

## II MEETING OF THE GROUP OF LEGAL EXPERTS TO EXAMINE THE CONCEPT OF THE "COMMON CONCERN OF MANKIND" IN RELATION TO GLOBAL ENVIRONMENTAL ISSUES.

*Geneva, March 20 - 22, 1991*

### REPORT

1. The first meeting of UNEP Group of Legal Experts to examine the concept of the common concern of mankind in relation to global environmental issues was held in Malta on 13-15 December 1990. The meeting was organized jointly by the United Nations Environment Programme (UNEP), the Ministry of Foreign Affairs and Justice of Malta and the University of Malta.
2. The second meeting took place in Geneva on 20-22 March 1991 and was attended by Dr. Mostafa K. Tolba (UNEP Executive Director), Prof. Antonio A. Cançado Trindade (Brazil), Prof. Sun Lin (China), Mr. Frank X. Njenga (Kenya), Mr. Ajai Malhotra (India), Prof. David Attard (Malta), Ambassador Juan Antonio Mateos Cicero (Mexico), Mr. Alexandre Timoshenko (USSR), Mr. Amdan Mat Din (Malaysia), Mrs. Iwona Rummel-Bulska (UNEP). The Session had five rounds of discussions.
3. In his introductory statement the Executive Director of UNEP Dr. Mostafa K. Tolba drew the attention of the participants to the growing interest of States in the concept of common concern of mankind particularly within the context of negotiations on legal instruments on climate change and conservation and sustainable use of biological diversity. He identified the following aspects of the concept of common concern of mankind which require further consideration and elaboration by legal experts:

- possible implications of the concept for specific obligations in the relevant international treaties;
- implication for the human right to healthy environment;
- implications with respect to the issues of equitable burden sharing and fair compensation.

Several other issues were identified as requiring consideration by the legal experts:

- elaboration of an Earth Charter as a possible outcome of the United Nations Conference on Environment and Development;
- environmental implications of the Gulf War.

4. During the general discussion on the concept of common concern of mankind, the experts reiterated that the concept still has no legal consequences in terms of rights and duties. It was stressed that the concept should not infringe the sovereign right of States and, in this context, a point was raised whether it is desirable to narrow down the scope of the concept and its application and to confine it to global environmental issues which may cause significant adverse effects upon the environment. It was re-emphasized that the common concern concept was not meant to substitute the concept of common heritage. There was a general understanding that at the current stage the common concern of mankind may serve as a guiding principle rather than as a legal rule. The responsibility and cooperation aspects of the concept were further emphasized.

5. While discussing the practical application of the common concern concept, it was stressed that the current global environmental agenda has been tailored mainly according to the interests of the developed countries. The world community needs an improved and comprehensive international environmental agenda which should also incorporate the issues of particular concern to developing countries, e.g. eradication of poverty, desertification, soil erosion, health, education, nutrition, urbanisation and housing. It was agreed that more attention by the international community would be required with respect to environmental protection of global commons. The provision of a life of dignity to all in a clean, safe and healthy environment should be a matter of common concern of mankind.

6. The subject of equitable and fair burden sharing was discussed in detail at the first meeting of the Group. It was re-emphasized by the experts as an important implication of the common concern concept.

It was agreed that the use of the term "equitable" would be preferable because of its acceptance by general international law and in particular, in relevant decisions of the International Court of Justice. At the same time it was pointed out that the principle of fair burden sharing and compensation could be applicable in some specific cases (e.g. access to biological diversity resources).

7. The experts considered the principles relating to common concern of mankind which could be to be reflected in a possible Convention on Biological Diversity. It was acknowledged that each State had the full sovereign right to exploit its natural resources. It was also felt that the informal innovation by local peoples -the concept of farmer's rights- would also need to be recognized and duly rewarded. The experts stressed that the additional burden on developing countries, due to the protection of their biological diversity, must be recognized in any protection of their biological diversity, and met by new and additional funding to be provided by the developed countries. It was stressed that the benefits of research in biotechnology should be equitably shared and made available to the developing countries which, in most cases, were the original source of the gene pools on which the research was based. The experts further emphasized the importance of recognition of the direct linkage between the conservation of biological diversity in developing countries and access to their bio-materials, with: (a) the access of developing countries to end products made by using their bio-material and to the relevant technologies, and (b) the equitable sharing of the benefits and profits from such use of bio-material with the country of origin of such bio-material. In interpreting equitable considerations one has to be innovative. It should be a legal reflection of a full scale global partnership, which simultaneously seeks to protect the environment while looking to the upliftment of the developing countries.

8. Against the background of the consideration of the issue at their first meeting, the experts further examined of the human right to a safe and favourable environment given the growing attention of the world community to the subject. It was acknowledged that this issue had important implications for developing countries' problems with direct bearing of living conditions such as eradication of poverty, demographic pressures, health and sanitation, education, nutrition, housing and urbanization, and for translating the internationally accepted right to development into reality.

9. A discussion was held on a possible new code of international environmental principles (e.g. in the form of an Earth Charter) to be elaborated by the 1992 United Nations Conference on Environment and Development.

It was felt that the principles and recommendations emanating from the 1972 Stockholm Conference on Human Environment needed to be re-assessed. The experts pointed out that the possible new code should place further emphasis on addressing the issues of environment and development in an inter-related manner. While not incorporating legal obligations such a code could be an authoritative statement of world community on the issues of environment and development.

10. The matter of institutional authority in respect of issues characterized as common concern of mankind was raised. Suggestions as to which institutional authority this may be were considered, such as the UN General Assembly, the Security Council, the International Court of Justice (chambers), and strengthening the role of the UNEP Governing Council.

11. In the deliberations on the issue of the ecological warfare its relevance to the environmental consequences of the Gulf War was examined. It was acknowledged that war produces environmental harm even when the specific objective was not to inflict environmental damage. The following means and methods of the hostile activities harmful to the environment were identified: a) warfare of any kind with environmental implications; b) ecological warfare where the environment its components or ecological processes are used as a weapon. The magnitude of potential environmental damage has expanded considerably as a result of development and availability of more powerful and sophisticated weaponry.

Acknowledging the complexity of defining "ecological warfare" the experts put forward certain preliminary considerations:

- deliberate use of the environment: as a means of destruction, damage, or injury; and
- the extent of environmental damage incurred in relation to the widespread, long-lasting or severe effects.

In this respect the term "ecological aggression" as an alternative to the term "ecological warfare" was suggested. It was recognized that the difficulties to define "ecological warfare" went along with the difficulties to apply existing law. In particular, a possible applicability of the 1977 First Additional Protocol to the 1949 Geneva Conventions on Humanitarian Law and of the 1977 Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques was considered.

12. It was emphasized that ecological warfare could cause injury, not only to the hostile States themselves, but also to third States, and the environment including areas beyond national jurisdiction, to the international

community as a whole, thus making it a common concern of mankind. Within the context of ecological warfare, the problem of ecological refugees was raised: it was suggested that this issue should also be considered in broader terms covering ecologically displaced persons.

13. The experts discussed various options for legal remedies against ecological warfare. There was a proposal to qualify ecological warfare as an international crime. A need was emphasized for a wider involvement of the UN General Assembly with respect to ecological warfare/ecological aggression.

14. It was strongly felt that the UNEP Governing Council should play a prominent role in the study and consideration of the environmental ramifications of ecological warfare/ecological aggression. The appropriateness for the UNEP Governing Council's preventive and remedial actions with respect to ecological warfare/ecological aggression was emphasized.

15. The experts identified the following aspects which would require further consideration, *inter alia*:

- ecological harm caused by warfare of any kind;
- the use of the environment as an instrument of war;
- protection of sites having specific ecological value and vulnerability and of sites with destructive potential to the environment;
- prohibition of certain categories of weapons of mass destruction;
- ecological refugees/ecologically displaced persons;
- damage beyond the territories of the hostile parties;
- implications for common concern of mankind;
- legal remedies and institutional mechanism.

16. In view of the complexity and variety of implications of ecological warfare/ecological aggression, the legal experts felt that a thorough and detailed study of the subject was required. For this purpose the Group could hold two or more meetings in 1991 after the 16th session of the UNEP Governing Council. Such a study would cover a substantive report on ecological warfare/ecological aggression containing not only a detailed investigation of the issue, but also recommendations on possible global responses and the relevant role of the UN system.

17. Upon being requested, the legal experts considered a number of issues concerning the Antarctica which had been raised at the 45th session of

the UN General Assembly. Given the timing of the current negotiations on Antarctica issues and the sensitivity involved the experts felt that certain constraints existed. The experts further felt that these issues should be re-assessed at a later stage, when the results of the forthcoming negotiations become available. However, in the experts' view any serious deterioration of the environment in the Antarctica would be unwise and should be avoided. If appropriate, this issue could also be further examined when this Group of legal experts next meet.

*UNEP Secretariat*