate a code of crimes against the peace and security of mankind without also establishing a mechanism to ensure its implementation. Recent developments in international relations made the establishment of such a jurisdiction more feasible than when the matter had been studied earlier. The international community had gradually grown more aware that certain international crimes had achieved such wide dimensions that they could endanger the very existence of States and seriously compromise international peaceful relations. Thus, the establishment of an international criminal jurisdiction could offer the following advantages: uniform application of the law, the avoidance of unilateral, arbitral interpretations of the Code by certain States, given the highly political nature of the charges that could be brought under the Code; the release of pressure which might otherwise be exerted on the judicial system of the smaller States by perpetrators of such major crimes as drug trafficking on a large scale (SR.33/16; 35/144; 31/75).

6. It was however stressed by some States that any international criminal jurisdiction should not be linked to political currents, and that its judges should retain their independence and integrity. Otherwise, no state would be willing to concede its own criminal jurisdiction in respect of any individual or group which had committed grave crimes against its people or territory. The following elements were considered necessary to obtain the objectives: (i) an instrument defining a limited number of very serious crimes and establishing the penalties to be applied; and (ii) a well-structured international criminal court with guaranteed independence and impartiality, and capable of ensuring adequate application of the Code (SR.33/79; 36/21–23; 38/8 and 17).

7. On the other hand, some States expressed serious reservations about the idea of establishing an international criminal jurisdiction. Attention was first drawn to previous occasions on which the question was discussed and no agreement was possible.[27] Despite the improvement in international relations, profound differences still divided States with respect to various aspects of the issue, particularly the jurisdiction of the proposed court. Even if such differences were overcome, jurisdiction could not, under the domestic legislation of many States, be transferred from domestic courts to an international court. In this regard, reference was thus made to the adoption of the 1988 Convention against illicit traffic in narcotic drugs and psychotropic substances; the signatories to the Convention could only agree to take the necessary steps in accordance with their domestic legislation to promote international cooperation in that field (SR.34/27–29; 36/79; 38/2; 37/75).

8. Moreover, the subject was highly controversial, given the existence of different legal systems and the likelihood that conflicts would arise with respect to the various aspects that would have to be considered in creating an international criminal jurisdiction. The current international situation had little impact on the profound differences of views regarding the scope of the proposed court and it was thus premature to link the draft Code to such a mechanism.

9. Some states also felt that effective systems based on the universal jurisdiction of domestic courts existed for a large number of crimes, and that the establishment of an international criminal court must not disrupt the satisfactory functioning of the existing systems and would meet with

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27. These occasions were summarized in the Commission's report: *ILC Report 1990*, paras. 103–115.

resistance, since it would be seen by many as a serious curtailment of national sovereignty. The conclusion of extradition and mutual assistance treaties dealing with various types of proceedings was considered more preferable.

18. INTERNATIONAL LAW COMMISSION[28]

1. The International Law Commission held its 42nd session at the UN Office at Geneva from 1 May to 20 July 1990. Its agenda included: filling of a casual vacancy in the Commission (Mr Alain Pellet was elected to fill the vacancy caused by the death of Mr Paul Reuter); state responsibility; jurisdictional immunities of States and their property; draft code of crimes against the peace and security of mankind; the law of non-navigational uses of international watercourses; international liability for injurious consequences arising out of acts not prohibited by international law; relations between States and international organizations (second part of the topic); programme, procedures and working methods of the Commission, and its documentation.[29]

2. The General Assembly adopted resolution 45/41 on 28 November 1990 on *Report of the International Law Commission on the Work of its Forty-second session.* The Assembly requested the ILC, *inter alia*, to pay special attention to indicating in its annual report, for each topic, those specific issues on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest for the contribution of its work.

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28. The International Law Commission is an expert group of 34 members in their personal capacity established by the General Assembly in 1947. For a summary of part of its work, see *The Work of the International Law Commission.* United Nations, New York: 1988, 4th ed., 402 pp. (UN Sales No. E.88.v.1.). The proceedings of the Commission are published in the Yearbook of the International Law Commission, Volume One containing the summary records of the discussions, Volume Two Part One containing the reports prepared by the Rapporteurs, and Volume Two Part Two containing the (annual) report of the Commission on its work.

29. See *Report of the International Law Commission on the work of its forty-second session*, 1 May–20 July 1990, General Assembly Official Records: Forty-fifth session, Supplement No. 10 (A/45/10) (Hereinafter referred to as *ILC Report*, 1990).

19. UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)[30]

1. The agenda of the Commission at its 23rd session in 1990, included: countertrade; international payments; new international economic order; international contract practices; legal problems of electronic data interchange; training and assistance.

2. At its 45th session in 1990, the General Assembly, *inter alia*, reaffirmed the importance, particularly for developing countries, of the work of the Commission with respect to training and assistance in the field of international trade law and the desirability for it to sponsor seminars and symposia for that purpose. States were invited by the Assembly to consider signing, ratifying or acceding to the Conventions elaborated under the auspices of the Commission, including the Convention on the Limitation Period in the International Sale of Goods, 1974; the United Nations Convention on Contracts for the International Sale of Goods, 1980; the UN Convention on the International Bills of Exchange and International Promissory Notes, 1988.

20. SPECIAL COMMITTEE ON THE CHARTER OF THE UNITED NATIONS AND ON THE STRENGTHENING OF THE ROLE OF THE ORGANIZATION (THE CHARTER COMMITTEE)[31]

1. Under the question of the maintenance of international peace and security, the Committee received two proposals on fact-finding submitted respectively by Belgium, FRG, Italy, Japan, New Zealand and Spain (A/AC.182/L.60/Rev.1), and by Czechoslovakia and the German Democratic Republic (A/AC.182/L.62/Rev.1); they were then merged into one

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30. UNCITRAL was created in 1966 by General Assembly resolution 2205 (XXI) as the core legal body within the UN system to coordinate legal activities in the field of international trade law in order to avoid duplication of effort and to promote efficiency, consistency and coherence in the unification and harmonization of international trade law, and to maintain close cooperation with the other international institutions and organizations, including regional organizations, active in the field of international trade law. The Commission has 36 member States who are elected for a term of six years. *Report of the United Nations Commission on International Trade Law on the work of its twenty-third session.* 25 June–26 July 1990, *General Assembly Official Records*: Forty-fifth session, Supplement No. 17 (A/45/17) hereinafter referred to as *UNCITRAL Report*, 1990.

31. The Charter Committee, with 47 member States, was created by the General Assembly in 1975. The Assembly sets out the work program of the Committee annually after having received a report of the Committee on its work.

proposal (A/AC.182/L.66) entitled: "Fact-finding by the United Nations in the field of the maintenance of international peace and security."[32]

2. According to this proposal, either the Security Council, the General Assembly or the Secretary-General may initiate a fact-finding mission in the context of their respective responsibilities. States were encouraged to give their consent to admit a proposed mission. Special reference was made in the proposal to the Secretary-General's capacity in information-gathering particularly for the purpose of early warning.

3. At its 45th session, the General Assembly, by resolution 45/44, requested the Charter Committee at its 1991 session to endeavour to complete its consideration of the proposal on fact-finding with a view to submitting its conclusions, in an appropriate form, to the General Assembly at its 46th session.

4. The Charter Committee was also requested to continue its work on the question of the peaceful settlement of disputes between States and, in this context, to consider proposals relating to this question that might be submitted to the Special Committee and to consider the final text of the draft handbook on the peaceful settlement of disputes between States prepared by the Secretary-General.[33]

5. Since 1985, the Charter Committee has been actively working on the question of rationalization of existing procedures of the United Nations. As a result of intensive work, it completed at its 1990 session the document on the subject and submitted it to the General Assembly for consideration and adoption.[34] The Assembly approved the "conclusions" of the Charter Committee and decided by its resolution 45/45[35] to reproduce it as an annex to its rules of procedures.[36]

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32. *Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization. General Assembly Official Records*: Forty-fifth session, Supplement No. 33 (A/45/33). For text of the proposals, see para. 68.
33. The Committee later considered this final text which is reproduced in its subsequent Report: GAOR 46th sess., Suppl. No. 33 (A/46/33) Annex (pp. 23–220), and recommended its publication.
34. Report n. 31, paras. 83–86.
35. The resolution was adopted by a recorded vote of 149-0-1 (Cuba).
36. The text is annexed to General Assembly resolution 45/45 of 28 November 1990.

CHRONICLE

Ko Swan Sik et al. (eds.), Asian Yearbook of International Law, 263–354.

CHRONICLE OF EVENTS AND INCIDENTS RELATING TO ASIA WITH RELEVANCE TO INTERNATIONAL LAW

January–September 1991

KO SWAN SIK*

with contributions from KOTERA AKIRA (Tokyo), RAYMOND LIM (Singapore) and R.P.M. LOTILLA (Manila)**

Editorial introduction

Dealing with international law involves both its interpretation or application, and its creation. In either case it is essential to take cognizance of the actual international relations as these constitute the soil on which the law is supposed to blossom and from which the seeds of the law germinate. Whenever we are confronted with international conflicts it appears that in most of the cases the dispute is about the different perceptions which the parties have of the facts, and that to a much lesser extent the parties disagree about what the law prescribes. This being so, the current international law discourse mostly rely on references to international events and incidents relating to Western States.

These are among the considerations which underlie the General Editors' resolve to start a regular section recording events and incidents relating to, or involving, Asian states and which are clearly relevant for the position of these states in international law. The "classic" chronicle edited by Charles Rousseau in the *Revue générale de droit international public* has naturally served as the great example. Yet we have opted for a rather different scheme of presentation of the data which may, as we hope, improve the usefulness of the survey.

In order to make the task feasible the present Editor is now starting with two main sources: the *International Herald Tribune* and the *Far Eastern Economic Review*. In addition other sources are used incidentally, such as UN documents, *NRC-Handelsblad* (Rotterdam), *Straits Times* (Singapore) and *South China Morning Post* (Hong Kong). The intention is, however, to form a team of correspondents from the main Asian capitals who together could cover the main Asian daily press. It is gratefully recorded that even for this first issue contributions have been received from Professor KOTERA AKIRA (University of Tokyo), Professor R.P.M. LOTILLA (University of the Philippines) and Mr RAYMOND LIM (National University of Singapore). Other volunteers from other Asian countries will be most warmly welcomed by the Editor.

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*General Editor

**National Editorial Correspondents

TABLE OF HEADINGS

AFGHANISTAN

UN peace formula

In May 1991 the UN Secretary-General proposed a new peace formula calling for a halt to the fighting and an end to foreign intervention. An intra-Afghan dialogue

should lead to a broad-based interim government, thus ensuring the Afghans a choice for a permanent constitutional structure. All the interested countries expressed their approval to the plan, and apart from the question of the future role of the present President, the remaining disagreement seemed to be that according to the Soviet Union the cease-fire must precede the formation of an interim government, while according to Pakistan the mujaheddin groups would not be prepared to cease the fighting before a settlement is reached.
(FEER 27-06-91, pp. 17–18)

Exchange of prisoners

On 12 August 1991, the Afghan guerrillas freed a Soviet prisoner of war as a goodwill gesture, and in exchange the government agreed to release 25 imprisoned guerrillas.
(IHT 13-08-91)

United stand agreed by Pakistan, Iran, and Afghan guerillas based in both countries

At a meeting in Islamabad, ending on 29 July 1991, Pakistan, Iran and the various guerilla groupings agreed on the elements of a political settlement in Afghanistan. The guerilla groupings that participated at the meeting were 9 Iran-based groups, 4 groups from the 7-party Afghan Interim Government (AIG) based in Peshawar, Pakistan and 3 other independent groups also based in Pakistan. The meeting produced a joint declaration supporting the five broad principles proposed by the UN Secretary-General.

Pakistan-Iranian differences on Afghanistan came to the surface after the failure of their ministerial talks in February 1989, but they now agreed on the inability of the guerillas to force a military solution. Both countries stated publicly that the incumbent Afghan President Najibullah was unacceptable to any of the resistance groups.
(FEER 15-08-91, p. 13)

AIR TRAFFIC

Indonesia-China

In the wake of the re-establishment of diplomatic relations in August 1990, the two countries were reported to have preliminarily agreed to restore direct air services.
(FEER 14-02-91, p. 55)

Taiwan-Australia

An air agreement was signed on 25 March 1991, clearing the way for direct flights between the two countries by non-flag carriers. China complained that Canberra had not sought its prior approval. On the occasion the Chinese embassy affirmed the Chinese stand according to which air links between any foreign aviation company and Taiwan are not within ordinary non-governmental trade and economic ties, but are a

political issue relating to Chinese sovereignty. The Australian foreign minister said that his government had kept the Chinese government closely informed on the negotiations and affirmed that in line with Australia's policy of recognition of the [government of the] People's Republic, neither *Quantas* nor Taiwan's flag carrier *China Airlines* would operate the route.
(IHT 27-03-91; FEER 04-04-91, p. 53)

Thailand-United States

In November 1990, the then existing air-traffic agreement between the two countries lapsed. While talks on reviving the defunct agreement carried on both parties agreed that in the meantime no reduction would be introduced in the number of flights between the two countries until 31 October 1991 (38 weekly passenger and cargo US flights into Bangkok). At issue were the "fifth freedom" flights, by which US airlines carry passengers to Thailand from other Asian countries.
(FEER 28-02-91, p. 73; 04-04-91, p. 53)

ALIENS: ACTIVITIES

China

A delegation including persons from the US, Canada, Britain and the Netherlands, who came to China in January 1991 to express concern about political prisoners, were detained and ordered to leave the country. The persons were told they were violating their tourist visa status.

A similar incident took place in August 1991, when four members of a human rights delegation coming from the US to investigate conditions of political prisoners were detained to be expelled later. They had come on tourist visas, and the Chinese Public Security Ministry told them that their visas had been shortened because they were engaging in activity incompatible with their status.
(IHT 22-01-91; 23-08-91)

A US Congressional human rights delegation held a ceremony at Tiananmen Square commemorating the victims of the June 1989 crackdown. They were considered to have violated city regulations requiring permission to hold demonstrations in specific places.
(IHT 06-09-91)

Vietnam

Vietnam on 12 April 1991 arrested an American citizen of Vietnamese origin (Dr. BUI DUY TAM) on allegations that he had tried to take secret documents out of the country after having returned to Vietnam in March to visit relatives, bringing opposition documents with him. It was later reported that the person would be deported.

Vietnam on 15 May 1991 expelled a French documentary film-maker of Vietnamese origin, GESBERT BERNARD ROMAI, for having smuggled into Vietnam letters and

documents from Vietnamese living abroad.
(IHT 31-05-91; FEER 30-05-91, p. 14)

Malaysia

Five foreign environmental activists who entered Sarawak posing as tourists but participated in demonstrations in protest against large-scale felling of tropical forests were sentenced by the Miri (Sarawak) magistrate's court on 18 July 1991 to between 50 and 60 days in prison. This highlights the Malaysian attitude of not tolerating outside interference in its domestic affairs.
(FEER 01-08-91, p. 19)

ALIENS: TREATMENT

Koreans in Japan

Under Japanese administrative practice virtually all foreign residents over the age of 16 are required to have their fingerprints registered. South Korea has since long demanded an exemption for Koreans who have long been living in Japan. Many of these approximately 700,000 residents are descendants of forced laborers shipped to Japan during the Japanese occupation of Korea.

In a memorandum signed by the Foreign Ministers of the two countries in January 1991, Japan promised to halt, by the end of 1992, the practice of finger-printing Koreans living in Japan. Japan also agreed to ease the regulations on deportation of Korean residents, and to extend to 5 years (from the current 1 year) the period during which Koreans are allowed to re-enter Japan after having left it. This latter modification of the law has meanwhile been carried out by way of the "Immigration Control Law for the Special Treatment of Persons who have Renounced Japanese Nationality based on Peace Treaties with Japan". The law applies to Koreans as well as to Taiwanese residents and also grants a special right to permanent residence to their offspring.

In the memorandum, Japan further promised to reduce other institutional forms of discrimination by opening the way for Koreans to be hired as full-time school teachers or as clerks at local government level. However, Koreans born in Japan will still be denied the right to vote or to stand for public posts.
(Straits Times 08-01-91; IHT 11-01-91; FEER 31-01-91, p. 38; The Japan Law Journal, June 1991)

ARMED INCIDENTS

Iran protested to the US over the firing by a US ship of an Iranian vessel in the central part of the Persian Gulf on 21 May 1991, resulting in damage to the Iranian vessel and a sailor wounded. The Pentagon reported an incident involving two unidentified ships, with the US navy's Gulf Command ship returning fire when it was fired upon.
(IHT 23-05-91)

ARMS SALES

See also: Foreign aid: Military cooperation; Sanctions

Soviet Union-China

China concluded an agreement with the Soviet Union for the purchase of a squadron of twenty-four Su 27 combat aircraft at a cost of US$ 700–800 million of which 60 percent would be paid in hard currency and 40 percent in barter trade. It is reported to be one of the biggest-ever foreign arms acquisitions by the People's Liberation Army. The sale did not involve the most advanced version of the aircraft.
(FEER 11-04-91, p. 18; 23-05-91, p. 8; 30-05-91, p. 19)

China-Pakistan-Syria

In its 22 April 1991 issue, *Time* magazine reported about deliveries of M-11 missile systems by China to Pakistan, and about negotiations on the sale to Syria of M-9 missiles. With the missiles Pakistan could reach cities and military installations in India, and Syria could reach any point of Israeli territory. China later acknowledged having sold "short-range" missiles to Pakistan without confirming that these involved the M-11s (the definition used for short-range missile is based on a range of 300 km) but it denied the alleged deliveries to Syria, although the Foreign Ministry declined to answer questions about future sales to Syria. The US Secretary of State confirmed that the US had no evidence of Chinese deliveries of M-9 missiles to Syria but warned that such deliveries and those of M-11 missiles to Pakistan would have potentially profound consequences for Sino-US relations. Reports in August 1991 mentioned actual sighting of M-9 missiles in Syria.

China said it was seriously considering to abide by the Missile Technology Control Regime (MTCR) which, incidentally, does not prohibit the sale of M-9 and M-11 tactical missiles. Besides, China is no party to the MTCR and has given no promise to the US not to sell missiles to Pakistan and Syria although it has reassured the US that China will act in a prudent and responsible manner. Some analysts say that such deliveries may stem from the fact that the recipient countries might have provided the bulk of the funds for the development of the systems.

Note: The Missile Technology Control Regime (MTCR) refers to a sixteen-nation body set up by and comprising mainly Western industrialized countries which aims at controlling the global proliferation of missile systems. It was founded in 1987 with the US, Canada, Japan, Britain, France, Germany and Italy ("G-7") as core members. It was later joined by: Australia, New Zealand, Austria, Norway, Belgium, Denmark, The Netherlands, Luxembourg and Spain.

By way of implementation of the MTCR Guidelines a new title to the US Military Authorization Bill was passed by Congress in the autumn of 1990 imposing sanctions on a foreign corporation or government entity that sells missiles or missile technology capable of delivering a payload with a range of 300 km. The sanction can be waived by the President on grounds of national security.
(IHT 08-05-91; 18-06-91; 20-06-91; 23-08-91; FEER 04-04-91, p. 13; 02-05-91, p. 10; 16-05-91, p. 15; 27-06-91, p. 12; 22-08-91, p. 6)

Sale of communications satellite technology barred

The US has barred the sale of US components for a Chinese domestic communications satellite because of concerns about possible Chinese exports of weapons of mass destruction to Third World countries.

Note: Satellites, components and associated technologies are included in the *US Munitions List* requiring license for export to countries like China.
(IHT 02-05-91; FEER 09-05-91, p. 57)

US-Philippines

It is reported that the United States offered military equipment as part of the deal to allow US bases to remain in the Philippines. The offer would classify the Philippines as a major non-NATO ally of the US, alongside Israel, Egypt, and South Korea.
(IHT 16-05-91)

China-Myanmar

Myanmar bought arms from China for the total value of US$ 1.3–1.4 billion of which 60% is supposed to be covered through short- and long-term barter trade, a further 10% said to be in grants and soft loans, and the remaining 30% in cash. The deal is said to have included eleven F-7 jet fighters (the Chinese version of the Soviet MiG 21), naval patrol boats, tanks, anti-aircraft guns, rocket launchers, and small arms.
(FEER 06-06-91, p. 12)

US-Pakistan

The United States has put as condition for resumption of the sale of conventional military hardware to Pakistan that Pakistan proves it neither has built nor is building a nuclear bomb.

American arms shipments were cut off in October 1990 when the US President could not certify to the US Congress that Pakistan did not have nuclear capabilities. The funds frozen were part of a US$ 4.01 billion 6-year package that ranked Pakistan third after Israel and Egypt among major aid recipients.
(IHT 12-06-91)

Registration of arms sales

Japan launched a proposal for the disclosure and recording of international arms sales. The idea was submitted to the Group of Seven (G-7) meeting on 15–17 July 1991. The "Conventional Arms Sale Disclosure System" plan would include a public registry to be maintained by the UN.

The danger of international arms sales might be reduced if sellers and buyers were required to disclose all sales to the UN. The records of the sales would be open to any country, group, or individual. The visible record could give the UN advance warning of military build-up in a particular region and thus help head off regional wars.

The Japanese prime minister urged the Chinese leaders to support the proposal during his visit to China in August 1991. The Chinese responded by affirming that China supported "proper international control on the transfer of weapons".
(IHT 03-07-91; 14-08-91)

Note: The idea of a register of arms sales under UN auspices was also raised in a British working paper submitted to the UN Disarmament Commission, see UNdoc.A/CN 10/144 of 22 Apr. 1991

ASIAN DEVELOPMENT BANK

See also: Sanctions

Influence of Western donors

Until the China issue as a result of the Tiananmen square incident emerged in 1989, the ADB was a traditional, straightforward bank which kept politics to a minimum. Western donors started pushing for a stronger interventionist role in the 1990s during the Bank's annual conference at Vancouver in April 1991, emphasizing human rights and democratic reform as a yardstick for its policy towards the borrower countries. An open split emerged during the conference between developing countries and Western donors led by the US which blocked the normalization of lending to China.

The conference failed to resolve the question whether to resume lending to China, and whether to grant China and India access to the soft-loan Asian Development Fund (ADF). The conference was concluded without a decision on the amount of new funds to be committed by donors to the ADF.
(IHT 29-04-91; FEER 09-05-91, p. 57)

ASSOCIATION OF SOUTH EAST ASIAN NATIONS

See also: East Asian Economic Grouping; Human rights; Security of the region

Oil pooling

The oil producing member states of ASEAN, Indonesia, Malaysia and Brunei, have pooled their oil output in order to support the other member states who suffer from the stagnation in oil supply as a result of the Gulf War.
(NRC 05-01-91)

ASEAN dialogue partners

It has been a long-established custom for the annual ASEAN Foreign Ministers Conference to be followed by discussions with the foreign ministers of a number of non-member states which are the most important economic partners of ASEAN. These are at present: the US, Japan, the European Economic Community, Canada, Australia, and New Zealand; and since July 1991, the Republic of Korea.

At the annual meeting in July 1991 at Kuala Lumpur, the Soviet Union and China were invited for the first time. The talks with the Soviet and Chinese foreign ministers about which Japan and the US expressed some reservations were to be separate from the traditional dialogue partners. According to officials of the host country, Malaysia,

the status of future discussions between ASEAN and the Soviet Union and China would be decided in the months following the meeting by a committee set up to review the external relations of ASEAN.
(IHT 18-01-91; 21-06-91; 20/21-07-91)

ASEAN Free Trade Area

At the annual meeting of ASEAN foreign ministers in July 1991, the Malaysian prime minister endorsed a recent Thai proposal to work toward the establishment of an ASEAN free trade area sometime by the turn of the century. The idea had already been endorsed earlier by the prime minister of Singapore who thought it might take twenty years rather than ten to create an integrated ASEAN market. Trade between ASEAN states account for only 20% of the group's total trade. Indonesia proposed that tariffs be reduced only in selected industrial sectors but that in the chosen sectors all tariffs would be cut. The Philippines suggested that whatever were decided should be made legally binding through an ASEAN treaty of economic cooperation.
(IHT 20/21-07-91)

Concern about Myanmar registered

The ASEAN states decided to send the Philippine foreign minister to Yangon to register their concern and to make constructive representations to the military rulers in Myanmar. (See also *infra*, Human Rights)

When the military in Myanmar suppressed a democratic uprising in 1988 many Western states banned arms sales, suspended aid and halted financial assistance. ASEAN states and China have always refused to join the boycott, saying that boycott only stiffens the attitude of the Myanmar rulers, and makes it more difficult to bring about changes. Isolating the country would not work, while a process of constructive engagement is needed to persuade the Myanmar authorities that change is in the country's interest.
(IHT 24-07-91)

BORDER INCIDENTS

Iran-Iraq

During the Shiite uprising in Southern Iraq after cessation of the Iraq-Kuwait War, Iran allowed the "Badr Brigades" of the Iraqi Shiite opposition which were based in Iran to enter Iraq and take part in the fighting. Some Iranian Revolutionary Guards were reported also to have crossed into Iraq to attack border posts and to harass camps of the Mujahidin Khalq, the Iranian opposition whose exiled forces were expelled from France during the Iran-Iraq war and who subsequently set up paramilitary bases in Iraq to exploit opportunities for raids into Iran.
(IHT 27/28-04-91)

Kashmir

The Indian army was reported to have intercepted about 300 armed men who had

crossed the so-called Line of Actual Control from the Pakistan-controlled sector of Kashmir in early May. Indian and Pakistani troops were also reported to have exchanged artillery fire over a two-day period.
(FEER 16-05-91, p. 14)

BORDERS

See also: Territorial claims

China-India

As a result of the late prime minister Rajiv Gandhi's visit to China in December 1988 a joint working group have been dealing with the issue of the undemarcated 4,500 km border.

Since 1982 a Chinese proposal for a pragmatic solution of the border question consists of accepting the existing lines of control as the permanent boundary, with China getting the Aksai Chin sector of Ladakh which it occupies and which is allegedly of little strategic use to India. However, it contains the road linking Tibet and the province of Xinjiang which is important to the Chinese. In the eastern sector both parties would recognize the so-called *MacMahon* line of 1914 which means the affirmation of the existing boundaries of the state of Arunachal Pradesh.
(FEER 28-02-91, p. 18)

India-Pakistan

See: Inter-state relations

Sino-Indian border trade

China and India agreed on 2 February 1991 to resume land trade across their Himalayan border in May 1991, after a break of 31 years. The resumption of trade was already agreed in principle in June 1988 by Chinese and Indian trade officials, but implementation was delayed, possibly by the occurrence of disturbances in Tibet since then.
(FEER 14-02-91, p. 14)

Thailand-Laos

The two countries agreed on 12 March 1991 to withdraw their troops from a disputed border area. They also agreed to replace the existing border committee with a joint coordinating committee that would be responsible for promoting bilateral trade and economic cooperation.

Thailand and Laos fought a brief battle in 1988 over Ban Rom Klao, near the border of Thailand's Phitsanulok province and Laos' Sayabouri province.
(FEER 28-03-91, p. 12)

China-Soviet Union

China and the Soviet Union signed an agreement on the eastern part of their border on 16 May 1991 during the visit to Moscow by the General-Secretary of the Chinese

Communist Party. The agreement settled most of the eastern territorial disputes. It excludes some "difficult" parts such as the Amur River islands over which the two sides clashed in 1969. With the conclusion of this agreement about ten percent of the border is still in dispute, i.e., the part along Xinjiang province in the West.
(IHT 03-04-91; 16-05-91; 17-05-91; FEER 30-05-91, p. 18)

Malaysia-Thailand

Malaysia is to build a concrete wall about 100 km long along the frontier between Thailand and the Malaysian state of Kelantan. Of the four Malaysian states along the 515 km border with Thailand, Kelantan is the only one which does not yet have border fencing. The existing walls were intended to prevent Communist infiltration into Malaysia. The new wall would help stop the flow of smuggled narcotics, cigarettes and other taxable goods from Thailand into Malaysia. The decision to build the wall followed the arrest of 11 Malaysian forestry officers for allegedly engaging in illegal logging in Thai territory and the seizure on 7 July by Thai officials of goods from Malaysian traders at Padang Besar, just inside Malaysia, resulting in a formal Malaysian protest in Bangkok. Also, Thai officials complained that the Pan-Malayan Islamic Party government of Kelantan was providing refuge to Thai Muslims demanding independence for southern Thailand.
(IHT 10-07-91)

CAMBODIA

Draft for a comprehensive political settlement

During the first half of 1990 the five permanent members of the UN Security Council held 6 meetings in order to define the *key elements* of a comprehensive political settlement of the Cambodian conflict based on an enhanced UN role. At their meeting in New York on 28 August 1990, they reached an agreement on a framework for a settlement. This framework was endorsed by the UN Security Council (res. 668) and the UN General Assembly. The framework document consists of 5 sections on: (1) transitional arrangements regarding the administration of Cambodia during the pre-election period; (2) military arrangements during the transitional period; (3) elections under UN auspices; (4) human rights protection; and (5) international guarantees.

Section 1 deals, first, with the establishment of a Supreme National Council of Cambodia as a unique legitimate body and source of authority in which national sovereignty and unity would be enshrined during the transnational period. The SNC is to delegate to the UN Transitional Authority in Cambodia (UNTAC) all powers necessary to ensure the implementation of the comprehensive agreement, including the conduct of general elections and the "relevant aspects of the administration of Cambodia". In order to ensure free and fair general elections, administrative agencies, bodies and offices which could directly influence the outcome of elections should be placed under direct UN supervision. In this context "special attention will be given to foreign affairs, national defence, finance, public security and information".

Section 2 deals with the establishment of a UN Transitional Authority in Cambodia with a military as well as a civilian component. This is necessary in view of the intended enhanced UN role. The UNTAC would supervise, monitor and verify the cease-fire and in a later stage initiate a phased process of arms control and reduction.

Section 3 elaborates on the organization and conduct of "free and fair elections" under the auspices of the UN within a specified period. The elections should lead to the formation of a constituent assembly which would draft and approve a constitution, and transform itself into a legislative assembly which would create the new government. The constitution should be based on principles which are an integral part of the comprehensive political settlement.

Section 4 specifically deals with human rights protection. In view of the tragic recent history of Cambodia the comprehensive political settlement should commit Cambodia to comply with the obligations of the relevant international human rights instruments and UN General Assembly resolutions.

Section 5 prescribes perpetual neutrality for Cambodia and the conclusion of an agreement among the states participating in the Paris conference, recognizing and respecting the territorial integrity and neutrality of Cambodia. The particulars would be determined by consensus in the Second Committee of the Paris Conference on Cambodia.

Once the Cambodian parties would have accepted the framework and a Supreme National Council had been formed the Paris Conference on Cambodia would be reconvened with the task of adopting the elements of a comprehensive political settlement and drawing up a detailed plan of implementation. The Conference would then recommend that the UN Security Council adopt a resolution endorsing the final agreement and enabling the Secretary-General to implement it.

By way of preparatory work, the five permanent Security Council members together with the co-chairmen of the Paris Conference on Cambodia and a representative of the UN Secretary-General met in November 1990 and reached consensus on a draft comprehensive political settlement. This consisted of a draft agreement covering the major aspects of the settlement, and annexes dealing with: (1) the proposed mandate for the UN Transitional Authority in Cambodia (UNTAC); (2) withdrawal, cease-fire and related measures; (3) elections; (4) repatriation of Cambodian refugees and displaced persons; and (5) principles for a new constitution for Cambodia. Besides, a draft agreement concerning the sovereignty, independence, territorial integrity and inviolability, neutrality and national unity of Cambodia, and a draft declaration on rehabilitation and reconstruction of Cambodia were also elaborated.
(UNdoc.S/21689; S/21985. *See* also: *Documents, infra.*)

Implementation of the UN peace plan

Despite accepting the UN peace plan's framework, along with the three Cambodian resistance factions in Jakarta, September 1990, the Phnom Penh government objected to four aspects of the plan: the virtual taking over of the country's sovereignty by the UN, the dismantling of the Phnom Penh government, the complete disarmament of the armed forces of all four factions, and the absence of any arrangement for the punishment of those responsible for the crimes committed during the Khmer Rouge rule. After the December 1990 round of the Paris Conference on Cambodia provided some clarifying explanation, the complaints were reduced to two: the trying of Khmer Rouge leaders and the demobilization of the Phnom Penh forces.

At a meeting of the representatives of the five permanent members of the UN Security Council in Beijing in July 1991, the UN peace plan was altered by agreeing that the warring factions need not fully demobilize. The Phnom Penh government who had opposed demobilization arguing that the disarming of the Khmer Rouge could not

be verified, later declared its agreement to an arrangement under which 30 percent of its forces would be maintained until after elections. Agreement was reached in late August 1991, whereby each party would reduce its forces by 70 percent, and put the remaining troops under UN control. The agreement obtained qualified approval from the permanent members of the UN Security Council.

During the peace talks held by the Cambodian factions on 24–26 June 1991 at Pattaya the Khmer Rouge tentatively agreed with the establishment of the Supreme National Council embodying Cambodian sovereignty in Phnom Penh, though conditional on UN guarantees for the safety of the Council members.
(FEER 31-01-91, p. 19; 18-04-91, p. 13; 04-07-91; IHT 26-06-91; 27-06-91; 29/30-06-91; 20/21-07-91; 28-08-91; 31-08-91; 01-09-91; UNdoc.A/46/269 of 25-06-91 and A/46/271 of 26-06-91)

At their subsequent meeting in Beijing on 16–17 July 1991 the factions agreed on a single delegation to the UN, and accepted a special UN team to monitor the cease-fire.
(IHT 17-07-91)

At the end of the second Pattaya round of talks in late August 1991, the only undecided question that remained was that of the post-war electoral system. The Phnom Penh government wanted to apply a constituency system while one of the other factions, the Khmer People's National Liberation Front, insisted on proportional representation.
(IHT 30-08-91)

Humanitarian aid to the resistance groups

It was reported in April 1991 that the United States had suspended humanitarian aid to the two non-Communist resistance groups on grounds of their cooperation with the Khmer Rouge. The aid had always been quite irregular because of a Congressional ban against helping any organization that engaged in "tactical or strategic" cooperation with the Khmer Rouge. The halting of the aid could result in civilians living in areas controlled by the two factions being forced to turn to the Khmer Rouge or the Phnom Penh government. In early May, the US administration decided to resume the aid, the criteria being changed from "non-lethal" to "strictly humanitarian purposes".
(FEER 18-04-91, p. 10; 09-05-91, p. 12; IHT 02-05-91)

Sino-Vietnamese understanding over Cambodia
See: Inter-State relations: general aspects

Repatriation of Cambodians from Thailand

It was announced by UN officials in early August that the UN would soon begin building reception centres and making other preparations for the eventual repatriation of the 330,000 Cambodians in Thailand. The building of six centres inside Cambodia where the refugees would stay on their way back to their home villages was projected to be a 6-month task. The refugees were accommodated in a half-dozen camps near the Thai-Cambodian border that were aided by the UN but controlled by the three guerilla groups opposing the Phnom Penh government. A UN agency estimated last year that the entire repatriation effort would cost US$ 109 million.
(IHT 09-08-91)

CONSULAR RELATIONS

See also: Inter-state relations (China-India)

Malaysia-Vietnam

Malaysia was reported to open a consulate in Ho Chi Minh City, being the first ASEAN Country to do so.
(FEER 21-02-91, p. 14)

China-France

During his visit to China in April 1991, the French foreign minister and the Chinese government exchanged notes on the establishment of consulates-general in each other's country.
(Beijing Review 13 May 1991)

South Korea-Soviet Union

Agreement was reached on the opening of two or three Korean consulates in Tashkent (Uzbekistan), Alma Ata (Kazakhstan) and Sakhalin to serve the needs of 450,000 ethnic Koreans living there.
(FEER 01-08-91, p. 12)

DEBTS

Vietnam

The SU informed Vietnam that it would not cancel the latter's debt incurred after 1973 (believed to total around US$ 16.7 billion), and that it expected Vietnam to pay US$ 350 million a year to service this debt.

Algeria asked Vietnam for urgent repayment of its outstanding loans, estimated at over US$ 220 million, and Vietnam was reported to plan repaying by sending workers to Algeria and exporting shoes and educational supplies.
(FEER 30-05-91, p. 8)

Japanese policy regarding foreign state debts

It was reported in April 1991 that a deepening rift was developing between the US and Japan on fundamental points in the strategy for dealing with debt problems: how big a role politics should be allowed to play in making economic judgements and whose political standards should apply.

Japanese policy is that debt forgiveness encourages irresponsibility and is unattractive since it calls for general application. The reduction and cutting of existing state debts would imply lack of credit worthiness and would be incompatible with the making of new loans. Consequently the accord by the "Paris Club" of government creditors to cut the Polish debt by 50 percent and the expected similar accord for

Egyptian official debts will be treated by Japan as exceptions, and not a precedent for other debtor states. In the Japanese view, the choice of the two countries was made to reward Poland for its commitment to a rapid transition to capitalism and Egypt for its support in the war against Iraq.

In accordance with the above policy it was expected that Japan would oppose any attempt by the Philippines to write off part of its US$ 29 billion overseas debt because once that takes place it would be extremely difficult to continue providing assistance.
(IHT 30/31-03-91; 15-04-91; 03-05-91)

The "Brady Plan"

In 1989 the so-called "Brady Plan" offered countries which owed most of their debts to commercial banks a market-based debt reduction instrument backed by IMF and World Bank funds and on the condition that they pursued economic restructuring. Only five out of nineteen eligible debtors (among which the Philippines) concluded agreements with creditor banks on this basis. (IHT 29-04-91)

Philippine presidential powers in respect of foreign debts

The Philippine Supreme Court on 29 April 1991 upheld the authority of the President to set aside government funds to service foreign debts without the approval of Congress. The decision was made with reference to three decrees from the Marcos era conferring that right to the President.
(FEER 09-05-91, p. 57)

Japanese arrangement for Soviet commercial debts

Japan was reported to plan providing US$ 350 million in "bridge loans" to help the Soviet Union refinance its (currently about US$ 500 million outstanding trade) debts to Japanese companies.

Japanese companies that are owed money by Soviet import agencies would ask the Bank of Foreign Economic Affairs in Moscow to consolidate the debt and assume responsibility for repayment. Japanese banks would then make stop-gap loans to the Soviet bank which would repay the debts and collect money from other Soviet agencies later.
(IHT 25-07-91)

Philippine debt settlement

The Philippines reached agreement in principle with foreign banks on a new debt-reduction package but this would probably go ahead only if the Philippine Senate ratified a new military base agreement with the US. This ratification would increase the likelihood of the important US support for the package. In addition the banks would probably only sign the new accord if a $250 million debt relating to the suspended construction of a nuclear plant would be included in the debt that could be bought back under the agreement. There is Philippine opposition against such inclusion, and a lawsuit is pending against Westinghouse in the US on the basis of alleged faulty construction and overpricing.

The aim of the agreement was to reduce the Philippine medium and long-term bank debt of $5.3 billion (The Philippines has a total foreign debt of $29 billion) by $1.5 billion over six years. Under the agreement the Philippines offered commercial creditors three options.

The first involves lending new money over the next two years by buying newly issued Philippine bonds (of 17 years maturity with a 5-year grace period) or joining a co-financing transaction with the Asian Development Bank (of 14 years maturity with a 3-year grace period). For each $1 of new bonds purchased the creditor may convert $4 of existing Philippine debt into bonds with the same terms as the new bonds. The second option involves swapping existing loans for new Philippine bonds that will mature in 25 years. The third option offers to swap the debts for 15-year bonds with a 7-year grace period.

The agreement commits the US, the IMF, the World Bank and Japan to provide the Philippines with at least $640 million collateral for the bonds.
(IHT 20-08-91; 03-09-91; 05-09-91)

Myanmar debt written off by France

The French government wrote off debts totalling US$ 82 million outstanding against Myanmar. The debts were incurred when Myanmar took ODA loans from France beginning from 1976.
(FEER 25-07-91, p. 14)

DEVELOPMENT AID

See: Economic cooperation

DIPLOMATIC INVIOLABILITY

Iranian diplomat killed in Pakistan

A junior Iranian diplomat in Lahore, director of the local Iranian cultural centre, was killed on 19 December 1990 during a farewell party given in connection with his intended return to Iran.

Pakistan reacted strongly: the Foreign Secretary went to the Iranian embassy to inform the ambassador, and the President, the Prime Minister and the Foreign Minister condoled and rang up Tehran. The prime minister flew to Lahore for the funeral prayers. An Air Force aircraft was provided to fly out the body to Iran, escorted by the Governor of Punjab. The administration promised a thorough investigation and exemplary punishment, and agreed to Iran's request for associating Iranian policement with the investigation.
(FEER 03-01-91, p. 9; UN doc.A/INF/46/4)

Protection of ambassadorial residence in Singapore

On 27 October 1990, a US sailor broke into the Thai ambassador's residence in Singapore. It turned out on that occasion that the Singapore emergency telephone line

system failed to function. Despite a formal protest from the diplomatic community over what is seen as insufficient protection from the authorities, the Singapore foreign ministry maintained that embassies should hire private guards if they want additional security.
(FEER 24-01-91, p. 8)

Shiite demonstration at Iraqi embassy

During a demonstration by hundreds of Shiite Muslims at the Iraqi embassy in New Delhi, at least two people were injured when fire was opened on the demonstrators from the embassy building. Fire was opened when demonstrators smashed the windows of parked cars and tried to climb over the spiked iron fence into the building's front yard.
(IHT 23/24-03-91)

Thai diplomat arrested on seizure of narcotics

British customs agents arrested a Thai diplomat upon his arrival at London Heathrow Airport after seizing 60 kilograms of heroin in his possession. The Thai government is reported to have cancelled the diplomat's accreditation as counselor at the Thai embassy in London, and to have lifted his diplomatic immunity.
(IHT 26-08-91)

DIPLOMATIC RELATIONS

Expulsion of Chinese diplomats

Sweden expelled three Soviet and two Chinese diplomats on grounds of behaviour incompatible with their diplomatic status. It is not clear what this referred to in the case of the Chinese. China has retaliated by expelling two Swedish diplomats.
(NRC 03-01-91)

Expulsion of Iraqi diplomats

Thailand expelled two Iraqi diplomats in January 1991. It also refused to allow two other Iraqi diplomats who were expelled from Australia, to stay in Thailand. The measures are believed to be inspired by concern for terrorist activities.
(IHT 29-01-91)

Upgrading of Belgium-Vietnam diplomatic relations

Belgium upgraded its relations with Vietnam by accrediting its first ambassador to Hanoi since January 1979. The relations were downgraded in December 1978 because of Vietnam's invasion of Cambodia.
(IHT 31-01-91)

Alleged diplomatic involvement in terrorist activity

On 19 January a premature detonation of a powerful C-4 plastic explosive device in the Makati business district of Manila killed a suspected Iraqi and wounded his companion. The Philippine authorities linked the Iraqi Consul-General in Manila to the incident and expelled him. This was the first case of expulsion of a diplomat in the Philippines and the first act of terrorism so far to be linked to the Gulf War. The Consul-General was said to have had several meetings during the past weeks with the two bombers who entered the Philippines on 6 December as merchants from Baghdad.
(FEER 31-01-91, p. 10)

Thai-Cambodian relations

The newly appointed minister for foreign affairs after the 23 February 1991 *coup d'état* in Thailand delayed implementation of the decision by the previous government to set up a trade representative office in Phnom Penh. Implementation had to wait until a comprehensive solution to the Cambodian conflict is reached.
(FEER 21-03-91, p. 12)

Financial problems of embassies and the Vienna Convention

Over a hundred diplomats from 34 embassies accredited to South Korea having personal or chancery accounts with the Bank of Credit and Commerce International's Seoul branch had an amount of US$ 5 million frozen as a result of the suspension of the Bank's activities in early July 1991. The cash shortage at many embassies became so acute that some were said to be unable to carry out their normal duties. Paraguay's ambassador as dean of the diplomatic corps invoked the Vienna Convention in requesting the South Korean foreign ministry to intervene on behalf of the affected embassies. The ministry responded that banking problems were not covered by the Convention and that it had no authority to help the diplomats.
(FEER 15-08-91, p. 8)

Sri Lankan-United Kingdom relations

The British High Commissioner broke the law by entering a polling station in the town of Dickwella while voting was taking place, and subsequently lodged a police complaint alleging irregularities in the elections to local government bodies on 11 May 1991. Accusing him of interfering in the internal affairs of Sri Lanka the government declared him *persona non grata*. The declaration was not accompanied by a request to recall, nor by a fixation of a time-frame when he should leave.
(IHT 31-05-91)

Thai-Vietnamese exchange of military attachés

Thailand and Vietnam agreed to exchange military attachés.
(FEER 20-06-91, p. 12)

Philippines-Democratic People's Republic of Korea (DPRK) relations established

The Philippines and the DPRK agreed to establish diplomatic relations according to the Joint Statement issued by the two states on 13 June 1991. The agreement would be effectuated before the end of 1991.
(FEER 27-06-91, p. 22)

Iran-United Kingdom relations resumed

Iran and the United Kingdom resumed diplomatic links in September 1990, after a break of eighteen months over the sentence of death on the author SALMAN RUSHDIE.

The release in April 1991 of a British hostage by Shiite Muslim militants in Lebanon was widely regarded in London as an attempt by Iran to improve relations.
(IHT 22-07-91)

DISCRIMINATION

See: Exclusion from international economic cooperation

DISSIDENTS

See also: Human rights; Insurgents

Myanmar dissidents in Myanmar embassy

Two Myanmar dissidents entered the Myanmar embassy in Bangkok on 19 January 1991, and later returned to Myanmar. According to the embassy they had surrendered to the embassy. According to the rival government set up in December 1990 in the Myanmar jungle, the two persons were kidnapped or tricked into the embassy while in Bangkok for medical treatment.
(IHT 26/27-01-91; FEER 14-02-91, p. 14)

US interventions in favour of Chinese dissidents

In December 1990, the US Assistant-Secretary of State requested the release of 150 Chinese activists, mentioned by name, during a visit to China.

In March 1991, members of the US Congress on a visit to China presented the Chinese prime minister with a letter from 100 Congress members demanding the release of political prisoners. The prime minister told on that occasion that the government was not in a position to make decisions regarding the judiciary.

During a later visit the US Under-Secretary of State for Political Affairs called upon China to show leniency to political prisoners and to give an amnesty for those who engaged in non-violent political acts.
(NRC 07-01-91; IHT 29-03-91; 08-05-91; FEER 03-01-91, p. 8)

Denial of exit permits

Members of an opposition grouping in Indonesia called "Group of 50" have been denied permission to travel abroad upon their application for exit permits on 3 May 1991. The Coordinating Minister for Security and Political Affairs said the persons concerned were liable to make critical statements about Indonesia while abroad, which could threaten Indonesia's continued access to funding from foreign donors.
(FEER 16-05-91, p. 14)

DIVIDED STATES: CHINA

See also: Air traffic; Foreign investment

Unification guidelines of the Taipei government

The unification guidelines endorsed by the government in Taipei distinguishes between different stages. In the first stage, the present level of informal contacts should establish the principles of reciprocity and parity between the two sides. This stage calls on Beijing to carry out economic reforms "forthrightly" and to allow freedom of expression and democratic development. It also asks Beijing to renounce the use of force against Taiwan and to accept Taiwan's presence in the international community.

The second stage proposes equality between the two sides as the basis for opening official communications as well as direct trade and the joint development of China's southeastern coast. At this stage Taiwan asks for mutual cooperation in international affairs and exchange of visits by high-ranking officials.

The final stage proposes long-term consultation and unification "in accordance with the will of the people in both the mainland and Taiwan areas".
(FEER 25-07-91, p. 21)

Growing economic ties between Taiwan and mainland China

While the first Taiwan-financed venture in mainland China with formal approval from the Taipei authorities was opened in Shanghai in February 1991, total indirect and unapproved Taiwan investment are estimated to amount to US$ 1.5–2 billion. The Taiwan's Investment Commission requires all Taiwan investors in mainland China to register and to set up third country subsidiaries to run the business. By the registration deadline of 8 April 1991, 2,940 Taiwan-based firms had notified direct or indirect investments on the Chinese mainland.

Two-way trade through Hong Kong reached US$ 4 billion in 1990, and Taiwan's exports to the mainland is approaching 10% of its total export trade.

Transfers of money also began to flow to mainland China since Taiwanese travel restrictions were eased in the late 1980s, and these are now facilitated by the launching of transfer services through the post office.

The growing economic links have alarmed the Taiwan authorities who expressed fears that the island's growing economic reliance on China could make it vulnerable to political pressure. According to the spokesman for the Mainland Affairs Council of the Taipei cabinet, Taiwan is now considering curbs on investments.
(IHT 29-01-91; 28-02-91; 02-09-91; FEER 18-04-91, p. 73; 01-08-91, p. 61)

Channels for Taiwanese indirect investments in mainland China

Taiwan decided to promote Singapore instead of Hong Kong as the main channel for indirect Taiwan investments in mainland China, one reason being that Singapore has investment guarantee treaties with both Taipei and Beijing.
(IHT 29-04-91)

Mainland investments in Taiwan

The government at Taipei is planning measures to stop capital from China finding its way to Taiwan under the guise of foreign investments from other countries.
(IHT 22/23-06-91)

Economic integration

The Chinese trade ministry called for far-reaching economic integration with Taiwan as a prelude to political reunification. This was rejected by Taipei saying that Beijing would have to make political concessions first, such as promise never to use force against Taiwan and cease its diplomatic campaign to isolate the island.
(IHT 04-07-91; 05-07-91)

Termination of era of confrontation

On 1 May 1990, the legislature in Taiwan abolished the law instituting the "period of Communist rebellion" which was enacted in 1949. This coincided with the first visit to Beijing of a delegation from the Straits Exchange Foundation, a mediation group established by the government in Taipei to deal with bilateral issues on a semi-official basis.

Subsequently the Planning Commission for the Recovery of Mainland China was disbanded. It was set up in 1954. Planning for reunification will now be mainly done in the National Unification Council, a multi-party body.
(FEER 28-02-91, p. 13; 09-05-91, p. 8; IHT 23-04-91; 05-07-91)

Seizure of Taiwan coast guard officers

Three Taiwan coast guard officers were seized when they boarded a Chinese fishing boat during an anti-smuggling operation. The men were taken to the Chinese mainland. The Taiwan authorities asked the Red Cross to negotiate the return of the three officers.
(FEER 21-03-91, p. 12)

Mainland observers at Taiwan trial

The government at Taipei had allowed representatives of the Chinese Red Cross to visit Taiwan for the first time since the end of the civil war in 1949. The representatives should come from the Red Cross national headquarters and should not hold any government or party posts. The purpose of the visit was to check on the condition of a

number of fishermen detained by the Taiwan navy on suspicion of piracy after they boarded a Taiwan fishing vessel, allegedly in an attempt to get compensation after a Taiwanese boat sliced through their fishing net. Two Chinese Red Cross officials were, however, barred from coming at the last minute in August, while two journalists were admitted to cover the trial, also the first such visit since 1949.
(IHT 29-07-91; 13-08-91; FEER 08-08-91, p. 12; 22-08-91, p. 12)

Activities on the other side of the "Davis line"

On 14 June 1991 navy ships from Taiwan caught six Chinese customs officials from the port of Xiamen who inspected a Panamanian registered freighter suspected of smuggling a cargo of duty-free cigarettes, on the Taiwan side of the so-called Davis line which has divided the Taiwan Strait in the past 40 years. The customs officers and ship were taken to Taiwan; the officers were returned to China via Hong Kong on 18 June.

This incident was the second time that China crossed the line. The first time was in 1987 soon after Taiwan had lifted martial law.
(FEER 27-06-91, p. 9; 11-07-91, p. 21)

One country two governments

The Chinese newspaper "People's Daily" declared "incompatible with the grand cause of reunification" a Taiwan proposal that Beijing and Taipai recognize each other as equal political entities ("dual recognition"). It would be similar to "one country two governments", "one country two regions".
(SCMP 07-06-91)

Dual diplomatic relations

The Central African Republic re-established diplomatic relations with Taipei (which it had broken off before to establish relations with the Chinese government in Beijing) without closing its embassy in Beijing.
(FEER 18-07-91, p. 14)

French arms delivery to Taiwan

France renewed a contract for the sale of Lafayette-class frigates to Taiwan earlier in 1991. A similar agreement was broken off in 1990 after Beijing protested. This time France appeared to go through with the sale.
(FEER 25-07-91, p. 8)

Chinese membership in Asian Pacific Economic Cooperation conference (APEC)

China, Hong Kong and Taiwan were to join APEC in November 1991, after having agreed to a formula whereby, *inter alia*, Taiwan would be called "Chinese Taipei" and would not be represented at foreign minister level but by lesser officials. Details of Hong Kong's membership were not revealed.
(IHT 29-08-91)

DIVIDED STATES: KOREA

See also: Joint development

Reunification talks between prime-ministers

High level reunification talks between the prime ministers of North and South Korea began in September 1990. North Korea cancelled the fourth round of talks due for 25–28 February 1991 in Pyongyang because of the annual US-South Korean military exercises which have been held since 1976 and which were held in January 1991 under the name "Team Spirit '91". Several months later North Korea offered to resume the talks in Pyongyang on 27 August 1991 which was accepted by South Korea.
(IHT 29-01-91; 19-02-91; 12-07-91; 23-08-91)

New proposals

The President of South Korea proposed the adoption of a non-aggression declaration, the conclusion of an internationally guaranteed peace treaty formally ending the 1950–1953 War, and an increase of social and cultural contacts to prepare for an eventual reunification. The expanded contacts should include exchange of radio and TV broadcasts which now have incompatible systems. It is now illegal in South Korea to receive North Korean broadcasts and in North Korea most radios cannot receive outside broadcasts. The peace treaty proposal would be put forth at the Prime Ministers' meeting in August 1991.

North Korea suggested a loose confederation between North and South Korea as a possible first step towards reunification. This would permit the two Koreas to share one UN Seat (see *infra*) while diplomacy and military matters could for the time being be kept autonomous.
(IHT 03-06-91; 13/14-07-91; 09-08-91)

Unified sports teams

For the first time since the division of the country in 1945 agreement was reached on 12 February 1991 to form unified Korean sports teams, such as for the World Table Tennis Championships in Japan, April 1991, and the World Youth Soccer Championships, Portugal, June 1991.
(IHT 13-02-91; 31-05-91)

United Nations membership

In a memorandum of 5 April 1991 to the UN Security Council, South Korea announced its resolve to seek UN membership, hoping that North Korea would do the same. It emphasized that such parallel membership should serve as a confidence-building measure and is "without prejudice to the ultimate objective of Korean unification". It referred to the German and Yemeni cases to disprove the contention that parallel UN membership might perpetuate or legitimize Korea's division.
(UNdoc.S/22455; IHT 08-04-91)

In a statement of 27 May 1991, the North Korean Ministry of Foreign Affairs announced that it had been left with "no alternative" and would apply for separate UN membership. The statement said that if the South were allowed to enter the United Nations alone, important issues related to the interests of the entire Korean nation would be dealt with in a biased manner in the UN. The application was filed on 2 July 1991.

So far, both Korean states have observer status at the UN.
(UNdoc.S/22642; IHT 24-06-91; 29-05-91; UNdoc.A/46/295 of 10-07-91)

Note: By aide-mémoire of 13 August 1990, North Korea put forward its proposal of a joint UN membership with a single seat which would accommodate the question of admission to the UN with the question of reunification. It admitted that there is no precedent for joint admission of the two sides of a divided state to the UN with a single seat, but it held that the UN would find a way to permit such a construction if it had the intention to help relax the tense situation and hasten Korea's peaceful reunification. On the other hand, separate or simultaneous admission could create further difficulties and obstacles to reunification of Korea. The example of East and West Germany did not fit the reality of Korea because in contradistinction to Germany the division of Korea was brought about by foreign forces and the question of reunification in Korea already existed before admission of either part to the UN.
(UNdoc.S.21787)

In a letter of 26 September 1990 to the President of the UN Security Council, South Korea reaffirmed its position on admission of both parts of Korea to the UN as an interim measure pending reunification. The South Korean letter classified the North Korean formula as unprecedented and impracticable. It was incompatible with UN Charter as any agreement on single seat membership before unification would not amount to the formation of a "State" as defined in the Charter and in generally accepted international practice.
(UNdoc.S/21827, and cf. subsequent letter of 1 Oct. 1990 from the North Korean permanent observer to the President of the Security Council, UN.doc.S/21836)

Size of representation in Inter-Parliamentary Union

North Korea restricted the size of the South Korean parliamentary delegation which was due to attend the 85th conference of the Inter-Parliamentary Union in Pyongyang on 30 April–4 May 1991. It was the first international conference held in North Korea attended by South Korea.
(FEER 11-04-91, p. 14)

South Korean threat to mount a commando raid

In view of North Korean reluctance to submit to international inspection of its nuclear facilities (see Nuclear capability, *infra*) the South Korean defence minister has been quoted as saying that the South might launch a commando raid against North Korean nuclear facilities if North Korea did not agree to inspection. North Korean authorities qualified the remark as virtually a declaration of war.
(IHT 13/14-04-91; 16-04-91)

Intra-Korean trade

The two Korean states would engage in direct barter trade for the first time since the

end of World War II. Previously the two states had traded only through third countries. Meanwhile, South Korea's imports from North Korea jumped 10-fold in the first six months of 1991.
(FEER 25-04-91, p. 63; 25-07-91, p. 63; IHT 06-09-91)

Reduction of US forces

The US started pulling out troops as part of the so-called "Nunn-Warner Bill". After completion of the first phase by the end of 1992 there will be about 36,000 US military personnel remaining in South Korea.
(FEER 02-05-91, p. 19)

Nuclear-free Korean peninsula

North Korea proposed on 30 July 1991 that there should be established a nuclear-free Korea to be guaranteed by China, the Soviet Union and the US. This idea of a nuclear-free Korea had already been vented much earlier, on 23 June 1986. South Korea said that it would consider talks on the matter, on condition that North Korea accept international inspection of its nuclear plants. As to the idea of a reduction of US nuclear arms from South Korea, the South Korean president had formerly responded that such a reduction would be useful only if the Soviet Union, China and the US would agree on North East Asia as a nuclear-free zone. On 7 August, China explicitly supported the North Korean proposal, and it was reported that at a recent meeting in Honolulu senior officials of the US and South Korea discussed the issue of a nuclear-free zone covering the Korean peninsula.
(IHT 15/16-06-91; 02-08-91; 08-08-91; 14-08-91; UNdoc.S/21957; FEER 11-07-91, p. 11)

EAST ASIAN ECONOMIC GROUPING

The scheme for an East Asian Economic Grouping emerged when the Malaysian minister for primary industries told reporters in the Malaysian parliament early December 1990 that if the Uruguay Round of multilateral trade negotiations failed to reach an agreement (which it did on 7 December) "it is inevitable that emphasis will be put on regional pacts". An Asian trading bloc "will allow [the Asian countries] to counter the emergence of protectionism and regionalism in world trade". The idea has been strongly pursued since by the Malaysian government. An EAEG would include the ASEAN countries, Myanmar, the countries of Indo-China, China, Japan, South Korea, Taiwan, and Hong Kong, and the purpose of the proposal would be to counter other trade blocs being formed in North-America and Europe.

The United States criticized the plan as it would diminish the meaning of another loose grouping, the Asia-Pacific Economic Cooperation forum (APEC), which was formed at the instigation of Australia at a meeting at Canberra on 6–7 November 1989 and which includes the US, Canada, Australia, New Zealand, the ASEAN states and Japan.

Note: The basic principles agreed at the Canberra meeting stated, *inter alia*, that Asia-Pacific Economic Cooperation should be a loose, exploratory and informal consultative process, that it should not dilute the identity of ASEAN, and that it should not be directed towards the establishment of an economic trading bloc.

While other countries pledged their support in principle many provisos were made. The main worry is that an Asian trading bloc would jeopardize access for their exports to their still most important markets, the US and the European Community. This applies particularly to Japan, whose prime minister on his ASEAN tour in early May 1991 made it clear that Japan was not prepared to endorse the EAEG idea before the ASEAN countries had thrashed out the proposal. It is said that although Japan is willing to speak up for the Asian region, its first commitment – dictated by Japan's own economic interests – remains to the larger markets of North America and Europe. Indonesia and the Philippines were also reported to take a reserved stance. Singapore supported both the Malaysian proposal and the Thai proposal of an ASEAN Free Trade Area (see *supra*, Association of Southeast Asian Nations). Singapore's position on the EAEG proposal was that it should be consistent with the principles of free trade as laid down in GATT, does not affect the APEC initiative and should not undermine the solidarity of the member states of ASEAN. Singapore viewed the Thai proposal of an ASEAN Free Trade Area as being consistent with the EAEG and suggested that ASEAN adopt moves and measures towards greater economic integration.

The Malaysian initiative was further explored by an EAEG working group of ASEAN on 3–5 July 1991 in Kuala Lumpur, where little seemed to have changed in the opposing positions and where Thailand was reported to have pushed its own preference, namely the creation of an ASEAN free-trade area. Singapore too seemed to have swung behind the idea of a free-trade area, while Indonesia put forward a less stringent Common Effective Preferential Scheme. The Philippines, on the other hand, proposed an all encompassing ASEAN economic treaty.

(Straits Times 08-01-91 and 26-06-91; FEER 17-01-91, p. 11; 31-01-91, p. 32; 07-02-91, p. 14; 14-03-91, p. 55; 21-02-91, p. 51; 18-04-91, p. 70; 09-05-91, p. 19; 18-07-91, p. 8; 25-07-91, pp. 54–55; IHT 25-01-91; 06-03-91; 29-04-91; 06-05-91; 22-05-91; 19-07-91; Stock Exchange Journal of Singapore, June 91; UNdoc.A/45/389)

ECONOMIC COOPERATION AND ASSISTANCE

South Korean loan to the Soviet Union

See also: Inter-state relations

On 22 January 1991, a three-year Korean loan to the USSR to the amount of US $ 3 billion was finalized in Seoul. Most of the amount was tied to the purchase of Korean goods. Later in the year the two states formally agreed to the transfer of high technology and the combination of Soviet technology with Korean production and marketing skills.

(FEER 07-02-91, p. 44; IHT 19/20-01-91; 23-01-91; 19-04-91; 06-06-91)

Chinese loan to the Soviet Union

It was announced on 15 March 1991 that China had granted the USSR a loan of SFR 1 billion (US$ 730 million) for the purchase of food and consumer goods. Both parties denied that the loan be part of a larger package involving the sale of Soviet military aircraft and other weaponry to the Chinese (see Arms sales, *supra*). The credit was twice the size of the short-term commodity loan extended in 1990 for the purchase of clothing and light consumer goods.

(FEER 28-03-91, p. 11; IHT 16/17-03-91; 28-03-91)

Japanese emergency loan to India

Japan provided India with an emergency loan of US$ 150 million on 29 May 1991, matching a similar loan given earlier by the Asian Development Bank.
(FEER 13-06-91, p. 75)

Diminished United States aid to Pakistan

The US government notified Congress that even if Pakistan abandoned its nuclear weapons program (*infra*, Nuclear capability) it would receive only US$ 217 million of the US$ 489 million originally proposed for fiscal year ending September 1991. Pakistan received US$ 505 million in the year ending September 1990. In October 1990, the US suspended economic and military aid on suspicion that Pakistan was developing nuclear weapons and against the background of heightened Indo-Pakistan tension over Kashmir. The present decision was a reflection of US downgrading of relations with Pakistan in the post-Cold War period.
(FEER 07-02-91 p.59; 14-02-91 p.10)

Competing development aid to Pakistan

According to existing Pakistan-Iranian plans a gas pipeline would be laid from Iran to Pakistan which would supply Iranian gas to help Pakistan develop a petrochemical industry. Qatar later offered to build a gas pipeline from Qatar to Karachi under the Arabian Sea (1,700 km) without Pakistan having to pay anything towards its construction.
(FEER 20-06-91, p. 6)

Conditions for United States aid to India

The US House of Representatives on 13 June 1991 voted to halt economic aid and military sales to India unless it stopped producing nuclear weapons. At stake was US$ 22 million in development aid and less than US$ 1 million in assistance for military training programmes for 1992.
(FEER 27-06-91, p. 22)

Japanese role in economic assistance to Latin America

Japan pledged support for a multilateral fund proposed by the US for Latin America. Japan is also hoping for greater voting power at the Inter-American Development Bank. Its current voting share is 1.1 percent compared to US 34.6, Canada 4.4, and other non-regional members together but excluding Japan 7.1.
(IHT 08-04-91)

Japanese role in aid to Mongolia

Japan promised to be the host at a conference in September 1991 on aid to Mongolia. The US, Japan, Germany, the IMF and the ADB would be represented at the session.
(IHT 15-08-91)

Resumption of Japanese lending to Iran

The Japanese foreign ministry said that Japan would resume the grant of loans to Iran, the first in sixteen years. The grant of loans by Japan ceased in 1975 because Iran was considered to have become too well-off to qualify and because Tehran also stopped accepting loans from abroad.
(IHT 29-05-91)

Japanese reluctance to extend aid to the Soviet Union

A spokesman of the Japanese foreign ministry said that for the time being Japan was not quite inclined to extend large financial aid to the Soviet Union. It is assumed that a key reason for this attitude lies in the dispute over the four islands off northern Japan (see *infra*, Territorial claims). While stopping short of making the return of the islands a condition to large-scale aid, it was said that the issue is important in establishing a foundation of trust and confidence between the two countries.
(IHT 19-06-91)

Japanese aid to China

The Japanese minister for international trade and industry said that Japan would expand trade and investment relations with China and that he would explore the possibility of providing Japan's 1991 aid in a lump sum. Japan pledged US$ 6 billion in aid for the 1990–1995 period, in annual installments.
(IHT 25-03-91)

French loan to China

France lent US$ 370 million, its largest-ever loan to China, reportedly to finance an automobile joint venture, an airport and water-processing, power and gas plants.
(FEER 11-07-91, p. 51)

Pacific Economic Cooperation Conference (PECC)

The PECC was set up in 1980 by fifteen countries as a forum to exchange views among business, government and academic experts.

A PECC conference was held in Singapore in May 1991 to discuss the GATT stalemate and regional economic arrangements such as EAEG. The meeting was also to admit Chile, Mexico, Peru and Hong Kong as members, while the Soviet Union, who already had observer status, had applied for full membership. The application would be backed by Japan.
(FEER 02-05-91, p. 8; IHT 15-05-91)

Conditions for Japanese aid

A white paper on aid published in 1990 by the Japanese government stressed that those countries which do not spend heavily on arms imports are most likely to receive

Japanese aid in the future. The present climate of opinion in the foreign ministry is reported to favour imposing similar criteria. According to Japanese sources it has now become a "serious policy objective".

As to respect for human rights, the prime minister said in parliament on 10 April 1991 that Japan would "consider" the human-rights track record of recipients when it disburses aid in future. This remark was preceded by the Foreign Ministry's annual report released in March 1991 which touched on the need "to debate" how political values such as human rights were to be linked to aid.
(FEER 04-04-91, p. 14; 20-06-91, p. 64; 22-08-91, p. 14)

Note: The *Human Development Report 1991* published by UNDP and written by Pakistan's former finance and planning minister MAHBUB UL HAQ argues that aid should be conditional on how aid-recipient countries manage their health and education priorities.
(FEER 13-06-91, p. 20)

Japanese official development aid (ODA)

Japan's ODA contributions (US$ 8.9 billion in 1989) constitutes 0.35% of GNP (compared with 0.15% or US$ 7.7 billion for the US). Whereas the US and other Western donor countries are reducing their commitment to new credits, Japan is virtually the only state steadily expanding new loans to the Third World. Fifty-five percent of total Japanese bilateral aid is in the form of loans, mainly in the form of credits from the Overseas Economic Cooperation Fund (OECF) at a current interest of about 2.5%. This is in contrast to the United States which makes only 4.3% of its ODA contributions in loan form and the rest in grants, and the European loan proportion of around 30%. On the other hand, the untied component of Japanese ODA (78% in 1989) is the highest among donor countries.

Private flows of Japanese financial resources to *developing countries* in 1989 amounted to US$ 13.5 billion, 84% of it in the form of direct investments by Japanese business concerns, while Japanese direct investments in *other countries* reached US$ 54 billion in the same year. Besides there was US$ 36 billion of international lending by Japanese commercial banks during 1989.

Unlike the US, Japan has accepted the UN target for spending 0.7% of GNP on ODA contributions. A forum on the least developed countries (LDCS) jointly sponsored by the Japanese government and the UN Capital Development Fund was held in Tokyo on 13–15 May 1991, as a follow-up to the Second UN Conference on LDCs in Paris, September 1990. The holding of the meeting was inspired by the calls for an increase in Japan's aid efforts. According to the foreign ministry, Japan should consider raising the present ratio of 0.32% of GNP to 1% in five years and shifting part of the aid currently channeled through multilateral organizations (24.4%) into bilateral assistance.
(FEER 23-05-91, p. 18–19; 16-06-91, p. 14; 20-06-91, p. 62; IHT 30/31-03-91; 02-04-91)

EMBARGO

See also: Sanctions

US ban on delivery of British aircraft to Iran

The US denied approval to a sale to Iran of four BAe-146 aircraft plus spare parts by British Aerospace PLC. The approval was needed because the aircraft contains about 16% US components requiring an export license. The US had earlier given approval for the export to Iran of a rival Dutch airplane built by Fokker in Holland.

Note: Under US law foreign-made aircraft with over 10% controlled US-origin parts and components require US re-export authorization to a number of destinations which are subject to US export controls. Iran is subject to such controls as a country on the list of state supporters of terrorism.
(IHT 23-07-91)

Vietnam evasion of US embargo

Vietnam has leased a Boeing 737-300 from *Transavia* in Holland, complete with cockpit crew, technical support and spare parts, for about US$ 500,000 a month. By not directly involving US citizens or companies, the deal managed to avoid a 16-year US economic embargo against Vietnam.
(IHT 5/6-01-91)

EMIGRATION

See: Hong Kong

ENVIRONMENTAL PROTECTION

Compensation for noise pollution

A Japanese District Court ordered the government to pay US$ 1,24 million to 330 people as compensation for noise from a military base used by Japanese and US jet fighters. The lawsuit had taken 15 years. The plaintiffs contended that noise from Komatsu base, 300 km NW from Tokyo, impaired their hearing and caused physical and mental stress. They had sought US$ 9.5 million in compensation.
(IHT 16/17-03-91)

Oil dumping in the sea

In late 1990 an Indonesian cargo vessel was impounded by the port authorities of Inchon, South Korea, for dumping waste oil into the sea. The crew was detained pending trial for causing environmental damage and for a demand by local fishermen for US$ 54 million in compensation. The Indonesian embassy is reported to have been lobbying the Korean foreign ministry for the release of the crew and an out-of-court settlement, but quiet pressure from the ministry on the port officials and the public prosecutor was of no avail.
(FEER 28-03-91, p. 6)

Preservation of rain forests

Responding to the concern mainly in developed countries over large-scale felling of tropical forests, the Malaysian prime minister is reported to take the following stance: Now that the developed countries have sacrificed their own forests in the race for higher standards of living, they want to preserve other countries' rain forests – citing a global heritage – which would indirectly keep countries like Malaysia from achieving the same levels of development. The Western environmental lobbyists should pressure their own governments to pay more for tropical timber so that Malaysia would need to chop down fewer trees to maintain current export earnings.
(FEER 01-08-91, p. 20)

Thai record of protection of endangered species

A report by the London-based group Trade Record Analysis of Flora and Fauna in Commerce (TRAFFIC) criticized Thailand for being a "laundering centre" for rare and protected animals and plants. The report was submitted in April 1991 to the [Bureau of the] Convention on International Trade in Endangered Species (CITES), resulting in a call for a worldwide embargo on trade with Thailand in any form of wildlife.

Although Thailand became a party to CITES in 1983, no enabling act existed giving the Royal Forestry Department enforcement powers. Such a law was being drafted under the direction of the prime minister.
(IHT 6/7-04-91; FEER 09-05-91, p. 30)

EUROPEAN ECONOMIC COMMUNITY

Human rights conditions for development aid

The EEC has been preparing to introduce tough new guidelines authorizing EC officials for the first time to study the human rights records of Asian countries before granting development aid.

EC heads of government issued a statement in December 1990, emphasizing that such actions could not be considered interference in the internal affairs of states. Instead they declared that the new policy reflected "a legitimate concern under international law, essential for the creation of a sound political climate fostering peace, security and cooperation".

The EC aid programme for Asia amounts to US$ 400 million annually.
(FEER 14-03-91, p. 20)

EC-Japanese partnership declaration

In 1988 the Japanese prime minister held a speech in London in which he called for a new "three pillar" relationship among the US, Europe and Japan. These efforts were heightened by the ending of the Cold War, and aimed at including security and political matters in the relationship. Japan's view appeared to be directed towards a future EC constituting a greater degree of political and monetary union.

On the basis of this initiative both parties decided to prepare a joint declaration establishing the principles for future cooperation. Japan aimed at an agreement similar to the declarations of common partnership between the EEC and the United States and Canada of September, 1990. The Japanese push to formalize the relationship was, *inter alia*, driven by Japan's growing business ties to Europe (direct investments rose from US$ 1.5 billion in 1985 to more than US$ 10 billion in 1989).

Differences of opinion about the contents of the projected declaration lay in EC demands for references to economic and trade matters aimed at rectifying the worsening imbalance in trade (which resulted in a Japanese trade surplus reaching US$ 18.5 billion in 1991 and which is due partly to soaring demand in Eastern Germany for Japanese household goods and cars) and investment, while Japan wanted a broad agreement that would not focus exclusively on economic and trade issues and would not amount to managed trade. Whereas Japan stuck to the principles of the multilateral trading system, there was a tendency on the EC side to stick to bilateralism. Thus the EC pressed for and Japan refused the inclusion of language referring to a "balance of benefits" in trade and economic relations.

On 18 July 1991, the two parties, after having been held up by France until the last minute, issued a Declaration on Trade and Political Cooperation. A crucial paragraph commits both sides to "pursuing their resolve for equitable access to their respective markets, and removing obstacles, whether structural or other, impeding the expansion of trade and investment, on the basis of comparable opportunities".

The Declaration calls for annual summit meetings between the Japanese prime minister and the EC president [of the Council of Ministers] and annual ministerial meetings between the Japanese government and the EC Commission.

The Declaration includes general principles of coordination and consultation on political, economic, scientific and cultural issues. More specifically, the agreement calls for enhanced political consultation "on the international issues which might affect world peace and stability" – including non-proliferation of nuclear, chemical and biological weapons and trade in conventional arms. The Declaration also calls for improved cooperation in energy, advanced technology, the environment and competition rules, and it seeks joint efforts to combat international terrorism, the drug trade and money laundering.

The parties also pledged to strengthen the world trade system "by rejecting protectionism and recourse to unilateral measures and by implementing GATT and OECD principles concerning trade and investment".

(FEER 06-06-91, p. 19; 20-06-91, p. 60; 01-08-91, p. 13; IHT 11/12-05-91; 15/16-06-91; 28-06-91; 03-07-91; 10-07-91; 19-07-91)

EXCLUSION FROM INTERNATIONAL COOPERATION

Exclusion of Japanese-owned companies

Europe's semi-conductor research consortium, the US$ 5 billion "JESSI" program, expelled ICL PLC from three out of the five projects in which it was participating. ICL PLC is Britain's leading computer company and has been taken over recently by the Japanese company Fujitsu Ltd. The expulsion is in sharp contrast to the decision taken

by the consortium in 1990 to invite IBM which dominates the European computer market, to participate in two key JESSI projects.
(IHT 05-04-91)

Note: It was earlier reported that Japanese government officials had invited leading computer companies in the US and Europe, along with top research universities on both side of the Atlantic, to join in a 10-year "Sixth Generation Project" for the development of advanced computers for the next century.
(IHT 16/17-03-91)

FINANCIAL CLAIMS

Arbitration award in Iran v. Framatome

A Swiss arbitration tribunal gave its award in *Iran* v. *Framatome* (the "*Eurodif case*"), convicting Framatome to pay US$ 550 million for non-fulfillment of its contractual obligations. The amount consists of a repayment of Iranian advance payments and $279 million by way of interest.

The contract was for delivery of fuel for a French-built nuclear plant. When Iran ceased payments after the 1980 revolution for the building of the plant, France also suspended its part of the obligations.

Another case, concerning a claim of five billion Francs by *Framatome et al.* for the supply of a nuclear plant near the port of Abadan, was still pending.
(NRC-Handelsblad 04-02-91)

Aborted projects in Iran

Japanese companies filed trade-insurance claims totalling US$ 685 million against the Japanese government in respect of losses on an abandoned project in Iran for the construction of a petro-chemical plant at Bandar Khomeini. The plant was badly damaged in the Iran-Iraq War causing the firms to withdraw from the project in 1989.
(FEER 28-03-91, p. 65)

Iranian claims on unowed funds

Iran asserts that the US owes it at least US$ 10 billion in frozen assets and interest on money paid by the Shah to buy weapons that the US never delivered after the Iranian Revolution. The US has refused to enter any talks with Iran before six US citizens being held hostage by Lebanese groups would be freed.
(IHT 03-07-91)

Settlement of Franco-Iranian claims

Disputes had arisen concerning a loan extended by the late Shah of Iran to the French atomic energy agency (CEA) in 1974 to the amount of US$ 1 billion, for a 10% share in Eurodif, an agency that oversees the enrichment of uranium for several

West European countries. In return France agreed to help Iran set up nuclear reactors and feed them with enriched uranium imported from CEA and its affiliates. After the Iranian revolution in 1979 France froze the agreement. Iran claimed back the money with US$ 1 billion interest. France asserted that part of the money should be used to compensate French companies whose assets had been seized in Iran, and for contracts cancelled by Iran after the revolution. France agreed to return US$ 1.6 billion. In 1986 and 1987 it made two payments: $330 million and $300 million, after which French hostages being held in Lebanon were released and diplomatic relations were restored in 1988. However, it rejected an unexpected Iranian demand for enriched uranium as part of the settlement.
(IHT 03-07-91; 04-07-91; 05-07-91)

FISHERIES

See also: Territorial claims; (Relations with) unrecognized entities

Philippine-Taiwan fisheries and navigation dispute

On 14 April 1991, nine Taiwanese fishermen were apprehended by the Philippine Navy while fishing 4 miles off Y'ami, the Philippines' northernmost island, which is 78 miles from the southernmost tip of Taiwan. On the other hand, Taiwan claimed that the fishermen were legally within their national territory. This claim of Taiwan overlaps with the Philippine boundary at the 50-mile Bashi Channel. On 27 April 1991, a Taiwanese fishing boat, the *Chin Yu Kun*, was sunk by the Philippine Navy as it was sailing east off the Philippines' main island of Luzon. For the month of April 1991 alone, at least seven Taiwanese fishing boats were detained by the Philippines on charges of violating Philippine territorial waters. Taipei claimed that since 1978, 171 Taiwanese fishing boats had been detained by Philippine authorities. These incidents revived a long-running border dispute between the Philippines and Taiwan over their respective territorial water, while there is, besides, a long history of unregulated fishing on both sides of the Ruzon Strait. The problem is augmented by the great number of Filipinos working as crew members on Taiwanese fishing boats, while some Taiwanese boat owners have concluded joint-venture agreements with Filipino partners and part of their catch are being sold in the Philippines.

Taiwan officials take the position that many of the boats which were detained and fined were merely exercising their right of innocent passage through the Bashi Channel between the Philippine island of Batan and Taiwan and other international waterways. The officials had also been accusing the Philippine authorities of detaining the relatively valuable Taiwanese boats for profit.

In the early part of May 1991, Taiwan started its own retaliatory measures. It made a formal protest to the Philippine Government for the sinking of the *Chin Yu Kun*. As part of its economic pressure on the Philippines, it suspended the importation of 4,500 metric tons of coconut from the Philippines. Taiwan also threatened to cancel Philippine loans, halt investments and ban Filipino workers as reprisals against the arrests.

Taiwan is one of the major foreign investors in the Philippines and hosts thousands of Filipino workers. It has also been seeking more formal relations with the Philippines (Manila Chronicle, 7 May 1991). At present, both countries conduct relations through

informal offices. Diplomatic relations are not allowed since the Philippines adheres to the "One-China" policy and recognizes only the People's Republic of China.

On 21–22 May 1991, "exploratory talks" were held in Manila between delegations coming from both the Philippines and Taiwan, and in early July an agreement was reached by government officials from Manila and Taipei whereby the Philippines designated two sea-lanes for Taiwan fishing boats in transit through Philippine waters.

(Manila Chronicle 06-05-91; 07-05-91; Manila Bulletin 04-05-91, 14-05-91; New Chronicle 09-05-91; 21-05-91; FEER 23-05-91, p. 15; 18-07-91, p. 14)

Malaysian-Thai dispute

A dispute between the two countries exists over fishing rights in the Gulf of Thailand and the South China Sea. It is reported that more than a thousand Thais had been jailed for illegal fishing in Malaysian waters. Despite the existence of a Thai-Malaysian joint (border) commission, the two sides agreed to hold a ministerial meeting before the end of the year.

(IHT 10-07-91; FEER 01-08-91, p. 10–11)

Driftnet fishing

Under US pressure the Council of Agriculture in Taiwan temporarily suspended the licenses of 69 driftnet fishing boats for failing to report their operating locations in the North Pacific.

(FEER 17-01-91, p. 14)

According to an announcement of the Japanese government, Japanese driftnet fishing in the South Pacific was to be suspended from the 1990/1991 fishing season, one year in advance of the date of cessation stipulated in UN General Assembly resolution 44/225 (i.e., no later than 1 July 1991). The suspension would continue until appropriate conservation and management arrangements for albacore tuna resources, as referred to in the UN resolution, will be made.

(A/45/350 annex)

FOREIGN INVESTMENT

See also: Financial claims

Taiwan-Indonesian investment guarantee agreement

Indonesia and Taiwan signed an investment guarantee agreement giving Taiwanese investors in Indonesia the same protection enjoyed by investors from other countries. Investments from Taiwan in Indonesia are believed to total more than US$ 2 billion.

(FEER 03-01-91, p. 49)

Note: No data were provided about the form of this agreement in view of Indonesian recognition of the Beijing government as the only legal government of China.

Taiwan investment in Saudi Arabia to balance loss of recognition

The Taipei authorities planned a major industrial investment in Saudi Arabia to strengthen unofficial ties after the Kingdom switched recognition from Taipei to Beijing in 1990. The state-owned Taiwan Fertilizer Co. said it would jointly build a US$ 200 million ethyl-hexanol factory with the state-run Saudi Basic Industries Corp.
(IHT 05-07-91)

Oil exploration by foreign companies in India

India is to open up onshore oil blocks for exploration by foreign companies for the first time. It was said to offer 72 blocks for exploration. In 1986, 27 offshore blocks were offered in a round of tenders. Under the new terms, oil firms will not have to pay bonuses and will not be required to make a specified financial commitment over a period of time.
(IHT 23-08-91)

Oil concessions in Myanmar

Myanmar has started inviting new bids for offshore oil and gas concessions in the Andaman Sea for the first time since 1977.
(FEER 01-08-91, p. 6; 08-08-91, pp. 59–60)

Oil exploration in Iran

Iran has reached preliminary agreement with Japan Petroleum Exploration Co. (Japex) on a nine-year, $1.75 billion deal to explore for oil in the Strait of Hormuz. The National Iranian Oil Co. (NIOC) would repay Japex by exporting the oil.
(IHT 06-09-91)

FOREIGN PROPERTY RIGHTS

Protection of intellectual property rights

On 26 April 1991, the US Trade Representative charged China, Thailand and India for inadequate protection of intellectual property rights. The three countries were put on the US watchlist of countries whose intellectual property rights protection are considered inadequate. This took place under section 301 of the US Omnibus Trade and Competitiveness Act, 1988 which directs the Trade Representative to complete investigation of the charges within a certain limited period. The US gave China until 26 November 1991 to show significant improvement on copyright protection after which Chinese exports would be hit by up to 100% tariffs.

So far as China was concerned, the charge took place despite China's adoption of trademark, patent and copyright laws (a copyright law came into force on 1 June 1991). A spokesman for China's Ministry of Foreign Economic Relations and Trade (MOFERT) emphasized that the level of a country's development should determine

how much protection of intellectual property it can afford. It was said that China hoped to meet international standards by 1992.
(FEER 10-01-91, p. 54; 09-05-91, p. 54; IHT 29-04-91; 03-06-91; 17-06-91)

Indonesian Patent Act

The Indonesian Patent Act went into effect on 1 August 1991, almost two years after being passed by parliament.
(FEER 15-08-91, p. 51)

GENERAL AGREEMENT ON TARIFFS AND TRADE

Macau member of GATT

Macau has been accepted as a member of GATT. It will maintain its membership status after it becomes a special administrative region (SAR) of China in 1999. The application was supported by both Portugal and China.

Taiwan application for membership

Taiwan applied for membership in GATT in January 1990 under the name of "Customs territory of Taiwan, Penghu, Jinmen and Matsu".
(FEER 08-08-91, p. 8)

GURKHA SOLDIERS IN FOREIGN SERVICE

Release from British army

The UK government announced on 23 July 1991 that the Gurkha Brigade would be cut from 8,000 to 2,500 by 1997. Nepal receives £20 million (US$33.5 million) a year in the form of the Gurkhas' pensions, salaries and gratuities.

The costs of the British Gurkha battalion which is permanently stationed in Brunei are met by the Brunei government.

More than 55,000 Gurkhas serve in the regular Indian army, while a further 200,000 are scattered among various Indian paramilitary units, such as the central Reserve Police and the Border Security Force. Annual earnings from these Gurkhas total more than Rs 1.3 billion (US$ 31.42 million).
(FEER 08-08-91, p. 24)

HIJACKING OF AIRCRAFT

Thai passenger aircraft

Two Myanmar students who hijacked a Thai airliner en route to Calcutta in

November 1990 were released on bail in India on 12 February. Their request for political asylum would be decided on after their case had been brought to court.
(FEER 28-02-91, p. 12)

Singapore Airlines passenger plane

On 26 March 1991, a Singapore Airlines passenger plane was hijacked in Malaysian airspace by four Pakistani during a flight from Kuala Lumpur to Singapore. After landing in Singapore the hijackers demanded the release of a number of prisoners in Pakistan, including the husband of the former prime minister BENAZIR BHUTTO, Mr ASIF ALI ZARDIRI, and for the aircraft to be flown to Australia. When efforts to solve the incident by negotiations failed and when the hijackers threatened to kill one passenger every 10 minutes if their demands were not met, the aircraft was stormed the following day by Singapore Armed Forces commandos, killing all four hijackers and rescuing all passengers and crew.

It was later reported that the director-general of the Federal Investigation Agency in Pakistan had established that no political party or group had been involved in the hijacking.
(IHT 27/28-03-91; 15-04-91; FEER 04-04-91, p. 12; Straits Times 28-03-91)

HONG KONG AND MACAU

See also: General Agreement on Tariffs and Trade; Refugees

Membership of international organizations

In November 1990, Hong Kong withdrew from the ministerial session of the Second World Climate Conference sponsored by WMO, of which Hong Kong is a member. The withdrawal took place after Chinese objections, apparently on the contention that Hong Kong participation in a ministerial session is incompatible with its non-sovereign status. Hong Kong is also a member of GATT, and is represented separately in UNCTAD and the UN Economic and Social Commission for Asia and the Pacific (ESCAP).
(FEER 14-02-91, p. 24)

Limited grant of full British nationality

Allegedly in an effort to stem the growing tide of professional and skilled people leaving the colony in view of Hong Kong's reversion to Chinese rule, Britain had offered to grant full British nationality, i.e., with the right of abode in the UK, to 50,000 key people and their families to be selected upon application. Under a first tranche 43,500 offers would be made, with the remaining 6,500 to be distributed at a later stage before 1997.

China has always denounced the British offer, and has warned that Hong Kong Chinese [who possess Chinese nationality anyway] who have benefited from the offer would not be treated as British citizens by China. In the Basic Law which will serve as a mini-constitution for Hong Kong it is stipulated that local people with a right of

abode in foreign countries cannot become principal officials of the future Special Autonomous Region (SAR).

Under the British guarantee offer 250,000 application forms were distributed in accordance with the expected number of applications. In the event, by the 28 February 1991 deadline about 65,000 applications were received.
(FEER 14-02-91, pp. 28–29; 14-03-91, p. 14; IHT 01-03-91)

Chinese attitude towards a Hong Kong bill of rights

A bill of rights was enacted by the Hong Kong Legislative Council on 5 June 1991. In response to this act China warned that it may review the bill which would adversely affect the implementation of the Basic Law which would provide ample protection for the rights and freedoms of the people of Hong Kong after 1997. The Hong Kong government, on the other hand, insisted that the bill is in line with the Sino-British 1984 Joint Declaration on Hong Kong and the Basic Law, and "that it did not have overriding power over the post-1997 mini-constitution".
(SCMP 07-06-91)

Establishment of Chinese companies in Hong Kong

According to Chinese sources, China has set up thousands of companies, primarily under the impetus of China Resources (Holdings), China Travel Service, and the Bank of China Group. The investments also take place in trade, insurance, transport, advertising and manufacturing.
(IHT 24-06-91)

Sino-British disagreement over the Hong Kong project for a new container port and a new airport

The plans for a new airport on Lantau island together with a new container port that would become the largest public works project in the colony's history were first proposed by the Governor of Hong Kong in October 1989. The plan would cost the estimated amount of HK$ 127 billion, or US$ 16.3 billion, and the project would only be completed after 1997, the year Hong Kong will revert to Chinese rule.

China, while not specifically condemning the plan, objected strongly to the amount involved, particularly for fear that the project would deplete the colony's reserves before 1997 while part of the cost would mature after that year. Consequently China demanded to be consulted on the plans, and when this was initially ignored by the Hong Kong government, even demanded a freeze on the entire project until agreement had been reached by China and Britain. In the souring atmosphere that ensued, the Chinese side made the statement that during the transition period to 1997 only the Central People's Government could speak for the people of Hong Kong and reports were floated according to which China was backing an alternative Hong Kong airport plan set up by a local businessman.

For their part, the British and Hong Kong governments rejected the idea of China having the right to control decision-making in Hong Kong before the colony reverts to Chinese rule. However, they eventually accepted the demand for a Chinese seat on the

12-member Airport Authority and the setting up of an Airport Consultative Committee. While pledging to consult China on matters relating to Hong Kong's future, they did not go far enough to meet China's demand to be consulted on all issues straddling 1997. They admitted, meanwhile, that lack of Chinese approval would keep prospective international investors away and would in fact make the plans unfeasible.

As to the financial reserves of Hong Kong, China demanded that the Hong Kong government set aside a substantial amount of money from the fiscal reserves for the future SAR government. The level of fiscal reserves in early 1991 was HK$ 72 billion, excluding a surplus of several tens of billions HK dollars held in the Exchange Fund for backing the currency. The Hong Kong government estimates were that the reserves in 1997 would be around HK$ 30 billion following several years of intense building activities involving the airport. China maintained that the reserves could be as low as HK$ 5 billion in 1997, and demanded an amount of HK$ 50 billion (US$ 6.4 billion) to be set aside.

The Sino-British impasse could be the result of different interpretations of the agreement between Britain and China to "cooperate" during the last few years leading to Hong Kong's reversion to Chinese sovereignty (Annex II of the 1984 Joint Declaration). The different interpretations could, among other things, be the result of discrepancies of meaning between the Chinese and English versions.

At last, Britain and China reached agreement on the airport plans on 4 July 1991. The Memorandum of understanding which has come in effect upon signature by the two prime ministers on 3 September 1991 in Beijing contains, *inter alia*, the following items:

(1) China supports the projects and guarantees for the period after 30 June 1997 the obligations related to the projects entered into or guaranteed by the Hong Kong government.
(2) The two parties will consult each other on important matters relating to the project that straddle 30 June 1997.
(3) Consultations are specifically prescribed in a number of cases:
    (a) Granting of major franchises or contracts straddling 30 June 1997 and guaranteeing of debts straddling 30 June 1997. In these cases "the Chinese side will adopt a positive attitude", but on the other hand "[a]ny decision will give full weight to the Chinese Government's views". The governing criteria in case of franchise will be "profitability and efficiency".
    (b) In case of proceeding with other airport projects, and with the present project for which the bulk of Government expenditure will fall after 30 June 1997. These projects will only be initiated upon mutual agreement.
    (c) In case of borrowing by the Hong Kong government exceeding HK$ 5 billion (US$ 640 million) and straddling 30 June 1997, which can only proceed upon mutual agreement.
    (4) The fiscal reserves on 30 June 1997 to be left for the use of the Hong Kong SAR government will not be less than HK$ 25 billion (US$ 3.2 billion).
(5) Consultations will take place in an Airport Committee to be set up.
(6) A person from the Bank of China group in Hong Kong will be appointed as full member on the board of the Airport Authority.
(7) The Hong Kong government will set up a Consultative Committee on the airport project, with no decision-making power.

(8) In appointing members of the Airport Authority and the Consultative Committee the views of the Chinese side will be taken account of.
(9) Apart from the airport project, the two sides agreed on intensified consultation and cooperation in the approach to 30 June 1997. The British foreign secretary and the Chinese foreign minister will meet twice a year, and the Director of the Hong Kong and Macau Office of the [Chinese] State Council and the Governor of Hong Kong will hold regular meetings.

(IHT 11-01-91; 15-01-91; 17-01-91; 24-01-91; 08-04-91; 10-04-91; 24-04-91; 15-05-91; 29-05-91; 06-06-91; 05-07-91; 3/4-08-91; 03-09-91; FEER 14-02-91, p. 24; 21-03-91, p. 11; Press release Foreign and Commonwealth Office 04-07-91, courtesy of *China Economic Review*)

Draft Basic Law for Macau

Unlike the Hong Kong Basic Law, the one being drafted for application to Macau after 1999 places no restrictions on foreign passport holders taking important posts (except that of chief-executive) in the Macau administration after the colony's reversion to Chinese rule. In contradistinction to Hong Kong, an estimated one quarter of Macau's Chinese residents qualify for full Portuguese passports. Chinese officials have stated that Portuguese passports held by ethnic Chinese will be regarded as travel documents rather than nationality documents. Also important to the issue was the role of the enclave's 10,000 Macanese, locally born Portuguese of mixed blood, in the civil service.

Another key concession is the absence of provision for China's armed forces to be stationed in Macau after 1999. Macau's Basic Law is also stronger than Hong Kong's in limiting immigration from the mainland after 1999.

It is said that the good relations between Portugal and China have been an important factor in China yielding ground on issues that would have drawn a more obstinate stance under the tension-fraught circumstances that plague Sino-British relations in Hong Kong.

(FEER 25-07-91, p. 22)

HOSTAGES

Iranian stand on hostages in Lebanon

At a press conference, the Iranian interior minister who is a key figure in the Revolutionary Guard said that the Iranian government "oppose, denounce and reject all hostage-taking actions". "But unfortunately, despite this clear and open stand, there are attempts to link Iran to this issue." The Iranian vice-president expressed his expectation that the world dealt with the matter on an equal basis: the issue of all hostages should be resolved whether they are Western, Iranian, Lebanese or Palestinian.

(IHT 12-08-91; 13-08-91)

Iranian hostages

Iran linked its efforts on behalf of Western hostages in Lebanon to information on the fate of four Iranians missing since being seized by pro-Israeli Christian militiamen in 1982. Lebanese officials had said that the Iranians were killed while in captivity, but the Iranian government demanded proof that they were no longer alive.

HUMAN RIGHTS

See also: Association of South-East Asian Nations; Dissidents; European Economic Community

Situation in Iran subject of UN resolution

In a resolution on the "situation of human rights in the Islamic Republic of Iran" the UN General Assembly referred to visits paid to Iran by the special representative of the UN Commission on Human Rights in 1990, and called upon Iran to investigate and rectify the human rights issues raised in the reports of the special representative. Specific mention was made of the administration of justice and due process of law in accordance with the International Covenant on Civil and Political Rights.
(A/RES/45/173 of 25-03-91)

European Community accusation of human rights abuses in East Timor

The EC presented a strongly worded statement on alleged human rights abuses in East Timor to the UN Commission on Human Rights on 27 February 1991, accusing Indonesia of, *inter alia*, torture and widespread killing. However, Indonesian as well as European sources reported that a number of EC member state missions in Jakarta had backed away from the statement, which was considered exaggerated.
(FEER 04-04-91, p. 10)

Red Cross visiting Aceh province in Indonesia

The International Committee of the Red Cross (ICRC) was given permission at its own request to visit the northern Indonesian province of Aceh. The Red Cross planned a 2-week trip in June–July 1991 to visit Acehnese under detention or in jail because of suspected participation in a movement pushing for autonomy.
(FEER 27-06-91, p. 9)

Human rights delegations visiting China

China agreed to visits by Australian, Swiss and French human rights delegations. The Australian delegation would be the first of the three delegations to visit four cities including Lhasa in Tibet from 14–26 July. The delegation would comprise parliamentarians, legal and human rights experts and China scholars. It would have access to Chinese agencies and officials involved in human rights matters at central and provincial levels, at least two prisons in Beijing and Shanghai and defence lawyers involved in cases with human rights implications.

In September 1991 a group of scholars from the Chinese Academy of Social Sciences' Institute of Law would visit the US and Canada to study human rights issues.

Early September 1991, the first US congressional human rights delegation since the Tiananmen crackdown visited China and held talks with officials from the ministries of justice, public security and foreign affairs. They were reported to have told the Chinese authorities about the continuing battle in the US over most-favoured nation status for China, and that changes in the Soviet Union were likely to increase pressure in the US Congress to strip China of the MFN status or to impose tough human rights conditions on renewing the status.
(IHT 15-05-91; 10-07-91; 11-07-91; 13/14-07-91; 05-09-91)

ASEAN attitude toward human rights issues

At a meeting of Finance and Economy ministers of ASEAN countries and their EC counterparts in Luxembourg in May 1991 the EC countries proposed cooperation on increasing international pressure on the military regime in Myanmar to observe human rights and to transfer power to elected civilians. An agreement would include an embargo on arms supplies, trade sanctions and joint support for a UN resolution calling for democratic government in Myanmar. The plan was backed by the US, Australia and other Western states. They referred to the international operation in support of the Kurdish refugees in Iraq as having set a precedent for collective action on human rights that could be applied to Myanmar. The ASEAN countries, however, were wary of the plan because it would represent unacceptable interference in the internal affairs of a Third World country.

The Western attempts were repeated during the "Post-Ministerial Conference" (PMC) on 22–24 July 1991 in Kuala Lumpur between the ASEAN and their dialogue partners, but the ASEAN states again strongly resisted, refusing to impose human rights standards by intervening in the internal affairs of Myanmar.

Asian officials said there is a fundamental divergence of view between ASEAN and Western countries over the definition of human rights and how standards should be applied in developing countries. The West maintained that all countries have an obligation to observe internationally accepted norms of behaviour, and that gross abuses should be countered by international pressure, including an arms embargo. ASEAN countries, which are neighbours of Myanmar and have extensive trade contacts, insisted that outside pressure would simply harden the regime's policies, increase xenophobia and close off all chance of gradual change.

In a joint communique issued at the end of their meeting the foreign ministers of the ASEAN states criticized attempts by some unnamed governments and lobby groups in the West to make observance of human rights standards a condition of aid and trade to developing countries.

In his opening speech on 19 July, the Malaysian prime minister said ASEAN states had been right to place "a high premium on political stability by managing a balance between the rights of the individual and the needs of society as a whole". And the foreign minister of Singapore said: "ASEAN is of the view that the development of human rights cannot be at the same pace as those in Europe or in the West".
(IHT 30-05-91; 22-07-91; FEER 01-08-91, pp. 10–11)

Utterance of Japanese prime minister on the importance of upholding human rights

During his visit to China on 9–12 August 1991, the Japanese premier is reported to have expressed himself as follows:

"Whatever the nation, upholding the fundamental human rights of its people and steadily undertaking political and economic reform based on the principle of politics for the good of its citizens is a path that will in the end strengthen the nation's ties with the rest of the world.... There should be complete agreement on the need to implement the wishes of the majority, or to understand accurately the will of the people and to represent that will in the political process."
(IHT 12-08-91; FEER 22-08-91, pp. 14–15)

HUMANITARIAN LAW

Vietnamese prisoners of war held by China

It is reported that China is still holding at least twenty-three Vietnamese prisoners of war whom it has so far refused to repatriate though no formal state of war exists between China and Vietnam.

Among the twenty-three, nine were captured during the brief Sino-Vietnamese naval engagement over the Spratly Islands in early 1988, while the other fourteen were captured during various border incidents over the past five years.
(FEER 15-08-91, p. 8)

INSURGENTS

See also: Diplomatic jurisdiction; Dissidents

Ship blown up by Myanmar dissidents

The Thai Supreme Commander on 14 January 1991 said that he would visit Yangon (Rangoon) to ask the Myanmar authorities to compensate the owners of a Thai trawler which was blown up in Myanmar waters by local dissidents. The trawler was destroyed by the dissident student group after its owners failed to pay a Baht 5 million (US$ 198,000) ransom.
(FEER 24-01-91, p. 22)

Bougainville moves for secession

See also: Military cooperation

In May 1990, the Island of Bougainville (Papua New Guinea) announced a unilateral declaration of independence, but the government of Papua New Guinea and the secessionist island managed to reach a peace agreement which was signed in, and called after the Solomon Islands capital of Honiara (the Honiara Declaration on Peace, Reconciliation and Rehabilitation on Bougainville).

The agreement deferred the issue of the islands's political status for a further round of talks later in the year. The agreement provided for a "multinational supervisory team" which would essentially be a peace-keeping force consisting of military and police forces of Australia, Canada, New Zealand, Fiji, the Solomon Islands and Vanuatu. In exchange for the peace-keeping concession the Bougainville Revolutionary Army, which set up an interim government, would surrender its arms.
(FEER 07-02-91, p. 15. An outline of the PNG government's position is to be found in its statement of August 1991, UNdoc.E/CN.4/Sub.2/1991/64, and E/CN.4/1992/76)

Separatist leader in Irian Jaya sentenced

A leader of the main Irian Jaya (Indonesia) separatist movement "Free Papua Organization", MELKIANUS SALOSSA, was sentenced to life imprisonment by the district court at Jayapura in Irian Jaya. The man was charged with subversion and was found guilty of killing a soldier and fourteen civilians in 1988, and of trying to undermine the state ideology *Pancasila*. He was arrested in PNG in May 1990 and later deported to Indonesia.
(FEER 04-04-91, p. 12)

US aid to Afghan rebels halted

The US government did not request funds for the Afghan rebels ("Covert programs") in its proposed 1992 budget.

Since President Carter had approved secret aid for the guerillas in 1980 the US funneled more than US$ 2 billion into the program through the CIA. After withdrawal of Soviet troops in 1989, the US president vowed to continue aiding the rebels as long as the Soviet Union aid the Afghan government.
(IHT 13-05-91)

INTER-STATE RELATIONS: GENERAL ASPECTS

China-India

The ice-breaking visit to Peking by the late prime minister RAJIV GANDHI in December 1988 started a process of normalization of the Sino-Indian relationship. Several working groups were formed in order to deal with various issues, such as the border question (*supra*, Borders) and the promotion of economic and technological exchanges. Further progress in the improvement of the relations were made as a result of the visit of the Indian foreign minister to China on 1–6 February 1991. Agreement was reached on the resumption of direct land trade (*supra*, Borders) and on the opening of consulates in Shanghai and Bombay.
(FEER 28-02-91, p. 17)

China-Japan

The visit by the Japanese foreign minister to China on 5–6 April 1991 marked the

normalization of Sino-Japanese relations following China's suppression of the anti-government demonstrations in June 1989.

This development of the relations was later affirmed by the visit of the Japanese prime minister, 10–13 August 1991, the first head of government of the so-called G-7 Group to travel to China since the ban on high-level visits introduced by the G-7 summit conference in 1989. Besides, China has invited the Japanese Emperor to visit China in 1992 to mark the 20th anniversary of the re-establishment of diplomatic relations (between Japan and the Chinese government in Beijing). The turning point in relations marked by the premier's visit was expressed by the Japanese spokesman as follows: "It is a new departure in the sense that the two countries are no longer concerned with just bilateral relations. We believe this marks the beginning of a substantive policy dialogue on the whole broad range of policy issues." The central issue of the premier's visit was his call for Asia's biggest country and Asia's richest country to play a larger role in world affairs. In one of his speeches he said that Japan is the only Asian member of the G-7 group of industrialized nations and China the only Asian member of the UN Security Council, and that, as a result, the two must take responsibility for representing all of Asia to the rest of the world.

The Chinese government showed the importance it placed on the Japanese prime minister's visit by cancelling two events which would have reflected Japan's wartime atrocities: memorial ceremonies for forced Chinese labour in Japan and victims of Japan's 1937 massacre of Chinese in Nanjing.
(FEER 18-04-91, p. 16; 22-08-91, p. 10; IHT 27-06-91; 14-08-91)

China-Soviet Union

For the first time since decades of Sino-Soviet hostility, the Soviet Union, on the occasion of a visit by the Soviet minister of defence to China, stated that China and the Soviet Union do not pose a threat to each other.
(IHT 10-05-91)

China-United States

See also: International trade

In connection with the many US complaints against Chinese behaviour, White House officials are reported to have said in May 1991 that China had given private assurances on some issues related to arms sales and political reforms, and had given detailed accounting of the arrests stemming from the 1989 demonstrations. A month later a spokesman for the Chinese State Council gave a long list of what he said were accommodations and other conciliatory steps that China had taken to meet US demands.
(IHT 17-05-91 (citing Washing Post); 17-06-91)

China-Vietnam

The new Vietnamese leadership elected in the last week of June 1991 is likely to hasten reconciliation with China. Eight new members were elected in the 13-man

Politburo. Relations between China and Vietnam were ruptured in 1978 when Vietnamese forces invaded Cambodia, overthrowing the Chinese-backed Khmer Rouge government. It is thought that this reconciliation could have an important impact on the settlement of the Cambodian problem. A sign of improving ties has been the recent meetings that have taken place between various Chinese and Vietnamese state as well as party officials on improving relations in the context of a Cambodian settlement. It is expected that the process of normalization of relations would be completed during a trip to Beijing in October by the new General Secretary of the Vietnamese Communist Party.
(IHT 29/30-06-91; 07-08-91; 09-08-91; 14-08-91; FEER 15-08-91, p. 8; 22-08-91, pp. 8–9)

India-Nepal

The Indian prime minister's official visit to Nepal on 12–15 February 1991, the first such visit since 1977, resulted in ending the hostility that stemmed from India's partial economic blockade of Nepal in 1989–1990. Agreement was reached on expansion of cooperation in trade, industry, transportation, communication and water resources. Agreement was also reached on the establishment of a rail link between *Raxaul* in India and *Hetaudu* in Nepal.
(FEER 28-02-91, p. 12)

India-Pakistan

During the talks between the Indian and Pakistani foreign secretaries in December 1990 no progress was made on the three key issues between the two countries: Kashmir, nuclear non-proliferation and continuing troop concentrations on each side of their common border.

They agreed, however, on ratification of an 1988 agreement against attacking each other's nuclear facilities (*infra*, Non-aggression) and on resumption of weekly telephone contacts between their military headquarters.

In April 1991, agreements were signed on preventing air space violations and on providing advanced notice of troop manoeuvres. It was also announced that a series of meetings would be held in the near future on water sharing and combating drug smuggling, and on the disputed Siachen glacier border area. The last discussion held on this issue was in 1989.
(FEER 03-01-91, p. 12; IHT 08-04-91)

India-Soviet Union

It was announced on 8 August 1991 that the two states would extend the 1971 friendship treaty for another twenty years. Under its terms the two parties agreed to abstain from assisting any country that went to war with the other and pledged mutual assistance in case of an attack on either of them.
(IHT 09-08-91)

Iran-United States

Iran sent a message that it agreed to accept US aid for Kurdish refugees from Iraq. This US relief aid would be the first direct commerce since the "Iran-Contra" affair in 1985–1986 when US weapons were supplied to Iran in an effort to gain the freedom of US hostages believed to be held in Lebanon by groups loyal to Iran's leadership.
(IHT 25-04-91)

Japan-Republic of Korea

On the occasion of a visit by the Japanese prime minister to South Korea on 9–10 January 1991, a joint communique was issued enunciating Three Principles for Promoting Friendship and Cooperation. These are: forging a spirit of partnership between the two countries; making joint efforts to promote peace, prosperity and harmony in Asia and the Pacific region; and starting closer consultation on global issues.
(FEER 31-01-91, p. 38)

Japan-Soviet Union

The President of the Soviet Union paid an official visit to Japan on 16–19 April 1991. The visit did not result in a solution of the Japanese claim to the disputed islands off Hokkaido (*infra*, Territorial claims), nor in any Japanese commitment for investment and economic aid.
(IHT 19-04-91; 20/21-04-91; 22-04-91)

Japan-United States

A report entitled "Japan 2000" has been written as the result of a CIA-sponsored confidential seminar, of eight prominent scholars, business leaders and security experts, held in Rochester, N.Y. in 1990. The report was written by ANDREW J. DOUGHERTY, a former US Air Force colonel and former director of research at the US Defense Department's National Defense University, and at the relevant time working at RIT Research Corp., a subsidiary of the Rochester Institute of Technology. The report warns that Japan is a fundamentally a-moral society that will dominate the world through its economic prowess unless challenged anew by the West. The report caused embarrassment and indignation among some of the experts who attended the seminar, and Japanese government officials have chosen to ignore the report.
(IHT 12-06-91; 8/9-06-91; 15/16-06-91)

In a poll conducted by the Japanese daily *Yomiuri Shimbun* in June 1991 to which 3,000 persons responded, 24% named the US among 5 states as the greatest threat to their security, followed by the Soviet Union (22%), North Korea (12.6%), South Korea (5.9%) and China (3.7%).
(IHT 05-07-91)

In a stock market scandal, Japan's largest securities houses admitted having made improper payments of more than US$ 1 billion to about 200 stock market investors to cover losses in the collapse in 1990. As a result of this scandal, the political survival of Japan's finance minister Mr RYUTARO HASHIMOTO was being threatened. In a highly

unusual move, the US finance minister spoke out in favour of Mr HASHIMOTO's survival, contrary to the normal silence concerning another country's domestic political matters. The minister justified his step because the Japanese government had been so helpful to the US during the Gulf War, and because the US was eager not to lose such a cooperative ally at a time when the world is faced with a host of tough economic issues.
(IHT 29-07-91)

Democratic People's Republic of Korea-Soviet Union
See also: Military cooperation

Underscoring the strains following Soviet recognition of the Republic of Korea on 30 September 1990, North Korea decided to effectively close the bureaus of three Soviet news organizations in Pyongyang.
(FEER 10-01-91, p. 18)

Republic of Korea-Soviet Union

It was announced in January 1991 that South Korea would grant a US$ 3 billion soft loan to the Soviet Union. The Soviet and South Korean presidents met at Cheju island on 19 April 1991, during President Gorbachov's overnight stop on his way home from a visit to Japan. It was their third meeting. Among other things, the Soviet president endorsed South Korean efforts to gain UN membership. On the other hand the Korean president expressed reservations about a Soviet proposal made in Japan for an Asian security conference.
(IHT 22-04-91; FEER 02-05-91, p. 12)

Republic of Korea-United States
See: International trade

Vietnam-ASEAN

Responding to an Indonesian proposal Vietnam announced that it would sign the Treaty of Amity and Cooperation drawn up by ASEAN in 1976 at the end of the Vietnam War in an effort to build regional trust and avoid armed conflict.
(IHT 21-06-91)

Vietnam-United States

In a meeting in New York on 9 April 1991, the US presented a blueprint to Vietnam, the so-called "road map offer", which indicates the requirements to be fulfilled by Vietnam at various stages of the Cambodian settlement in order to proceed with a US-Vietnamese normalization process. The blueprint posits four major phases: (a) agreement to sign the peace plan; (b) signing the plan; (c) implementing the plan; and (d) free elections. At each phase when Vietnam cooperates with the plan, the US would respond, easing step-by-step its trade embargo and the blocking of official multilateral lending, and in the end fully normalizing relations. The response would

also depend on progress on the accounting of US personnel missing in action from the Vietnam War and other humanitarian issues, such as the liberation of members of the former South-Vietnamese regime.

In a letter from the Vietnamese foreign minister to the US Secretary of State, of late May, Vietnam rejected the US plan. The plan would basically require all four Cambodian contending factions to agree to demobilize their forces before the US would open a diplomatic office in Hanoi or fully lift its trade embargo against Vietnam. Yet the US had agreed early May to establish a "temporary" office in Hanoi to facilitate the search for American servicemen missing in action.

The two parties nevertheless agreed to reopen talks in Bangkok late July 1991.
(FEER 18-04-91, p. 13; 25-04-91, p. 10; 02-05-91, p. 14; IHT 1/2-06-91; 16-05-91; 25-07-91)

Note: The US embargo against Vietnam was originally imposed on North Vietnam in 1964 and extended to the entire country after the Vietnamese defeated the US forces in 1975. *Inter alia*, it bars US citizens from trade with Vietnam and denies Vietnam loans from international financial institutions. In the US blueprint (above) priority is given to bilateral US-Vietnam trade over an IMF aid programme for Vietnam. This seems to be in response to demands from the US Senate: a reverse order "would open the door to all [non-US] foreign business interests while slamming the door on American business, forfeiting a generation of business prospects for US citizens".
(FEER 25-04-91, pp. 10–11; IHT 25-07-91)

Cooperation agreement among Asian Soviet republics

The five central Asian republics of the Soviet Union signed a cooperation agreement on 14 August 1991, to link their economies and reduce their dependence from Moscow. The republics are Kazakhstan, Uzbekistan, Kirghizia, Tadzhikistan and Turkmenistan.
(IHT 15-08-91)

INTERFERENCE IN INTERNAL AFFAIRS

See also: Aliens: activities; Human rights; Inter-state relations; Refugees

US President's meeting with the Dalai Lama

China protested the US president's meeting with the Tibetan Dalai Lama, calling it "gross interference".
(IHT 19-04-91)

Conditioning of development aid to Indonesia

The Dutch minister for development cooperation who was Chairman of the Inter-Governmental Group on Indonesia (IGGI), an 18-member international donors group, implied that future aid to Indonesia would be linked to Indonesia's performance on economic and social issues. The remarks drew mainly negative response in Indonesia, accusing the minister of interference and describing the remarks as patronizing and insulting.
(FEER 30-05-91, p. 16)

Appointment of dissident priest as Roman Catholic cardinal

China accused the Vatican of interfering in its internal affairs by appointing China's best known dissident Roman Catholic priest, aged 90, living in the US, as cardinal. China said it put new obstacles in the way of improving relations between China and the Vatican [The Vatican recognizes the Taipei government as the government of the Chinese state].
(IHT 18-06-91)

Non-interference in Myanmar affairs

Thai officials prevented the "prime minister" of the Thai-border-based National Coalition Government of the Union of Burma (NCGUB) from boarding an aircraft at Bangkok to Geneva on 21 July 1991. The NCGUB comprises candidates who were elected to Myanmar's National Assembly in the elections of May 1990 but have so far been prevented from taking office. They fled to the Thai border where they proclaimed their own government to challenge the legitimacy of the military regime.
(FEER 08-08-91, p. 6)

INTERNATIONAL COMMERCIAL ARBITRATION

International arbitration centre set up in Singapore

An international arbitration centre for commercial disputes has been set up in Singapore. The Singapore International Arbitration Centre is the third such body in Asia, the two other centres are in Kuala Lumpur and Hong Kong. The Singapore centre will focus on shipping, banking, commodities trading and construction. As Singapore is a signatory to the 1958 United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards, arbitration awards made here are enforceable in other member countries.
(Straits Times 06-07-91)

INTERNATIONAL MONETARY FUND: MEMBERSHIP

The US and several other Western countries and Japan recently rejected a French proposal to re-admit Vietnam to the IMF. Vietnam lost its membership in 1985 because it stopped paying foreign debts from 1981. Re-admission would result in loans for projects, but US firms would not benefit because of the still prevailing US embargo against Vietnam.
(IHT 16-05-91)

INTERNATIONAL TRADE

See also: Sanctions

Opening of Japan's rice market

So far Japan has barred any import of rice and has kept its rice production on a self-sufficient level arguing that this is done on the basis of national security considerations.

In May 1991 the Japanese prime minister indicated willingness to partly opening the country's rice market to imports. This was in accordance with suggestions made by the Federation of Economic Organizations (*Keidanren*) and leaders of the governing Liberal Democratic Party.

(IHT 30-05-91; FEER 06-06-91, p. 59)

Trade and investment relations between the US and South East Asia

The US and Singapore would begin discussions in June 1991 on a bilateral trade and investment framework agreement, in an effort to reduce economic frictions between the US and South East Asia. Hope was expressed that similar agreements would also be concluded with other ASEAN member states.

(IHT 23-05-91)

Hard currency trade with the Soviet Union

In early 1990 the USSR decided on switching to hard-currency trade. Accordingly Sino-Soviet trade was put on the basis of arrangements finalized during the trip to Moscow by the Chinese prime minister in April 1990. These arrangements eliminated the prevailing system of government-to-government barter trade, and switched to hard currency trade. Mutual extension of credits would be employed as a way to clean up their bookkeeping.

Later in the year, however, the Soviet Union backed down from an overall introduction of the new trade system, and transitional arrangements were negotiated with Vietnam, Mongolia and North Korea. For the time being settlements would be made within the framework of clearing accounts.

(FEER 03-01-91, p. 6; 28-03-91, p. 11)

Liberalization of trade between Taiwan and the Soviet Union

Taiwan has lifted a ban on direct trade with the Soviet Union by some ten state enterprises, after having taken a similar measure for private companies in March 1990.

(IHT 06-06-91)

US-Korean trade relations

A South Korean campaign against excessive consumer spending on luxury goods had been interpreted by the US as an official campaign to curb imports. The US

threatened with retaliation, and South Korea called for diplomatic efforts to defuse a looming trade conflict. Generally speaking South Korea accepts US bilateral trade demands, such as equal treatment of imported and local products and the support of the US position at GATT as much as possible. The Republic of Korea relies for more than 30% of its exports on the US.
(IHT 01-01-91; 08-01-91)

Sale of sensitive high technology

In December 1990, the US approved in principle the sale of a *Cray* supercomputer to the Indian Institute of Sciences in Bangalore. This computer sale is particularly sensitive because of its potential use in military programmes, in particular the development of a long-range missile with which the scientific establishment in Bangalore is closely involved. The sale demonstrates American trust and Indian willingness to allow the US a periodical check as to its use.
(FEER 31-01-91, p. 13)

US-Japanese agreement on the sale of supercomputers

The US and Japan reached informal agreement on revising their export controls on supercomputers to discourage the spread of nuclear weapons in the Third World, but they would ease controls on sales to Western Europe.

In the past the main instrument for US-led export controls has been the 17-member Coordination Committee for Multilateral Export Controls (COCOM). In 1984 the two parties agreed to consult each other before exporting supercomputers to reduce the risk that the Soviet Union would obtain them. The 1984 export restrictions were applicable to all countries including Western Europe. The revised rules have now created two broad categories of countries. The Western European countries will now be able to import supercomputers with less delay and fewer controls.
(IHT 10-06-91)

Sino-US economic relations
See also: Space activities

Against the background of US outrage over Chinese measures during the 1989 demonstrations and other alleged human rights violations, the US trade deficit with China kept rising to reach the third place after those with Japan and Taiwan. While different sources offer different figures on imports and exports, the deficit rose from US$6.2 billion in 1989 to US$ 10.4 billion in 1990, which figure could be estimated at US$ 12 billion if the purchase of Chinese products through Hong Kong were included. It was feared that the deficit could reach more than US$ 15 billion in 1991. The US has thus replaced Japan last year as China's leading trading partner.

These developments contributed to increasing frictions between the US and China, which manifested themselves in various fields, such as accusations of import controls, dumping, falsifying origin information, violation of intellectual property, prison labour, arms deals, and unfair exchange rate policy, apart from the ever present accusations of violations of human rights. Among the counter-measures suggested by the critics of

China, particularly in the US Congress, are actions under the US law against unfair trade practices, sustained US opposition to loans for China from multilateral institutions, and supporting Taiwan's application to join the GATT.

Allegations of the use of prison labour in China for the production of export goods were released on 19 April 1991 by the human rights group "Asia Watch". There had been instances in the past where the Chinese media had lauded the progress made in transforming the Chinese prisons into small-scale enterprises that earned foreign currency. In the US the Smoot-Hawley Tariff Act of 1930 prohibits the importation of prison-made goods. In addition, the US has ratified an international treaty banning forced labour in May 1991.
(IHT 24-01-91; 13-02-91; 2/3-03-91; 30-04-91; 17-05-91; 22-05-91; 30-05-91; FEER 02-05-91, p. 10)

Cutbacks of import quota on allegations of quota evasion

In late December 1990, the US cut sharply its import quotas for Chinese-made garments and textiles following allegations that Chinese exporters were evading quota limits by shipping products with fraudulent country-of-origin certification, and by routing unmarked goods through other countries where middlemen label the products as being of local origin. Such decisions, whereby the excess shipments would be counted against the 1991 quota, may be implemented unilaterally subject only to eventual ratification by the GATT-affiliated Textiles Supervision Board. China reacted by threatening to retaliate.
(IHT 24-01-91; FEER 24-01-91, p. 34)

China's most-favoured-nation (MFN) status vis-à-vis the US

All the factors which were relevant in bringing about the frictions between the US and China (see *supra*, Sino-US economic relations; The relevance of the use of prison labour) contributed to the reluctance in many US circles to extend MFN status to China.

The status had been accorded to China on a year-to-year basis. The annual term expired July 3, but the President must give the Congress one month notice on extending. To block extension both Houses of Congress must vote for a resolution of disapproval within 90 days which the President can veto. The Senate may overrule the veto by a two-thirds majority.

On 28 May 1991, the US President announced that he intended to extend the MFN status to China for another year. At the same time he ordered three measures to limit the export of missile and satellite technology to China: (1) licenses would be refused for sale to China of high-speed computers that can be used for flight testing of missiles; (2) unless the US becomes satisfied that China is abiding by international restrictions on the flow of ballistic missile and nuclear technology licenses would not be granted to US company participation in satellite launches by China; and (3) no license would be granted to the sale of missile technology or equipment to the government-run Chinese Precision Machinery Import-Export Corp. (this was said to be in response to the Chinese sale of missile technology and equipment to Pakistan).

In an effort to win Senate support for the extension of MFN status for China, the US

President in a letter outlined, *inter alia*, "self-initiated" retaliatory action under US trade laws unless China moderates "unfair" trade practices. The government would also support Taiwan's application for GATT membership and initiate tighter controls on imports of Chinese goods produced by prison labourers. The US would continue sanctions and international loan restrictions designed to moderate human rights abuses and to press China's entry into weapons non-proliferation agreements.

The US Senate adopted a bill introduced by the majority (Democrat) leader GEORGE MITCHELL which proposed to attach a 6-month review of China's behaviour to an MFN extension by way of incentive for China to change its policies. MFN status would be revoked in 180 days unless the President certified to Congress that China had performed a series of desired actions, including releasing or accounting for all political prisoners, stopping arrests of pro-democracy activists, permitting unrestricted emigration, protecting US intellectual property rights, providing fair and unrestricted access to Chinese markets, buying more US goods and services, stopping shipment of goods through Hong Kong and other non-Chinese ports to disguise their origin, and participating in international efforts to control proliferation of advanced weapons. However, the bill failed to muster a majority that could overcome a presidential veto (55–44). The House voted to pass a similar bill two weeks earlier on 10 July 1991, but a Presidential veto cannot be overruled by the House.
(IHT 30-04-91; 11/12-05-91; 16-05-91; 28-05-91; 30-05-91; 25-06-91; 22-07-91; 25-07-91; FEER 25-07-91, p. 14)

US complaints over China's exchange rate policy

The US Treasury Department complained about recent devaluation of the Chinese currency: "The recent [Chinese] devaluations in conjunction with large external surpluses, raise concerns and indicate that exchange rate policy may be aimed at reinforcing China's attempt to generate sizeable external surpluses".
(FEER 30-05-91, p. 19)

International trade statistics involving Japan

Japanese exports to the US had gone down slightly of late, while those to the EC and Asian countries had risen. Japan has consequently become less dependent on exports to the US.

The overall Japanese trade surplus was still increasing. After declining to US$ 63.5 billion last year, a 34% decline from the 1987 peak, the surplus was expected to reach US$ 70 billion in 1991.

In interpreting the trade statistics vis-à-vis each individual country, it should be borne in mind that art purchases by Japanese collectors are listed as imports from the (European) country where the painters (such as: van Gogh) originate, in accordance with the "country of origin rule" prevailing under the GATT regime. The EC had objected against this application of the rule, alleging it distorts the picture of the trade surpluses.

As to US exports, Asia and the Western Pacific (including Japan) have long surpassed Europe as buyer of US exports, and this lead is widening every year.
(IHT 24-04-91; 15/16-06-91; FEER 06-06-91, p. 48)

The framework of US-Japanese trade relations

In June 1990, the US and Japan agreed on a "Structural Impediments Initiative (SII) Accord" aiming at restructuring and modifying various aspects of Japanese economic life in order to reduce imbalances in the economic relations between the two countries. In this accord and in the follow-up trade talks in January 1991, sovereign states demand from each other fundamental changes in matters which have always been considered domestic matters. It is said that Japan has implemented more of the agreement than the US.

Among the subjects covered by the SII Accord are: Japan's savings balance; Japan's investment balance; Japan's share-holding system; Japan's exclusionary business practices; Japan's land use; reforming the corporate disclosure requirements in Japan; the reduction of the threshold for share-holders to examine company books and records from 10 percent to 1 percent; Japan's commitment to make the government's system of "administrative guidance" more public; Japan's commitment to spend US$ 3.15 billion on public works over 10 years; the proposal of the Japanese Fair Trade Commission to raise maximum penalties against anti-monopoly law violators from 2% to 6% of the company's annual sales. An additional example of the way in which the economic relations between the two countries are being conducted is the warning of the US Assistant Secretary of the Treasury for International Affairs that Japan must take steps to end the "collusive practices" of its tightly knit corporate groups (*keiretsu*) lest Japan's overseas investments be "severely undermined".

While the American Chamber of Commerce in Japan countered the mounting criticism of Japan by asserting that the Japanese market had become much more open in the past five years and was still opening up, the remarks of the Japanese Vice-Minister for International Trade and Industry about desirable US-Japanese economic cooperation are noteworthy. *Inter alia*, the minister said that because the US had helped rebuild Japan after World War II, Japanese companies should reciprocate now that US industry was having difficulties in competing on markets.
(IHT 18-01-91; 19/20-01-91; 21-05-91; 23-05-91; 12-06-91; 15/16-06-91)

US and Japanese participation in each other's construction projects

In 1988 the US and Japan concluded the Major Projects Agreement (MPA) which facilitated bidding on Japanese construction contracts by foreign firms. Despite this agreement, frictions remained because of Japan's alleged refusal to grant broader access to US companies seeking public works contracts in Japan, so that the US administration in spring of 1991 considered retaliation by barring Japanese construction companies from some US government projects. This would be the first trade retaliation against Japan by the US since 1987 when the US imposed punitive tariffs on electronic goods on grounds that Japan had violated an agreement on the trade in semi-conductors (see *infra*). From the other side, Japanese officials confirmed that if the US would impose sanctions by way of barring Japanese companies from taking part in federally funded construction projects, Japan would respond by cancelling the 1988 agreement.

In May 1991, negotiations were held on the US demand to give US companies the right to bid on big construction projects in Japan, and its proposal to open 27 current

and upcoming projects for foreign bids. On 1 June, Japan agreed to open a further 17 public works projects, heading off US sanctions.
(IHT 26/27-01-91; 18-04-91; 29-04-91; 1/2-06-91; 03-06-91; FEER 09-05-91, p. 54; 13-06-91, p. 75)

US-Japanese trade in semi-conductors

In 1986 the two countries agreed on a 5-year agreement on trade in semi-conductors. In 1987 the US leveled trade sanctions against Japan when the US found that Japan was not living up to parts of the agreement which called for a US share of the Japanese market. The sanctions placed a 100% penalty duty on imports of Japanese high-performance computers, but lost practical impact by the import of Japanese components into the US for assembly there. A consequent decline of US semi-conductor manufacturing would harm the country's international competitiveness in advanced technology.

The 1986 agreement also had its controversial sides. It formed in fact a global cartel for semi-conductors, artificially raising their costs, giving rise to complaints from computer makers, including those in the US. While according to the US the agreement was supposed to increase US sales of semi-conductors in the Japanese market to 20 percent in 1991, that figure was disputed by the Japanese because it was contained only in a secret side letter and was not part of documents made public by both sides.

On 4 June 1991, both countries agreed on a new semi-conductor pact for another five years, becoming effective on 1 August 1991. The agreement specified that sales of foreign-made semi-conductors should reach at least 20 percent of the Japanese market by the end of 1992. While this is not intended to be a guarantee, the US could take "corrective steps" if that goal is not reached. The parties failed to agree on how to measure this market share and acknowledged that each side would use somewhat different figures.
(IHT 23-05-91; 31-05-91; 05-06-91; FEER 13-06-91, p. 75)

Import of Japanese cars into the US

Japan was reported to plan continuing for another year, starting 1 April 1991, its voluntary restrictions on auto exports to the US. The export restraints were originally imposed in 1981 under US pressure arguing that American car manufacturers needed time to revitalize. The 10-year old export limitation has become a politically important symbol of Japanese deference to US wishes.

Meanwhile the big three US car-makers filed a petition with the US International Trade Commission in May 1991, accusing Japanese car manufacturers (*inter alia*, Toyota and Mazda) of dumping Japanese-made mini-vans on the US market. In the case of Chrysler, however, the complaint could turn against itself. One of the vehicles the Americans wanted to stop was the "Expo LRV" made by Mitsubishi for Chrysler which plans to sell it under its own name in the US. It is reported that Chrysler and Mitsubishi attempted to have the US definition of mini-van changed so that the Expo would no longer fall in the dumping case.
(IHT 12/13-01-91; 1/2-06-91; 13-08-91)

Japanese subsidiary acting as US company

For years the US typewriter manufacturer Smith Corona had fought Japanese rivals, such as by accusing them of selling foreign-made typewriters in the US below the fair market value in an attempt to seize market share. Meanwhile the Japanese manufacturer Brother had set up a subsidiary in the US (Tennessee) while Smith Corona had started to produce in a factory in Singapore to cut manufacturing costs. In 1991 Brother, posing as an American industry, accused Smith Corona of dumping its Singapore products at the US market, threatening the jobs of Tennesseans. Smith Corona argued that its typewriters were essentially American-bred. The research and development was done in New York, and the tools were designed there.
(IHT 13-08-91)

Japanese car sales in the US

Problems arose from the fact that Japanese cars and those produced by Japanese transplant factories had reached almost 30 percent of all passenger car sales in the US in the first six months of 1991. There had been increased pressure to assure that US car-makers fare better in Japan and that the Japanese sharply raise their use of American auto parts in spite of the fact that a significant percentage of their cars were produced in the US with American workers. The number of cars exported from Japan to the US had actually dropped, but the share of large and luxurious cars had risen. As to the American contention that the Japanese market is rigged against American car manufacturers because of the expense and difficulties of establishing dealerships, the Japanese refer to the success of Mercedes-Benz, Volkswagen and BMW.
(IHT 05-09-91)

Japanese car imports in Europe

During the past year there was a heated discussion in Europe about the increasing rise of car imports from Japan to the countries of the European Community and the question whether and to what extent these imports should be limited in order to protect the European car industry and yet not infringe the consequences of a single market with totally free trade. The problems involved included the difference in policy among the EC member states, with France and Italy most inclined to protect their own industry, and the question to what extent the cars produced by factories in Europe set up by Japanese parent industries should be counted as European or Japanese cars.

In May 1991 the European Commissioner for competition matters issued an "explanatory note" attempting to "clarify" a policy on so-called "transplant" factories which fulfil the requirements to be considered national industries. In this note the Commissioner held the view that while "transplant" cars "are EC products" so that to treat them as imports during the transition period to a free vehicle market "would be completely inconsistent with the single market", they compete with Japanese imports for the same share [!] of the EC market, so transplants must be taken into account in fixing import quotas during the transition period. As a consequence he said: "We therefore need an accurate estimate of the number of transplants which are likely to come on stream during the transition.... This estimate can then be taken into account in

arriving at the transitional arrangements which will apply to imports." Emphasizing the transitional nature of arrangements aimed at sheltering European manufacturers for seven years before they have to face the full brunt of Japanese competition, the Commissioner said that the Community would not pay for the short-sightedness of European car producers who would have failed to restructure in time to face outside competition in a single market with totally free trade. It was reported, however, that the Commissioner represented the only exceptional view within the European Commission.

On 26 July 1991 the EC countries agreed to proposals drafted by the EC Commission. Japan gave its approval on 31 July 1991. The arrangement starts from the assumption that "Japanese cars" (i.e., directly imported cars *and* vehicles made in European "transplant" factories) would cover 16% of the EC market in 1999. Beginning in the year 2000 the EC market will be totally free.

Current projections indicate 15 million new car sales in the EC in 1999, and 2.4 million would represent 16% of the EC market. Currently Japan exports 1.2 million cars to the EC and another 260,000 are produced in the EC-based "transplant" factories. The agreement limits direct imports in 1999 to 1.23 million cars, a virtual freeze on current levels, while the EC expects that Japanese "transplant" production will not exceed 1.2 million in 1999. This number, however, is not binding because restricting production within the Community would violate EC free-trade laws. Within the overall imports limit for 1999, five EC countries that currently restrict imports will have individual limits. If there had been no agreement, the EC countries which do not set import quotas would have become an import sieve for the whole EC. The agreement resembled the one Japan made with the US ten years ago.

Meanwhile the agreement leaves unanswered questions about the possibility of importation in the EC from manufacturing bases elsewhere, outside Japan. Equally unanswered is the question whether the EC will discourage further Japanese car manufacturing investment in Europe, and it remained uncertain what the expectation of "transplant" production of 1.2 million cars in 1999 means. It is reported that most EC officials were wary of Japan's European investments, arguing that the factories are little more than assembly plants set up by Japanese auto-makers to avoid EC import restrictions. Opinions like these defy claims of e.g., Nissan that the "local content" of its British cars is already up to 80% of the car's components. EC officials were quoted as saying that "[c]omparing cars made in Europe by Japanese and American companies is like comparing apples and oranges.... US cars are conceived, designed and built in Europe... Japanese cars are just assembled here." As to the assumption of a "transplant" production of 1.2 million cars, the *Yomiuri Shimbun* reported on 29 August 1991 that the agreement was in fact intended to include a limitation.

As to the temporal scope of the agreement, the affirmation of a totally free market in the year 2000 also raised the necessary doubts in view of past experience. Reference is here made to national car quotas which have been in place for 20 years, textile curbs which have existed for 30 years and steel import restrictions which took 12 years to be gradually removed.

(IHT 17-05-91; 21-05-91; 27-06-91; 6/7-07-91; 20/21-07-91; 25-07-91; 27/28-07-91; 30-07-91; 01-08-91; 30-08-91; FEER 08-08-91, p. 54–55)

Extension of the Multi-Fibre Arrangement (MFA)

The International Textiles and Clothing Bureau (ITCB) which represents producing countries, agreed in May 1991 to seek an extension to the existing MFA governing textile exports. Just before the current MFA expired, the GATT Textiles Committee decided on extension until the end of 1992, despite calls by Third World exporters for lower import barriers.

The Asian producer countries did not reach their objective of obtaining assurances that the importing countries would refrain from introducing any new restrictions during the 17-month period, although the MFA extension protocol reaffirmed the general Uruguay Round commitment to restrain protectionism.

The 52-party Multi-Fibre Arrangement is an umbrella accord under which the industrialized countries strike bilateral agreements with Third World producers limiting imports in order to protect the domestic textile industries in the rich countries.
(FEER 23-05-91, p. 67; 08-08-91, p. 62; IHT 01-08-91)

Dumping
See: Space activities

Japan-Vietnamese trade

There is a steady expansion in trade between Japan and Vietnam, and turnover was expected to reach US$ 1 billion in 1991. This expansion takes place despite Japan's partial adherence to the US embargo against Vietnam. In deference to the US, Japan discourages investment in Vietnam and vetoes most multilateral lending but it does allow commercial trade.
(IHT 30-07-91)

Japan's trade surplus with Asia

Although Asia's export of manufactures to Japan is increasing, there is no narrowing of the region's trade deficit with Japan: the deficit of the "new industrialized countries" (NICs) is steadily growing, the trade surplus of ASEAN is quickly dwindling. One of the fundamental reasons is that the industrialization of Asia is relying increasingly on Japan for capital equipment and components. Another reason is the strongly increasing consumer demand for Japanese consumer goods. A third factor is the relative strength of various NIC-currencies against the yen, blunting the competitive edge in penetrating the Japanese market.

China would appear to be the only Asian country enjoying a trade surplus with Japan, but much of Japan's exports that are recorded with Hong Kong are actually trans-shipped to China.
(FEER 01-08-91, p. 57)

Japan's trade surplus with Taiwan

Taiwan's senior representative in Japan, and later its vice-economics minister, warned that Japanese companies might be excluded from contracts in Taiwan's six-

year, $300 billion development plan if Japan's trade surplus with Taiwan continued to swell. This surplus amounted to $7.66 billion in 1990 and was expected to reach $9 billion in 1991. "If the deficit goes on rising, popular anger at home will intensify.... Measures taken by the government will have to be in line with that reaction and the reaction of legislators...." Taiwan is Japan's fourth largest export market after the US, Germany and South Korea.
(IHT 09-08-91; 20-08-91)

Participation in public works contracts in exchange for diplomatic concessions

Suggestions have been raised from among the Taipei government that Taiwan should use its $300 billion public works program to pressure foreign governments into establishing air links with Taiwan and easing visa restrictions on Taiwanese.
(IHT 15-08-91)

INTERVENTION

See: Border incidents, Dissidents

IRAQ-KUWAIT WAR

Contributions to the war efforts

Thailand sent fifty medical personnel to Saudi Arabia where 100,000 Thais work. *Bangladesh* sent 2,300 troops to Saudi Arabia. They would be engaged only in defensive operations. About 400,000 Bangladeshi live and work in the Gulf area (IHT 18-01-91). *Pakistan* sent 11,000 troops to Saudi Arabia to be engaged in the defence of the holy places of Islam (NRC 10-01-91; 21-01-91). *The Philippines* sent a 300-man medical team to Saudi Arabia. It has raised no objections to the use of Subic naval base and Clark air base as staging posts for US supply flights and for replenishing US warships heading for the Persian Gulf (FEER 24-01-91, pp. 12–13). The *Indian* government initially allowed US military transport aircraft to refuel at Bombay airport while shuttling supplies from Clark air base in the Philippines to the Persian Gulf. The Indian government understood the aircraft were carrying "non-lethal" cargo. Given friendly bilateral relations, and India being a party to the UN resolution calling for Iraq to withdraw from Kuwait, the government saw no reason to deny the US refueling facilities. In February 1991, however, the refueling rights were withdrawn, following a threat by the Congress Party to topple the government.
(FEER 07-02-91, p. 14; IHT 18-02-91)

The South Korean contribution and the underlying considerations

In an initial phase South Korea sent a 154-member military medical team to Saudi Arabia, and pledged US$ 220 million in financial assistance and aid in kind to the "frontline states" such as Turkey and Egypt. The costs involved in sending the team would total US$ 14 million, and the defence minister assured that it would not lead to

combat forces being sent. This assurance was given in reply to objections from the opposition in Parliament who recalled that the dispatch of a medical team to Vietnam in 1964 had escalated into full military involvement.

By the end of January 1991 it was decided to raise the financial contribution to US$ 500 million while parliamentary approval was sought for the dispatch of an additional 150 men air force contingent and five cargo aircraft for military transportation.

Korea is relying on Saudi Arabia and Kuwait for 70% of its oil supplies, and Korean contractors had about US$ 1.5 billion worth of unfinished projects in the region.
(FEER 24-01-91, p. 12; 31-01-91, p. 12; 14-02-91, p. 11)

Indonesia

Popular Muslim reaction to the "Gulf War" exerted considerable pressure on the governments of Indonesia and Malaysia. While firmly sticking to a condemnation of Iraq's invasion of Kuwait and calling on Iraq to withdraw, Indonesia called on the US to give assurances that an Iraqi pull-out would lead to a settlement of other long-standing Middle East issues. It also joined efforts by non-aligned countries to search for a solution.
(IHT 31-01-91; FEER 28-02-91, p. 20)

Vietnam

Vietnam, by way of an article in the Communist Party newspaper, strongly criticized the US for its action in the "Gulf War", charging, *inter alia*, that the US was going far beyond the limits set by the UN Security Council.
(FEER 14-02-91, p. 14)

Malaysia

It is reported that Malaysia, as a member of the UN Security Council, voted for resolution 678 (mandating UN members to use force against Iraq) instead of abstaining from voting, as a result of successful pressure. It later strongly criticized the "alarming escalation" of military force beyond what Malaysia considered were the original objectives of the UN resolutions.
(FEER 28-02-91, p. 20)

The Japanese contribution

Japan first pledged to contribute US$ 4 billion including $2 billion to be used for the military operations and $2 billion by way of economic aid to the "frontline states" Jordan, Egypt and Turkey. In accordance with the US request and after US pressure at the G-7 meeting on 19–20 January 1991 in New York that Japan bear one fifth of the estimated expenses, Japan later in January 1991 agreed to increase its contribution, likely with an additional US$ 9 billion. The money would be put at the disposal of the Gulf Cooperation Council, and Japan would ask the Council not to use the Japanese contribution for the procurement of military hardware but only for logistics and non-military goods.

Besides, the sending of military aircraft for the transport of refugees from Amman, Jordan, to Egypt and Syria was taken into consideration. This idea was controversial because of Article 9 of the Constitution prohibiting the Japanese Self-Defence Force to operate outside Japan. Another obstacle was seen in Article 100 of the Self-Defence Law which limits the SDFs role in transportation to carrying members of the imperial family, state dignitaries and high-ranking government officials. The government intended to amend the provision by a special decree defining transportation of refugees to be a legitimate activity which does not require a change in the Self-Defence Law.

According to the plans, four C130 transport aircraft would be stationed in Cairo together with two hundred SDF personnel including technicians. It was envisaged that the planes would ferry refugees out of Jordan at the request of the UN International Organization for Migration (IOM). The practical justification for sending military aircraft was the impossibility for commercial aircraft to obtain insurance for flights into Amman and Damascus.

As to the financial contribution, the Japanese Upper House on 5 March 1991 approved a supplementary budget in yen terms as is normally the case, to finance the pledge based on the rate of the US dollar on 28 February, and consequently the equivalent of US$ 8.6 billion was transferred to a Gulf Peace Fund, set up late 1990 to distribute Japan's contribution and overseen by a committee of six allied Arab states.

After strong American protests, Japan finally decided to make up for what was considered by the US to be a shortfall in Japan's pledged US$ 9 billion contribution, and make another, formally unrelated contribution of US$ 500 million to clean oil pollution in the Gulf and to aid Kurdish refugees. In return the US gave up its claim to US$ 700 million more in additional war funding that it had requested from Japan. The figure represents money that Japan paid to the UK, France and the Arab states to offset war expenses but which the US had insisted to be paid to the US instead.
(NRC 23-01-91; IHT 26/27-01-91; 29-01-91; 04-02-91; 06-03-91; 14-03-91; 22-05-91; 11-07-91; FEER 31-01-91, p. 46; 07-02-91, p. 10)

Lawsuits against Japanese contributions

A citizens' group of 850 persons filed lawsuits asking district courts in Tokyo and Osaka to stop the government from spending money on the allied forces in the "Gulf War". They asked the government to pay each plaintiff 10,000 yen (US$ 76) compensation, being the cost of the aid package to each Japanese resident.
(IHT 05-03-91)

JAPAN'S MILITARY ROLE

United Nations Peace Cooperation Bill: A Japanese response to the Iraqi invasion of Kuwait

In October 1990, the Japanese Cabinet introduced the United Nations Peace Cooperation Bill in the Diet. The main purpose of the bill was to enable the dispatch abroad of a Peace Cooperation Corps by way of contributing to the efforts and activities of the United Nations undertaken under UN resolutions for the maintenance

of international peace and security. The Corps was not intended to act as a fighting force, but to engage in the following activities: (a) surveillance of cease-fires; (b) advice or guidance on administrative matters; (c) transportation, telecommunication and repair and maintenance of material and equipment; (d) medical care; (e) activities for the relief of victims; (e) repair of damage caused by conflicts, etc. The intention was to dispatch the Corps to support the Coalition troops in Saudi Arabia which consisted mainly of US troops.

This effort of the Japanese Government to send armed personnel abroad for the first time since the Second World War ran into a storm of opposition in the Diet, and some Asian states like South Korea and Singapore were outspoken critics of the plan. Since the governing Liberal Democratic Party did not hold the majority in the Parliament, the Cabinet could not obtain sufficient support, and in November 1990 the Cabinet finally withdrew the bill.

Article 9 of the Constitution of Japan stipulates that Japan renounces war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes, and consequently armed forces would never be maintained. The Japanese Government has interpreted the provision as follows: the Japanese Government can only exercise the right of individual self-defence, not that of collective self-defence, though the latter is recognized in the Charter of the United Nations and armed forces may be maintained to pursue the former. The dispatch of a Peace Cooperation Corps was beyond the traditional position, although the Cabinet argued that it should be constitutional to engage Japanese forces in behind-the-lines work like surveillance, maintenance and medical care.

Participation in peace-keeping operations

Since the Gulf War, the question has been hotly discussed whether Japan should play a more active role in international affairs, both politically and militarily, such as participating in UN peacekeeping operations. Since 1988, Japan has participated in several peace-keeping operations, such as in Afghanistan and Nicaragua, but only in election-monitoring and using civilian personnel. The question of an increased Japanese role is a consequence of the diminished Soviet power, the weakened position of China, and a gradual reduction of US forces in the region. The US has more than once insisted on a more active Japanese role.

Contrary to their previous stance, South East Asian states appear to have no objections and even to encourage Japan to take part in UN peacekeeping operations. The Indonesian president is reported to have said that it is Japan's sovereign right to decide whether to send troops overseas on peace-keeping missions under UN auspices. The minister for foreign affairs of Singapore suggested that Japanese and other Asians should meet and clarify Tokyo's possible future role in regional and international security. In June 1991 the Japanese government specifically proposed that Self-Defence Force members may participate in UN peace-keeping operations.
(IHT 06-03-91; 08-03-91; 14-03-91; FEER 14-03-91, p. 14; 09-05-91, p. 19; 06-06-91, p. 12)

Japanese mine-sweepers to the Gulf

Twice in the past proposals to send mine-sweepers have run afoul of constitutional problems. In 1987, during the Iran-Iraq War, the government backed away from its proposal after public protests. In 1990 the US asked Japan to send mine-sweepers in the time of the military build-up against Iraq, but this time the government itself said that the constitutional ban would pose a problem because the mines were placed only by one side so that clearing them would be considered a hostile act in a conflict.

After the termination of the war there were again requests from Saudi Arabia, Japanese business and shipping interests. This time the Japanese cabinet approved sending four mine-sweepers and two support ships, being Japan's first overseas military mission since World War II. The ships left for the Gulf on 26 April 1991. The reactions to the move from other Asian countries were favourable with the single exception of China where the foreign ministry described the dispatch a "very sensitive question" and called on Japan to act cautiously.
(IHT 13/14-04-91; 25-04-91; FEER 09-05-91, p. 19)

JOINT DEVELOPMENT

The "growth triangle" of Sumatra, Northern Malaysia and Southern Thailand

The Indonesian trade minister floated the idea of "triangular trade" between the three areas when speaking at a trade fair in Northern Sumatra in early February. This was in support of the idea of a second growth triangle concept (in addition to the one covering Singapore, Riau and Johor) covered by earlier talks between the Indonesian foreign minister and Thai officials.
(FEER 21-02-91, p. 14)

Parts of the "Timor Gap" opened for exploration

By way of implementation of the 1989 treaty on the "Timor Gap" between Indonesia and Australia, the joint authority set up under the treaty put on offer 14 areas of the "Gap" for oil exploration under production-sharing contracts.
(IHT 04-07-91)

The Tumen River region

At the initiative of North Korea, seven states – North and South Korea, the US, Japan, China, the Soviet Union and Mongolia – would attend a meeting in China in August 1991 to discuss the development of the *Tumen* River region bordering North Korea, China and the Soviet Union into a special economic district. The development project in North Korean territory would include new electric power plants, increased farm output and improved economic relations with China and the Soviet Union.
(IHT 30-07-91)

Indonesian-Singaporean joint water supply project

The two countries reached agreement on 28 June 1991 on the development of a water supply project on the Indonesian island of Bintan. About half the initial production would go to Singapore accounting for more that one quarter of the island republic's current consumption. So far Singapore's main water supplier is the Malaysian state of Johor. Under a 1962 agreement it was granted the right to draw up to 250 million gallons a day from the Johor river. A new agreement of November 1990 increased this entitlement, provided Singapore paid compensation towards the cost of land and a dam needed to supply the extra water.
(FEER 11-07-91, p. 14; 18-07-91, p. 22)

JUDICIAL ASSISTANCE

Tracing and recovery of Philippine assets taken by the former President FERDINAND E. MARCOS

Since early 1991, Switzerland started releasing bank documents to the Philippines about money placed in Swiss banks by the late President MARCOS. It later (May 1991) also complied with a Philippine request to freeze two accounts believed by the Philippine government to hold US$ 1.3 billion stashed by the family of the former President, although the bank involved denied it held such accounts. The Swiss government has always said it would be prepared to authorize the release of bank documents first, and then the money itself provided that due process of law has been exhausted. The Swiss Supreme Court gave the Philippine government until 20 December 1991 to file charges against the late President's widow IMELDA R. MARCOS as a requirement for access to the accounts. (see *infra:* Passports and visas)

The Philippine President approved the filing of criminal charges against Mrs MARCOS in order to comply with the Swiss requirements. Mrs MARCOS was also allowed to return to the Philippines from her present stay in the US.
(IHT 19/20-01-91; 31-05-91; 04-06-91; 12-06-91; FEER 28-03-91, p. 12)

KOREAN WAR

Remains of US servicemen

North Korea turned over 11 remains of US servicemen killed in the Korean War, and said it would help search for 9,000 Allied (US, Canadian, Australian, British) military personnel listed as missing. It agreed in principle to form a committee with the US for that purpose.

In May 1990 the remains of five servicemen were turned over.
(IHT 20-06-91; 25-06-91)

MIGRANT WORKERS

See also: (Relations with) unrecognized entities

Chinese labour for Japan

China proposed sending Chinese skilled and unskilled workers to meet Japanese demand for labour, and to make up for the loss of remittances from its nationals in the Middle East.
(FEER 04-04-91, p. 6)

Labour law protection of Asian workers in the Middle East

International labour experts urged Asian governments to secure improvements in the labour laws of the Gulf states for the Asian migrant workers who will return to the Gulf area after the end of the Gulf War. Before the war there were an estimated 1.9 million Asians working in Iraq and Kuwait.

At the ILO meeting in March 1991, Bangladesh, India and Pakistan asked the ILO to review the labour system in the Gulf states. Kuwait and Saudi Arabia are not a party to four key ILO conventions on recruitment, engagement, working conditions and social security benefits for migrant workers.

The ILO Director General promised that the ILO would press the Gulf states to apply internationally recognized labour standards for migrant workers.

The ILO would also press the migrants' Asian countries of origin to reform their recruitment systems and prevent illegal recruitment.
(FEER 02-05-91, p. 13)

MILITARY BASES

See also: Security of the region

The US military bases in the Philippines

With the US lease for the *Subic Bay* naval base, the *Clark* air base and four other smaller installations (*Wallace* Air Station, *San Miguel* Naval Communications Station, Camp *O'Donnell*, and Camp *John Hay*) lapsing on 16 September 1991 [the original agreement on US control of the bases was signed in 1947; Clark was first used in 1901 as a cavalry base] the past year saw several rounds of talks between the two countries trying to reach a mutually satisfactory settlement. The main points of disagreement were the future term during which the US would be entitled to make use of the bases, and the amount and form of the compensation to be paid by the US. In the past few years the bases provided $530 million annually into the Philippine economy or 1.1% of GNP, as well as providing jobs for 79,000 Filipino workers.

Following the fifth round of talks in February 1991, the Philippine demand was $825 million a year for a 7-year lease of the Clark and Subic bases, consisting of $400 million in cash and $425 million in debt reduction and trade concessions. The US offer was $360 million a year with the prospect of a range of other benefits depending on the term of the lease.

Before the talks could lead to an agreement, the volcanic eruptions of Mt. Pinatubo, on 10 mile distance of Clark air base, which began on 15 June 1991, caused so much damage to the air base that the US decided to abandon it in principle. The cost of restoring it was estimated at $520 million. As a result, the US proposed to reduce its original cash offer to about $200 million for the Subic naval base alone.

On 17 July 1991 the US and Philippine governments finally reached agreement: the US would be entitled to use Subic Bay naval base for at least 10 more years; Clark air base would be returned to the Philippines on 16 September 1992 at the latest; unless the Philippine grants continued access, a US withdrawal from Subic Bay would start at the end of the 10th year.

The agreement was signed on 27 August 1991 but was subject to ratification by the Philippine Senate for which 16 of the 23 members' affirmative votes are necessary. In an unusual step the chief US negotiator at the bases talks on 6 August 1991 wrote to all Philippine senators urging them to ratify and telling them "that the Philippine Senate has in its hands the future of the relationship between the two countries".
(Straits Times 08-01-91; IHT 14-01-91; 15-01-91; 12-02-91; 19-02-91; 13/14-04-91; 4/5-05-91; 17-05-91; 22-05-91; 24-06-91; 27-06-91; 12-07-91; 16-07-91; 17-07-91; 18-07-91; 3/4-08-91; 08-08-91; 09-08-91; FEER 24-01-91, p. 13; 28-02-91, pp. 18–19; 01-08-91, pp. 14–15)

Soviet bases in Vietnam

In January 1990 the Soviet minister for foreign affairs predicted that the Soviet military presence in Asia beyond Soviet borders would soon be abolished.

In June 1991 the Soviet rear-admiral with responsibility for the Asia-Pacific region said that the Soviet Union had after all decided to maintain air and naval bases in Vietnam as a number of countries in the region wanted, as the admiral put it, a "reduced but conspicuous" Soviet as well as US presence, to guard against possible encroachments by Japan, China, or India. These Soviet intentions were, however, quickly denied and it was emphasized that the withdrawal should be completed by 1994.
(IHT 14-06-91; 19-06-91)

MILITARY COOPERATION

China-Soviet Union

Consequent to the Sino-Soviet agreement on the purchase of Su 27 aircraft (*supra:* Arms deals), the two countries signed an agreement in early May 1991 allowing Chinese air force pilots and support personnel to be sent to the Soviet Union for training.
(FEER 30-05-91, pp. 18–19)

Indonesia-Papua New Guinea

The Indonesian foreign ministry denied news reports that it planned to give military

assistance to PNG in its fight against the secessionist movement on Bougainville island.
(FEER 17-01-91, p. 14)

Indonesia-Malaysia

The two countries concluded an agreement in Jakarta on joint patrols to safeguard security in the Malacca Straits by monitoring piracy and fishing. New reports noted that the accord came at a time of concern about links between rebels in the Indonesian province of Aceh and Malaysia's sizeable Acehnese population.
(FEER 31-01-91, p. 12)

Air force training in the Philippines

In view of the lapse of the current US-Philippine agreement on the US military bases in the Philippines on 16 September 1991 (*supra:* Military bases), it was expected that the Australian, Thai and Singapore air forces would be unable to continue training at the so-called *Crow Valley* combat instrumentation range unless bilateral agreements were concluded. This would conform with constitutional stipulations in the Philippines that foreign military bases or troops would not be allowed beyond the above date without an agreement.
(FEER 24-01-91, p. 9)

Singapore-US

While Singapore endorses the ASEAN consensus to establish a Zone of Peace, Freedom and Neutrality (ZOPFAN) over the long term, it also recognises that until this is achieved, a continued US presence in South East Asia is desirable as it will maintain the balance of power in the wider region, reinforce the stable and peaceful regional environment, and enable the non-Communist countries in South East Asia to concentrate their resources on economic development.

To this end, Singapore signed an agreement with the United States on 13 November 1990, allowing United States navy and air force to increase their use of training, maintenance and repair facilities in Singapore.
(Singapore Govt. Press Release No. 16/Aug 08-28908/04; Straits Times 14-11-90; IHT 11/12-05-91)

Reduction of US forces in Asia

The US is in the midst of reducing its 135,000 servicemen and women based in Japan, South Korea and the Philippines by about 11% by the end of 1992. Under a plan agreed upon with South Korea, the US will withdraw 7,000 of the 44,000 American servicemen in South Korea by the end of 1992. The total US Pacific Force is 350,000 strong. The head of the US Pacific Command expects reductions in the Pacific area to be smaller than those in other parts of the world "because changes in the military situation have been less dramatic".
(IHT 11/12-05-91; 27/28-07-91)

Indonesia-Singapore

The two countries agreed on 2 August 1991 to jointly develop a computerized air combat range in Sumatra.
(FEER 22-08-91, p. 12)

MONETARY MATTERS

Asia-Pacific forum of central banks

The Bank of Japan hosted a meeting of regional central banks on 22 February 1991, and hopes to organize such meetings three times a year. According to some sources, the new forum for periodic consultations has as its ultimate aim the development of an Asian version of the Bank for International Settlements in Basel.
(FEER 14-02-91, p. 42; 27-06-91, p. 59)

NATIONALITY

Special grants of citizenship in Pacific states

Tonga decided to grant citizenship to more that 400 foreigners. It had been selling passports for US$ 10,000 or more since 1984. Recipients were mostly from South East Asia. Parliament declared the sales illegal in 1988, but in February 1991 the king agreed to a legal amendment allowing 426 persons to become Tongan citizens.
(IHT 9/10-03-91)

Effect of forgery in obtaining citizenship in the past

The Philippine administration had started deportation proceedings against a man accused of having obtained Philippine citizenship by using forgery thirty years ago. On 8 July 1991, however, the Philippine Supreme Court declared a real estate and plastics tycoon, WILLIAM TIU GATCHALIAN, to be a Philippine citizen and barred immigration authorities from going ahead with the deportation proceedings against him.
(FEER 13-06-91, p. 14)

NON-AGGRESSION

Indo-Pakistani pact not to attack nuclear facilities

In December 1988, the two states concluded an agreement under which both parties committed themselves not to attack each other's nuclear facilities. After years of delay in ratifying as a result of the tensions in the Jammu and Kashmir area, the agreement came in force on 27 January 1991. The agreement covers seven nuclear facilities in India, while Pakistan had yet to prepare a list of installations to be covered by the accord.
(IHT 28-01-91; FEER 07-02-91, p. 14)

NON-ALIGNED MOVEMENT (NAM)

Ministerial Conference at Accra

The 103-member NAM decided to keep its name and maintain its general role in international politics despite the collapse of the Soviet bloc. The conference rejected an Egyptian proposal to merge with the Group of 77. The Movement elected Indonesia as its next chairman.
(IHT 7/8-09-91; NRC 9-09-91)

NUCLEAR CAPABILITY

Indo-Philippine cooperation

The two countries concluded a five-year accord on cooperation in research in the field of peaceful use of atomic energy.
(BLD 1991 No. 9)

Alleged Pakistan efforts to develop nuclear weapons

The US suspended economic and military aid to Pakistan in October 1990 on the ground that it was not convinced that Pakistan was not developing nuclear weapons – a condition for aid imposed by the US Congress.

In early July 1991, the British customs started investigations whether computer software capable of being used in a nuclear arms programme might have been exported illegally from Norway to Pakistan by way of Britain. Pakistan denied being a party to any attempt to evade export controls. The Pakistan spokesman said it was up to foreign suppliers to comply with the laws and regulations governing exports from their countries.

China (1989) as well as France (1990) have promised assistance to Pakistan in the field of nuclear energy. Pakistan has not signed the Nuclear Non-proliferation Treaty.
(FEER 14-02-91, p. 10; IHT 6/7-07-91; 08-07-91)

Inspection of North Korean nuclear facilities

See also: Divided states

North Korea acceded to the Nuclear Weapons Non-proliferation Treaty in 1985 and by so doing also committed itself to inspection by the IAEA. It has, however, so far refused to conclude a subsequent safeguards agreement on verification by IAEA and it has denied that it is preparing the production of nuclear weapons.

The North Korean position has always been that the US, which is assumed to have deployed nuclear weapons in South Korea, must certify that it has no unclear weapons stored in South Korea, and must also agree to inspection of its nuclear facilities in South Korea. However, US policy is to neither confirm nor deny the presence of nuclear weapons in South Korea. The US also argues that the two issues are separate, as the Non-proliferation Treaty does not require *existing* nuclear powers to open their

military sites to inspection. On his part the South Korean president rejected calls for a reduction of US nuclear arms from South Korea as a gesture to reduce tensions. The North Korean position has been upheld in its negotiations with Japan on normalization of the relations between the two countries.

The North Korean nuclear plant is located at *Yongbyon*, about 60 miles from Pyongyang and 160 km from the demilitarized zone. Satellite pictures have shown considerable construction during the past five years and according to US allegations, North Korea would be able to produce atomic weapons in a few years' time.

On 7 June 1991, North Korea told the IAEA that it was prepared to sign an agreement allowing international inspection of its nuclear installations, but insisted that the US bases in Korea must be investigated simultaneously. A delegation would negotiate an inspections agreement in Vienna in July with signing expected in September 1991. Meanwhile, the head of the US Pacific Command had said that the US considers a North Korean program to develop nuclear weapons as the most immediate danger in Asia and the Pacific. Reflecting growing US concerns about the adequacy of international supervision of national nuclear programs, the Admiral said that North Korea would have to do more than sign a safeguards agreement with the IAEA and allow its inspectors to check that no nuclear weapon development or production was taking place. Implying that North Korea would have to dismantle existing key facilities he said that North Korea would have to "stop the move toward reprocessing [spent uranium fuel from the North Korean reactor] and stop that [nuclear weapons] program".

(IHT 23-01-91; 16-04-91; 31-05-91; 04-06-91; 10-06-91; 12-06-91; 15/16-06-91; 03-07-91; 27/28-07-91; FEER 20-06-91, p. 12; 04-07-91; UNdoc.S/21957; S/2225)

Chinese policy on export of nuclear technology and on non-proliferation of nuclear weapons

The *Washington Post* disclosed on 20 April 1991 that US intelligence agencies had revealed that China was helping Algeria to build a nuclear reactor that may eventually produce fuel for nuclear weapons. The reactor under construction was reported to be larger than required for routine nuclear research while the construction site showed no provisions for the transmission of electric power from the reactor. Shortly afterwards, China disclosed that it had been helping Algeria develop a nuclear capability for peaceful applications under a 1983 nuclear cooperation agreement, and had provided a 10–15 MW heavy water reactor. It had urged Algeria to open the nuclear facilities to inspection by the IAEA to which Algeria had agreed. This was in accordance with the Chinese promise in a 1984 Sino-US nuclear trade agreement that as a member of the IAEA, China would export nuclear technology only under international inspection. When the French minister for foreign affairs visited China in April 1991 he was provided with details about the Sino-Algerian nuclear cooperation and was assured that it is out of the question for Algeria to develop nuclear weapons [on the basis of the cooperation].

The Sino-Algerian nuclear cooperation program is one of a number of arrangements entered into by China with other developing countries. According to official Chinese publications on nuclear issues, about forty countries have entered such civilian nuclear agreements.

China has not signed the NPT but has explicitly endorsed the aims of the treaty. It has joined the IAEA in 1984 and accepts IAEA monitoring its nuclear exports although it is reported to be less forthcoming in respect of agreements pre-dating its IAEA membership.

While there is as yet no evidence that the Chinese have ever provided military-related nuclear assistance to other countries, the lack of openness raised concern among Western countries which desire to curb the proliferation of nuclear technology into the Middle East. On the other hand, China accuses the Western countries of arrogance in claiming exclusive rights in the field of nuclear power. It also resents the fact that cooperation projects involving peaceful nuclear power automatically come under suspicion from a military viewpoint, even when open to international scrutiny.

On 27 June 1991, the Chinese foreign ministry spokesman declared that China does not advocate, encourage or practice nuclear [weapons] proliferation, nor does it help other countries to develop nuclear weapons. In a latest development, on the occasion of the visit to China by the Japanese prime minister on 9–12 August 1991, it was announced that China would sign the Non-proliferation Treaty.

(IHT 24-04-91; 02-05-91; 13-05-91; 20-06-91; 28-06-91; 12-08-91; FEER 02-05-91, p. 10; 16-05-91, p. 15)

OIL

Oil producers and consumers dialogue

A meeting between oil producing and oil consuming countries was organized by the French and Venezuelan governments early July 1991. The parties agreed to meet again both at technical and political levels. The talks sought to bring oil producers (OPEC countries) and consumers together after decades of distrust.

(IHT 03-07-91)

PASSPORTS AND VISAS

The case of Mrs IMELDA MARCOS

Until July 1991 the Philippine president had directed that no passport be issued to Mrs MARCOS enabling her to return to the Philippines. On 31 July, however, this policy was reversed and permission was granted to Mrs MARCOS to return to the Philippines where she would face criminal charges. The remains of the late former president, however, remained barred from the country. One-way travel documents would be issued to Mrs MARCOS, her son, two daughters, sons-in-law, and three grandchildren after the authorities had determined that the family no longer presented a threat to national security. Meanwhile the Solicitor-General had filed 11 charges of tax evasion against Mrs MARCOS, eight tax fraud charges against Ferdinand Jr., another eight against one daughter and her husband and two against the other daughter and son-in-law. These charges are aimed at meeting conditions imposed in December 1990 by the Swiss Federal Tribunal before it would consider ordering the return of US$ 350

million frozen in Swiss bank accounts on the name of the late president. (See *supra:* Judicial assistance)
(FEER 28-03-91, p. 12; 15-08-91, pp. 12–13; IHT 31-07-91)

Visa obligation between ASEAN and Australia

ASEAN has urged Australia to adopt an "open sky" policy and waive the need for visas on short visits of ASEAN nationals. Reversely, Australians do not need visas for short visits to most ASEAN countries, and have unlimited entry to Malaysia and Singapore.
(IHT 25-04-91)

PIRACY

Increase of piracy cases

Shippers in Singapore have been seeking help of ASEAN governments to curb a tenfold increase in regional piracy. According to the Singapore National Shippers Association, 32 piracy cases were reported in 1990. The matter was taken up with the Federation of ASEAN Shippers Associations.
(IHT 15-01-91)

RAILWAYS

India-Nepal
See: Inter-state relations: General aspects

North Asian railway network proposed

At an ESCAP meeting in Seoul, the USSR and the ROK proposed an Asian railway network linking North and South Korea, China, Mongolia, and the USSR.
(IHT 08-04-91)

Singapore-Bangkok link

The Eastern and Oriental Express Ltd., owned by Malaysian companies, a Thai firm and Orient-Express Hotels Inc. plans to start a train service linking Singapore and Bangkok (1,940 km) via Kuala Lumpur.
(IHT 31-07-91)

RECOGNITION
See: Unrecognized entities

REFUGEES

See also: Cambodia

Closure of Malaysian refugee transit camp

In late January 1991, the Malaysian government decided to shut down *Pulau Bidong*, the island transit camp for Vietnamese refugees off Malaysia's east coast. More than 230,000 refugees have passed through Pulau Bidong on their way to settlement in other countries.

Judicial review of government decision on application for recognition as refugee

A Hong Kong High Court judge quashed a government decision classifying a Vietnamese refugee as an "economic immigrant", saying the decision was flawed on the grounds of procedural irregularity, breach of natural justice and unreasonableness. Hong Kong is the only jurisdiction among Asian first-asylum countries which permits Vietnamese boat people to challenge the authorities' screening policy in court.
(FEER 07-03-91, p. 24)

Repatriation of Vietnamese boat people to holding camps in Vietnam

After one forced repatriation of 51 boat people from Hong Kong in December 1989, Vietnam refused to accept anymore refugees returned against their will. The US also opposed forced repatriation, but in June 1991 it appeared changing its attitude by agreeing with a British proposal of setting up holding centres in Vietnam to be managed by an international organization like the UNHCR. The plan was subsequently submitted for discussion with Vietnam. The centres would hold boat people screened out as economic migrants rather than refugees but who do not volunteer to return home. In 1989 already the British foreign secretary said that the US would pay £5 million towards any regional holding centre for boat people.

In the first six months of 1991 nearly 13,000 Vietnamese sailed illegally into Hong Kong, compared to 6,400 in all of 1990. In 1989 the number was 34,000. There is still a total of 116,000 Vietnamese boat people in camps outside Vietnam, more than half of them in Hong Kong.

Since June, British and Vietnamese officials have held seven rounds of negotiations in Geneva on the proposal to set up internationally managed centres. US support for the talks is considered important because Vietnam has previously been concerned that it would be branded as a human rights violator if it accepted mandatory repatriation.
(IHT 26/27-01-91; 13-05-91; 06-06-91; 02-07-91; FEER 07-02-91, p. 15; 20-06-91, p. 12; SCMP 07-06-91; 02-08-91)

Myanmar refugees in India

India granted temporary asylum to Myanmar political refugees who crossed the borders in early 1991. The decision is said to have been taken on compassionate grounds and the refugees were expected not to engage in political activities. India rejected charges from Myanmar that its actions constituted interference in Myanmar's internal affairs.
(FEER 28-02-91, p. 12)

Iranian efforts in respect of Iraqi refugees

Figures prepared by international relief agencies and provided by Western officials showed that, as of 14 April 1991, Iran had committed US$ 57 million to the relief effort to help Kurds fleeing to Iran, far more than any other Western or Asian country.

After having said previously that it would not close its border to Iraqi refugees, Iran said in early April that it would accept no more after having accepted more than half a million, due to lack of food, bedding, and clothing. An agreement was reached between Iran and Germany in late April under which Germany would send troops to Iran to help Iran cope with the refugees.
(IHT 08-04-91; 19-04-91; 30-04-91)

Arrival of boat-loads of Acehnese in Malaysia

Since mid-March 1991, several boat-loads of persons coming from the Indonesian province of Aceh – where rebels under the banner of the so-called *"Aceh Merdeka"* ["Free Aceh"] movement had been fighting Indonesian forces over the past one and a half years – had landed on Penang island, Malaysia. The UNHCR representative in Kuala Lumpur initially did not receive any official request from the Acehnese arrivals seeking refugee status but later reports informed differently. After initially promising to send the Acehnese back, Malaysia later retraced its steps.
(FEER 18-04-91, p. 17; 25-07-91, pp. 19–20)

Deportation of Chinese dissidents from Japan

A Chinese woman, LIN GUIZHEN, was sent back to China on 14 August 1991, in spite of her protests for fear of reprisals over her part in the 1989 anti-government demonstrations in China. Miss LIN arrived in Japan in September 1989 in a boat with 230 other Chinese. She applied for political asylum saying she had been active in demonstrations and campaigns for democracy. In March 1990, a district court in Fukuoka accepted Miss LIN's plea to stay. The ruling was however overturned by the Fukuoka High Court, and the Supreme Court upheld that decision. Although the person appealed to the minister of justice, arguing that her human rights would be in danger in China, the ministry rejected the plea for refugee status and proceeded with the deportation.

Of the 2,844 Chinese who had arrived illegally in Japan since 1989, 2,381 were denied refugee status and sent back.
(IHT 15-08-91)

Refusal of entry to Vietnamese refugees in Malaysia

The Malaysian deputy prime minister said that Western powers had criticized Malaysia for its refusing of entry to Vietnamese refugees but had not done the same when Italy forcibly repatriated Albanians in August 1991. Since 1989 Malaysia has been towing refugee boats back out to sea after resupplying them with food, water and medicine. Many of the boats later landed in Indonesia.

Malaysia has granted temporary asylum to about 260,000 Vietnamese, 587 of whom have returned home since the start of a voluntary repatriation program in early 1989. About 13,000 Vietnamese refugees are still in Malaysia.
(IHT 19-08-91)

Repatriation of Lao refugees

Thailand, Laos and the UNHCR agreed (29 June 1991) on a plan under which all 60,000 Lao refugees now in camps in Thailand will either be repatriated or resettled in third countries by the end of 1994. The UNHCR would expand and upgrade facilities in Laos to receive the returning refugees.
(FEER 11-07-91, p. 14)

Muslim Myanmar refugees fleeing to Bangladesh

In 1978 the Burmese government launched a campaign code-named *Naga Min* (Dragon King) driving more than 200,000 Muslims from Arakan state across the border into Bangladesh, allegedly as a result of a routine check on illegal immigrants. A similar campaign seems to be carried out recently with the result that according to some estimates a number of 16,000 Muslim refugees from Myanmar are near the border in Bangladesh.

Many Myanmarese insist that the Muslims are in fact Bengalis, but this is denied by the persons concerned who constitute a minority known as *Rohingya*. The treatment by the Myanmar government should also be seen in light of the persistent ethnic fear in Myanmar that their country and especially the sparsely populated Arakan area could be flooded by people from the over-populated neighbouring country.
(FEER 18-07-91, p. 8; 29-08-91, pp. 26–28)

SANCTIONS

See also: International trade

Sanctions against China

Western sanctions following the suppression of the anti-government demonstrations in June 1989 included the suspension of arms sales, high level exchanges and loans. The cut-off of foreign credit led China to order a sharp curb on imports to preserve foreign exchange, and the promotion of exports at all costs. Only as the foreign exchange reserves reached record levels did China's trade policy undergo some change.

Japan decided in early January 1991 to lift its ban on investments in China, the last of its economic sanctions, with the maintenance of a slow pace of disbursement of its ¥810 billion loan for the period of 1990–1995 as the only remaining barrier because of Japanese sensitivity to Western opinion. It was reported in early August 1991, however, that Japan will lend 700 billion yen (US$ 5.1 billion) to help promote development of oil, coal and natural gas resources.
(Straits Times 08-01-91; FEER 17-01-91, p. 55; IHT 07-01-91; 25-06-91; 05-08-91)

Loans from the Asian Development Bank were frozen at the behest of the US and other Western members, but at the ADB annual meeting in Vancouver on 24–26 April 1991 Japan, India, and southeast Asian countries called for an end to the freeze, and the G-7 countries recommended a resumption of loans for humanitarian and environmental projects and for economic reforms. On 28 May 1991 the ADB approved a US$ 70 million loan to pay for the construction of a toll bridge over Shanghai's Huangpu river.
(IHT 27/28-04-91; FEER 06-06-91, p. 59)

The European Community decided on 22 October 1990 to lift virtually all sanctions against China, except certain bans on arms sales. France lifted its ban on high-level contacts by receiving the Chinese planning minister in January 1991 and by sending its minister for foreign trade to China.
(IHT 19/20-01-91; 31-01-91)

Sanctions against Myanmar

The US on 22 July 1991 announced the imposition of trade sanctions against Myanmar because of the lack of progress in stanching the flow of narcotics and ending human rights violations. The sanctions included the decision not to renew a bilateral textile agreement which covers about 40% of Myanmar's total export to the US.

The US also asked China to halt the sale of arms to Myanmar, and has been opposing loan requests from Myanmar at the World Bank and other international lending institutions.
(IHT 24-07-91; FEER 01-08-91, p. 12)

SEA-BED EXPLORATION

On 20 August 1990 the China Ocean Mineral Resources Research and Development Association applied to the UN Preparatory Commission for the International Sea-Bed Authority to be registered as a pioneer investor under the provisions of resolution II of the UN Conference on the Law of the Sea (Final Act, Annex I) and to be allocated a pioneer area.
(LOS/PCN/113, 24 Aug. 1990)

SECURITY OF THE REGION

US bases in the Philippines

During a visit in the Philippines the Singapore prime minister urged the Philippine government to retain the US military bases (*supra*, Military bases) "as long as possible" for the sake of regional security. He publicly praised the US bases in the Philippines as playing a major role in maintaining regional peace and security.
(IHT 13/14-04-91)

Plans for a new security network

It is reported that the US and the non-Communist states of East Asia are preparing to develop a new security network to compensate for the decline in US and Soviet military presence in the area. The strategy, elaborated in a speech by a US deputy Assistant Secretary of Defence is called "Cooperative vigilance" and was discussed at a regional security conference held in Manila on 6–7 June 1991.

The conference was sponsored by ASEAN and included participants from the US, Japan, the Soviet Union and China. A second conference was planned for Bangkok in November 1991 when the Vietnamese were also likely to be invited. At the conference, *inter alia*, the idea was broached of an ASEAN consultative mechanism which could also address security-related issues as drug-trafficking, the environment, and sealane safety.
(IHT 27/28-04-91; FEER 20-06-91, p. 28)

Soviet proposals for an Asia-Pacific Council

Japan and Korea dismissed a call by the president of the Soviet Union during his visit to Japan in April 1991 to consider a new multilateral security forum embracing Japan, the Soviet Union, China, India and the US. According to the Japanese foreign minister the proposal does not take Asia's complexity and diversity into account.
(IHT 25-04-91; FEER 02-05-91, p. 11)

Canadian and Australian proposals

In July 1990, Canada proposed a framework for security dialogue in the Asia-Pacific region, called North Asian Forum. It pressed ahead in 1991 with a dialogue on security cooperation involving officials and academics from Canada, China, Japan, North and South Korea, the Soviet Union and the US.

Australia recently proposed a forum similar to the Conference on Security and Cooperation in Europe (CSCE).
(IHT 21-06-91; FEER 20-06-91, p. 6)

US attitude towards proposals on multilateral security arrangements

The US and Japan are said to strongly resist a premature adoption of multilateral security arrangements for the Asia-Pacific region because they would undermine US naval superiority, the bilateral security treaty with Japan, and the network of US-led alliances that have sustained the regional balance of power. The US would prefer adapting "existing institutions to new circumstances, working through the UN and forging *ad hoc* coalitions of states suited to the nature of the problem, rather than by working through a large, unwieldy and ill-defined region-wide collective security forum."
(IHT 21-06091)

Japanese proposals

At the meeting between ASEAN member states and their "dialogue"-partners in

Kuala Lumpar on 22–24 July 1991 (*supra*, Association of South East Asian Nations) Japan proposed that twelve Asia-Pacific countries begin a dialogue on regional security. This would meet the fears for a possible resurgence of Japanese military power and the attitude of most South East Asian countries that there should be no Japanese military presence in the region. The proposal, however, did not receive a positive response. The US prefers to keep a network of strategic bilateral alliances (*supra*), and the South East Asian states reacted cautiously, because they are concerned that it might be seen as a new, institutionalized, multilateral alliance that would complicate the task of improving relations with Indo-China, the Soviet Union and China.
(IHT 22-07-91; FEER 01-08-91, p. 11)

SHIPWRECKS

Recovery of valuables from the "Flor de la Mar"

A 16th century 400-ton Portuguese sailing ship, the *Flor de la Mar*, flagship of ALFONSO DE ALBUQUERQUE, commander of a Portuguese fleet, was reported located off the northern tip of Sumatra, about 8 km north of *Tanjung Jambu Air*. The ship is said to contain a huge cargo of gold, precious stones, jewelry, coins, statues and other artifacts.

The search is carried out by an Indonesian salvage company, *P.T. Jayatama Istikacipta*, at the direction of an American marine archeologist and underwater treasure hunter. The operations take place on the basis of an 1989 agreement between the salvage company and the Indonesian government, according to which each party are to get a half-share of the recovered cargo. Malaysia and Portugal are reported to have claimed some of the cargo.
(IHT 26-03-91; 04-04-91)

Illegal searching for treasures in the Java Sea

The Indonesian navy detained two ships, the *Nur Cahaya* and the *Bunga Laut*, laden with ancient Chinese ceramics taken from the bottom of the Java Sea. They had been found illegally searching for treasure in the Java Sea.
(IHT 30-04-91)

SOUTH ASIAN ASSOCIATION FOR REGIONAL COOPERATION (SAARC)

Colombo Declaration

The Sixth Summit Conference of the Association which was held at Colombo on 21 December 1991 issued the Declaration. It covered various issues such as regional cooperation, international economic issues, international political developments, projection of collective positions, strengthening of SAARC, international cooperation, poverty alleviation, trade manufactures and services, environmental issues, children,

terrorism, security of small states, drug trafficking, people-to-people contact, Fund for Regional Projects, South Asian Development Fund, visa exemption scheme, and science and technology.

SPACE ACTIVITIES

Japanese-US cooperation

Concerned that its participation in NASA's proposed space station was threatened by US Congressional budget cuts, Japan issued a warning that it might refuse to contribute billions of dollars to US-led scientific projects unless plans to build the space station remain intact. The US concluded agreements with Japan on the project and Japan is building a US$ 2 billion space laboratory, the Japan Experimental Module, that is to be attached to the station.
(IHT 20-05-91)

The launching of the Indonesian B-4 satellite

As part of its "*Palapa*" satellite program which was started in 1976, Indonesia planned the launching of a new B-4 satellite, in addition to the two already in orbit. Initially the Indonesian telecommunications agency considered the launching by a Chinese "Long March" rocket contrary to the launching of its earlier satellites by McDonnell Douglas Corp. Payment to the Chinese Great Wall Industry Corp. would in part or all take place in goods.

In April 1991, however, Indonesia awarded the launch-contract to McDonnell Douglas. Although the Chinese bid was lower, two non-price factors were decisively in favour of the US company. McDonnell Douglas could have the satellite launched in April 1992, whereas the Chinese rocket could not be ready for launch before early 1993. A second factor working against the Chinese bid was the potential delay in obtaining an (American) export licence to bring the satellite, to be supplied by Hughes Aircraft from the US, to the Great Wall Industry's launching site. There was the possibility of American objections against the barter payment conditions in the Sino-Indonesian contract and a holding up of the licence as a result. Besides, opting for the Chinese launcher would imply extra transportation, security, and other support costs.
(FEER 14-02-91 p.43; 18-04-91 p.71)

Competition in the field of satellite-launching

A "launch war" has erupted between China and Western companies as China offers to launch satellites and perform the same service at prices with which the Western companies are said to be unable to compete. The "war" started in April 1990 when China Great Wall Industry Corp. (GWIC) put the AsiaSat 1 communication satellite into orbit for a Hong Kong-based international consortium, charging US$ 30 million or about half the rate charged by Western launch companies. It has also secured contracts to launch satellites for the Arab-Sat Consortium and the Australian Aussat. The Western launch companies (Arianespace, McDonnell Douglas, Martin Marietta, and

General Dynamics) complained that GWIC is contravening a Sino-US launch agreement which limits China to launching 9 Western communication satellites between 1988 and 1994 and charging fees in line with the international market. In the US Congress, efforts are under way to ban the shipment of US-made satellites or those with US parts to China for launching unless the US Trade Representative certifies that China is abiding by the above agreement. US retaliation could also be found in the requirement of export licence for the shipping of American-built satellites to China for launching, based on technology transfer control regulations.

The conflicts among launch-countries will likely increase by the entry of the Soviet Union and Japan into the commercial launching-market.
(FEER 14-02-91, p. 43; 16-05-91, p. 52)

Note: In 1989, China and the US signed three memorandums of agreement, on the security of satellite technology, on responsibility for satellite launchings, and on the international trade aspects of commercial launch services. In the latter agreement both countries pledged not to discriminate unfairly against any international user or commercial supplier.
(UN doc.A/AC.105/C.2/16/Add.1)

SPECIFIC TERRITORIES WITHIN A STATE

Dalai Lama's proposals and Chinese attitude regarding Tibet

The Dalai Lama said he was withdrawing his proposal made in 1988 for a form of association between Tibet and China, whereby Tibet would have full autonomy in its domestic affairs with the central government retaining authority in defence and foreign affairs matters.

These proposals had drawn no serious response from the Chinese government which wants prior acceptance that Tibet is part of China rather than an equal party to negotiations.
(FEER 04-04-91, p. 12)

Indonesian record of rule over East Timor

Outside observers have given Indonesia credit for a more accommodating stance towards Timorese insurgents. Recent policies in the territory are said to be a clear improvement over the military's previous policy. Since the province was incorporated into Indonesia, the government spent some US$ 60 million to improve facilities in the territory.
(FEER 04-04-91, p. 10)

TERRITORIAL CLAIMS

See also: Fisheries

The Japanese-Soviet dispute over four islands

Since the end of the Second World War the two countries have disputed control and

sovereignty over the islands of *Habomai*, *Shikotan*, *Kunashiri* and *Etorofu* north of Hokkaido, known as the "Northern Territories" to Japan and as part of the Kurile chain of islands to the Soviet Union. The islands were conquered by the Soviet Union during the latter days of the Second World War and annexed on the basis of the Yalta Agreement which entitled it to control all Kurile Islands. The renunciation of the Kurile Islands by Japan was affirmed in the 1951 Peace Treaty, but the treaty did not define "Kurile Islands" and the Soviet Union was not a party to the treaty. The Japanese contention is that the four islands are not part of the Kuriles and should be returned to Japan. The dispute has so far prevented the two countries from signing a peace treaty. According to a 1956 Soviet draft treaty, the Soviet Union would recognize Japanese sovereignty over two of the four islands, but the Soviet Union later revised its attitude after Japan signed a security agreement with the US.

The strategic importance of the islands lies in their role of protecting the Soviet sub-marine-based strategic missile force in the *Sea of Okhotsk* which is separated from the Pacific by the Kurile chain. During the 1980s the passages by Soviet naval ships through the southern *Tsushima Strait* has declined, but those through the *Soya Strait* have doubled. This has been the consequence of a shift in Soviet naval strategy from a force projection into the Pacific Ocean and the South China Sea to a "bastion" approach focused on protecting strategic submarines deployed in the *Sea of Okhotsk*.

Recently the Soviet-Japanese dispute has been linked with the post-Cold War detente and the efforts to set up an economic cooperation plan between the two countries. Arrangements whereby the islands would revert to Japan, either at once or in two phases, in return for massive Japanese economic assistance to the Soviet Union, have been the topic of various discussions and speculations. The visit by the Soviet president to Japan in April 1991 has only resulted in an agreement to continue the talks on the four disputed islands. The Soviet Union has, however, pledged to reduce its troops on the islands, and according to the latest reports the number will be reduced by a third by the end of 1991.
(IHT 02-01-91; 22-03-91; 23/24-03-91; 27-03-91; 15-04-91; 16-04-91; 1/2-06-91; FEER 02-05-91, p. 11)

The Spratly and Paracel Islands

The Indonesian foreign ministry hosted an informal ASEAN workshop at Bali in January 1990 on the problem of territorial and sea boundary disputes in the South China Sea, particularly those relating to the various claims on the Spratly and Paracel Islands. Another informal conference was organized in Bandung on 15–18 July 1991 on the contradictory claims to the Spratly Islands, and for the first time the six claiming states were represented: Brunei, China, Malaysia, the Philippines, Taipei, and Vietnam.

China seized the Paracels in 1974 from the South Vietnamese regime, and took a few of the Spratly reefs from Vietnam in 1988. The Chinese prime minister hinted in August 1990 that China may be interested in the idea of joint development of the Spratlys while temporarily putting aside the question of sovereignty. This interest was affirmed by the Chinese president during his visit to Indonesia in June 1991. According to the Chinese president, China's claim to sovereignty over the whole Spratly area is based on discovery and prior occupation. It also claims shoals known as the *Macclesfield Bank* in the center of the South China Sea.

At a regional security conference in Kuala Lumpar in June 1991, the Malaysian deputy prime minister emphasized that a fundamental step in maintaining peace with regard to the Spratlys would be "for all parties to pledge not to resort to force in the pursuit of their respective claims". A deputy director general of the China Center for International Studies affirmed that China wanted to avoid the use of force unless challenged by Vietnam. He further said that Chinese experts were reviewing the boundary line marking the extent of China's claims in the South China Sea.

In May 1991, Vietnam announced its 200 mile EEZ including the Spratlys, followed by Malaysia and the Philippines. Malaysia has maintained a presence on (*terumbu*) *Layang-Layang* since the early 1980s and on the neighbouring atoll (*terumbu*) *Mantanani*. It hopes to consolidate its claims, without changing the status of the atoll as a military base. Malaysia argues that its claim in the Spratly group is concurrent with a 1979 map of its continental shelf, and therefore in accordance with the law of the sea. The Philippines has placed several garrisons on the *Kelayaan* group. Vietnam's presence is most obvious in the *Amboyna Cay* group. It is said that Vietnam has troops on 25 of the islands, the Philippines on 8, China on 7, Malaysia on 3 and Taiwan on one. (IHT 19-06-91; 16-07-91; FEER 10-01-91, p. 11; 20-06-91, p. 20; 04-07-91, p. 10)

Sipadan and Ligitan islands

A disagreement between Malaysia and Indonesia exists over two islands in the Sulawesi Sea on the Sabah-Kalimantan border, *Sipadan* and *Ligitan*. The dispute dates back to at least 1982. Both states assumed sovereignty over the islands based on maps each inherited from the Dutch and British colonial powers. Three years ago the two countries agreed to maintain the status quo. However, a few years ago Malaysia allowed a private company, "Borneo Divers", to develop Sipadan as a tourist resort, and it is now rated as one of the top diving spots in the world. By patrolling the surrounding waters to protect tourists and local fishermen, Malaysia tacitly instituted a claim. Indonesia's stand is that neither claimant should develop the islands until the dispute is settled. The subject would be raised at the existing, security-related Joint Border Commission's meeting in July 1991. However, during the annual ASEAN foreign ministers conference at Kuala Lumpur in July 1991 both sides agreed to set up a separate joint commission to deal with the issue.
(FEER 20-06-91, p. 20; 01-08-91, p. 10–11)

Conflicting Philippine and Malaysian territorial claims

A conflict involving overlapping maritime and territorial claims (territorial waters and EEZ) between Malaysia and the Republic of the Philippines in the South China Sea remains the subject of negotiations between officials of the two countries.

On 11 June 1978, the Philippine president promulgated Presidential Decree 1596 declaring a portion of the South China Sea, including certain islands in the Spratlys group, as part of Philippine territory. On the same day, the Presidential Decree No. 1599, establishing an Exclusive Economic Zone to a distance of 200 nautical miles from the baselines of the territorial sea, was issued.

For its part, Malaysia, through a proclamation by the King on 1 April 1980 and its Exclusive Economic Zone Act of 1984 declared its 200 nautical mile EEZ, part of

which overlapped with the waters claimed by the Philippines under Presidential Decree 1596. Its EEZ along the northern part of Sabah penetrated approximately 75 nautical miles into Philippine-claimed waters, including *Commodore Reef.*

The conflict came to a head in 1988 when 49 Filipino crewmen of three Filipino-owned and registered fishing vessels were apprehended by the Malaysian Navy at lat. 07 deg. 43.59'N and long. 114 deg. 54.82'E, near the disputed Spratly Isles, 120 nautical miles off *Ligas Point*, Balabac Island, Palawan Province.

The incident occurred at about 9:30 p.m. on 5 April 1988, when a contingent of Malaysian Navy Boats led by Destroyer KB *Kasturi* and backed by helicopters, boarded the fishing vessels and ordered the Filipinos to proceed to the nearest Malaysian port. The 49 fishermen including their Chief Steward, Capt. RENATO BEJASA, were then charged with violating Section 15 of the Malaysian Fisheries Act passed in 1975.

On 1 August 1988, the Filipinos were acquitted but they continued to be detained in Kota Kinabalu pending an appeal lodged by Malaysian Government Prosecutors.

In view of representations made by the Philippine Government, the Filipinos were released on 12 August 1988, after one of them died of a heart attack while under detention. Nonetheless, the Malaysian Government declared that its decision not to proceed with the appeal should not in "anyway prejudice Malaysia's sovereignty, title and jurisdiction in respect to territory".
(Philippine Daily Globe 03-05-88; Philippine Daily Inquirer 11-08-88)

TERRITORIAL SOVEREIGNTY

Intrusion of Japanese airspace by Soviet planes

Japan protested against "repeated violation of Japanese airspace" on 15 August 1991 by Soviet bombers off Hokkaido for about two minutes. On the following day another intrusion took place for about five minutes. The protest was conveyed to the Soviet embassy on 16 July 1991.
(IHT 17/18-08-91)

UNITED NATIONS

South Korean as head of UN delegation

A South Korean General, General HWANG YOUNG (WON?) TAK, became the first South Korean to be appointed chief delegate of the UN-Command delegation at the Military Armistice Commission talks with North Korea, as of 1 January 1991. North Korea has refused to accept the appointment because South Korea is no signatory of the armistice agreement of 1953, so that a South Korean could not represent the UN Command.
(FEER 03-01-91, p. 7; 04-04-91, p. 11)

Chinese participation in UN peace-keeping

China agreed to send 20 military observers to join the UN peace-keeping force along the Iraq-Kuwait border, the fist time it agreed to send personnel to participate in front-line supervision duties.
(FEER 02-05-91, p. 14)

Singapore participation in UN peacekeeping

Of late, Singapore has participated in various UN peacekeeping efforts. In 1989, a 21-men team joined the United Nations Transition Assistance Group (UNTAG) to help oversee the Namibian elections. In 1991, Singapore sent a 7-men team to join the UN Iraq-Kuwait Observer Mission (UNIKOM) to monitor the demilitarized zone between Iraq and Kuwait, an 8-men team to join the UN Angola Verification Mission (UNAVEM) to help monitor the withdrawal of Cuban troops from Angola and a 17-men team to join the UN Mission in Western Sahara (MINURSO) to ensure the observance of the cease-fire between Morocco and the Polisario Front.
(Straits Times 21 Apr. 1989, 21 Jun. 1991 and 28 Jun. 1991)

UNRECOGNIZED ENTITIES

See also: Divided states

China-Republic of Korea

The two countries agreed in October 1990 to exchange official trade offices which would be entitled to perform consular functions. It is said that there was some connection between the conclusion of the agreement and South Korean assistance to China for the Asian Games, held in Beijing in 1990. The South Korean official China Trade Mission was opened in Beijing on 30 January 1991, the Chinese Trade Representative Office started activities in Seoul some months later and is formally functioning under the auspices of the China Chamber of International Commerce.

China and South Korea were also reported to be negotiating the draft of three agreements covering trade, investment protection and avoidance of double taxation.

As to airline connections China early 1991 refused to extend a special charter agreement with Korean Air, but talks would be started on opening a regular commercial air route between Seoul and Beijing.

These developments are said to reflect Chinese moving away from its principle of linking normalization of Sino-South Korean relations with that of North Korean-US and North Korean-Japanese relations. According to South Korean sources, Seoul-Beijing relations are expected to be established simultaneously with the setting up of Tokyo-Pyongyang ties, and South Korean television reported on 8 September 1991 that China's senior leader, DENG XIAOPING, had sent a message to the South Korean government calling for full diplomatic ties. The report said talks were expected to be started when the Chinese foreign minister would attend the APEC ministerial meeting in Seoul in November 1991.
(IHT 02-04-91; 10-06-91; 09-09-91; FEER 31-01-91, p. 12; 09-05-91, p. 18; 01-08-91, pp. 22–23)

Taipei relations with foreign countries

It was reported in early January 1991 that a Taiwanese trade office would start activities in Moscow in January. The office would be under the China External Trade Development Council, and would resemble the one already opened in Hungary and another planned for Yugoslavia. The office would not issue visas.

The Taipei administration signed an agreement with Saudi Arabia under which their representatives would continue to enjoy diplomatic status despite the break in official relations in July 1990 as a result of Saudi recognition of the government in Beijing. The embassy buildings would be retained by Taipei and renamed "Taipei Economic and Cultural Representative Office". The Saudi Arabian office in Taipei is now called "The Business Affairs Office of Saudi Arabia".

The mutual contacts between the governments in Tokyo and Taipei are conducted by the (Taiwanese) Association for East Asian Relations in Tokyo and the (Japanese) Interchange Association in Taipei. Taiwan maintained the former Chinese consular offices in Osaka, Fukuoka and Yokohama as branch offices of the Association. The Osaka and Fukuoka offices are authorized to issue visas.

Philippine-Taiwan relations

Various problems arising in the relations between the Philippines and the neighbour island of Taiwan appear less easy to settle as a result of the lack of formal links, and officials of the "Manila Economic and Cultural Office" in Taipei were reported to be openly pushing the Philippine government to upgrade the relationship.

It is alleged, for example, that a higher level of representation would make it easier to settle the status of illegal Filipino workers in Taiwan. The Taipei authorities have so far dismissed Philippine pressures for legal recognition of the workers under a contract system. In another case the dispute over fishing in adjacent waters seems to have been affected by the reluctance of the Philippines to negotiate or to conclude a fisheries agreement in order not to jeopardize its one-China policy.

In order to allay Taiwanese concerns the Philippine government has put an investment protection bill before the Philippine Congress assuring Taiwan investors about their status in the absence of official relations.

Relations were further improved by an agreement reached in July 1991 dealing with the designation of sea-lanes for Taiwan fishing boats, but also with assistance from Taiwan for the expansion of port facilities and the development of the Philippine fishing industry and relief assistance for victims of the volcanic eruption of Mt. Pinatubo.
(FEER 23-05-91, p. 15; 18-07-91, p. 14)

Fiji-Taiwan relations

Fiji has concluded an official technical cooperation agreement with the authorities in Taipei for assistance to the Fijian sugar industry. The prime minister of Fiji called the Chinese one-China policy hypocritical and claimed that the member states of the South Pacific Forum had a right to discuss trade and economic relations with Taiwan.
(FEER 15-08-91, p. 14)

Democratic People's Republic of Korea and Macau

A semi-official North Korean travel agency formally opened a Macau office on 15 April 1991 to handle visa applications. It is named the "DPRK-Macau International Tourism Co."
(FEER 03-01-91, p. 49; 17-01-91, p. 14; 21-02-91, p. 40; 25-04-91, p. 14)

Japan-Democratic People's Republic of Korea

On 28 September 1990, delegations of the governing Japanese Liberal Democratic Party, the Japanese Socialist Party, and the governing (North) Korean Labour Party signed a joint communiqué in Pyongyang which said, *inter alia*, that: (a) the Japanese Government should make apologies and compensation for the loss suffered by the Koreans during the 36 years of colonial government as well as the 45 years' post-war era; (b) the two Governments should establish normal diplomatic relations as early as possible; (c) it is necessary to develop exchanges in the political, economic and cultural spheres, such as the utilization of communication satellites and the opening of direct air flights between the two countries; (d) the Japanese Government should respect the fundamental human rights and the national rights of the Koreans residing in Japan, and eliminate the restriction on the validity of Japanese passports to all countries and areas except North Korea, etc.

The communiqué was characterized as drastically changing the basic structure of post-war Japanese-Korean relations as Mr KANAMARU, former deputy Prime Minister and influential leader of the governing party, headed the Japanese mission.

On 3 November 1990 preliminary negotiations between the two countries started in Beijing.

The first official talks between Japan and North Korea on normalization of relations took place on 30–31 January 1991 in Pyongyang. Among the Korean demands is a US$ 10 billion aid package while Japan demands North Korean submission to IAEA inspection of its nuclear facilities. Besides there is the question of compensation for alleged Korean "war reparations" for losses during the pre-war colonial period and in the time after the Second World War. North Korea demands "war reparation" for the colonial rule in the period 1910–1945 and for "sufferings and losses" after 1945. Japan maintains it never was at war with Korea and refuses compensation for the post-World War II period.

After the second round of the talks in March 1991 in Tokyo, Japan insisted to conduct further talks outside North Korea because of fear that communications between the delegation and Tokyo might be intercepted, and it was thereupon agreed to meet in Beijing.

So far the talks bogged down over Japan's insistence on international inspection of North Korea's nuclear facilities and over the issue of a Korean woman from Tokyo allegedly abducted to North Korea in the 1970s and forced to train North Korean agents in the Japanese language. The issue arose from the statement of a Korean woman (KIM HYUN HUI) who was seized in 1987 on charges of planting a bomb in a Korean Air airliner off Burma. According to the statement Miss KIM identified a woman who trained her in Japanese as LI UN HYE, the woman who worked as a bar hostess in Tokyo during the 1970s and who disappeared in 1978.
(FEER 14-02-91, p. 20;, 21-03-91, p. 7; IHT 31-01-91; 21-05-91; 22-05-91; 23-05-91; 27-05-91)

US-Democratic People's Republic of Korea

The US's four conditions for recognition of North Korea are: North Korean renunciation of terrorism, return of the remains of US troops killed in the Korean War; progress on North Korean dialogue with South Korea; international inspection of the Yongbyon nuclear facility (although US officials now speak of a further condition of guarantees on the destruction of existing nuclear-reprocessing facilities).
(FEER 01-08-91, p. 23)

VIETNAM WAR

US servicemen "missing in action" (MIA)

A total of 2,273 US servicemen who served in Indo-China are still unaccounted for. Among them the US government considers 1,172 as missing and 1,101 as killed in action. Over the past three years the US has persuaded Vietnam to repatriate the remains of 122 Americans and to help resolve dozens of other cases by opening archives and allowing investigations of reported sightings.

A US military team began searches in Vietnam for evidence of missing Americans with the agreement of the Vietnamese government.
(IHT 22-07-91; 25-07-91; 01-08-91)

VISAS

See: Passports and visas

WAR AND NEUTRALITY

Iraqi aircraft in Iran

In April 1991 the Iranian foreign minister said that only 22 of the Iraqi aircraft that sought refuge in Iran during the war "would be returned when the crisis is over". In June 1991, however, the Iranian ambassador to Pakistan said that Iran would fully abide by the international rules, and return all Iraqi planes.

Estimates of the numbers of Iraqi military and civil aircraft that were flown to Iran during the Gulf War differ from 137 (US sources) to 148 (Iraq).
(IHT 24-04-91; 21-06-91)

WEAPONS (CHEMICAL)

Chemical weapons in Cambodia

The Phnom Penh government accused the guerillas of using chemical weapons for the first time in the 12-year-old civil war, by referring to artillery shells containing "toxic substances" being fired.
(IHT 28-03-91)

WORLD WAR II

Remains of Japanese soldiers

Ashes of 3,500 Japanese soldiers killed during World War II in Irian Jaya were handed over by Indonesia to the Japanese ambassador at Jakarta.
(IHT 02-01-91)

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BIBLIOGRAPHY OF INTERNATIONAL LAW CONCERNING ASIAN AFFAIRS*

J.J.G. SYATAUW**

Editorial introduction

This bibliography has been prepared primarily as a service to Asian readers of this Yearbook so as to inform them about current international law writings on Asian affairs. For the same reason, the selection of materials has been limited by the following criteria: (a) included here are only (1) books, articles and other materials dealing with Asian topics and topics directly related to Asia, published both in and outside the Asian continent; (2) in exceptional cases, other publications considered of great interest; (b) this being the first volume of the *Yearbook*, the listing goes back three years (until 1988); (c) only publications in the English language have been included.

For the sake of convenience, the materials have been arranged under the following headings:

1. General
2. States and groups of states
3. Territory and jurisdiction
4. Sea
5. Air and space
6. Environment
7. International conflicts and disputes
8. War, armed conflict, neutrality
9. International criminal law
10. Peaceful settlement of international disputes

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* In the preparation of this bibliography good use has been made of book review sections in established professional journals of international law, of Asian studies and of international affairs, while special mention should also be made of the bibliography on Public International Law published by the Max Planck Institute of Foreign Public Law and International in Heidelberg, Federal Republic of Germany, and of the regular lists of acquisitions of the Peace Palace Library in The Hague, The Netherlands. In future it is hoped to establish regular contacts for this bibliography section with law libraries and legal publishers in Asian countries.

** General Editor.

11. Diplomatic and consular relations
12. Individuals and groups of persons – human rights
13. Decolonization and self-determination
14. International economic relations
15. Development
16. Information and communication
17. International/regional cooperation and organization

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SECRETARY-GENERAL'S TRUST FUND

(Information note, 25 October 1991)

In response to the need of developing countries, the Secretary-General of the United Nations established in 1989 a Trust Fund. The purpose of the Fund is to provide financial assistance in order to encourage States to seek a solution to their legal disputes through the International Court of Justice.

Legal disputes exist in various parts of the world. The high costs incurred in proceedings often constitute a financial obstacle to the seeking of a judicial settlement through the Court. This is particularly true in many developing countries where multiple needs compete for very limited funds. There are known cases where the parties are prepared to resort to judicial settlement but are in need of funds or legal expertise or both. There have also been cases where the parties were willing but unable to implement an ICJ Judgement. The availability of external resources in such cases can therefore be extremely helpful in their search for peaceful means through the Court for the settlement of disputes. The Trust Fund offers limited financial assistance for the purpose of defraying expenditures incurred in Court proceedings. It thus encourages States to make better use of the International Court of Justice and also actively foster the peaceful settlement of disputes.

The Fund has received worldwide support and some 30 States from all regions of the world have made financial contributions. It received its first application in March this year and an award was subsequently made in May to a developing country which is seeking a solution to a dispute with its neighbour through the International Court of Justice. A second application, also from a developing country, is now pending. The present assets of the Fund are however very limited.

Relations in many regions of the world will indeed be greatly improved if more legal disputes can be settled through the International Court of Justice, the legal arm of the United Nations.

The Fund relies on voluntary contributions and is open to all entities. It welcomes contributions from States, individuals, institutions, corporations and non-governmental organizations. Contributions may be made in monetary terms (to the Secretary-General's Trust Fund to assist States in the Judicial Settlement of Disputes, Chemical Bank, UN Branch Account No. 015-004473). Further information may be obtained from the Office of Legal Affairs, Office of the Legal Counsel, United Nations Secretariat, New York, N.Y. 10017.

Ko Swan Sik et al. (eds.), Asian Yearbook of International Law, 375.

STATUTES OF THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

Text as in force with effect from 12 January 1987

Article 1

The Asian-African Legal Consultative Committee constituted by the original participating States of Burma[1], Ceylon[2], India, Indonesia, Iraq, Japan and the United Arab Republic[3] shall also consist of other Asian-African States that are or may be admitted.

Article 2

The Government of a participating State shall nominate a legal expert to serve on the Committee as Member. Alternate Members, advisers and experts may also be nominated if considered necessary.

Article 3

The Committee may admit any other Asian-African State as an associate participating State.

The terms of admission of an associate participating State shall be prescribed by rules to be framed by the Committee under Article 9.

Article 4

The functions and the purposes of the Committee shall be as follows:

(a) To examine questions that are under consideration by the International Law Commission and to arrange for the view of the Committee to be placed before the Commission; to consider the reports of the Commission and to make recommendations thereon to the governments of the participating States;

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1. Burma, now Myanmar, withdrew from the membership of the committee with effect from 1 January 1974.
2. Now Sri Lanka.
3. Now Arab Republic of Egypt and Syrian Arab Republic.

Ko Swan Sik et al. (eds.), Asian Yearbook of International Law, 376–378.

(b) To communicate, with the consent of the governments of the participating States, the points of view of the Committee on international legal problems referred to it, to the United Nations, other institutions and international organisations;

(c) To consider legal problems that may be referred to the Committee by the participating States and to make such recommendations to governments as may be thought fit;

(d) To exchange views and information on matters of common concern having legal implications and to make recommendations thereto if deemed necessary; and

(e) To undertake, with the consent of or at the request of participating States, such other activities as may be deemed appropriate for fulfilment of the functions and purposes of the Committee.

Article 5

(1) The Committee shall normally meet once in every year and such meetings shall be held in the participating States by rotation to the extent possible.

(2) Annual sessions, other meetings and consultations shall be held in accordance with the rules framed by the Committee.

Article 6

(1) The Committee shall have its permanent Secretariat at New Delhi[4].

(2) The Secretariat shall be headed by a Secretary-General appointed by the Committee for a term of three years in accordance with the provisions of the Statutory Rules.

Article 7

The expenditure to be incurred for the purposes of the Committee including the Secretariat shall be borne by the participating and associate participating States in such proportions as may be agreed upon and the contribution shall be paid annually in advance and deposited in the account or accounts to be maintained in the name of the Committee.

The expenses locally incurred in connection with the meetings of the Committee shall normally be met by the participating State in which the meeting is held, unless otherwise agreed upon between the Secretary-General and the host country.

The expenditure and expenses shall be approved in accordance with the provisions of the Statutory Rules.

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4. This article will become operative upon the conclusion of the headquarters agreement with the Government of India.

Article 8

The Committee may enter into arrangements for cooperation with the United Nations, its organs and agencies and such other international organizations or bodies as may be deemed appropriate.

Article 9

The Committee may from time to time frame such rules as may be considered necessary for carrying into effect the purposes of the Committee.

AGREEMENT ON THE ORGANIZATION FOR INDIAN OCEAN MARINE AFFAIRS CO-OPERATION (IOMAC)

Arusha, 7 September 1990

I

DEFINITIONS

Article 1

Definitions

For the purposes of this Agreement:

"coastal State of the Indian Ocean" means a State the coast of which borders on, or is contained within, the Indian Ocean or the adjacent seas or gulfs thereof;

"hinterland State" means a State which is immediately adjacent to a coastal State of the Indian Ocean;

"land-locked State" shall have the same meaning as in the United Nations Convention on the Law of the Sea;

"geographically disadvantaged State" shall have the same meaning as in the United Nations Convention on the Law of the Sea;

"active in marine affairs in the Indian Ocean" means having substantial marine affairs activities in the Indian Ocean or its adjacent seas or gulfs.

II

GENERAL PROVISIONS

Article 2

Establishment

1. The Organization for Indian Ocean Marine Affairs Co-operation (IOMAC) hereinafter referred to as the "Organization" is hereby established.
2. The headquarters of the Organization shall be in Colombo, Sri Lanka.

Ko Swan Sik et al. (eds.), Asian Yearbook of International Law, 379–388.

Article 3

Objectives

The objectives of the Organization shall be:

(a) To create an awareness regardness the Indian Ocean, its resources and potential for the development of the States of the region, and promoting co-operation among them, as well as between them and other States, bearing in mind the ocean régime embodied in the United Nations Convention on the Law of the Sea;

(b) To provide a forum where the coastal and hinterland States of the Indian Ocean and other interested States could consider, examine and review the economic uses of the Indian Ocean, its resources and related activities including those undertaken within the framework of intergovernmental organizations, and to identify fields in which they could benefit from enhanced international co-operation, co-ordination and concerted action;

(c) To enhance the economic and social development of the coastal and hinterland States of the Indian Ocean through integration of ocean-related activities in their respective development processes, and to further a policy of integrated ocean management through regular and continuing dialogue and co-operative international and regional action with particular emphasis on technical co-operation among developing countries.

Article 4

Principles and fields of co-operation

1. Principles of co-operation in marine affairs in the Indian Ocean shall be:

   (a) optimization of the utilization of the resources of the Indian Ocean for the benefit of the States of the Indian Ocean;

   (b) development of national capabilities in marine affairs with a view to promoting self-reliance in ocean management;

   (c) enhancement of co-operation with other States;

   (d) establishment and maintenance of effective co-operation with international, governmental, and nongovernmental organizations. agencies and other entities active in marine affairs; and

   (e) due regard to the rights and needs of the land-locked and geographically disadvantaged Member States recognized in the new ocean régime.

2. Fields of co-operation in marine affairs in the Indian Ocean shall be:

   (a) marine science, ocean services and marine technology;

   (b) living resources;

   (c) non-living resources;

(d) ocean law, policy and management;

(e) marine transport and communications;

(f) marine environment; and

(g) other fields relevant to co-operation in marine affairs.

III

INSTITUTIONAL PROVISIONS

Article 5

Membership

Any coastal or hinterland State of the Indian Ocean may become a Member of the Organization by becoming a party to this Agreement.

Article 6

Structure of the Organization

The Organization shall have the following principal bodies:

(a) the Conference;

(b) the Committee; and

(c) the Secretariat.

Article 7

The Conference

Composition

1. The Conference shall be composed of representatives at a ministerial or equivalent level of all the Members of the Organization.

Functions

2. The Conference shall:

(a) establish policies and principles which shall govern the programmes and activities of the Organization;

(b) elect the members of the Committee of the Organization in accordance with the provisions of article 8, paragraph 1, below;

(c) appoint the Secretary-General of the Organization;

(d) receive and consider the reports of the Committee and of the Secretary-General;

(e) approve the budget and accounts of the Organization for each financial period;

(f) approve proposals for programmes and activities of the Organization;

(g) establish such subsidiary bodies as it may deem necessary;

(h) examine disputes that may arise concerning the interpretation or application of this Agreement and make such recommendations, and if necessary establish such procedures as it may deem appropriate with a view to their solution;

(i) establish its rules of procedure except as otherwise provided in this Agreement;

(j) establish the financial regulations of the Organization;

(k) establish the staff regulations of the Organization and provide for conditions of service consistent as far as possible with those of other international organizations;

(l) exercise such other functions as may be permissible under this Agreement.

Meetings and procedure

3. The Conference shall meet in regular session once every two years.

4. The Conference shall meet in special session whenever a majority of its Members of the Committee requests the convening of a special session.

5. A quorum for meetings of the Conference shall be two-thirds of the Members of the Organization.

6. Each Member shall have one vote.

7. The Conference shall endeavour to reach its decisions by consensus. Where consensus is not possible, decisions of the Conference shall unless otherwise provided in this Agreement be made by a majority of the Members present and voting.

8. The Conference shall at each regular session elect from amongst the Members its President and Vice-Presidents. They shall hold office until the election of their successors at the next regular session of the Conference.

9. Representatives of Governments not Members of the Organization, representatives of the United Nations and the appropriate agencies and bodies of the United Nations, representatives of such other international and national governmental or non-governmental organizations as the Conference may deem appropriate, and experts in fields of interest to the Conference may be invited to attend meetings of the Conference as observers. If one third of the Members of the Organization objects to the invitation of an observer to the Conference that observer shall not be invited thereafter.

10. Sessions of the Conference shall be held at the headquarters of the Organization unless the Conference decides otherwise.

Article 8

The Committee

Composition

1. The Conference shall determine the size and elect the members of the Committee from amongst the Members of the Organization, and shall endeavour to ensure that the major geographical areas and the principal ocean-related interests (namely, land-locked, geographically disadvantaged, mainland, coastal and archipelagic) shall be represented in the Committee.

Functions

2. The Committee which shall be the executive body of the Organization shall:

(a) provide the necessary policy guidance for the implementation of the Programme of Co-operation and Plan of Action of the Organization, and for the furthering of co-operation through the framework of the Organization;

(b) consider the implementation of decisions taken by the Conference;

(c) supervise the administration and finances of the Organization;

(d) submit to the Conference, for its approval, the budget estimates and accounts of the Organization, together with comments and recommendations;

(e) submit to the Conference, for its approval, proposals for programmes and activities of the Organization;

(f) authorize the Secretary-General to take whatever steps the Committee considers necessary for achieving the objectives of the Organization;

(g) establish its rules of procedure except as otherwise provided in this Agreement; and

(h) exercise such other functions as may be referred to it by the Conference.

Meetings and procedure

3. The Committee shall meet in regular session once a year.

4. The Committee shall meet in special session whenever a majority of the members of the Committee requests the convening of a special session.

5. A quorum for meetings of the Committee shall be two thirds of the members of the Committee.

6. The Committee shall elect a Chairman and a Vice-Chairman.

7. Members of the Organization not elected to the Committee may participate at its meeting without a vote.

8. The Committee shall endeavour to reach its decisions by consensus. Where consensus is not possible, decisions of the Committee shall, unless otherwise provided in this Agreement, be made by a majority of its members present and voting.

9. Representatives of Governments not Members of the Organization, representatives of the United Nations and the appropriate agencies and bodies of the United Nations, representatives of such other international and national governmental and non-governmental organizations as the Committee may deem appropriate, and experts in fields of interest to the Committee may be invited to attend meetings of the Committee as observers. If one third of the Members of the Organization objects to the invitation of an observer to the Committee that observer shall not be invited thereafter.

Article 9

The Secretariat

1. The Secretariat shall be composed of the Secretary-General, who shall be the chief administrative officer of the Organization, and such staff as the Organization may require.

2. The Secretary-General shall be appointed by the Conference for a period of four years on such terms as the Conference shall determine, and shall be eligible for reappointments.

3. The Secretary-General shall as chief administrative officer, be responsible under the guidance of the Committee for the administration of the Organization and its programmes. He shall ensure that the Organization shall be an effective and dynamic channel of co-operation in marine affairs in the Indian Ocean.

4. The Secretary-General shall:

(a) serve as Secretary of the Conference and of the Committee;

(b) report to the Conference and to the Committee on the administration of the programmes and activities of the Organization;

(c) report to the Conference and the Committee on the financial and other resources available to the Organization;

(d) having regard to the importance of ensuring efficiency and equitable geographical representation, appoint such staff as may be necessary for the proper functioning of the Secretariat;

(e) prepare and submit to the Committee the budget estimates and accounts of the Organization, and proposals for programmes and activities for the consideration of the Committee;

(f) perform such other tasks as may be entrusted to him by the Conference or the Committee.

5. The Secretary-General shall be responsible to the Conference in the performance of his functions.

Article 10

Legal status

The Organization shall have juridical personality and the capacity necessary for the performance of its functions and, in particular, to contract, to acquire and dispose of movable and immovable property and to institute legal proceedings.

Article 11

Facilities, privileges and immunities

1. Each Member of the Organization shall accord to the Organization, its representatives, officials and consultants such facilities, privileges and immunities as it accords to intergovernmental organizations of a similar nature.

2. The Organization shall conclude a headquarters agreement with the Government of Sri Lanka. Until such time as a headquarters agreement is concluded, the Government of Sri Lanka shall accord to the Organization, its representatives, officials and consultants such facilities, privileges and immunities as it accords to intergovernmental organizations of a similar nature.

Article 12

Relations with other organizations

The Organization shall establish effective relations and co-operate closely with the United Nations and the appropriate agencies and bodies of the United Nations, as well as with other governmental and non-governmental organizations, agencies and institutes that are active in marine affairs.

IV

RESOURCES

Article 13

Resources

1. The resources of the Organization shall include:

   (a) the financial contributions of the Members of the Organization in accordance with paragraph 2 of this article;

   (b) such additional financial contributions as Members may wish to make to ensure that the programmes and activities of the Organization proceed on a sound financial basis;

   (c) other funds whose receipt is consistent with the purposes of the Organization as determined by the Secretary-General in consultation where necessary with the Committee;

(d) contributions of a non-financial nature whose receipt is consistent with the purposes of the Organization as determined by the Secretary-General in consultation where necessary with the Committee.

2. The financial contributions of the Members of the Organization shall consist of a yearly contribution from each Member, made in United States dollars, as follows:

(a) a sum arrived at by dividing 50 per cent of the required and approved budget of the Organization equally amongst all the Members of the Organization; and

(b) an additional sum, the amount of which shall be determined periodically by the Secretariat and approved by the Committee, to meet its share of the remainder of the required and approved budget. Such amount shall be calculated on the basis of the rates of assessment applicable in the United Nations, to the Members of the Organization with respect to their contributions to the regular budget of the United Nations.

Provided that the contributions, under sub-paragraphs (a) and (b) above, of any Member of the Organization shall not in the aggregate exceed $30,000 a year for the first financial period of the Organization and, thereafter, such fixed annual sum for each subsequent financial period as the Conference shall determine.

3. A Member which is in arrears in the payment of its contributions under paragraph 2 above to the budget of the Organization to the extent that the amount of its arrears is equivalent to or exceeds the sum of its required contributions, under paragraph 2 above, for the two preceding calendar years, shall cease to be entitled to vote in the Conference and to be represented in the Committee. The Conference may nevertheless permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.

Article 14

Management of resources

1. The Conference and the Committee shall at each of its sessions review the status of the resources of the Organization and shall make such recommendations to the Members of the Organization, as may be deemed appropriate, to ensure that timely and adequate resources are always available to the Organization and its programmes, and that a reasonable balance between such resources and the programmes and activities of the Organization is maintained.

2. The resources of the Organization shall be administered on a sound economic and financial basis.

3. Rules for the receipt, custody and expenditure of the financial and non-financial resources of the Organization and for the auditing of its accounts shall be established by the Secretary-General with the approval of the Committee.

V

FINAL PROVISIONS

Article 15

Signature, ratification, accession

1. Any coastal or hinterland State of the Indian Ocean may become a party to this Agreement by:

(a) signing this Agreement subject to ratification, acceptance or approval, and, thereafter, depositing an instrument of ratification, acceptance or approval; or

(b) acceding to this Agreement.

2. This Agreement shall be open for signature at the Ministry of Foreign Affairs, Dar es Salaam, United Republic of Tanzania and at the secretariat of the Organization for Indian Ocean Marine Affairs Co-operation, in Colombo, Sri Lanka, until its entry into force.

3. Instruments of ratification, acceptance, approval or accession shall be deposited with the Government of Sri Lanka.

Article 16

Entry into force

1. This Agreement shall enter into force on the thirtieth day after eight States have become parties to this Agreement in accordance with article 15.

2. For each State depositing an instrument of ratification, acceptance, approval or accession after the entry into force of this Agreement, the Agreement shall enter into force on the thirtieth day after such deposit.

Article 17

Amendment

1. Any party to this Agreement may propose an amendment to this Agreement.

2. The text of the proposed amendment shall be communicated by the Secretary-General to all the parties to this Agreement at least six months in advance of consideration of the proposed amendment by the Conference.

3. If approved by a two-thirds majority in the Conference, the proposed amendment shall, nevertheless, only enter into force for all parties to this Agreement on the thirtieth day after deposit of instruments of acceptance or approval of the proposed amendment by two thirds of the parties to this Agreement.

Article 18

Withdrawal from the Organization

1. Any Member of the Organization may withdraw from this Agreement and, in doing so, from its Membership in the Organization by giving written notice of withdrawal to the depositary of this Agreement and to the Secretary-General.

2. The withdrawal shall take effect six months after the date of receipt of the notification by the depositary.

3. A Member withdrawing from the Organization shall continue to be responsible for the obligations incurred within the period of its membership.

Article 19

Dissolution of the Organization

1. The Conference may, by a two-thirds majority of its Members, resolve that the Organization shall be dissolved.

2. On the endorsement of such a resolution by two thirds of the States parties to this Agreement in notifications addressed to the President of the Conference the necessary steps shall be taken by the Conference for the dissolution of the Organization. These steps shall include the establishment by the Conference of a committee to advise the Conference, in consultation with the Committee and the Secretary-General, on the manner in which the assets and obligations of the Organization should be liquidated prior to its dissolution.

3. The Conference shall, at the appropriate stage, adopt a final declaration stating that on a specified date the Organization shall be deemed dissolved. The declaration shall be communicated by the President of the Conference to the Members of the Organization and to the depositary of this Agreement.

Article 20

Depositary

The two original copies of this Agreement shall be deposited with the Government of Sri Lanka which will be the depositary of this Agreement in accordance with the Vienna Convention on the Law of Treaties.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed this Agreement.

DONE at Arusha, the United Republic of Tanzania, in two copies in the English language this seventh day of September one thousand nine hundred and ninety.

FINAL ACT OF THE PARIS CONFERENCE ON CAMBODIA, PARIS 23 OCTOBER 1991*

1. Concerned by the tragic conflict and continuing bloodshed in Cambodia, the Paris Conference on Cambodia was convened, at the invitation of the Government of the French Republic, in order to achieve an internationally guaranteed comprehensive settlement which would restore peace to that country. The Conference was held in two sessions, the first from 30 July to 30 August 1989, and the second from 21 to 23 October 1991.

3. The following States participated in the Conference: Australia, Brunei Darussalam, Cambodia, Canada, the People's Republic of China, the French Republic, the Republic of India, the Republic of Indonesia, Japan, the Lao People's Democratic Republic, Malaysia, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America and the Socialist Republic of Vietnam.

In addition, the Non-Aligned Movement was represented at the Conference by its current Chairman at each session, namely Zimbabwe at the first session and Yugoslavia at the second session.

4. At the first session of the Conference, Cambodia was represented by the four Cambodian Parties. The Supreme National Council of Cambodia, under the leadership of its President, H.R.H. Prince NORODOM SIHANOUK, represented Cambodia at the second session of the Conference.

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* Text from UN Doc. A/46/608 or S/23177 of 30 October 1991; only the relevant sections are reproduced.

Ko Swan Sik et al. (eds.), Asian Yearbook of International Law, 389–416.

10. At the second session, the Conference adopted the following instruments:

1. AGREEMENT ON A COMPREHENSIVE POLITICAL SETTLEMENT OF THE CAMBODIA CONFLICT, with annexes on the mandate for UNTAC, military matters, elections, repatriation of Cambodian refugees and displaced persons, and the principles for a new Cambodian constitution;

2. AGREEMENT CONCERNING THE SOVEREIGNTY, INDEPENDENCE, TERRITORIAL INTEGRITY AND INVIOLABILITY, NEUTRALITY AND NATIONAL UNITY OF CAMBODIA; and

3. DECLARATION ON THE REHABILITATION AND RECONSTRUCTION OF CAMBODIA.

These instruments represent an elaboration of the "Framework for a Comprehensive Political Settlement of the Cambodia Conflict" adopted by the five permanent members of the United Nations Security Council on 28 August 1990, and of elements of the work accomplished at the first session of the Conference.

11. On behalf of Cambodia, the instruments will be signed by the twelve members of the Supreme National Council of Cambodia, which is the unique legitimate body and source of authority enshrining the sovereignty, independence and unity of Cambodia.

II – AGREEMENT ON A COMPREHENSIVE POLITICAL SETTLEMENT OF THE CAMBODIA CONFLICT, PARIS 23 OCTOBER 1991

The States participating in the Paris Conference on Cambodia, namely Australia, Brunei Darussalam, Cambodia, Canada, the People's Republic of China, the French Republic, the Republic of India, the Republic of Indonesia, Japan, the Lao People's Democratic Republic, Malaysia, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America, the Socialist Republic of Vietnam and the Socialist Federal Republic of Yugoslavia,

In the presence of the Secretary-General of the United Nations,

In order to maintain, preserve and defend the sovereignty, independence, territorial integrity and inviolability, neutrality and national unity of Cambodia,

Desiring to restore and maintain peace in Cambodia, to promote national reconciliation and to ensure the exercise of the right to self-determination of the Cambodian people through free and fair elections,

Convinced that only a comprehensive political settlement to the Cambodia conflict will be just and durable and will contribute to regional and international peace and security,

Welcoming the Framework document of 28 August 1990, which was accepted by the Cambodian Parties in its entirety as the basis for settling the Cambodia conflict, and which was subsequently unanimously endorsed by Security Council resolution 668 (1990) of 20 September 1990 and General Assembly resolution 45/3 of 15 October 1990,

Noting the formation in Jakarta on 10 September 1990 of the Supreme National Council of Cambodia as the unique legitimate body and source of authority in Cambodia in which, throughout the transitional period, national sovereignty and unity are enshrined, and which represents Cambodia externally,

Welcoming the unanimous election, in Beijing on 17 July 1991, of H.R.H. Prince NORODOM SIHANOUK as the President of the Supreme National Council,

Recognizing that an enhanced United Nations role requires the establishment of a United Nations Transitional Authority in Cambodia (UNTAC) with civilian and military components, which will act with full respect for the national sovereignty of Cambodia,

Noting the statements made at the conclusion of the meetings held in Jakarta on 9–10 September 1990, in Paris on 21–23 December 1990, in Pattaya on 24–26 June 1991, in Beijing on 16–17 July 1991, in Pattaya on 26–29 August 1991, and also the meetings held in Jakarta on 4–6 June 1991 and in New–York on 19 September 1991,

Welcoming United Nations Security Council resolution 717 (1991) of 16 October 1991 on Cambodia,

Recognizing that Cambodia's tragic recent history requires special measures to assure protection of human rights, and the non-return to the policies and practices of the past,

Have agreed as follows:

PART I

ARRANGEMENTS DURING THE TRANSITIONAL PERIOD

Section I
Transitional Period

Article 1

For the purposes of this Agreement, the transitional period shall commence with the entry into force of this Agreement and terminate when the constituent assembly elected through free and fair elections, organized and certified by the United Nations, has approved the constitution and transformed itself into a legislative assembly, and thereafter a new government has been created.

Section II
United Nations Transitional Authority in Cambodia

Article 2

(1) The Signatories invite the United Nations Security Council to establish a United Nations Transitional Authority in Cambodia (hereinafter referred to as "UNTAC") with civilian and military components under the direct responsibility of the Secretary-General of the United Nations. For this purpose the Secretary-General will designate a Special Representative to act on his behalf.

(2) The Signatories further invite the United Nations Security Council to provide UNTAC with the mandate set forth in this Agreement and to keep its implementation under continuing review through periodic reports submitted by the Secretary-General.

Section III
Supreme National Council

Article 3

The Supreme National council (hereinafter referred to as "the SNC") is the unique legitimate body and source of authority in which, throughout the transitional period, the sovereignty, independence and unity of Cambodia are enshrined.

Article 4

The members of the SNC shall be committed to the holding of free and fair elections organized and conducted by the United Nations as the basis for forming a new and legitimate Government.

Article 5

The SNC shall, throughout the transitional period, represent Cambodia externally and occupy the seat of Cambodia at the United Nations, in the United Nations specialized agencies, and in other international institutions and international conferences.

Article 6

The SNC hereby delegates to the United Nations all powers necessary to ensure the implementation of this Agreement, as described in annex 1.

In order to ensure a neutral political environment conducive to free and fair general elections, administrative agencies, bodies and offices which could directly influence the outcome of elections will be placed under direct United Nations supervision or control. In that context, special attention will be given to foreign affairs, national defence, finance, public security and information. To reflect the importance of these subjects, UNTAC needs to exercise such control as is necessary to ensure the strict neutrality of the bodies responsible for them. The United Nations, in consultation with the SNC, will identify which agencies, bodies and offices could continue to operate in order to ensure normal day-to-day life in the country.

Article 7

The relationship between the SNC, UNTAC and existing administrative structures is set forth in annex 1.

Section IV
Withdrawal of foreign forces and its verification

Article 8

Immediately upon entry into force of this Agreement, any foreign forces, advisers, and military personnel remaining in Cambodia, together with their weapons, ammunition, and equipment, shall be withdrawn from Cambodia and not be returned. Such withdrawal and non-return will be subject to UNTAC verification in accordance with annex 2.

Section V
Cease-fire and cessation of outside military assistance

Article 9

The cease-fire shall take effect at the time this Agreement enters into force. All forces shall immediately disengage and refrain from all hostilities and from any deployment, movement or action which would extend the territory they control or which might lead to renewed fighting.

The Signatories hereby invite the security Council of the United Nations to request the Secretary-General to provide good offices to assist in this process until such time as the military component of UNTAC is in position to supervise, monitor and verify it.

Article 10

Upon entry into force of this Agreement, there shall be an immediate cessation of all outside military assistance to all Cambodian Parties.

Article 11

The objectives of military arrangements during the transitional period shall be to stabilize the security situation and build confidence among the parties to the conflict, so as to reinforce the purposes of this Agreement and to prevent the risks of a return to warfare.

Detailed provisions regarding UNTAC's supervision, monitoring, and verification of the cease-fire and related measures, including verification of the withdrawal of foreign forces and the regrouping, cantonment and ultimate disposition of all Cambodian forces and their weapons during the transitional period are set forth in annex 1, section C, and annex 2.

PART II

ELECTIONS

Article 12

The Cambodian people shall have the right to determine their own political future

through the free and fair election of a constituent assembly, which will draft and approve a new Cambodian Constitution in accordance with Article 23 and transform itself into a legislative assembly, which will create the new Cambodian Government. This election will be held under United Nations auspices in a neutral political environment with full respect for the national sovereignty of Cambodia.

Article 13

UNTAC shall be responsible for the organization and conduct of these elections based on the provisions of annex 1, section D, and annex 3.

Article 14

All Signatories commit themselves to respect the results of these elections once certified as free and fair by the United Nations.

PART III

HUMAN RIGHTS

Article 15

1. All persons in Cambodia and all Cambodian refugees and displaced persons shall enjoy the rights and freedoms embodied in the Universal Declaration of Human Rights and other relevant international human rights instruments.

2. To this end,

   (a) Cambodia undertakes:
   - to ensure respect for and observance of human rights and fundamental freedoms in Cambodia;
   - to support the right of all Cambodian citizens to undertake activities which would promote and protect human rights and fundamental freedoms;
   - to take effective measures to ensure that the policies and practices of the past shall never be allowed to return;
   - to adhere to relevant international human rights instruments;

   (b) the other Signatories to this Agreement undertake to promote and encourage respect for and observance of human rights and fundamental freedoms in Cambodia as embodied in the relevant international instruments and the relevant resolutions of the United Nations General Assembly, in order, in particular, to prevent the recurrence of human rights abuses.

Article 16

UNTAC shall be responsible during the transitional period for fostering an environment in which respect for human rights shall be ensured, based on the provisions of annex 1, section E.

Article 17

After the end of the transitional period, the United Nations Commission on Human Rights should continue to monitor closely the human rights situation in Cambodia, including, if necessary, by the appointment of a Special Rapporteur who would report his findings annually to the Commission and to the General Assembly.

PART IV

INTERNATIONAL GUARANTEES

Article 18

Cambodia undertakes to maintain, preserve and defend, and the other Signatories undertake to recognize and respect, the sovereignty, independence, territorial integrity and inviolability, neutrality and national unity of Cambodia, as set forth in a separate Agreement.

PART V

REFUGEES AND DISPLACED PERSONS

Article 19

Upon entry into force of this Agreement, every effort will be made to create in Cambodia political, economic and social conditions conducive to the voluntary return and harmonious integration of Cambodian refugees and displaced persons.

Article 20

(1) Cambodian refugees and displaced persons, located outside Cambodia, shall have the right to return to Cambodia and to live in safety, security and dignity, free from intimidation or coercion of any kind.

(2) The Signatories request the Secretary-General of the United Nations to facilitate the repatriation in safety and dignity of Cambodian refugees and displaced persons, as an integral part of the comprehensive political settlement and under the overall authority of the Special Representative of the Secretary-General, in accordance with the guidelines and principles on the repatriation of refugees and displaced persons as set forth in annex 4.

PART VI

RELEASE OF PRISONERS OF WAR AND CIVILIAN INTERNEES

Article 21

The release off all prisoners off war and civilian internees shall be accomplished at the earliest possible date under the direction of the International Committee of the Red Cross (ICRC) in co-ordination with the Special Representative of the Secretary-General, with the assistance, as necessary, of other appropriate international humanitarian organizations and the Signatories.

Article 22

The expression "civilian internees" refers to all persons who are not prisoners of war and who, having contributed in any way whatsoever to the armed or political struggle, have been arrested or detained by any of the parties by virtue of their contribution thereto.

PART VII

PRINCIPLES FOR A NEW CONSTITUTION FOR CAMBODIA

Article 23

Basic principles, including those regarding human rights and fundamental freedoms as well as regarding Cambodia's status of neutrality, which the new Cambodian Constitution will incorporate, are set forth in annex 5.

PART VIII

REHABILITATION AND RECONSTRUCTION

Article 24

The Signatories urge the international community to provide economic and financial support for the rehabilitation and reconstruction of Cambodia, as provided in a separate declaration.

PART IX

FINAL PROVISIONS

Article 25

The Signatories shall, in good faith and in a spirit of co-operation, resolve through peaceful means any disputes with respect to the implementation of this Agreement.

Article 26

The signatories request other States, international organizations and other bodies to co-operate and assist in the implementation of this Agreement and in the fulfilment by UNTAC of its mandate.

Article 27

The Signatories shall provide their full co-operation to the United Nations to ensure the implementation of its mandate, including by the provision of privileges and immunities, and by facilitating freedom of movement and communication within and through their respective territories.

In carrying out its mandate, UNTAC shall exercise due respect for the sovereignty of all States neighbouring Cambodia.

Article 28

(1) The Signatories shall comply in good faith with all obligations undertaken in this Agreement and shall extend full co-operation to the United Nations, including the provision of the information which UNTAC requires in the fulfilment of its mandate.

(2) The signature on behalf of Cambodia by the members of the SNC shall commit all Cambodian parties and armed forces to the provisions of this Agreement.

Article 29

Without prejudice to the prerogatives of the Security Council of the United Nations, and upon the request of the Secretary-General, the two Co-Chairmen of the Paris Conference on Cambodia, in the event of a violation or threat of violation of this Agreement, will immediately undertake appropriate consultations, including with members of the Paris Conference on Cambodia, with a view to taking appropriate steps to ensure respect for these commitments.

Article 30

This Agreement shall enter into force upon signature.

Article 31

This Agreement shall remain open for accession by all States. The instruments of accession shall be deposited with the Governments of the French Republic and the Republic of Indonesia. For each State acceding to the Agreement it shall enter into force on the date of deposit of its instruments of accession. Acceding States shall be bound by the same obligations as the Signatories.

Article 32

The originals of this Agreement, of which the Chinese, English, French, Khmer and

Russian texts are equally authentic, shall be deposited with the Governments of the French Republic and the Republic of Indonesia, which shall transmit certified true copies to the Governments of the other States participating in the Paris Conference on Cambodia, as well as the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto, have signed this Agreement.

DONE at Paris this twenty-third day of October, one thousand nine hundred and ninety one.

ANNEX 1
UNTAC mandate

Section A. ***General procedure***

1. In accordance with article 6 of the Agreement, UNTAC will exercise the powers necessary to ensure the implementation of this Agreement, including those relating to the organization and conduct of free and fair elections and the relevant aspects of the administration of Cambodia.

2. The following mechanism will be used to resolve all issues relating to the implementation of this Agreement which may arise between the Secretary-General's Special Representative and the Supreme National Council (SNC):

(a) The SNC offers advice to UNTAC, which will comply with this advice provided there is a consensus among the members of the SNC and provided this advice is consistent with the objectives of the present Agreement;

(b) If there is no consensus among the members of the SNC despite every endeavour of its President, H.R.H. Samdech NORODOM SIHANOUK, the President will be entitled to make the decision on what advice to offer to UNTAC, taking fully into account the views expressed in the SNC. UNTAC will comply with the advice provided it is consistent with the objectives of the present Agreement;

(c) If H.R.H. Samdech NORODOM SIHANOUK, President of the SNC, the legitimate representative of Cambodian sovereignty, is not, for whatever reason, in a position to make such a decision, his power of decision will transfer to the Secretary-General's Special Representative. The Special Representative will make the final decision, taking fully into account the views expressed in the SNC;

(d) Any power to act regarding the implementation of this Agreement conferred upon the SNC by the Agreement will be exercised by consensus or, failing such consensus, by its President in accordance with the procedure set out above. In the event that H.R.H. Samdech NORODOM SIHANOUK, President of the SNC, the legitimate representative of Cambodian sovereignty, is not, for whatever reason, in a position to act, his power to act will transfer to the Secretary-General's Special Representative who may take the necessary action;

(e) In all cases, the Secretary-General's Special Representative will determine whether advice or action of the SNC is consistent with the present Agreement.

3. The Secretary-General's Special Representative or his delegate will attend the meetings of the SNC and of any subsidiary body which might be established by it and give its members all necessary information on the decisions taken by UNTAC.

Section B. ***Civil administration***

1. In accordance with Article 6 of the Agreement, all administrative agencies, bodies and offices acting in the field of foreign affairs, national defence, finance, public security and information will be placed under the direct control of UNTAC, which will exercise it as necessary to ensure strict neutrality. In this respect, the Secretary-General's Special Representative will determine what is necessary and may issue directives to the above-mentioned administrative agencies, bodies and offices. Such directives may be issued to and will bind all Cambodian Parties.

2. In accordance with article 6 of the Agreement, the Secretary-General's Special Representative, in consultation with the SNC, will determine which other administrative agencies, bodies and offices could directly influence the outcome of elections. These administrative agencies, bodies and offices will be placed under direct supervision or control of UNTAC and will comply with any guidance provided by it.

3. In accordance with Article 6 of the Agreement, the Secretary-General's Special Representative, in consultation with the SNC, will identify which administrative agencies, bodies, and offices could continue to operate in order to ensure normal day-to-day life in Cambodia, if necessary, under such supervision by UNTAC as it considers necessary.

4. In accordance with article 6 of the Agreement, the authority of the Secretary-General's Special Representative will include the power to:

(a) Install in administrative agencies, bodies and offices of all the Cambodian Parties, United Nations personnel who will have unrestricted access to all administrative operations and information;

(b) Require the reassignment or removal of any personnel of such administrative agencies, bodies and offices.

5. (a) On the basis of the information provided in Article I, paragraph 3, of annex 2, the Special Representative of the Secretary-General will determine, after consultation with the Cambodian Parties, those civil police necessary to perform law enforcement in Cambodia. All Cambodian Parties hereby undertake to comply with the determination made by the Special Representative in this regard;

(b) All civil police will operate under UNTAC supervision or control, in order to ensure that law and order are maintained effectively and impartially, and that human rights and fundamental freedoms are fully protected. In consultation with the SNC, UNTAC will supervise other law enforcement and judicial processes throughout Cambodia to the extent necessary to ensure the attainment of these objectives.

6. If the Secretary-General's Special Representative deems it necessary, UNTAC, in consultation with the SNC, will undertake investigations of complaints and allegations

regarding actions by the existing administrative structures in Cambodia that are inconsistent with or work against the objectives of this comprehensive political settlement. UNTAC will also be empowered to undertake such investigation on its own initiative. UNTAC will take, when necessary, appropriate corrective steps.

Section C. ***Military functions***

1. UNTAC will supervise, monitor and verify the withdrawal of foreign forces, the cease-fire and related measures in accordance with annex 2, including:

(a) Verification of the withdrawal from Cambodia of all Categories of foreign forces, advisers and military personnel and their weapons, ammunition and equipment, and their non-return to Cambodia;

(b) Liaison with neighbouring Governments over any developments in or near their territory that could endanger the implementation of this Agreement;

(c) Monitoring the cessation of outside military assistance to all Cambodian Parties;

(d) Locating and confiscating caches of weapons and military supplies throughout the country;

(e) Assisting with clearing mines and undertaking training programmes in mine clearance and a mine awareness programme among the Cambodian people.

2. UNTAC will supervise the regrouping and relocating of all forces to specifically designated cantonment areas on the basis of an operational time-table to be agreed upon, in accordance with annex 2.

3. As the forces enter the cantonments, UNTAC will initiate the process of arms control and reduction specified in annex 2.

4. UNTAC will take necessary steps regarding the phased process of demobilization of the military forces of the parties, in accordance with annex 2.

5. UNTAC will assist, as necessary, the International Committee of the Red Cross in the release of all prisoners of war and civilian internees.

Section D. ***Elections***

1. UNTAC will organize and conduct the election referred to in Part II of this Agreement in accordance with this section and annex 3.

2. UNTAC may consult with the SNC regarding the organization and conduct of the electoral process.

3. In the exercise of its responsibilities in relation to the electoral process, the specific authority of UNTAC will include the following:

(a) The establishment, in consultation with the SNC, of a system of laws, procedures and administrative measures necessary for the holding of a free and fair election in Cambodia, including the adoption of an electoral law and of a

code of conduct regulating participation in the election in a manner consistent with respect for human rights and prohibiting coercion or financial inducement in order to influence voter preference;

(b) The suspension or abrogation, in consultation with the SNC, of provisions of existing laws which could defeat the objects and purposes of this Agreement;

(c) The design and implementation of a voter education programme, covering all aspects of the election, to support the election process;

(d) The design and implementation of a system of voter registration, as a first phase of the electoral process, to ensure that eligible voters have the opportunity to register, and the subsequent preparation of verified voter registration lists;

(e) The design and implementation of a system of registration of political parties and lists of candidates;

(f) Ensuring fair access to the media, including press, television and radio, for all political parties contesting in the election;

(g) The adoption and implementation of measures to monitor and facilitate the participation off Cambodians in the elections, the political campaign, and the balloting procedures;

(h) The design and implementation of a system of balloting and polling, to ensure that registered voters have the opportunity to vote;

(i) The establishment, in consultation with the SNC, of co-ordinated arrangements to facilitate the presence of foreign observers wishing to observe the campaign and voting;

(j) Overall direction of polling and the vote count;

(k) The identification and investigation of complaints of electoral irregularities, and the taking of appropriate corrective action;

(l) Determining whether or not the election was free and fair and, if so, certification of the list of persons duly elected.

4. In carrying out its responsibilities under the present section, UNTAC will establish a system of safeguards to assist it in ensuring the absence of fraud during the electoral process, including arrangements for Cambodian representatives to observe the registration and polling procedures and the provision of an UNTAC mechanism for hearing and deciding complaints.

5. The timetable for the various phases of the electoral process will be determined by UNTAC, in consultation with the SNC as provided in paragraph 2 of this section. The duration of the electoral process will not exceed nine months from the commencement of voter registration.

6. In organizing and conducting the electoral process, UNTAC will make every effort to ensure that the system and procedures adopted are absolutely impartial, while the operational arrangements are as administratively simple and efficient as possible.

Section E. ***Human rights***

In accordance with article 16, UNTAC will make provisions for:

(a) The development and implementation of a programme of human rights education to promote respect for and understanding of human rights;

(b) General human rights oversight during the transitional period;

(c) The investigation of human rights complaints, and, where appropriate, corrective action.

ANNEX 2
Withdrawal, cease-fire and related measures

Article I

Cease-fire

1. All Cambodian Parties (hereinafter referred to as "the Parties") agree to observe a comprehensive cease-fire on land and water and in the air. This cease-fire will be implemented in two phases. During the first phase, the cease-fire will be observed with the assistance of the Secretary-General of the United Nations through his good offices. During the second phase, which should commence as soon as possible, the cease-fire will be supervised, monitored and verified by UNTAC. The Commander of the military component of UNTAC, in consultation with the Parties, shall determine the exact time and date at which the second phase will commence. This date will be set at least four weeks in advance of its coming into effect.

2. The Parties undertake that, upon the signing of this Agreement, they will observe a cease-fire and will order their armed forces immediately to disengage and refrain from all hostilities and any deployment, movement or action that would extend the territory they control or that might lead to a resumption of fighting, pending the commencement of the second phase. "Forces" are agreed to include all regular, provincial, district, paramilitary, and other auxiliary forces. During the first phase, the Secretary-General of the United Nations will provide his good offices to the Parties to assist them in its observance. The Parties undertake to co-operate with the Secretary-General or his representatives in the exercise of his good offices in this regard.

3. The Parties agree that, immediately upon the signing of this Agreement, the following information will be provided to the United Nations:

(a) Total strength of their forces, organization, precise number and location of deployments inside and outside Cambodia. The deployment will be depicted on a map marked with locations of all troop positions, occupied or unoccupied, including staging camps, supply bases and supply routes;

(b) Comprehensive lists of arms, ammunition and equipment held by their forces, and the exact locations at which those arms, ammunition and equipment are deployed;

(c) Detailed record of their mine-fields, including types and characteristics of mines laid and information of booby traps used by them together with any information available to them about mine-fields laid or booby traps used by the other Parties;

(d) Total strength of their police forces, organization, precise numbers and locations of deployments, as well as comprehensive lists of their arms, ammunition and equipment, and the exact locations at which those arms, ammunition and equipment are deployed.

4. Immediately upon his arrival in Cambodia, and not later than four weeks before the beginning of the second phase, the Commander of the military component of UNTAC will, in consultation with the Parties, finalize UNTAC's plan for the regroupment and cantonment of the forces of the Parties and for the storage of their arms, ammunition and equipment, in accordance with article III of this annex. This plan will include the designation of regroupment and cantonment areas, as well as an agreed timetable. The cantonment areas will be established at battalion size or larger.

5. The Parties agree to take steps to inform their forces at least two weeks before the beginning of the second phase, using all possible means of communication, about the agreed date and time of the beginning of the second phase, about the agreed plan for the regroupment and cantonment of their forces and for the storage of their arms, ammunition and equipment and, in particular, about the exact locations of the regroupment areas to which their forces are to report. Such information will continue to be disseminated for a period of four weeks after the beginning of the second phase.

6. The Parties shall scrupulously observe the cease-fire and will not resume any hostilities by land, water or air. The commanders of their armed forces will ensure that all troops under their command remain on their respective positions, pending their movement to the designated regroupment areas, and refrain from all hostilities and from any deployment or movement or action which would extend the territory they control or which might lead to a resumption of fighting.

Article II

Liaison system and Mixed Military Working Group

A Mixed Military Working Group (MMWG) will be established with a view to resolving any problems that may arise in the observance of the cease-fire. It will be chaired by the most senior United Nations military officer in Cambodia or his representative. Each Party agrees to designate an officer of the rank of brigadier or equivalent to serve on the MMWG. Its composition, method of operation and meeting places will be determined by the most senior United Nations military officer in consultation with the Parties. Similar liaison arrangements will be made at lower military command levels to resolve practical problems on the ground.

Article III

Regroupment and cantonment of the forces of the Parties and storage of their arms, ammunition and equipment

1. In accordance with the operational timetable referred to in paragraph 4 of article I of the present annex, all forces of the Parties that are not already in designated cantonment areas will report to designated regroupment areas, which will be established and operated by the military component of UNTAC. These regroupment areas will be established and operational not later than one week prior to the date of the beginning of the second phase. The Parties agree to arrange for all their forces, with all their arms, ammunition and equipment, to report to regroupment areas within two weeks after the beginning of the second phase. All personnel who have reported to the regroupment areas will thereafter be escorted by personnel of the military component of UNTAC, with their arms, ammunition and equipment, to designated cantonment areas. All Parties agree to ensure that personnel reporting to the regroupment areas will be able to do so in full safety and without any hindrance.

2. On the basis of the information provided in accordance with paragraph 3 of article I of the present annex, UNTAC will confirm that the regroupment and cantonment processes have been completed in accordance with the plan referred to in paragraph 4 or article I of this annex. UNTAC will endeavour to complete these processes within four weeks from the date of the beginning of the second phase. On the completion of regroupment of all forces and of their movement to cantonment areas, respectively, the Commander of the military component of UNTAC will so inform each of the four Parties.

3. The Parties agree that, as their forces enter the designated cantonment areas, their personnel will be instructed by their commanders to immediately hand over all their arms, ammunition and equipment to UNTAC for storage in the custody of UNTAC.

4. UNTAC will check the arms, ammunition and equipment handed over to it against the lists referred to in paragraph 3.b of article I of this annex, in order to verify that all the arms, ammunition and equipment in the possession of the Parties have been placed under its custody.

Article IV

Resupply of forces during cantonment

The military component of UNTAC will supervise the resupply of all forces of the Parties during the regroupment and cantonment processes. Such resupply will be confined to items of a non-lethal nature such as food, water, clothing and medical supplies as well as provision of medical care.

Article V

Ultimate disposition of the forces of the Parties and of their arms, ammunition and equipment

1. In order to reinforce the objectives of a comprehensive political settlement, minimize the risks of a return to warfare, stabilize the security situation and build confidence among the Parties to the conflict, all Parties agree to undertake a phased and balanced process of demobilization of at least 70 per cent of their military forces. This process shall be undertaken in accordance with a detailed plan to be drawn up by UNTAC on the basis of the information provided under Article I of this annex and in consultation with the Parties. It should be completed prior to the end of the process of registration for the elections and on a date to be determined by the special Representative of the Secretary-General.

2. The Cambodian Parties hereby commit themselves to demobilize all their remaining forces before or shortly after the elections and, to the extent that full demobilization is unattainable, to respect and abide by whatever decision the newly elected government that emerges in accordance with Article 12 of this Agreement takes with regard to the incorporation of parts or all of those forces into a new national army. Upon completion of the demobilization referred to in paragraph 1, the Cambodian Parties and the Special Representative of the Secretary-General shall undertake a review regarding the final disposition of the forces remaining in the cantonments, with a view to determining which of the following shall apply:

(a) If the Parties agree to proceed with the demobilization of all or some of the forces remaining in the cantonments, preferably prior to or otherwise shortly after the elections, the Special Representative shall prepare a time-table for so doing, in consultation with them.

(b) Should total demobilization of all of the residual forces before or shortly after the elections not be possible, the Parties hereby undertake to make available all of their forces remaining in cantonments to the newly elected government that emerges in accordance with Article 12 of this Agreement, for consideration for incorporation into a new national army. They further agree that any such forces which are not incorporated into the new national army will be demobilized forthwith according to a plan to be prepared by the Special Representative. With regard to the ultimate disposition of the remaining forces and all the arms, ammunition and equipment, UNTAC, as its withdraws from Cambodia, shall retain such authority as is necessary to ensure an orderly transfer to the newly elected government of those responsibilities it has exercised during the transitional period.

3. UNTAC will assist, as required, with the reintegration into civilian life of the forces demobilized prior to the elections.

4. (a) UNTAC will control and guard all the arms, ammunition and equipment of the Parties throughout the transitional period;

(b) As the cantoned forces are demobilized in accordance with paragraph 1 above, there will be a parallel reduction by UNTAC of the arms, ammunition and equipment stored on site in the cantonment areas. For the forces remaining in the cantonment areas, access to their arms, ammunition and equipment shall only be on the basis of the explicit authorization of the Special Representative of the Secretary-General;

(c) If there is a further demobilization of the military forces in accordance with paragraph 2. a) above, there will be commensurate reduction by UNTAC of the arms, ammunition and equipment stored on site in the cantonment areas;

(d) The ultimate disposition of all arms, ammunition and equipment will be determined by the government that emerges through the free and fair elections in accordance with article 12 of this Agreement.

Article VI

Verification of withdrawal from Cambodia and non-return of all categories of foreign forces

1. UNTAC shall be provided, no later than two weeks before the commencement of the second phase of the cease-fire, with detailed information in writing regarding the withdrawal of foreign forces. This information shall include the following elements:

(a) Total strength of these forces and their organization and deployment;

(b) Comprehensive lists of arms, ammunition and equipment held by these forces, and their exact locations;

(c) Withdrawal plan (already implemented or to be implemented), including withdrawal routes, border crossing points and time of departure from Cambodia.

2. On the basis of the information provided in accordance with paragraph 1 above, UNTAC will undertake an investigation in the manner it deems appropriate. The Party providing the information will be required to make personnel available to accompany UNTAC investigators.

3. Upon confirmation of the presence of any foreign forces, UNTAC will immediately deploy military personnel with the foreign forces and accompany them until they have withdrawn from Cambodian territory. UNTAC will also establish checkpoints on withdrawal routes, border crossing points and airfields to verify the withdrawal and ensure the non-return of all categories of foreign forces.

4. The Mixed Military Working Group (MMWG) provided for in article II of this annex will assist UNTAC in fulfilling the above-mentioned tasks.

Article VII

Cessation of outside military assistance to all Cambodian Parties

1. All Parties undertake, from the time of the signing of this Agreement, not to obtain

or seek any outside military assistance, including weapons, ammunition and military equipment from outside sources.

2. The Signatories whose territory is adjacent to Cambodia, namely, the Governments of the Lao People's Democratic Republic, the Kingdom of Thailand and the Socialist Republic of Vietnam, undertake to:

(a) Prevent the territories of their respective States, including land territory, territorial sea and air space, from being used for the purpose of providing any form of military assistance to any of the Cambodian Parties. Resupply of such items as food, water, clothing and medical supplies through their territories will be allowed, but shall, without prejudice to the provisions of sub-paragraph (c) below, be subject to UNTAC supervision upon arrival in Cambodia;

(b) Provide written confirmation to the Commander of the military component of UNTAC, not later than four weeks after the second phase of the cease-fire begins, that no forces, arms, ammunition or military equipment of any of the Cambodian Parties are present on their territories;

(c) Receive an UNTAC liaison officer in each of their capitals and designate an officer of the rank of colonel or equivalent, not later than four weeks after the beginning of the second phase of the cease-fire, in order to assist UNTAC in investigating, with due respect for their sovereignty, any complaints that activities are taking place on their territories that are contrary to the provisions of the comprehensive political settlement.

3. To enable UNTAC to monitor the cessation of outside assistance to all Cambodian Parties, the Parties agree that, upon signature of this Agreement, they will provide to UNTAC any information available to them about the routes and means by which military assistance, including weapons, ammunition and military equipment, have been supplied to any of the Parties. Immediately after the second phase of the cease-fire begins, UNTAC will take the following practical measures:

(a) Establish check-points along the routes and at selected locations along the Cambodian side of the border and at airfields inside Cambodia;

(b) Patrol the coastal and inland waterways of Cambodia;

(c) Maintain mobile teams at strategic locations within Cambodia to patrol and investigate allegations of supply of arms to any of the Parties.

Article VIII

Caches of weapons and military supplies

1. In order to stabilize the security situation, build confidence and reduce arms and military supplies throughout Cambodia, each Party agrees to provide to the Commander of the military component of UNTAC, before a date to be determined by him, all information at its disposal, including marked maps, about known or suspected caches of weapons and military supplies throughout Cambodia.

2. On the basis of information received, the military component of UNTAC shall, after the date referred to in paragraph 1, deploy verification teams to investigate each report and destroy each cache found.

Article IX

Unexploded ordnance devices

1. Soon after arrival in Cambodia, the military component of UNTAC shall ensure, as a first step, that all known mine-fields are clearly marked.

2. The Parties agree that, after completion of the regroupment and cantonment processes in accordance with Article III of the present annex, they will make available mine-clearing teams which, under the supervision and control of UNTAC military personnel, will leave the cantonment areas in order to assist in removing, disarming or deactivating remaining unexploded ordnance devices. Those mines or objects which cannot be removed, disarmed or deactivated will be clearly marked in accordance with a system to be devised by the military component of UNTAC.

3. UNTAC shall:

(a) Conduct a mass public education programme in the recognition and avoidance of explosive devices;

(b) Train Cambodian volunteers to dispose of unexploded ordnance devices;

(c) Provide emergency first-aid training to Cambodian volunteers.

Article X

Investigation of violations

1. After the beginning of the second phase, upon receipt of any information or complaint from one of the Parties relating to a possible case of non-compliance with any of the provisions of the present annex or related provisions, UNTAC will undertake an investigation in the manner which it deems appropriate. Where the investigation takes place in response to a complaint by one of the Parties, that Party will be required to make personnel available to accompany the UNTAC investigators. The results of such investigation will be conveyed by UNTAC to the complaining Party and the Party complained against, and if necessary to the SNC.

2. UNTAC will also carry out investigations on its own initiative in other cases when it has reason to believe or suspect that a violation of this annex or related provisions may be taking place.

Article XI

Release of prisoners of war

The military component of UNTAC will provide assistance as required to the

International Committee of the Red Cross in the latter's discharge of its functions relating to the release of prisoners of war.

Article XII

Repatriation and resettlement of displaced Cambodians

The military component of UNTAC will provide assistance as necessary in the repatriation of Cambodian refugees and displaced persons carried out in accordance with articles 19 and 20 of this Agreement, in particular in the clearing of mines from repatriation routes, reception centres and resettlement areas, as well as in the protection of the reception centres.

ANNEX 3
Elections

[. . .]

ANNEX 4
Repatriation of Cambodian refugees and displaced persons

PART I

INTRODUCTION

1. As part of the comprehensive political settlement, every assistance will need to be given to Cambodian refugees and displaced persons as well as to countries of temporary refuge and the country of origin in order to facilitate the voluntary return of all Cambodian refugees and displaced persons in a peaceful and orderly manner. It must also be ensured that there would be no residual problems for the countries of temporary refuge. The country of origin with responsibility towards its own people will accept their return as conditions become conducive.

PART II

CONDITIONS CONDUCIVE TO THE RETURN OF REFUGEES AND DISPLACED PERSONS

2. The task of rebuilding the Cambodian nation will require the harnessing of all its human and natural resources. To this end, the return to the place of their choice of Cambodians from their temporary refuge and elsewhere outside their country of origin will make a major contribution.

3. Every effort should be made to ensure that the conditions which have led to a large number of Cambodian refugees and displaced persons seeking refuge in other

countries should not recur. Nevertheless, some Cambodian refugees and displaced persons will wish and be able to return spontaneously to their homeland.

4. There must be full respect for the human rights and fundamental freedoms of all Cambodians, including those of the repatriated refugees and displaced persons, in recognition of their entitlement to live in peace and security, free from intimidation and coercion of any kind. These rights would include, *inter alia*, freedom of movement within Cambodia, the choice of domicile and employment, and the right to property.

5. In accordance with the comprehensive political settlement, every effort should be made to create concurrently in Cambodia political, economic and social conditions conducive to the return and harmonious integration of the Cambodian refugees and displaced persons.

6. With a view to ensuring that refugees and displaced persons participate in the elections, mass repatriation should commence and be completed as soon as possible, taking into account all the political, humanitarian, logistical, technical and socio-economic factors involved, and with the co-operation of the SNC.

7. Repatriation of Cambodian refugees and displaced persons should be voluntary and their decision should be taken in full possession of the facts. Choice of destination within Cambodia should be that of the individual. The unity of the family must be preserved.

PART III

OPERATIONAL FACTORS

8. Consistent with respect for principles of national sovereignty in the countries of temporary refuge and origin, and in close co-operation with the countries of temporary refuge and origin, full access by the Office of the United Nations High Commissioner for Refugees (UNHCR), ICRC and other relevant international agencies should be guaranteed to all Cambodian refugees and displaced persons, with a view to the agencies undertaking the census, tracing, medical assistance, food distribution and other activities vital to the discharge of their mandate and operational responsibilities; such access should also be provided in Cambodia to enable the relevant international organizations to carry out their traditional monitoring as well as operational responsibilities.

9. In the context of the comprehensive political settlement, the signatories note with satisfaction that the Secretary-General of the United Nations has entrusted UNHCR with the role of leadership and co-ordination among intergovernmental agencies assisting with the repatriation and relief of Cambodian refugees and displaced persons. The Signatories look to all non-governmental organizations to co-ordinate as much as possible their work for the Cambodian refugees and displaced persons with that of UNHCR.

10. The SNC, the Governments of the countries in which the Cambodian refugees and displaced persons have sought temporary refuge, and the countries which contribute to the repatriation and integration effort, will wish to monitor closely and facilitate

the repatriation of the returnees. An *ad hoc* consultative body should be established for a limited term for these purposes. The UNHCR, the ICRC, and other international agencies as appropriate, as well as UNTAC, would be invited to join as full participants.

11. Adequately monitored short-term repatriation assistance should be provided on an impartial basis to enable the families and individuals returning to Cambodia to establish their lives and livelihoods harmoniously in their society. These interim measures would be phased out and replaced in the longer term by the reconstruction programme.

12. Those responsible for organizing and supervising the repatriation operation will need to ensure that conditions of security are created for the movement of the refugees and displaced persons. In this respect, it is imperative that appropriate border crossing points and routes be designated and cleared of mines and other hazards.

13. The international community should contribute generously to the financial requirements of the repatriation operation.

ANNEX 5

Principles for a new constitution for Cambodia

[. . .]

III – AGREEMENT CONCERNING THE SOVEREIGNTY, INDEPENDENCE, TERRITORIAL INTEGRITY AND INVIOLABILITY, NEUTRALITY AND NATIONAL UNITY OF CAMBODIA, PARIS 31 OCTOBER 1991

Australia, Brunei Darussalam, Cambodia, Canada, the People's Republic of China, the French Republic, the Republic of India, the Republic of Indonesia, Japan, the Lao People's Democratic Republic, Malaysia, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America, the Socialist Republic of Vietnam and the Socialist Federal Republic of Yugoslavia,

In the presence of the Secretary-General of the United Nations,

Convinced that a comprehensive political settlement for Cambodia is essential for the long-term objective of maintaining peace and security in South-East Asia,

Recalling their obligations under the Charter of the United Nations and other rules of international law,

Considering that full observance of the principles of non-interference and non-intervention in the internal end external affairs of States is of the greatest importance for the maintenance of international peace and security,

Reaffirming the inalienable right of States freely to determine their own political, economic, cultural and social systems in accordance with the will of their peoples, without outside interference, subversion, coercion or threat in any form whatsoever,

Desiring to promote respect for and observance of human rights and fundamental freedoms in conformity with the Charter of the United Nations and other relevant international instruments,

Have agreed as follows:

Article 1

1. Cambodia hereby solemnly undertakes to maintain, preserve and defend its sovereignty, independence, territorial integrity and inviolability, neutrality, and national unity; the perpetual neutrality of Cambodia shall be proclaimed and enshrined in the Cambodian constitution to be adopted after free and fair elections.

2. To this end, Cambodia undertakes:

(a) To refrain from any action that might impair the sovereignty, independence and territorial integrity and inviolability of other States;

(b) To refrain from entering into any military alliances or other military agreements with other States that would be inconsistent with its neutrality, without prejudice to Cambodia's right to acquire the necessary military equipment, arms, munitions and assistance to enable it to exercise its inherent right of self-defence and to maintain law and order;

(c) To refrain from interference in any form whatsoever, whether direct or indirect, in the internal affairs of other States;

(d) To terminate treaties and agreements that are incompatible with its sovereignty, independence, territorial integrity and inviolability, neutrality, and national unity;

(e) To refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations;

(f) To settle all disputes with other States by peaceful means;

(g) To refrain from using its territory or the territories of other States to impair the sovereignty, independence, and territorial integrity and inviolability of other States;

(h) To refrain from permitting the introduction or stationing of foreign forces, including military personnel, in any form whatsoever, in Cambodia, and to prevent the establishment or maintenance of foreign military bases, strong points or facilities in Cambodia, except pursuant to United Nations authorization for the implementation of the comprehensive political settlement.

Article 2

1. The other parties to this Agreement hereby solemnly undertake to recognize and to respect in every way the sovereignty, independence, territorial integrity and inviolability, neutrality and national unity of Cambodia.

2. To this end, they undertake:

(a) To refrain from entering into any military alliances or other military agreements with Cambodia that would be inconsistent with Cambodia's neutrality, without prejudice to Cambodia's right to acquire the necessary military equipment, arms, munitions and assistance to enable it to exercise its inherent right of self-defence and to maintain law and order;

(b) To refrain from interference in any form whatsoever, whether direct or indirect, in the internal affairs of Cambodia;

(c) To refrain from the threat or use of force against the territorial integrity or political independence of Cambodia, or in any other manner inconsistent with the purposes of the United Nations;

(d) To settle all disputes with Cambodia by peaceful means;

(e) To refrain from using their territories or the territories of other States to impair the sovereignty, independence, territorial integrity and inviolability, neutrality and national unity of Cambodia;

(f) To refrain from using the territory of Cambodia to impair the sovereignty, independence and territorial integrity and inviolability of other States;

(g) To refrain from the introduction or stationing of foreign forces, including military personnel, in any form whatsoever, in Cambodia and from establishing or maintaining military bases, strong points or facilities in Cambodia, except pursuant to United Nations authorization for the implementation of the comprehensive political settlement.

Article 3

1. All persons in Cambodia shall enjoy the rights and freedoms embodied in the Universal Declaration of Human Rights and other relevant international human rights instruments.

2. To this end,

(a) Cambodia undertakes:

- to ensure respect for and observance of human rights and fundamental freedoms in Cambodia;
- to support the right of all Cambodian citizens to undertake activities that would promote and protect human rights and fundamental freedoms;
- to take effective measures to ensure that the policies and practices of the past shall never be allowed to return;
- to adhere to relevant international human rights instruments;

(b) The other parties to this Agreement undertake to promote and encourage respect for and observance of human rights and fundamental freedoms in Cambodia as embodied in the relevant international instruments in order, in particular, to prevent the recurrence of human rights abuses.

3. The United Nations Commission on Human Rights should continue to monitor closely the human rights situation in Cambodia, including, if necessary, by the appointment of a Special Rapporteur who would report his findings annually to the Commission and to the General Assembly.

Article 4

The parties to this Agreement call upon all other States to recognize and respect in every way the sovereignty, independence, territorial integrity and inviolability, neutrality and national unity of Cambodia and to refrain from any action inconsistent with these principles or with other provisions of this Agreement.

Article 5

1. In the event of a violation or threat of violation of the sovereignty, independence, territorial integrity and inviolability, neutrality or national unity of Cambodia, or of any of the other commitments herein, the parties to this Agreement undertake to consult immediately with a view to adopting all appropriate steps to ensure respect for these commitments and resolving any such violations through peaceful means.

2. Such steps may include, *inter alia*, reference of the matter to the Security Council of the United Nations or recourse to the means for the peaceful settlement of disputes referred to in Article 33 of the Charter of the United Nations.

3. The parties to this Agreement may also call upon the assistance of the co-chairmen of the Paris Conference on Cambodia.

4. In the event of serious violations of human rights in Cambodia, they will call upon the competent organs of the United Nations to take such other steps as are appropriate for the prevention and suppression of such violations in accordance with the relevant international instruments.

Article 6

This Agreement shall enter into force upon signature.

Article 7

This Agreement shall remain open for accession by all States. The instruments of accession shall be deposited with the Governments of the French Republic and the Republic of Indonesia. For each State acceding to this Agreement, it shall enter into force on the date of deposit of its instrument of accession.

Article 8

The original of this Agreement, of which the Chinese, English, French, Khmer and Russian texts are equally authentic, shall be deposited with the Governments of the French Republic and the Republic of Indonesia, which shall transmit certified true copies to the Governments of the other States participating in the Paris Conference on Cambodia and to the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized thereto, have signed this Agreement.

DONE at Paris this thirty first day of October, one thousand nine hundred and ninety one.

IV – DECLARATION ON THE REHABILITATION AND RECONSTRUCTION OF CAMBODIA

1. The primary objective of the reconstruction of Cambodia should be the advancement of the Cambodian nation and people, without discrimination or prejudice, and with full respect for human rights and fundamental freedom for all. The achievement of this objective requires the full implementation of the comprehensive political settlement.

2. The main responsibility for deciding Cambodia's reconstruction needs and plans should rest with the Cambodian people and the government formed after free and fair elections. No attempt should be made to impose a development strategy on Cambodia from any outside source or deter potential donors from contributing to the reconstruction of Cambodia.

3. International, regional and bilateral assistance to Cambodia should be co-ordinated as much as possible, complement and supplement local resources and be made available impartially with full regard for Cambodia's sovereignty, priorities, institutional means and absorptive capacity.

4. In the context of the reconstruction effort, economic aid should benefit all areas of Cambodia, especially the more disadvantaged, and reach all levels of society.

5. The implementation of an international aid effort would have to be phased in over a period that realistically acknowledges both political and technical imperatives. It would also necessitate a significant degree of co-operation between the future Cambodian Government and bilateral, regional and international contributors.

6. An important role will be played in rehabilitation and reconstruction by the United Nations system. The launching of an international reconstruction plan and an appeal for contributions should take place at an appropriate time, so as to ensure its success.

7. No effective programme of national reconstruction can be initiated without detailed assessments of Cambodia's human, natural and other economic assets. It will be necessary for a census to be conducted, developmental priorities identified, and the availability of resources, internal and external, determined.

To this end there will be scope for sending to Cambodia fact-finding missions from the United Nations system, international financial institutions and other agencies, with the consent of the future Cambodian Government.

8. With the achievement of the comprehensive political settlement, it is now possible and desirable to initiate a process of rehabilitation, addressing immediate needs, and to lay the groundwork for the preparation of medium- and long-term reconstruction plans.

9. For this period of rehabilitation, the United Nations Secretary-General is requested to help co-ordinate the programme guided by a person appointed for this purpose.

10. In this rehabilitation phase, particular attention will need to be given to food security, health, housing, training, education, the transport network and the restoration of Cambodia's existing basic infrastructure and public utilities.

11. The implementation of a longer-term international development plan for reconstruction should await the formation of a government following the elections and the determination and adoption of its own policies and priorities.

12. This reconstruction phase should promote Cambodian entrepreneurship and make use of the private sector, among other sectors, to help advance self-sustaining economic growth. It would also benefit from regional approaches, involving, *inter alia*, institutions such as the Economic and Social Commission for Asia and the Pacific (ESCAP) and the Mekong Committee, and Governments within the region; and from participation by non-governmental organizations.

13. In order to harmonize and monitor the contributions that will be made by the international community to the reconstruction of Cambodia after the formation of a government following the elections, a consultative body, to be called the International Committee on the Reconstruction of Cambodia (ICORC), should be set up at an appropriate time and be open to potential donors and other relevant parties. The United Nations Secretary-General is requested to make special arrangements for the United Nations system to support ICORC in its work, notably in ensuring a smooth transition from the rehabilitation to reconstruction phases.

LIST OF DOCUMENTS OF SPECIAL INTEREST TO ASIA, NOT REPRODUCED IN THE PRESENT VOLUME

	Text in UNdoc:
UNGA Res. 45/116: Model Treaty on Extradition	A/RES/45/116
UNGA Res. 45/117: Model Treaty on Mutual Assistance in Criminal Matters	A/RES/45/117
UNGA Res. 45/118: Model Treaty on the Transfer of Proceedings in Criminal Matters	A/RES/45/118
UNGA Res. 45/119: Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentence or Conditionally Released	A/RES/45/119
UNGA Res. 46/57: Measures to Eliminate International Terrorism	A/RES/46/51
UNGA Res. 46/59: Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security	A/RES/46/59
Model Agreement between the United Nations and Member States contributing personnel and equipment to UN peace-keeping operations	A/46/185 + Corr.1 (3 June 1991)
[Draft] Handbook on the Peaceful Settlement of Disputes between States	GAOR 46th Session Suppl. 33 (A/46/33) Annex
Framework for a Comprehensive Political Settlement of the Cambodia Conflict (adopted by the Five Permanent Members of the UN Security Council, 28 August 1990). (See *supra*, p. 275)	A/45/472 (or: S/21689) Appendix
Annotated Check-list of Principles on General Rights and Obligations [of States and Regional Economic Organizations, as appropriate in the field of environment and development]. (Note by the Secretariat, Prep Com for the UNCED)	A/CONF. 151/PC 78 (26 July 1991)

Ko Swan Sik et al. (eds.), Asian Yearbook of International Law, 417–418.

	Text in UNdoc:
Principles on General Rights and Obligations [id., *supra*] (Proposal on behalf of the UN members that are members of the Group of 77)	A/CONF.151/PC/ WG.III/L.20 and Rev.1
Principles on General Rights and Obligations [id., *supra*] (Proposal Japan).	A/CONF.151/PC/ WG.III/L.22
Input from the Asian and Pacific Region to the UNCED, Brazil 1992 (Note by the Secretariat, Prep Com for the UNCED)	A/CONF.151/PC/84
Ministerial Declaration on Environmentally Sound and Sustainable Development in Asia and the Pacific, Bangkok 16 October 1990	A/CONF.151/PC/38 and A/CONF.151/PC/84 Appendix 2
Beijing Ministerial Declaration on Environment and Development, 19 June 1991	A/46/293
Singapore Resolution on Environment and Development, 18 February 1992	A/47/118 Appendix
Statement of General Principles of International Environmental Law (adopted by the Special Session of the AALCC on Environment and Development, Islamabad 1 February 1992)	A/CONF.151/ PC/WG.III/5
Joint Communiqué of the twenty-third ASEAN Ministerial Meeting, Jakarta 24–25 July 1990	A/45/389 and S/21455
Joint Communiqué of the twenty-fourth ASEAN Ministerial Meeting, Kuala Lumpur 20 July 1991	A/46/323 and S/22836
The Tehran Declaration: Towards a New Partnership for Development (adopted at the Seventh Ministerial Meetings of the Group of 77, Tehran 16–23 November 1991, in preparation of the eighth session of UNCTAD)	TD/356
Resolutions adopted at the Twentieth Islamic Conference of Foreign Ministers, Istanbul 4–8 August 1991	A/46/486 and S/23055
Colombo Declaration of the Heads of State or Government of the Member Countries of the South Asian Association for Regional Cooperation (SAARC), 21 December 1991	A/47/82 and S/23512

The UN Security Council resolutions on the Iraq-Kuwait War (Nos. 660; 661; 662; 664; 665; 666; 667; 669; 670; 674; 677; and 678) are reproduced in UN Documents S/RES/661-678 (1990)

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