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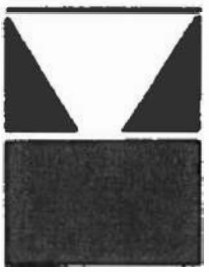

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VOLUME XIV 1989

CONTENTS

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i. to promote all forms of legal studies.
ii. to facilitate the exchange of ideas between local students and their fellow-students abroad.
iii. to serve as a link between the Għ.S.L.'s members, the Faculty of Law and the legal professions.

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EDITORIAL

Discussion on climate change or 'global warming' as a result of rapidly increasing man-made emissions of 'greenhouse' gases is undisputably of great importance for all mankind.

According to visiting lecturer from the Netherlands, **Jan van Ettinger** who delivered a public talk at Valletta late last year, on **Climate and Climate Change,** with special reference to the Oceans in general and the Mediterranean Sea in particular, *"global warming is a man-made phenomenon, it leads to introduction of energy (heat) into marine environment"* which has some deleterious effects. These effects are mentioned by the **Barcelona Convention** under the definition of 'pollution'; these are such effects *"as harm to living resources, hazards to human health, hindrance to marine activities including fishing, impairment of quality for use of sea water and reduction of amenities."*

To this effect, the 1988 **Maltese** initiative at the 43rd General Assembly of the United Nations for **The Protection of Global Climate for Present and Future Generations of Mankind,** is a welcoming step in the right direction.

Mikhail Gorbachev's policy of **glasnost,** or **openness,** has reached a huge dimension on the world-historical stage. The first edition for 1990 of the **International Time,** newsmagazine, describes the process of change that is taking place in the Easter European countries as *"the shell of an old world cracked, its black iron fragments dropping away, and something new, alive, exploded into the air in a flurry of white wings.*

And we have to do our part to encourage this *"flurry of white wings."*

As **law students,** we can support glasnost by communicating our ideas, our discussions, on legal concepts as applied in our law, with law students at the universities of Eastern European countries; and by learning what jurisprudence influences the legal sphere of these countries.

The comparative and theoretical study of some legal concepts in russian criminal law, being published in this edition, is a start; in fact, very few studies of this nature have been compiled up till now.

Indeed, it is a pleasure that besides subscription from Western Europe countries and the U.S., for the first time ever, since its first publication, we intend to market **Id-DRITT** law journal in Eastern European universities as well.

Various are the opinions on marital rape. The contemporary attitude taken up by courts has rectified the principle that the husband could not be prosecuted for raping his wife since it is argued that such a principle, advocated by the 17th-century English jurist **Sir Mathew Hale,** was based on a mistaken belief.

J.C. Barden in an articled entitled *"Marital Rape: Drive for tougher laws is pressed"* published in **The New York Times** in May 1987, maintains that having rectified this old mistake, *"it is now a crime in 25 states for a husband to rape his wife while the two are living together."* In fact, it was the state of South Dakota which was first to make the rape of a spouse a crime, in 1975. To this effect, *"nationally, from 1978 through June 1985... 118 husbands were prosecuted on charges of raping their wives and 104 of them convicted."*

Some believe that marital rape and battering are closely related; but **David Adams,** director of **Emerge** a Boston group that offers counselling services for men who beat their wives, says that not much more than 15 percent admit to forced rape.

Special mention goes to **Mr. Malcolm J. Naudi,** journalist, whose professional advice in editing the interview which I held with **His Honour Chief Justice Prof. Hugh W. Harding,** was greatly appreciated.

M.A.T.

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Articles

PROTECTION OF GLOBAL CLIMATE: A REVIEW OF DEVELOPMENTS *

PROF. DAVID J. ATTARD (1)

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PROTECTION OF GLOBAL CLIMATE: A REVIEW OF DEVELOPMENTS *

PROF. DAVID J. ATTARD (1)

I. Introduction

The international efforts to safegaurd the global climate have led to a dynamic process aimed at developing a legal regime which will ensure the adequate and effective protection of mankind against the adverse effects of climate change caused by human activities. The purpose of this study is to review the main developments which have occurred since the Government of Malta took the initiative to raise the question of climate change at the 43rd Session of the United Nations General Assembly.

The problem of climate change is a complex and intricate one. Clearly it is impossible, in this study, to discuss or even attempt to deal with the scientific aspects of the issue. In this respect, the reader would do well to refer to the proceedings of conferences and scientific literature which have dealt with the phenomenon of climate change. [2]

For the purposes of this study, it is sufficient to note that there is now considerable scientific support for the view that the world will face a warming of the order of 1° to 2° C by 2030. [3] Furthermore, there is considerbale evidence to link this global warming to the emission of the so-called "greenhouse gases" - predominantly carbon dioxide from fossil fuel burning [4] - into the atmosphere. [5] These gases, it is thought, interfere with the manner in which the earth maintains its temperature balance causing it to warm up.

At first sight, the estimated warming does not seem to be too alarming. The seriousness of this increase, however, is best appreciated if one considers the fact that such warming, over such a brief period, is unknown in the history of civilised man. In effect, the activities of the some 5 billion persons, who inhabit planet earth, are producing changes in the composition of the atmosphere which can lead to catastrophic results threatening mankind's very existence.

The need to protect the earth's climate has, over the last twelve months, been raised to the top part of the international political agenda. This widespread consciousness is due to a number of reasons such as the impressive scientific research that has been undertaken; the success in concluding, as will be seen below, a framework convention to deal with another international environmental problem, the protection of the ozone layer; the work of the United Nations system particularly that of WMO and UNEP; the findings of the World Commission on Environment and Development; [6] and the 1988 Maltese initiative at the 43rd General Assembly of the United Nations.

(1) The author is the Chairman of the Malta Advisory Committee on *Climate Change* and advisor on the legal aspects relating to the *protection of global climate*.

II. The Maltese Initiative

On the 22nd August, 1988, the Maltese Government agreed to a proposal requesting the United Nations to concern itself with the need to protect the global climate. [1] This request was conveyed to the Secretary General of the United Nations by Malta's Permanent Representative on the 12th September, 1988. [2] In his letter, the Maltese Representative requested the inclusion of an item on the agenda of the 43rd Session of the General Assembly entitled ***Conservation of Climate as part of the Common Heritage of Mankind.*** [3] The request was accepted by the Assembly's General Committee. [4] Furthermore, in view of the importance of the subject which the Maltese request had raised, it was agreed that a Plenary Meeting of the General Assembly would be convened to discuss the protection of the Global Climate. [5] This meeting was followed by a debate in the Second Committee which is responsible for economic and environmental issues. [6] Some seventy States called for the need to take appropriate measures to protect climate. [7]

On the 23rd November, 1988, a resolution on the matter - presented by Malta and co-sponsored by Australia, Canada, Colombia, El Salvador, Fiji, Finland, India, Jamaica, Morocco, New Zealand, Norway, Papua New Guinea, Poland, Samoa, Solomon Islands, Sweden, Togo, United Kingdom and Vanuata - was adopted by the Second Committee. [8] The said resolution entitled ***Protection of Global Climate for Present and Future Generations of Mankind*** (Resolution 43/53) (*vide* Annex 1) was unanimously adopted without a vote in the Plenary Meeting of the General Assembly on the 6th December, 1988. [9]

Resolution 43/53

The Maltese initiative sought to ensure that the problem of climate change was addressed on a multilateral basis. The global nature of the problem made the United Nations the natural forum within which the international community could formulate an effective and comprehensive strategy to protect climate. [1] Furthermore, whilst significant work - particularly scientific research - both within and outside the United Nations system had been undertaken, [2] there existed no mechanism which could co-ordinate these efforts. [3] In view of the magnitude of the problem and the limited resources available, the Maltese Government sought to establish an international strategy which would enable the world community to review the ongoing work and recommend how best to tackle the problem.

Resolution 43/53 attempts to provide a framework within which mankind's strategy to protect the global climate could be devised. The two main components of this framework are - a legal component and an organisational one.

The first and second substantive paragraphs of the Resolution state that the General Assembly recongnises climate change as "*a common concern of mankind, since climate is an essential condition which sustains life on earth, and determines that necessary and timely action should be taken to deal with climate change within a global framework.*"

Paragrpahs 3 to 9 consider the work relating to climate change undertaken by the appropriate organisations. The international community is urged by

the General Assembly in paragraph 6 to "*treat climate change as a priority issue*" and to encourage further research on the subject.

The General Assembly also endorsed the joint action of WMO and UNEP in setting up a Intergovernmental Panel on Climate Change [4] and called upon all relevant organisations and programmes of the United Nations system to support the Panel's work. [5] This would seem to suggest that the General Assembly considered the IPCC (its first meeting was held whilst Resolution 43/53 was still being discussed) to be the main vehicle for executing its programme of work. This view is supported by the text of the all-important paragraph 10 which spells out in detail what action the General Assembly requested from the WMO Secretary General and the UNEF Executive Director. It is clearly stated that such action should take place "*through the Intergovernmental Panel on Climate Change.*"

In view of its central importance, paragraph 10 is reproduced hereunder:

"*10. Requests the Secretary-General of the World Meteorological Organisation and the Executive Director of the United Nations Environment Programme, through the Intergovernmental Panel on Climate Change, immediately to initiate action leading, as soon as possible, to a comprehensive review and recommendations with respect to:*

(a) The state of knowledge of the science of climate and climatic change;
(b) Programmes and studies on the social and economic impact of climate change, including global warming;
(c) Possible response strategies to delay, limit or mitigate the impact of adverse climate change;
(d) The identification and possible strengthening of relevant existing international legal instruments having a bearing on climate;
(e) Elements for inclusion in a possible future international convention on climate."

An examination of the work undertaken by the IPCC demonstrates that it has become the main forum wherein the action referred to in paragraph 10 is effected. [6] At its first Session - which commenced on the 9th November, 1989 - it was decided to establish three working groups. Their tasks were the following: Working Group 1 was to report on the assessment of available scientific information on climate change; [7] Working Group 2 was to consider the element of environmental and socio-economic impacts of climate change; [8] and Working Group 3 was to examine the formulation of response strategies to climate change. [9] It is the work of the third Group which is particularly relevant to this review; the consideration of the legal aspects of climate change; is the responsibility of this Group.

IV. Canadian Initiatives

Canada has played an important role in the quest to protect the world's climate. Until the first few months of 1989, the Canadian position favoured not a climate convention but one to protect the earth's atmosphere. The position is reflected in the Conference Statement issued at the 1988 ***Conference on the Changing Atmosphere: Implications for Global Security.*** [1] Whilst recognising the need to protect the earth's climate, the Statement accepted the

offer of the Canadian Prime Minister to host a meeting of law and policy experts to elaborate "*the principles to be included in an umbrella / framework Convention on the Protection of the Atmosphere...*" [2]

The Meeting was held in Ottowa between the 20th and the 22nd February 1989. At this Meeting it became clear that a number of participants did not agree with the Canadian position. They were anxious, at least for the time being, not to seek an 'Atmosphere Convention', as they feared it could lead to the same protracted negotiations which the Third United Nations Conference on the Law of the Sea faced. The Meeting Statement adopted a compromise which gave the elements for the development of a Climate Convention and protocols, but which also dealt with the elements for an Atmospheric Protection Convention. [3] Canada now fully supports the preparations for the negotiations of a Climate Convention. [4]

V. The Declaration of The Hague

On the initiative of Prime Ministers Brudtland, Lubbers and Rochard, twenty-four state-leaders met, at The Hague on the 11th March, 1989, to consider how the earth's endangered atmosphere could best be protected. At the end of this summit, the **Declaration of The Hague** (*vide* Annex 2) was passed. [1] This innovative document recognised *inter alia* the dangers linked to the "*warming of the atmosphere.*" [2] It noted that the issue was being addressed by the IPCC, and that Resolution 43/53 recognised "*climate change as a common concern of mankind.*" [3] All States and international organisations were invited to "*join in developing, taking into account studies by the IPCC, the framework conventions and other legal instruments necessary to establish institutional authority and to implement the other principles ... to proctect the atmosphere and to counter climate change, particularly global warming.*" [4]

Whilst there was widespread agreement amongst the "Hague participants" on the need for urgent action, the approach to be adopted was controversial. It was generally accepted that the problem of atmospheric environmental degradation called for new and innovative approaches, largely "*through the development of new principles of international law including new and more effective decision-making and enforcement mechanisms.*" [6] The question as to what entity should be responsible for developing and introducing these new approaches proved to be very controversial. Some States strongly favoured the establishment of a new international authority which would be primarily responsible for protecting the earth's atmosphere. It was felt that the current existing institutions were incapable of dealing with contemporary environmental problems. Other States refused to endorse this idea. [7] They demonstrated a strong reluctance in accepting to create "*yet another institution.*" In their opinion, UNEP and similar entities could perform the functions envisaged by the Declaration if they were "strenghtened" to enable them to deal effectively with environmental problems and to ensure the global implementation of solutions.

This controversy, which remained unsolved, is reflected in paragraph 10(a) of the Declaration. The signatories agreed to develop within the United Nations

framework *"new institutional authority, either by strengthening existing institutions or by creating a new institution, which in the context of the preservation of the earth's atmosphere, shall be responsible for combating any further global warming of the atmosphere..."* [8]

A number of States strongly expressed the view that any effective decision-making mechanism could not depend on the achievement of a consensus. It was felt that if the unanimous support of the world community was to be sought every time a decision had to be taken, this would be time consuming. The need for urgent solutions, they stressed, required prompt decision taking. Furthermore, due to the nature of the problems envisaged effective solutions required global application. Consequently, they envisaged situations where even dissenting States would be required to implement decisions taken. The Declaration, in paragraph 10(a), reflects this view by acknowledging the need to adopt *"such decision making procedures as may be effective even if, on occasion, unanimous agreement has not been achieved"*

The Declaration also deals with two areas which are of particular importance to the climate debate.The first relates to the need to take measures with respect to *"emissions that effect the atmosphere."* [10] The second relates to the question of responsibility and liability. It was recognised that most of these emissions currently originate in the industrialised States [11] which also had the greatest resources to deal with the problem effectively. The Declaration stressed that the international community *"especially industrialised nations have special obligations to assist developing countries which will be very negatively affected by changes in the atmosphere although the responsibility of many of them for the process may only be marginal today."* [12]

VI. UNEP

As already been stated, UNEP and WMO have played a vital role in ensuring that the plan formulated in the United Nations Resolution 43/53 is carried out. [1] It was to be expected that the issue of climate change would be extensively discussed at the 1989 Meetings of their governing bodies. In this section, it is intended to review the work of the Fifteenth Session of the UNEP Governing Council as reflected in its Decision 15/36. [2]

Over a hundred States participated in the Council debate on climate change. Their deliberations led to Decision 15/36 entitled **Global Climate Change** (*vide* Annex 3). When compared to its former Decision 14/20 of June 1987, on the same subject, the latest Decision demonstrates clearly the catalytic effect of the United Nations Resolution 43/53. After recalling the General Assembly's Resolution, the Decision enlists the numerous international meetings concerned with climate change which occurred after the Resolution's adoption. [3]

Through its Decision 15/36, the Governing Council authorised the UNEP Executive Director to, *inter alia*, support the work of the IPCC. [4] It noted that the Panel intended to present its first *interim* report not later than October 1990 [5] and requested the UNEP Executive Director, in co-operation with the WMO Secretary General *"to begin preparations for negotiations on a framework convention on climate."* [6] Whilst the commencement of the said

preparations was not controversial, the date when the actual negotiations were to start was. Some States wanted to see the work of the IPCC finalised before negotiations could begin. The majority preferred to authorize UNEP to start negotiations after the *interim* report of the Panel was adopted, that is not later than October 1990. Decision 15/36 adopted the latter view and recommended that the negotiations on a framework climate convention *"should be initiated as soon as possible immediately after the interim* report." [7]

The preparation for negotiations have already started. The executive heads of UNEP and WMO established a *"task force"* made up of representatives of WMO and UNEP, the co-ordinator of the Second World Climate Conference, and experts. [8] The main function of this body is to advise both organisations on the implementation of the decisions of their governing bodies with respect to the preparations for the negotiations leading to a climate convention.

It is noteworthy that the WMO Executive Council at its June 1989 Meeting called upon the Organisation to convene the Second World Climate Conference between the 12th and 21st November, 1990. [9] This Conference which will meet only a few weeks after the presentation of the IPCC *interim* report, will provide a major opportunity to examine the *interim* report.It is envisaged that the Conference will have two "interlocking segments." [10] One would be of a technical nature, wherein the scientific consideration and debate on climate issues would take place. The other segment would provide a forum for Ministerial policy discussions. [11]

VII. Other International Fora

The problem of climate change has been discussed at a number of other international meetings. In this section, it is proposed to review briefly the relevant provisions of the final documents which were adopted by the said meetings.

Between the 7th and 10th November 1988, representatives from developed and developing States, as well as members of the scientific and industrial community, met at the **World Congress on Climate and Development** in Hamburg. This Congress gave particular attention to the issue of climate change and its economic, social and technological implications. [1] In its Final Conclusion, the Congress expressed the urgent need for political and scientific leadership as well as a need for industrial and consumer action to reduce the emission of "greenhouse gases." [4] It supported the negotiation of a "global convention" designed to protect the climate. [3] The need for such a convention was particularly supported by the NGOs attending the Congress. They envisaged a convention - to be negotiated by 1992 - which aimed at stabilising "*the concentration of greenhouse gases.*" [4] Four participants at the Congress supported the idea of developing a protocol - within the framework of the ***Geneva Convention on Long-Range Transboundary Air Pollution*** - [5] to control *inter alia* the emissions of volatile organic compounds. [6]

The problem of global warming and climate change, as it effected developing States, was considered at a conference held in New Delhi between the 21st and 23rd February, 1989. [7] The Conference Statement refers to the "A Maltese initiative at the 1988 United Nations General Assembly ..." [8] and

noted that the initiative "*gained global support.*" [9] This widespread support was interpreted "*as an expression of international concern over the problem*" of climate change. [10] The Statement gave "*particular relevence*" to the call in the Maltese initiative for "*the initiation of work on international legal instruments to address climate change.*" [11] Nevertheless, it is significant that the New Delhi Conference fell short of fully supporting the conclusion of a framework climate convention.

Closely related to the problem of climate change is the serious depletion of atmospheric ozone. At the time of the conclusion of the 1985 **Vienna Convention, for the Protection of the Ozone Layer** [12] and the 1987 **Montreal Protocol on Substances that Deplete the Ozone Layer** [13], there was not widespread recognition of this important relationship. [14] Increasingly, States are becoming aware of the fact that certain ozone depleting substances are "greenhouse gases" which lead to global warming and contribute to climate change. The Chairman's message from the 1989 **London Conference on Saving the Ozone Layer** noted that action to protect the ozone layer will, at the same time, reduce the impact of global warming. [15]

The characterisation of some ozone depleters as "*powerful greenhouse gases leading to global warming*" was recognised by Governments and the European Communities represented at the First Meetings of the Parties to the **Vienna Convention and the Montreal Protocol** in the **Helsinki Declaration on the Protection of the Ozone Layer** (*vide* Annex 4) adopted on the 2nd May, 1989. [16] It is significant that in their efforts to phase out the production and consumption of CFCs controlled by the Montreal Protocol, the "greenhouse effect" of CFCs was widely recognised. In effect, this relationship must also be considered in the light of developing a legal framework to protect the climate. Should the regime to protect the global climate from the said ozone depleting substances be developed within the proposed climate convention or should it fall under the 1985 **Vienna Convention**? It is suggested that the latter course of action would be more reasonable. It would seem safe to expect that the development of such a regime would take place faster under the already established **Vienna Convention** framework.

It is significant that Decision 15/36 of the UNEP Governing Council recommends that Governments should accede to the **Montreal Protocol** and comply with its regulatory measures. [17] The Decision notes that the internationl community's ultimate objective should be "*as far as possible, completely, eliminating the emission of the controlled substances to better protect the ozone layer and the global climate from change, consistent with the Helsinki Declaration ...*" [18]

The 1989 **Francophone Summit** adopted a resolution on the environment (*vide* Annex 6). [19] In this resolution, the participants expressed the view "*that in order to ensure the implementation*" of the "Hague Declaration principles", "*negotiations must start as soon as possible to find solutions to the problems related to global warming, by emphasising the need for a convention on the protection of global climate ...*"

In the **Economic Declaration** (*vide* Annex 6) issued at the **Summit of the Arch** - wherein the Heads of State or Government of seven industrial nations

and the President of the European Communities' Commission participated - a number of environmental issues were considered. [20] It was noted that agreement had to be achieved over the urgent necessity of concluding a "*framework or umbrella convention on climate change*" setting out general principles or guidelines. [21] This Convention, it was stated, could "*immobilise and rationalize the efforts made by the international community.*" [22] The Summit also referred to the need to develop "*specific protocols containing concrete commitment*" which could be fitted into the "*framework as scientific evidence requires and permits.*" [23] Even the Non-Aligned Movement called for a climate convention. At its **Ninth Conference of the Heads of State or Government of the Movement of Non-Aligned Countries,** *held in September 1989, it was agreed to call "for the preparation and adoption of an international convention on the protection and conservation of the global climate on an urgent basis."* (*vide* Annex 7)

The Heads of Government of the Commonwealth, at their 1989 meeting in Malaysia, issued the **Langkawi Declaration on Environment.** (*vide* Annex 8) Their deliberations leading to this Declaration demonstrated a difference in the approach to the climate change issue. Some States preferred to see a meeting declaration which would concentrate on climate change as an environmental problem to which an urgent and effective solution was needed. Other states wanted to consider all environmental issues, including climate change, and their relationship to the economic development process. The **Langkawi Declaration** tends to reflect the latter view. [24] Nevertheless, it does contain statements of particular significance to the climate change debate.

The "*greenhouse effect (which may lead to severe climate changes that could induce floods, droughts and rising sea levels)*" was described as one of the main environmental problems facing the world. [25] The Heads of Government called for "*the early conclusion*" of a climate convention and applauded "*the efforts of member governments to advance the negotiation of a framework convention under United Nations auspices.*" Support was also expressed for the work of the IPCC and the **Commonwealth Experts Group's Report on Climate Change.** [27]

In its Report [28], the Experts Group produced a realistic and effective Action Plan for the Commonwealth. [29] With respect to developing international legal instruments to deal with climate change, the Group was firmly in favour of climate convention. [30] It noted that the United Nations General Assembly "*adopted a resolution introduced by Malta*" on the protection of climate. [31] The Report pertinently points out that whilst it could identify signs of progress in the efforts to develop a regime to protect climate, this should not dealy action at national or international level to "*enhance the knowledge of the greenhouse phenomenon ... and to develop and apply energy conservation*" measures. [32]

The Report also addressed the question of developing specific protocols within the climate convention framework. It rightly noted that the negotiatiion of protocols to deal with such matters as the application of quantative limits of carbon dioxide emissions "*is likely to take time.*" [33] In this respect, it referred to the conflicting interests between different energy producers, the need

to develop further technology and the funding of technology transfers. [34]

At the first Meeting of the UNEP / WMO Task Force, held on the 25th October, 1989, it was decided that, whilst the framework climate convention should be based upon the model established by the 1985 **Vienna Convention,** it would be useful to attempt to go beyond this model and propose practical and effective measures to be inserted in the future convention. Three areas were identified: (1) utlising existing technology to improve energy efficiency particularly in the electricity industry supply and use sectors; (2) intitiating rational forestation programmes; and (3) establishing mechanisms to assist developing States to deal with climate change.

The Task Force agreed to avoid duplicating the work of the IPCC, and to attempt to complement it by offering guidance on political considerations and by recommending a timetable of activities leading to the elaboration of a climate convention. It was the opinion of the Task Force that the Convention should be adopted before the end of 1991.

Significant progress towards assessing clearly the extent of political support for the various strategies to protect the global climate was made at the **Ministerial Conference on Atmospheric Pollution and Climate Change** held in Noordwijk, the Netherlands (*vide* Annex 9). [35] At this Ministerial Conference, senior representatives of sixty States considered in detail the problem of man made changes to the global climate. The Conference tackled extensively the question of limiting carbon dioxide emissions. The issue proved to be controversial with the U.S., U.K. the U.S.S.R. and Japan refusing to adopt a Dutch proposal for stringent controls. The compromise adopted by the Declaration included a recognition for the need to stabilize, while ensuring stable development of the world economy, carbon dioxide emissions. This stabilization, was to be achieved "*as soon as possible at levels to be considered by the IPCC and the Second World Climate Conference ...*" [36]

With respect to the development of a climate convention, the Conference considered a **Background Paper on Elements of an International Convention on Climate** prepared by Canada and Malta. All States were urged to assist in the ongoing work with respect to the compilation of elements for a framework climate convention, so as to ensure that negotiations could start as soon as possible after the adoption of the **IPCC Interim Report.** [37] It envisaged the adoption of the said convention as early as 1991 and at the latest by the time of 1992 **United Nations Conference on Environment and Development.** [38]

It is noteworthy that the **Noordwijk Declaration** requested that the preparations for the Climate Convention should take into account the 1985 **Vienna Convention** and the 1987 **Montreal Protocol.** [39] The preparations were also to take into account "*innovative approaches*" which may be required in view of the complex character of the climate change problem. [40]

At a meeting of representatives from small States held in the Maldives between the 17th and the 18th November, 1989, particular attention was given to the quesiton of sea-level rise (*vide* Annex 10). The issue of climate change is closely related to this question which is of a special interest to small island states. There is widespread agreement that global warming will bring about a rise in the global sea level. It has been concluded that the "best" estimate

is that which considers a rise of between 17 and 26 cm by 2030, corresponding to a 1° to 2° C warming over the same period. [41]

VIII. Malta's Views on the Legal Regime to Protect Global Climate

Malta proposed the idea of a framework convention on climate as early as the 27th October, 1988. On that day, in a Statement to the Second Committee of the United Nations General Assembly, the author - on behalf of the Government of Malta - expressed the view that the ongoing international efforts to protect the global climate should lead to the adoption of a framework international convention on climate. [1]

On the 6th of February, the author - on behalf of the Government of Malta - presented the IPCC with a report entitled **Possible Elements For an International Legal and Institutional Strategy on Climate Change and Global Warming.** In this study, the Maltese Government reiterated its support for a framework international convention on climate. It proposed the 1985 **Vienna Convention** as a model to follow in the drawing up of the climate convention. The Report stated that the Convention could provide a legal and institutional framework within which national, regional and international measures to deal with the problem of climate change can be developed, co-ordinated and implemented. The Convention would lay down general principles with respect to climate, establish institutional mechanisms to co-ordinate the international management of the problem of climate change, and provide a procedure for the peaceful settlement of disputes.

Malta proposed specific elements for inclusion in a framework convention on climate in a document on legal measures and processes presented to the IPCC Working Group III. The suggested elements include:

(I) Preamble incorporating the following items:

(a) A brief introductory description of the problem; (b) Recognition and endorsement of the work carried out and being undertaken partiuclarly by the IPCC and related groups; (c) References to:
- UN General Assembly Resolution 43/53;
- Principle 21 of the **Stockholm Declaration;**
- The fundamental right not to be subjected, directly or indirectly, ot the adverse effects of climate change (as defined for the purposes of the Convention);
- Relevant legal instruments.

(d) Emphasis of the need to balance the sovereign right of States to exploit their natural resources with their duty to protect and conserve climate through limiting emission and increasing the absorpiton of "greenhouse gases" for the benefit of present and future generations. (e) A statement on the importance of technology transfer for purposes of undertaking economic activities (including energy conservation measures) to limit emissions of "greenhouse gases", taking into account, in particular the need to assist in the economic development of the developing countries. (f) Recognition of the need to increase

research to further develop the scientific knowledge of climate and climate change. (g) A statement urging the further study of social and economic impacts of climate change. (h) Affirmation of the need to develop strategies to limit, reduce and as far as possible prevent climate change, bearing in mind the special circumstances of States.

(II) A section on Definitions would follow, including, *inter alia*, definitions of: Climate, Atmosphere, Climate Change, Adverse Effects.

(III) The substantive text would deal with ***inter alia:***

(a) The recognition that Man has a fundamental right not to be subjected, directly or indirectly, to the adverse effects of climate change (as defined for the purposes of the Convention), and that therefore,
- States bear a solemn responsibility to protect and improve the composition of the atmosphere in order to protect and conserve climate for the benefit of present and future generations;
- climate change is a common concern of mankind;
- States have the sovereign right, in accordance with the United Nations Charter, to exploit and utilize their climate persuant to their environmental policies, and subject to their obligations under international law;
- States are obliged to exploit and utilize their environment in a reasonable and equitable manner so as not to cause climate change;
- States are not to threaten, or cause climate change;
- climate can only be exploited and utilised for peaceful purposes.

(b) The need of all Parties to take all appropriate measures to limit, reduce and, as far as possible, prevent climate change, including the development and implementation of appropriate policies and strategies.

(c) The obligation of the Parties to undertake not to transfer adverse effects on the climate into any other adverse environmental effects.

(d) The identification of the major factors contributing to climate change including particular references to ''greenhouse gases'', deforestation and changing land-use patterns.

(e) The need to strengthen the relevant existing international legal instruments, which have a bearing on climate, and to conclude new protocols to implement the various priniciples / provisions and measures listed in the Convention.

(f) The need to provide for the stabilization of carbon dioxide emissions.

(g) Provisions dealing with international co-operation which would include a general obligation to co-operate in the implementation of measures as stated above, and articles dealing with:

- Free exchange of scientific, technological, socio-economic and other information;
- Co-operation in facilitating the development and transfer of relevant technologies and the provision of technical assistance, bearing in mind the needs of the developing countries;
- Research and systematic observations, their collection and transmission.
- Prior notice and environmental impact assessment of planned activities;
- Consultations; and
- Consideration of a Protocol to establish a World Atmosphere and Climate Fund.

(h) An article allowing Parties to enter bilateral, multilateral or regional agreements / arrangements provided that they are not incompatible with the Convention.

(i) The recognition of the need to provide mechanisms to:
- ensure widespread and general respect for the principles enunciated in the Convention;
- develop and conclude supplementary Protocols;
- implement and enforce measures and standards provided for under the Convention and its supplementary Protocols;
- ensure that relevant legal instruments remain adequate to cope with the problem of climate change;
- regulate relevant activities occuring in areas which fall outisde national jurisdiction; and
- develop strategies dealing with other atmospheric problems.

(j) The following mechanisms would be established under the proposed Convention:

1. A Conference of the Parties, on the lines of the **Vienna Convention**
2. A Secretariat, also on the lines of the **Vienna Convention;** and
3. An executive committee / extended bureau / monitoring body. This body would have surveillance, regulatory and decision-making functions, and would be composed of the Contracting Parties on an rotation basis; the status of such a body would necessarily embody a political aspect, and should therefore be established at Ministerial level.

(k) Apart from the articles establishing the mechanism in (j) above, further articles would provide for:
- Transmission of information on implementation measures adopted by Parties, to the Conference of the Parties through the Secretariat;
- Assessment and review of limitation, reduction and prevention measures;
- Non-compliance provisions.

(l) An article would provide for the adoption of protocols.

(m) Articles, on the lines of the **Vienna Convention,** would provide for the amendment of the Convention and Protocols, and the adoption and amendment of annexes.

(o) Settlement of disputes; this section would include a compulsory system of peaceful settlement of disputes. To this end, States would be obliged to reach a solution by negotiation, inquiry, meditiation, conciliation, arbitration, judicial settlement, resort to regional agencies, or arrangements, or other peaceful means of their own choice. Where no settlement could be reached, the Convention should provide for the following mechanisms to achieve binding decisions: The International Court of Justice; A tribunal for Atmospheric Alterations (such a tribunal could be established on an *ad hoc* basis); A specially appointed arbitration tribunal.

(p) Usual final clauses, as in the **Vienna Convention,** would include:
- Signature
- Ratification
- Accession
- Right to Vote
- Relationship between the Convention and its Protocols
- Entry into Force
- Reservations
- Withdrawal
- Depositary
- Authentic Texts

In its Report, Malta expressed the view that entry into force of the Convention should reflect the realities of the problem of climate change, by requiring the general participation of countries which emit significant levels of ''greenhouse gases'', or have the potential to do so in the forseeable future (for example, due to population size).

IX. Common Concern of Mankind

If an effective solution to the problem of climate change is to be secured, it is important that certain human activities - such as fossil-fuel bruning - are regulated. These activities usually occur within a State's boundary. it is therefore reasonable to expect - at least for the time being - that any internationally accepted regulation would generally depend largely on the national enforcement of limitations, standards and measures. A major international problem could occur when a State allows the unregulated conduct of activities - within its national jurisdiction - which cause, or are likely to cause climate change resulting in significant adverse environmental, economic or social effects beyond its frontiers. Furthermore, the global nature climate requires that protective measures should enjoy general application if they are to be truly effective. States (or even a State), which refuse to adopt internationally agreed measures, could not only cause transboundary harm but also render futile the international community's efforts to protect the global climate.

The problem was pertinently described by the then Maltese Foreign Minister, Dr V. Tabone, in his opening speech at the General Assembly's plenary session on climate:

> *"The conservation of the global climate system - which 'involves the atmosphere, oceans and land surface (including vegetation) and cryosphere, all of which interact in complex ways over a vast range of time-scales' - is so essential and vital to the very existence of human life that it cannot be left to individual States to unilaterally decide what, if at all, conservation measures should be taken. The fundamental human right to life, and the need to conserve climate as one of the pre-requisites of human life, cannot be limited by political boundaries, and therefore requries an international strategy which transcends State sovereignty in the interests of present and future human generations".* [1a]

International law has a vital role to play in the efforts of mankind to protect the world's environment, including its climate. It it particularly useful in dealing with activities which cause transboundary harm. The **Trail Smelter** case [1]; the **Corfu Channel** case [2]; and the **Lake Lanoux** case [3] involved disputes where the matter was considered.

The influence of general principles of law in the solution of such disputes is significant. In the **Trail Smelter** case, the tribunal held;

> *"Under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence".* [4]

Reference can also be made to Principle 21 of the **Stockholm Declaration on the Human Environment** wherein States, in exploiting their own resources, are held responsible *"to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limites of national jurisdiction"*. Support for and interpretation of this principle can be found in U.N. Resolutions [5] and State practice [6]. The 1982 **Law of the Sea Convention** incorporates this principle in Article 192 (2). [7]

In view of the magnitude and nature of environmental degradation - including climate change - the harm caused is generally not just transboundary but global in character. Consequently any international regulation has to be undertaken within a global framework if it is to be effective. It is submitted that this requirement emphasizes the urgent need to develop and codify the relevant international rules. This need has, in recent months, been recognised in a number of important fora. The 1988 **Toronto Conference on the Changing Atmosphere** in its final statement called for:

> *"the progressive development and codification of the principles of international law taking into account the general principles of law set out in the Trail Smelter, Lake Lanoux, Corfu Channel cases, Principle 21 of the 1972 Declaration of the United Nations Conference on the Human Environment ..."* [8]

A similar position was taken by the **Declaration of The Hague:**

"Therefore we consider that, faced with a problem the solution to which has three salient features, namely that it is vital, urgent and global, we are in a situation that calls not only for implementation of existing principles but also for a new approach, through the development of new principles of international law including new and more effective decision making and enforcement mechanisms". [9]

Resolution 43/53 in its operative paragraph 10 requested that action should be taken to make, "as soon as possible" a comprehensive review and recommendations with respect to ***inter alia*** the identification and possible strengthening of relevant existing international legal instruments having a bearing on climate, and the proposal of elements for inclusion in a future international convention on climate.

Significantly, the U.N. Secretary General in his 1987 **Report on the Work of the Organisation** stated:

"There is also the need to address the question of the environment as a totality and to establish clear and equitable norms for the environmental behaviour of States through international law". [10]

In this respect, it is pertinent to refer to the concept of the common concern of mankind which was introduced by Malta in the General Assembly deliberations on the protection of the global climate. In the above-mentioned intervention, the Maltese Foreign Minister, Dr V. Tabone explained:

"Climatic change is a common concern of mankind, which is a corollary of the common heritage doctrine, requiring a conservation-strategy the application of which cannot be restricted by political boundaries, and must necessarily have as its primary objective the common good of mankind. In short, what Malta is today proposing is a development and an elaboration of the doctrine of the Common Heritage of Mankind for its application to a new area - Climatic Change particularly global warming".

"We must, Mr President, ensure that a balance is achieved between the short-term requirements and the future needs of mankind. The application of the common concern of mankind principle to climate ensures that climate is a natural resource which can be utilized by each State within its territory in the process of its social and economic development, but at the same time, it cannot be tampered with or abused of at the expense and to the detriment of mankind". [11]

Certain aspects of the above-mentioned Maltese statement are reflected in Resolution 43/53. In the first operative paragraph of the Resolution, the General Assembly unanimously characterized climate change as a "common concern of mankind". [11a] On the basis of this recognition, it may be asked: can a State legitimately refuse to implement internationally agreed measures to protect the climate such as limiting carbon dioxide emissions? Can it claim that the implementation or otherwise of the said measures within its territory is a matter to be decided exclusively by the State itself? Can it not argue that this matter falls essentially within its domestic jurisdiction particularly as such limitations could have a negative effect on the growth of its economy?

Any international process, which attempts to develop a legal regime to effectively protect the global climate, must address these questions. It will have

to consider whether the principle of domestic jurisdiction can be used to prevent the implementation of internationally agreed measures and thereby risk rendering such measures futile.

It is generally agreed that the meaning of domestic jurisdiction is one which can change over a period of time. It is not immutable as the Permanent Court of International Justice noted some sixty six years ago in the **Tunis and Morocco Nationality Decrees** case: *"The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations".* [12] In fact, over the last decades there has developed general support for the idea that certain matters, such as human rights, no longer fall within the "domain reserve". In such cases, action taken by the international community in respect of activities occurring within a State may be legitimate.

Does the characterisation of climate change as a "common conern of mankind" [13] tend to suggest that in the General Assembly's view climate change has been elevated from the "reserved domaine" of States? It is submitted that whilst it would be premature - at least for the time being - to give an affirmative answer, there seems to exist considerable evidence to suggest that the position may change. In Resolution 43/53, the U.N. General Assembly explained that it considered climate change to be *"a common concern of mankind"*, as *"climate is an essential condition which sustains life on earth".* [14] The implication seems to be that since the phenomenon of climate change threatens the existence of life itself, it is a matter which concerns mankind.

This approach links the whole issue of climate change with the protection of human rights. The Maltese Foreign Minister, in the above-mentioned Statement, clearly supported this linkage: *"... The global climate system ... is so essential and vital to the very existence of human life that it cannot be left to individual States to unilaterallly decided what, if at all, conservation measures should be taken".* [15]

The right to live and atmospheric degradation are linked in the **Declaration of The Hague** which in its opening paragraphs stated:

> *"The right to live is the right from which all other rights stem. Guaranteeing this right is the paramount duty of those in charge of all States throughout the world.*
>
> *Today, the very conditions of life on our planet are threatened by the severe attacks to which the earth's atmosphere is subjected".*

In his address to an international conference held under the auspices of the Conference on Security and Co-operation in Europe, the U.S. representative stated:

> *"... the degradation of any part of the natural environment, wherever located, diminishes us all. As President Bush expressed it recently in Budapest ... 'our shared heritage is the earth, and the fate of the earth transcends borders - it isn't just an East-West issue' ..."* [16]

The global character of the climate system tends to support the view that climate change is a matter of "international concern." [16a] As has been previously noted, any effective protection of the climate system ultimately

depends on the global application of agreed measures. It is noteworthy that in Resolution 43/53, the Assembly determined that "necessary and timely action should be taken to deal with climate change within a global framework;" [17]

A number of distinguished persons have commented on the "common concern of mankind" concept. In his analysis of Resolution 43/53, the Prime Minister of Malta Dr. E. Fenech Adami stated:

> *"We believe that this Resolution will provide the basis for global action to conserve the world's climate. Of particular importance is the unanimous recognition by the world community that climate change is the common concern of mankind. Malta feels that this concept lays the ground for the development of a new principle of international law. Such a principle would allow the international community to concern itself with activities which cause, or threaten to cause, adverse climate changes even when such activities occur within a State's frontiers."* [18]

The significance of the "common concern" concept was also considered by Dr M. Tolba, the Executive Director of UNEP:

> *"... I was in New York for only 48 hours introducing some subject to the General Assembly and I went back to Nairobi. There I started getting the signals that there was a development and evolution of the idea of common heritage into another new one, 'common concern'. Rather than being worried, I started being scared as this would really get the whole thing upside down. Everybody would look at the issue of 'common concern' in a completely different vision. 'Common concern' does mean that every human being under the sun can have his finger and poke into pie of everybody else and I could not imagine that anybody could accept that. 'Common heritage' was for me probably even more acceptable than 'common concern' and here comes the General Assembly and accepts for the first time a principle which, when it comes to codification of the law, probably not in a year or two but in three, four years to come, it will be felt very strongly. This significant move took place in the General Assembly through the Maltese initiative which I termed a 'most remarkable initiative."* [19]

The potential of the 'common concern' concept has been noted by the international environmental law specialist, Professor P. Birnie.

> *"This variant of the common heritage approach could provide the basis for new conceptual treaty-making and insitutional initiatives, which are now being studied by an Intergovernmental Panel on Climate Change."* [20]

It is submitted that at least two major obstacles must be surmounted before the matter of climate change may be considered to have emerged from a State's reserved domain. The first relates to the scientific controversy which still surrounds climate change and its effects. The work of the IPCC should provide an authoritative report on the best scientific consensus on the phenomenon and its effects. Before this is achieved there can be little hope of a political consensus on the policy responses to climate change.

The second obstacle is the question of funding activities to limit, reduce, and prevent climate change. [21] Briefly, the developing States argue that they should be compensated for undertaking these activities when they have a negative effect on economic development. [22] The problem has been pertinently described by Sir Crispin Tickell, the British U.N. Permanent Representative:

> *"... because all change tends to be disruptive, nothing will be cheap. We accept that the industrial countires, who unwittingly created the problem, will have to give leadership in discouraging the further build-up of greenhouse gases. We also accept that these countries will have to find means to help others leapfrog over the technologies which have caused the problem, and give the necessary help, some through multilateral, some through bilateral channels."* [23]

As these obstacles are specific to the problem of climate change, it should be stressed that there is nothing to impeed the concept of the "common concern of mankind" from being applied to other areas. Indeed, the **Langkawi Declaration on Environment** refers to "the current threat to the environment" as a "common concern of mankind.

The issues discussed above are intimately related to the so-called Doctrine of Obligations ***Erga Omnes***. In the **Barcelona Traction, Light and Power Co.** case, the International Court of Justice tended to recognise the possibility that a State may have obligations towards the international community as a whole, i.e. obligations *erga omnes*. [24] The doctrine was held to apply to aggression, genocide and basic human rights. If this doctrine is accepted, then (at least in respect of the matters to which it applies) it would give further support to the "common concern" concept. For it would seem that States - as members of the international community - would be able to concern themselves with activities taking place in another State, even if their own interests are not directly involved.

This view is best reflected in the 1989 initiative taken by the Maltese Government in proposing for consideration by the U.N. General Assembly the environmental protection of extra-territorial spaces. The Maltese draft resolution points out that the comprehensive protection of the global environment must necessarily provide for the effective protection of areas lying beyond national jurisidiction, i.e. the so-called "international commons", [25] The legal interest of the States which co-sponsored the Maltese draft resolution can be found in its first operative paragraph wherein the environmental degradation of areas beyond national jurisdiction was considered to be a common concern of mankind. [26] Clearly the environmental protection of State territory, to be truly meaningful, must be accompanied by effective protection being accorded to areas beyond jurisdiction.

It is pertinent to conclude this section by referring to the **Draft on State Responsibility** prepared by the International Law Commission. In Article 19(2), the Draft defines an "international crime" as an internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognised as a crime by that community as a whole. It is significant that international crimes include "serious breaches of

obligations to protect the environment''. [27] The concept of an ''international crime'' seems to invoke the criminal responsibility of a State vis-a-vis the international community, thereby recognising that the international community as a whole has rights which States are obliged to respect.

CONCLUSION

The above review of developments shows that the international community is becoming increasingly concerned with the phenomenon of climate change caused by the conduct of certain human activities such as fossil-fuel burning. There is evidence to suggest that the continued growth in atmospheric concentrations of ''greenhouse gases'' is capable of causing climate change leading ***inter alia*** to global warming and sea-level rise. This evidence has led to widespread support in favour of developing and codifying international law relating to the protection of global climate. In order to ensure that the developments of the law are based on sound scientific evidence, the international community has felt the need to improve its knowledge of the science of climate and climate change.

Despite the need to enhance the said knowledge, there seems to exist increasing support for the idea of concluding a convention on climate. Such a convention would be a framework convention enunciating the general rules of State conduct with respect to climate change. (It is significant that one of President Bush's proposals at the USA/USSR Summit held in Malta concerned the ''holding of a conference in Washington to negotiate a framework treaty on global warming ...''). [1] The general view is that whilst such conventions-as the 1985 **Vienna Convention** - provide a useful model, climate change requires developing new legal and institutional approaches. It is also envisaged that protocols, developed within the framework climate convention, will deal with concrete measures in the light of priorities that may be authoritatively identified on the basis of sound scientific knowledge, and on the basis of existing international political commitment.

The magnitude of the climate change problem is gaining widespread recognition. Policy-makers are becoming more and more aware of the need to take action as the intervention of Sir Ian Lloyd in the British House of Commons demonstrates. Sir Ian, who is the chairman of the Select Committee on Energy, warned:

> *''... that keeping man's tenancy on earth might require a world-wide programme by comparison with which all previous endeavours, even in war and in putting man on the moon 'will pale into insignificance!''* [2]

In the face of the catastrophic effects which climate change may bring, urgent action is being called for. The House of Lords Select Committee on Science and Technology, in its recent report on the ''greenhouse effect'', has concluded that despite uncertain scientific evidence, the world cannot afford to wait for proof before taking action to remedy the process of climate change because by that time it will be too late. The Committee prudently advised:

> *''Action, by way of insurance or 'no regrets' policies, is therefore needed in advance of obtaining clear proof that a global warming due to enhanced greenhouse gas concentrations is occurring.''* [3]

REFERENCES

I. INTRODUCTION

1 *Vide* in particular the conclusions of the 1985 meeting held at Villach Austria under the auspices of W.M.O., U.N.E.P., and I.C.S.U. *A Report of the International Conference on the Assessment of the Role of Carbon Dioxide and of Other Greenhouse Gases in Climate Variations and Associated Impacts.* (Geneva, W.M.O./I.C.S.U./U.N.E.P., 1986). At this meeting, scientists from 29 developed and developing countries concluded that climate change must be considered as a "plausible and serious probability". The proceedings of the W.M.O. World Climate Programme and the Intergovernmental Panel on Climate Change, referred to below in Section II, also provide an authoritative views of the problem.

2 For a brief and concise description of the climate change phenomenon, *Vide* W.M.O. Fact Sheet: *Climate Change and Understanding the Global Atmosphere* (1989). *Vide* also bibliography in Commonwealth Secretariat: *Climate Change: Meeting the Challange* (London, September 1989).

3 *Ibid* p.29; *vide* also U.N.E.P./G.E.M.S. and Beijer Institute: *The Full Range of Responses to Anticipated Climatic Change* (Nairobi, 1989).

4 *Vide* W.M.O. Fact Sheet *op. cit.* p.3.

5 Other "greenhouse gases" include methame, nitrous oxide and chlorofluoro-carbons. *Vide* U.N.E.P./G.E.M.S.: *The Greenhouse Gases* (Nairobi, 1987).

6 *Our Common Future* (O.U.P., 1987)

II. THE MALTESE INITIATE

1 Press Release (Dept. of Information, Malta) (September 1989)

2 General Assembly Doc. A/A43/241, 12th September 1988.

3 *Ibid.*

4 Agenda of the 43rd Session of the General Assembly, Item 148.

5 *Vide Report of the Second Committee* by the Rapporteur Mr. Martin Walter (Czechoslovakia), (General Assembly Doc. A/A43/905, 30th November 1988) para 1. The plenary meeting was introduced by Malta's Foreign Minister Dr V. Tabone.

6 *Ibid.* para 2; *vide* also Docs. A/Cf. 2/43/SR. 21-26, 30, and 44.

7 *Vide* statement by Professor G.O.P. Obasi Secretary General of the W.M.O. to the Intergovernmental Panel on Climate Change dated 9th November 1988.

8 Vide Report of the Rapporteur, pp.4 and 5.

9 General Assembly Doc A/RES/43/53, 27th January 1989.

III. RESOLUTION 43/53

1 Statement by D. J. Attard to the Second Committee (27th October 1988) (Press Release No. 3059. (Dept. of Information, Malta).

2 Vide, in particular, the *World Climate Programme* approved by the W.M.O., and the U.N.E.P. *Environment Programme* (1990-1995), *(Official Records of the General Assembly,* 43rd Session No. 25 (A/A43/25), Annex Decision S5.1/3). The work of the International Council of Scientific Unions and the Beijer Institute (Stockholm) has also to be considered. The work undertaken by the scientific community culminated in the 1985 Villach *Conference on Climate Change and Related Matters.*

3 Attard D.J., *Climate Change* (The Foundation for International Studies, Malta 1989).

4 Hereinafter referred to as the I.P.C.C., *vide* Para. 5.

5 *Vide* Para. 6.

6 *Vide* W.M.O./U.N.E.P.: *Report of the First Session of the I.P.C.C. Bureau* (6th to 7th February 1989, Geneva) (*World Climate Programme Publications,* Series TD-No 294).

7 *Ibid.* pp. 3 - 4.

8 *Ibid.* pp. 5 - 6.

9 *Ibid.* pp. 6 - 7; Malta was elected as one of the Group's vicechairmen.

10 In an earlier Maltese draft of the Resolution circulated in October 1989, the word "possible" qualified "elements" not "a convention". This change was necessary as a number of delegations, including the U.K. and the U.S., were unable to accept the Maltese draft which could imply that the those of General Assembly approved the conclusion of a climate convention.

IV. CANADIAN INITIATIVES

1 Held in Toronto between the 27th and 30th June 1988.
2 *Conference Statement* (1988) p.12.
3 *Vide, Statement of the International Meeting of Legal and Policy Experts on the Protection of the Atmosphere.* (22nd February 1989) pp. 1 - 2.
4 *Vide* below section (viii) *Other International Fora:* Canada and Malta have presented a joint study on the elements of a climate convention.

V. DECLARATION OF THE HAGUE

1 *Vide* Preamble 2.
2 Para. 2.
3 *Ibid.*
4 Para. 11.
5 Para. 6.
6 *Ibid.*
7 It has been reported that the U.K. refused to participate in the Hague Summit because it strongly opposed *inter alia* the establishment of a new international institution.
8 Para. 10(a).
9 *Ibid.*
10 Para. 7.
11 *Ibid.*
12 Paras. 8 and 10 (d).

U.N.E.P.

Amongst the U.N. specialist agencies which are concerned with the issue of climate change are U.N.E.S.C.O. (through I.O.C.), W.H.O. (conducts studies on health and climate change); F.A.O. (conducts studies on the impact of climate change on agriculture); and I.A.E.A. (conducts studies on energy policies and their impact on climate). The World Bank and U.N.D.P. are also supporting efforts in this field (*vide* General Assembly Doc. A/44/484 of 19th September 1989).

2 A parallel resolution was adopted in June 1989 by the fourty-first meeting of the W.M.O. Executive Council, vide *EC-XLI Resolution 4.*
3 *Vide* the Preamble.
4 Para. 3.
5 Para. 7; *vide Report of the First Session of the I.P.C.C.* (Doc. No. I.P.C.C. - 1/TD-No. 267), Paras. 3.2 and 3.3.
6 Para. 9.
7 Para. 10.
8 The author was nominated by UNEP to participate in this "task force". The first meeting was held on the 25th October 1989 in New York.
9 *EC-XLI Resolution 4.*
10 *Ibid.*
11 *Ibid.*

VII. OTHER INTERNATIONAL FORA

1 *Vide* Press Release issued by the U.N. Centre for Science and Technology For Development (10th November 1988).
2 Final Conclusion in the *Hamburg Congress Report.* The proceedings of the Congress will be published as a U.N. Sales Publication.
3 *Ibid.*
4 *Ibid.*, Section 2.4(5) *The Concerns of the N.G.O.'s.*
5 18 *I.L.M.* (1979), p. 1442.
6 *Congress Report.* Sections 2.2(3), 2.4(5).

7 *International Conference on Global Warming and Climate Change: Perspectives From Developing Countries* (Tata Energy Research Institute/Woods Hole Research Centre, U.N.E.P. and the World Resources Institute).
8 *Conference Statement* (edited by the Tata Energy Research Institute and distributed by the Woods Hole Research Centre), Section 5.3.
9 *Ibid.*
10 *Ibid.*
11 *Ibid.*
12 26 *I.L.M.* (1987), pp. 1516 et.
13 26 *I.L.M.* (1987), pp. 1541 et.
14 *Vide,* generally, Brunnée, S.: *Acid Rain and Ozone Layer Depletion* 61988).
15 The Conference held between the 5th and the 7th March, 1989 was attended by 123 states, (*vide* U.N.E.P./Oz.L.Pro.1/5, para. 11).
16 U.N.E.P./Oz.1.Pro.1/5, Appendix 1.
17 The decision was approved at the 1989 meeting of the U.N.E.P. Governing Council, *vide* para. 11(a).
18 *Ibid.*
19 *Resolution on the Environment* adopted in Dakar on the 23rd May 1989.
20 The Summit of the Arch was convened in Paris on the 16th July 1989.
21 *Economic Declaration,* Para. 45.
22 *Ibid.*
23 *Ibid.*
24 *Vide.* in particular, Paras. 3, 5 and 6.
25 Para. 3.
26 Para. 8.
27 *Ibid.*
28 *Climate Change: Meeting the Challenge* (Commonwealth Secretariat, September 1989).
29 *Ibid.* pp. 1 et.
30 *Ibid.* pp. 10, 114.
31 *Ibid.* p. 19.
32 *Ibid.* p. 114.
33 *Ibid.*
34 *Ibid.*
35 Held on the 6th and 7th November 1989. The *Noordwijk Declaration* is reproduced in a *Press Release* (11th November 1989) issued by the Dept. of information, Malta.
36 *Vide Declaration,* Para. 16.
37 *Ibid* Para. 29 (1); *vide supra.* Section VI.
38 *Ibid* Para. 29 (5).
39 *Ibid* Para. 29 (6).
40 *Ibid.*
41 *Commonwealth Experts Group Report,* (1989) p. 36, *Vide Male Declaration* preamble, para. 2.

VIII. MALTA'S VIEWS ON THE LEGAL REGIME TO PROTECT GLOBAL CLIMATE

1 *Press Release* (Dept. of Information, Malta), 27th October 1988. *Vide* also, the Statement to the first meeting of I.P.C.C., 9th November 1988.

IX. COMMON CONCERN OF MANKIND

1a Address, 24th October, 1988, Department of Information, Malta.
1 *Trail Smelter Arbitration,* (U.S.A. vs Canada) (1938, 1941) 3 *R.I.A.A.,* 1911.
2 I.C.J. Report (1949) 4.
3 *Lake Lanoux Arbitration,* (France vs Spain), 12 *R.I.A.A.,* 281.
4 *Op. cit.,* p.1965.
5 *Vide,* eg. the *General Assembly Resolution No. 2995 on Co-operation between States in the Field of Environment* (15th December, 1972) which requires States, in utilising their natural

resources, not to produce "significant harmful effects" in zones situated outside their national jurisdiction. Also, Principle 3 of the 1978 *UNEP Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation adn Harmonious Utilisation of Natural Resources Shared by Two or More States* (17 *I.L.M.* (1978), p. 1907).

6 *Vide*, eg. the 1983 Mexico/U.S. *Agreement to Co-operate in the Solution of Environmental Problems in the Border Areas* (22 *I.L.M.* (1983), p.1025) and the 1979 *Convention on Long-Range Transboundary Air Pollution* (18 *I.L.M.* (1979) p. 1442).
7 21 *I.L.M.* (1982) p. 1261.
8 *Vide* sections entitled *Legal Dimensions*, and *Climate Warming*.
9 Para. 6.
10 United Nations General Assembly Doc. A/44/1, 12th September, 1989, p. 22.
11 Address referred to in foot note (1a).
11a The Male' *Declaration on Global Warming and Sea-level Rise* refers to climate change, global warming and sea-level rise as "common concern of mankind".
12 *P.C.I.J.* B. 4 (1923), p.23.
13 For a detailed analysis see forthcoming study by the author entitled *The International Regime to Protect Global Climate* (1990).
14 Para. 1.
15 *Vide* foot note (1a).
16a *Vide* Howell, "Domestic Questions in International Law", 48 Proc.A.S.I.L. (1954), p.90.
16 Statement made on the 17th October, 1989, by R. Smith, Head of the U.S. delegation, U.S. Department, Press Release (EYR 206 - 17th October, 1989).
17 Resolution 43/53, para.2.
18 Address at a dinner in honour of Professor G.O.P. Obasi, Secretary General of W.M.O., 1st February, 1989, Department of Information, Malta.
19 Address at a dinner in honour of Dr M. Tolba, Executive Director of UNEP, 17th December, 1988, Department of Information, Malta.
20 Keynote address *Implementation of the Law of the Sea Convention Regional Approaches,* Inauguration of Class C: Management of the Mediterranean (I.O.I., Malta, 2nd October, 1989).
21 *Vide, Background Paper on Funding Machanisms* (October 1989) prepared by McKinsey & Company Inc. in *Proceedings of the Ministerial Conference on Atmospheric Pollution and Climate Change* (Netherlands, 6-7 November, 1989).
22 *Vide,* an interesting *Background Paper on Climate, Environment and Development* prepared by J. Van Ettinger et in *Proceeding of the Ministerial Conference on Atmospheric Pollution and Climate Change* (Netherlands, 6-7 November, 1989).
23 Statement to the ECOSOC Meeting; text issued by the U.K. Mission to the U.N., 6th July, 1989.
24 *I.C.J. Reports* (1970), para. 34.
25 *Vide*, U.N. General Assembly Doc. A/C 2/44/L.41 of 15th November, 1989; the Maltese draft resolution was co-sponsored by another four States at the time of its first presentation.
26 The Draft Resolution is still being discussed in the Second Committee.
27 Article 19(3).

CONCLUSION

1 *Vide, Sunday Times* (Malta), 3rd December 1989; *vide* also White House Fact Sheet EUR105, 4th December, 1989.
2 *Vide* Parliamentary Report, *The Times* (London) 11th November 1989.
3 *House of Lords Select Committee on Science and Technology. Sixth Report. Greenhouse Effect* 27th November 1989 (HMSO). A similar approach was taken at the first meeting (25th October 1989) of the joint UNEP/WMO Task Force set up to advise on preparations for negotiations leading to a climate convention. In its view, negotiations should begin after the adoption of the **IPCC "interim report"** in September 1990. The Task Force was of the view that a draft convention could be elaborated, and ready for adoption by at the earliest October 1991. It identified two areas where concrete action and measures could be taken: improving energy efficiency and forestation.

ANNEX 1

RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY

on the report of the Second Committee (A/43/905)

43/53. Protection of global climate for present and future generations of mankind

The General Assembly

Welcoming with appreciation the initiative taken by the Government of Malta in proposing for consideration by the Assembly the item entitled "Conservation of climate as part of the common heritage of mankind,"

Concerned that certain human activities could change global climate patterns, threatening present and future generations with potentially severe economic and social consequences,

Noting with concern that the emerging evidence indicates that continued growth in atmospheric concentrations of "greenhouse" gases could produce global warming with an eventual rise in sea levels, the effects of which could be disastrous for mankind if timely steps are not taken at all levels,

Recognizing the need for additional research and scientific studies into all sources and causes of climate change,

Concerned also that emissions of certain substances are depleting the ozone layer and thereby exposing the earth's surface to increased ultra-violet radiation, which may pose a threat to, *inter alia,* human health, agricultural productivity and animal and marine life, and reaffirming in this context the appeal, contained in its resolution 42/182 of 11 December 1987, to all States that have not yet done so to consider becoming parties to the Vienna Convention for the Protection of the Ozone Layer, adopted on 22 March 1985, and the Montreal Protocol on Substances that Deplete the Ozone Layer, adopted on 16 September 1987, as soon as possible,

Recalling its resolutions 42/186 and 42/187 of 11 december 1987 on the Environmental Perspective to the Year 2000 and Beyond and on the report of the World Commission on Environment and Development, respectively,

Convinced that changes in climate have an impact on development,

Aware that a considerable amount of valuable work, particularly at the scientific level and in the legal field, has already been initiated on climate change, in particular by the United Nations Environment Programme, the World Meteorological Organization and the International Council of Scientific Unions and under the auspices of Individual States,

Welcoming the convening in 1990 of a second World Climate Conference,

Recalling also the conclusions of the meeting held at Villach, Austria, in 1985, [1] which *inter alia,* recommended a programme on climate change to be promoted by Governments and the scientific community with the collaboration of the Worl Meteorological Organization, the United Nations Environment Programme and the International Council of Scientific Unions,

Convinced that climate change effects humanity as a whole and should be confronted withing a global framework so as to take into account the vital interests of all mankind,

1. *Recognizes* that climate change is a common concern of mankind, since climate is an essential condition which sustains life on earth;

2. *Determines* that necessary and timely action should be taken to deal with climate change within a global framework;

3. *Reaffirms* its resolution 42/184 of 11 December 1987, in which, *inter alia,* it agreed with the Governing Council of the United Nations Environment Programme that the Programme should attach importance to the problem of global climate change and that the Executive Director of the United Nations Environment Programme should ensure that the Programme co-operates closely with the World Meteorological Organization and the International Council of Scientific Unions and maintains an active, influential role in the World Climate Programme;

4. *Considers* that activities in support of the World Climate Programme, approved by the Congress and Executive Council of the World Meteorological Organization and elaborated in the system-wide medium-term environment programme for the period 1990-1995, which was approved by the Governing Council of the United Nations Environment Programme, [2] be accorded high priority by the relevant organs and programmes of the United Nations system;

5. *Endorses* the action of the World Meteorological Organization and the United Nations Environment Programme in jointly establishing an Intergovernmental Panel on Climate Change to provide internationally co-ordinated scientific assessments of the magnitude, timing and potential environmental and socio-economic impact of climate change and realistic response strategies, and expresses appreciation for the work already initiated by the panel;

6. *Urges* Governments, intergovernmental and non-governmental organizations and scientific institutions to treat climate change as a priority issue, to undertake and promote specific, co-operative action-oriented programmes and research so as to increase understanding on all sources and causes of climate change, including its regional aspects and specific time-frames as well as the cause and effect relationship of human activities and climate, and to contribute, as appropriate, with human and financial resources to efforts to protect the global climate;

7. *Calls upon* all relevant organizations and programmes of the United Nations system to support the work of the Intergovernmental Panel on Climate Change;

8. *Encourages* the convening of conferences on climate change, particularly on global warming, at the national, regional and global levels in order to make the international community better aware of the importance of dealing effectively and in a timely manner with all aspects of climate change resulting from certain human activities;

9. *Calls upon* Governments and intergovernmental organizations to

1. See *United Nations Environment Programme, Annual Report of the Executive Directors 1985* (UNEP(GC.14/2), chap. IV, paras. 138-140.

2. See *Official Records of the General Assembly, Forty-third Session, Supplement No. 25* (A/43/25), annex, decision SS.I/3.

collaborate in making every effort to prevent detrimental effects on climate and activities which affect the ecological balance, and also calls upon non-governmental organizations, industry and other productive sectors to play their due role;

10. *Requests* the Secretary-General of the World Meteorological Organization and the Executive Director of the United Nations Environment Programme, through the Intergovernmental Panel on Climate Change, immediately to initiate action leading, as soon as possible, to a comprehensive review and recommendations with respect to:

(a) The state of knowledge of the science of climate and climatic changes;

(b) Programmes and studies on the social and economic impact of climate change, including global warming;

(c) Possible response strategies to delay, limit or mitigate the impact of adverse climate change;

(d) The identification and possible strenghtening of relevant existing international legal instruments having a bearing on climate;

(e) Elements for inclusion in a possible future international convention on climate;

11. *Also requests* the Secretary-General to bring the present resolution to the attention of all Governments, as well as intergovernmental organizations, non-governmental organizations in consultative status with the Economic and Social Council and well-established scientific institutions with expertise in matters concerning climate;

12. *Further requests* the Secretary-General to report to the General Assembly at its forty-fourth session on the implementation of the present resolution;

13. *Decides* to include this question in the provisional agenda of its forty-fourth session, without prejudice to the application of the principle of biennialization.

70th plenary meeting
6 December 1988

ANNEX 2

DECLARATION OF THE HAGUE

(11th March 1989)

The right to live is the right from which all other rights stem. Guaranteeing this right is the paramoùnt duty of those in charge of all States throughout the world.

Today, the very conditions of life on our planet are threatened by the severe attacks to which the earth's atmosphere is subjected.

Authoritative scientific studies have shown the existence and scope of considerable dangers linked in particular to the warming of the atmosphere and to the deterioration of the ozone layer. The latter has already led to action, under the 1985 Vienna Convention for the Protection of the Ozone Layer and the 1987 Montreal Protocol, while the former is being addressed by the Intergovernmental Panel on Climatic Change established by UNEP and WMO, which has just begun its work. In addition the UN General Assembly adopted Resolution 43/53 on the Protection of the Global Climate in 1988, recognizing climate change as a common concern of mankind.

According to present scientific knowledge, the consequences of these phenomena may well jeopardize ecological systems as well as the most vital interests of mankind at large.

Because the problem is planet-wide in scope, solutions can obly be devised on a global level. Because of the nature of the dangers involved, remedies to be sought involve not only the fundamental duty to perserve the ecosystem, but also the right to live in dignity in a viable global environment, and the consequent duty of the community of nations vis-à-vis present and future generations to do all that can be done to preserve the quality of the atmosphere.

Therefore we consider that, faced with a problem the solution to which has three salient features, namely that it is vital, urgent and global, we are in a situation that calls not only for implementation of existing principles but also for a new approach, through the development of new principles of international law including new and more effective decision-making and enforcement mechanisims.

What is needed here are regulatory, supportive and adjustment measures that take into account the participation and potential contribution of countries which have reached different levels of development. Most of the emissions that affect the atmosphere at present originate in the industrialized nations. And it is in these same nations that the room for change is greatest, and these nations are also those which have the greatest resources to deal with this problem effectively.

The international community and especially the industrialized nations have special obligations to assist developing countries which will be very negatively affected by changes in the atmosphere although the responsibility of many of them for the process may only be marginal today.

Financial institutions and development agencies, be they international or domestic, must coordinate their activities in order to promote sustainable development.

Without prejudice to the international obligations of each State, the signatories acknowledge amd will promote the following principles:

(a) The principle of developing, within the framework of the United Nations, new institutional authority, either by strengthening existing institutions or by creating a new institution, which, in the context of the preservation of the earth's atmosphere, shall be responsible for combating any further global warming of the atmosphere and shall involve such decision-making procedures as may be effective even if, on occasion, unanimous agreement has not been achieved;

(b) The principal that this institutional authority undertake or commission the necessary studies, be granted appropriate information upon request, ensure the circulation and exchange of scientific and technological information - including facilitation of access to the technology needed - develop instruments and define standards to enhance or guarantee the protection of the atmosphere and monitor compliance herewith;

(c) The principle of appropriate measures to promote the effective implementation of and compliance with the decisions of the new institutional authority, decisions which will be subject to control by the International Court of Justice;

(d) The principle that countries to which decisions taken to protect the atmosphere shall prove to be an abnormal or special burden, in view, inter alia, of the level of their development and actual responsibility for the deterioration of the atmosphere, shall receive fair and equitable assistance to compensate them for bearing such burden. To this end mechanisims will have to be developed;

(e) The negotiation of the necessary legal instruments to provide an effective and coherent foundation, institutionally and financially, for the aforementioned principles.

The Heads of State and Government or their representatives, who have expressed their endorsement of this Declaration by placing their signatures under it, stress their resolve to promote the principles thus defined by:

- furthering the development of their initiative within the United Nations and in close coordination and collaboration with existing agencies set up under the auspices of the United Nations:
- inviting all States of the world and the international organisations competent in this field to join in developing, taking into account studies by the IPCC, the framework conventions and other legal instruments necessary to establish institutional authority and to implement the other principles stated above to protect the atmosphere and to counter climate change, particularly global warming;
- urging all States of the world and the international organisations competent in this field to sign and ratify conventions relating to the protection of nature and the environment;
- calling upon all States of the world to endorse the present declaration.

The original of this Declaration, drawn up in French and English, will be transmitted to the Government of the Kingdom of the Netherlands, which will retain it in its archives. Each of the partcipating States will receive from the Government of the Kingdom of the Netherlands a true copy of this Declaration.

The Prime Minister of the Netherlands is requested to transmit the text of this Declaration, which is not eligible for registration under Article 102 of the Charter of the United Nations, to all members of the United Nations.
The Hague, 11 March 1989

Félix Houphouët-Boigny
Président de la République de Côte d'Ivoire
President of the Republic of Côte d'Ivoire

Muhammed Hosni Mubarak
Président de la République Arabe d'Égypte
President of the Arab Republic of Egypt

Felipe González
Premier Ministre d'Espagne
Prime Minister of Spain

François Mitterrand
Président de la Républiqùe Française
President of the French Republic

Daniel Torotich arap Moi
Président de la République du Kenya
President of the Republic of Kenya

Edward Fench Adami
Premier Ministre de la République de Malte
Prime Minister of the Republic of Malta

Gro Harlem Brundtland
Premier Ministre du Royaume de Norvège
Prime Minister of the Kingdom of Norway

Geoffrey Palmer
Vice-Ministre Président de Nouvelle-Zélande
Deputy Prime Minister of New Zealand

Ruud Lubbers
Premier Ministre du Royaume des Pays-Bas
Prime Minister of the Kingdom of the Netherlands

Abdou Diouf
Président de la République du Sénégal
President of the Republic of Senegal

Enrique Colmenares Finol
Ministre de l'Environnement de la République du Venezuela
Minister for Environment of the Republic of Venezuela

Robert Gabriel Mugabe
Président de la République du Zimbabwe
President of the Republic of Zimbabwe

ANNEX 3

15/36. Global climate change

The Governing Council

Recalling its decision 14/20 of June 1987 on global climate change,

Recognizing that while further scientific studies are important, the knowledge and awareness of global climate change and its possible consequences are developing rapidly,

Emphasizing that the scientific participation of developing countries and therefore the development of their intellectual resources is essential to understanding of the state of the atmosphere and climate change for the world as a whole,

Emphasizing further the importance of discussing the whole range of climate-related measures on a broad international basis,

Recognizing also the expressions of readiness on the part of a growing number of States to act decisvely to protect the global climate,

Conscious Conclusion of General Assembly resolution 43/53 of 6 December 1988, entitled "Protection of global climate for present and future generations of mankind", which recognized that climate change is a common concern of mankind and detemined that necessary and timely action should be taken to deal with climate change within a global framework, and requested the Executive Director of the United Nations Environment Programme and the Secretary-General of the World Meteorological Organization to utilize the Intergovernmental Panel on Climate Change to initiate that action,

Noting that the heads of State or of Government of States members of the European Communities, meeting at Rhodes in December 1988, underlined the need for an effective international response to global environment problems such as climate change,

Noting the report of the International Meeting of Legal and Policy Experts on the Protection of the Atmosphere, held in Ottawa in Febraury 1989, in which an international convention or conventions with appropriate protocols was recommended as a means to ensure rapid international action to protect the atmosphere and limit the rate of climate change. [82]

Recalling the Chairman's message from the London Conference on Saving the Ozone Layer, which met from 5 to 7 March 1989 and was attended by 123 countries, which, *inter alia,* noted that action to protect the ozone layer will at the same time reduce the impact of global warming, which poses particularly serious threats to certain low-lying developing countries, [83].

Noting that representatives of twenty four States at the highest political level adopted in The Hague on 11 March 1989 a declaration on the threats to the atmosphere, particularly the warming of the atmosphere and the deterioration of the ozone layer,

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82. See *Protection of the Atmosphere: International Meeting of Legal and Policy Experts, 20-22 Febraury 1989, Ottawa, Ontario, Canada,* "Statement of the Meeting of Legal and Policy Experts; introduction.
83. UNEP/OzL. Pro1/5, para. 11.

Noting the initiatives of the Governments of the Netherlands and of Norway with regard to the establishment of a world climate fund and their willingness to contribute to such a fund,

Also noting the ongoing work of the Intergovernmental Panel on Climate Change on financial measures to implement strategies to respond to climate change,

Encouraging Governments and relevant international organizations to further the development of international funding mechanisms, not excluding a possible climate fund, for additional assistance, in particular to developing countries, for the implementation of national and international policies to protect the environment from climate change.

Noting further the Declaration by eighty-two countries and the European Communities in Helsinki on 2 May 1989 [84] in which they, mindful that some ozone-depleting substances are powerful greenhouse gases leading to global warming, agree to phase out the production and the consumption of chlorofluorocarbons controlled by the Montreal Protocol as soon as possible but not later than the year 2000, taking due account of the special situation of developing countries,

Emphasizing that the Montreal Protocol, as amended from time to time, is the legal instrument available to its Parties by which the production and consumption of ozone-depleting substances are to be controlled.

Emphasizing that, within the perspective of protection of the atmosphere, new measures to counteract global warming are required.

1. *Notes with satisfaction* the establishment of the Intergovernmental Panel on Climatic Change by the Secretary-General of the World Meteorological Organization and the Executive Director of the United Nations Environment Programme upon appropriate decisions by the Executive Council of the World Meteorological Organization and the Governing Council of the United Nations Environment Programme as an *ad hoc* intergovernmental working group;

2. *Requests* the Executive Director of the United Nations Environment Programme, in full collaboration with the Secretary-General of the World Meteorological Organization, to consult with the Intergovernmental Panel on Climate Change with respect to the determination of its internal organization and procedures, its budget and means of financing such budget;

3. *Authorizes* the Executive Director of United Nations Environment Programme to continue to give strong support to the work of the Intergovernmental Panel on Climate Change;

4. *Urges* all Member States of the United Nations, its specialized agencies and international organizations, including the International Atomic Energy Agency, as well as relevant intergovernmental and non-governmental organizations, to support fully and participate actively in the work of the Intergovernmental Panel on Climate Change;

5. *Urges* the Intergovernmental Panel on Climate Change to take the necessary steps to ensure the scientific and policy participation of developing countries in its work and *recommends* the international community to provide assistance in this respect;

84. Ibid., appendix I.

6. *Notes* the agreement within the intergovernmental Panel on Climate Change, as reflected in paragraph 10 of General Assembly resolution 43/53, that its work include the following main takes, each to be accomplished by a Working Group;

(a) Assessment of available scientific information on climatic change;

(b) Assessment of environmental and socio-economic impacts of climate change;

(c) The formulation of response strategies; [85]

7. *Further notes* the intention of the Intergovernmental Panel on Climatic Change to adopt an interim report not later than October 1990; [86].

8. *Notes* the agreement of the Response Strategies Working Group of the Intergovernmental Panel on Climate Change at a meeting held in Geneva from 10 to 12 May 1989, that its workplan includes the identification and evaluation of a range of measures to implement response strategies, namely legal measures, including the elements of a possible future framework convention on climate change, technological measures, financial measures, economic measures and educational measures;

9. *Requests* the Executive Director of United Nations Environment Programme, in co-operation with the Secretary-General of World Meteorological Organization, to begin preparations for negotiations on a framework convention on climate, taking into account the work of the Intergovernmental Panel on Climate Change, as well as the outcome of recent and forthcoming international meetings on the subject;

10. *Recommends* that such negotiations should be initiated as soon as possible immediately after the adoption of the interim report of the Intergovernmental Panel on Climatic Change;

11. *Recommends* that Governments and competent regional integration economic organizations consider, while awaiting the outcome of the negotiations, the range of possible options for averting the potentially damaging impacts of climate change, for removing the causes of the phenomenon, and for developing programmes for implementing those more appropriate to national needs, including, *inter alia,* to;

(a) Accede to the Montreal Protocol on Substances that Deplete the Ozone Layer, if they have not yet done so, and comply with its regulatory measures with the utmost speed, adopting and applying, where possible, more stringent controls than those specified in the Protocol in the shortest possible time with an ultimate objective of, as far as possible, completely eliminating the emission of the controlled substances to better protect the ozone layer and the global climate from change, consistent with the Helsinki Declaration on the Protection of the Ozone Layer;

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85. Report of the First Session of the Intergovernmental Panel on Climatic Change, (World Meteorological Organization/United Nations Environment Programme, *World Climate Programme Publications Series* No. IPCC-1TD-No.267 paras. 3.2 and 3.3.

86. *Ibid.*, paras. 3.12 and 4.3.

(b) Combat deforestation and accelerate reforestation and afforestation programmes to provide a natural bank for atmospheric carbon in terrestrial ecosystems;

(c) Promote programmes to improve energy efficiency and energy conservation in both the supply and use sectors of national economies, setting goals and objectives as appropriate;

(d) Adopt in industrialized countries strategies for actions, including use of regulations and technologies as appropriate, designed to control, stabilize and reduce national emissions of greenhouse gases through more efficient use of energy in both the production and consumption sectors of national economies, setting goals and objectives as appropriate, with, as a first step, the goal of stabilization of emissions of carbon dioxide and other greenhouse gases, and the development of energy sources that do not emit greenhouse gases which threaten global climate;

(e) Adopt in developing countries similar strategies for actions which, while not impeding the impetus of their development, make optimal use of energy production and consumption systems that are safe, affordable and efficient and that minimize emissions of greenhouse gases, which threaten global climate;

(f) Identify and possibly strengthen relevant existing internatinal legal instruments having a bearing on global climate change;

12. *Recommends* the institution of programmes and measures of assistance, including technology transfer, that will make it possible for developing countries to avoid risk to global climate;

13. *Recommends* that Governments, taking note of the need for scientific knowledge of global, regional and local climates and their impacts, continue and, wherever possible, increase their activities in support of the World Climate Programme and International Geosphere-Biosphere Programmes, including the monitoring of atmospheric composition and climatic conditions, and *further recommends* that the international community support efforts by developing countries to participate in these scientific activities.

ANNEX 4

HELSINKI DECLARATION

(on the protection of the ozone layer)
2 May 1989

The Governments and the European Communities represented at the First Meetings of the Parties to the Vienna Convention and the Montreal Protocol

Aware of the wide agreement among scientists that depletion of the ozone layer will threaten present and future generations unless more stringent control measures are adopted,

Mindful that some ozone depleting subtances are powerful greenhouse gases leading to global warming,

Aware also of the extensive and rapid technological development of environmentally acceptable substitutes for the substances that deplete the ozone layer and the urgent need to facilitate the transfer of technologies of such substitutes especially to developing countries,

Encourage all states that have not done so to join the Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol,

Agree to phase out the production and the consumption of CFC's controlled by the Montreal Protocol as soon as possible but not later than the year 2000 and for that purpose to tighten the timetable agreed upon in the Montreal Protocol taking due account of the special situation of developing countries,

Agree to both phase out halons and control and reduce other ozone-depleting substances which contribute significantly to ozone depletion as soon as feasible,

Agree to commit themselves, in proportion to their means and resources, to accelerate the development of environmentally acceptable substituting chemicals, products and technologies,

Agree to facilitate the access of developing countries to relevant scientific information, research results and training and to seek to develop appropriate funding mechanisims to facilitate the transfer of technology and replacement of equipment at minimum cost to developing countries.

ANNEX 5

FRANCOPHONE SUMMIT RESOLUTION ON THE ENVIRONMENT

Adopted in Dakar, 23 May 1989

The Heads of State, Government and Delegations of countries which use French as a common language,

Concerned over the environmental crisis that the world is presently experiencing and that is manifesting itself on a global scale through various phenomena, including deterioration of the ozone layer, atmospheric warming, deforestation, desertification, soil exhaustion, water and atmospheric pollution, toxic wastes, poaching, acid rain and the transfer of hazardous wastes to developing countries;

Convinced that the growth of all countries, notably the developing ones, can be guaranteed only by economic development based on policies of environmental protection and conservation;

Recognizing that all the world's countries must observe the existing standards and principles, and also that new principles of internationl law must be defined in this area;

Observing the significant progrress achieved in international cooperation on environmental questions, particularly the conclusions of the Vienna Convention on protection of the ozone layer and of the Montreal Protocol on substance that deplete the ozone layer as well as the creation of the Intergovernmental Panel on Climate Change, and the Ottawa Meeting of legal and policy experts on the protection of the atmosphere;

Noting that the Heads of State and Government assembled at The Hague on March 11, 1989, affirmed the vital, urgent and global need for solutions to these problems by the adoption of innovative principles of international law relating to both the decision-making process and to development assistance and the development, within the framework of the United Nations, of new institutional authority, either by strengthening existing institutions, or by creating a new institution;

Agree that the perservation of life on our planet in its various forms is the responsibility of all nations and all peoples;

- that all the participants in the development process should place priority on measures conducive to economic development which respects the environment;
- that the atmosphere and the oceans are common resources of inestimable value which must be managed and protected with the greatest possible care from all forms of abuse;
- that the existing international institutions in the United Nations system responsible for environmental questions and for protection of the climate and of the biosphere must be reinforced;
- that efforts must be pursued to completely eliminate controlled chloroflourocarbons (CFCs) by 1999 at the latest;
- that there is a need to draft and implement an energy strategy which would

facilitate the mastery and large-scale utilization of non-polluting renewable energy forms, notably solar energy;

- that human activities which contribute to deforestation, desertification and the destruction of arable lands must receive special attention, and that policies must be devised to restore the damaged regions.

Support the concept of sustainable development, as defined by the World Commission on Environment and Development, to affirm the interdependence of the economy and the environment;

Are pleased to note that a United Nations Conference on environment and development will be held in 1992;

Invite all governments to endorse the Declaration of The Hague on the Environment.

ANNEX 6

EXTRACT FROM THE SUMMIT OF THE ARCH ECONOMIC DECLARATION

16 July 1989

Environment

33. There is a growing awareness throughout the world of the necessity to preserve better the global ecological balance. This includes serious threats to the atmosphere, which could lead to future climate changes. We note with great concern the growing pollution of air, lakes, rivers, oceans and seas; acid rain, dangerous substances; and the rapid desertification and deforestation. Such environmental degradation endangers species and undermines the well-being of individuals and societies.

Decisive action is urgently needed to understand and protect the earth's ecological balance. We will work together to achieve the common goals of preserving a healthy and balanced global environment in order to meet shared economic and social objectives and to carry out obligations to future generations.

34. We urge all countries to give further impetus to scientific research on environmental issues, to develop necessary technologies and to make clear evaluations of the economic costs and benefits of environmental policies.

The persisting uncertainty on some of these issues should not unduly delay our action.

In this connection, we ask all countries to combine their efforts in order to improve observation and monitoring on a global scale.

35. We believe that international cooperation also needs to be enhanced in the field of technology and technology transfer in order to reduce pollution or provide alternative solutions.

36. We believe that industry has a crucial role in preventing pollution at source, in waste minimization, in energy conservation, and in the design and marketing of cost-effective clean technologies. The agricultural sector must also contribute to tackling problems such as water pollution, soil erosion and desertification.

37. Environmental protection is integral to issues such as trade, development, energy, transport, agriculture and economic planning. Therefore, environmental considerations must be taken into account in economic decision-making. In fact good economic policies and good environmental policies are mutually reinforcing.

In order to achieve sustainable development, we shall ensure the compatibility of economic growth and development with the protection of the environment. Environmental protection and related investment should contribute to economic growth. In this respect, intensified efforts for technological breakthrough are important to reconcile economic growth and environmental policies.

Clear assessments of the costs, benefits and resource implications of environmental protection should help governments to take the necessary decisions on the mix of price signals (e.g., taxes or expenditures) and regulatory actions, reflecting where possible the full value of natural resources.

We encourage the World Bank and regional development banks to integrate environmental considerations into their activities. International organizations such as the OECD and the United Nations and its affiliated organizations, will be asked to develop further techniques of analysis which would help governments assess appropriate economic measures to promote the quality of the environment. We ask the OECD, within the context of its work on integrating environment and economic decision-making, to examine how selected environmental indicators could be developed. We expect the 1992 UN Conference on Environment and Development to give additional momentum to the protection of the global environment.

38. To help developing countries deal with past damage and to encourage them to take environmentally desirable action, economic incentives may include the use of aid mechanisms and specific transfer of technology. In special cases, ODA debt forgiveness and debt for nature swaps can play a useful role in environmental protection.

We also emphasize the necessity to take into account the interests and needs of developing countries in sustaining the growth of their economies and the financial and technological requirements to meet environmental challenges.

39. The depletion of the stratospheric ozone layer is alrming and calls for prompt action.

We welcome the HELSINKI conclusions related, among other issues, to the complete abandonment of the production and consumption of chloro-flourocarbons covered by the MONTREAL protocol as soon as possible and not later than the end of the century. Specific attention must also be given to those ozone-depleting substances not covered by the Montreal protocol. We shall promote the development and use of suitable substitutes substances and technologies. More emphasis should be placed on projects that provide alternatives to chloro-fluorocarbons.

40. We strongly advocate common efforts to limit emissions of carbon dioxide and other greenhouse gases, which threaten to induce climate change, endangering the environment and ultimately the economy. We strongly support the work undertaken by the Intergovernmental Panel on Climate Change, on this issue.

We need to strengthen the worldwide network of observatories for greenhouse gases and support the World Meteorological Organisation initiative to establish a global climatological reference network to detect climate changes.

41. We agree that increasing energy efficiency could make a substantial contribution to these goals. We urge international organizations concerned to encourage measures, including economic measures, to improve energy conservation and, more broadly, efficiency in the use of energy of all kinds and to promote relevant techniques and technologies.

We are committed to maintaining the highest safety standards for nuclear power plants and to strengthening international cooperation in safe operation of power plants and waste management, and we recognize that nuclear power also plays an important role in limiting output of greenhouse gases.

42. Deforestation also damages the atmosphere and must be reversed. We call for the adoption of sustainable forest management practices, with a view

to preserving the scale of world forests. The relevant international organizations will be asked to complete reports on the state of the world's forests by 1990.

43. Preserving the tropical forests is an urgent need for the world as a whole. While recognizing the sovereign rights of developing countries to make use of their natural resources, we encourage, through a sustainable use of tropical forests, the protection of all the species therein and the traditional rights to land and other resources of local communities. We welcome the German initiative in this field as a basis for progress.

To this end, we give strong support to rapid implementation of the Tropical Forest Action Plan which was adopted in 1986 in the framework of the Food and Agricultural Organisation. We appeal to both consumer and producer countries, which are united in the International Tropical Timber Organization, to join their efforts to ensure better conservation of the forests. We express our readiness to assist the efforts of nations with tropical forests through financial and technical cooperation, and in international organizations.

44. Temperate forests, lakes and rivers must be protected against the effects of acid pollutants such as suplhur dioxide and nitrogen oxides. It is necessary to pursue actively the bilateral and multilateral efforts to this end.

45. The increasing complexity of the issues related to the protection of the atmosphere calls for innovative solutions. New instruments may be contemplated. We believe that the conclusion of a framework or umbrella convention on climate change to set out general principles or guidelines is urgently required to mobilize and rationalize the efforts made by the international community. We welcome the work under way by the United Nations Environment Program, in cooperation with the World Meteorological Organization, drawing on the work of the Intergovernmental Panel on Climate Change and the results of other international meetings. Specific protocols containing concrete commitments could be fitted into the framework as scientific evidence requires and permits.

46. We condemn indiscriminate use of oceans as dumping grounds for polluting waste. There is a particular problem with the deterioration of coastal waters. To ensure the sustainable management of the marine environment, we recognize the importance of international cooperation in preserving it and conserving the living resources of the sea. We call for relevant bodies of the United Nations to prepare a report on the state of the world's oceans.

We express our concern that national, regional and global capabilities to contain and alleviate the consequences of maritime oil spills be improved. We urge all countries to make better use of the latest monitoring and clean-up technologies. We ask all countries to adhere to and implement fully the international conventions for the prevention of oil pollution of the oceans. We also ask the International Maritime Organization to put forward proposals for further preventive action.

47. We are committed to ensuring full implementation of existing rules for the environment. In this respect, we note with interest the initiative of the Italian government to host in 1990 a forum on international law for the environment with scholars, scientific experts and officials, to consider the need for a digest of existing rules and to give in-depth consideration to the legal

aspects of environment at the international level.

48. We advocate that existing environment institutions be strengthened within the United Nations system. In particular, the United Nations Environment Program urgently requires strengthening and increased financial support. Some of us have agreed that the establishment within the United Nations of a new institution may also be worth considering.

49. We have taken note of the report of the sixth conference on bioethics held in Brussels which examined the elaboration of a universal code of environmental ethics based upon the concept of the "human stewardship of nature".

50. It is a matter of international concern that Bangladesh, one of the poorest and most densely populated countries in the world, is periodically devastated by catastrophic floods.

We stress the urgent need for effective coordinated action by the international community, in support of the Government of Bangladesh, in order to find solutions to this major problem which are technically, financially, economically and environmentally sound. In that spirit, and taking account of help already given, we take note of the different studies concerning flood alleviation, initiated by France, Japan, the US and the United Nations Development Program, which have been reviewed by experts from all our countries. We welcome the World Bank's agreement, following those studies, to coordinate the efforts of the international community so that a sound basis for achieving a real improvement in alleviating the effects of flood can be estbalished. We also the agreement of the World Bank to chair, by the end of the year, a meeting to be held in the United Kingdom by invitation of the Bangladesh Government, of the countries willing to take an active part in such a program.

51. We give political support to projects such as the joint project to set up an observatory of the Saharan areas, which answers the need to monitor the development of that rapidly deteriorating, fragile, arid region, in order to protect it more effectively.

Drug Issues

52. The drug problem has reached devastating proportions. We stress the urgent need for decisive action, both on a national and an international basis. We urge all countries, especially those where drug production, trading and consumption are large, to join our efforts to counter drug production, to reduce demand, and to carry forward the fight.

ANNEX 7

EXTRACT FROM THE HEAD OF STATES AND GOVERNMENTS OF NON ALIGNED COUNTRIES BELGRADE DECLARATION

4 - 7th Septermber 1989

The Heads of State or Government:

- Were greatly concerned at the continuing deterioration in the state of the environment. These trends if allowed to continue unchecked could disrupt the global ecological balance and jeopardise the earth's life-sustaning qualities. In a few decades the world could be facing an ecological catastrophe;
- Noted that the physical and social aspects of the deterioration of the environment are increasingly evident in developing countries; they confirmed that such trends were a consequence of the widening gap in development levels between the North and the South, that poverty and the degradation of the environment are closely related. Environmental protection in developing countries had to be viewed as an integral part of the development and could not be considered in isolation from it;
- Stressed the need of the international community to consider with utmost seriousness the degradation of the global life-support systems, primarily the process of water and air pollution, depletion of the ozone layer, soil degradation, desertification and deforestation. The pressures brought to bear on these global systems by the prevalent patterns of production and consumption especially in the developed countries make the current global trends unssutainable. If concerted measures were not taken to check these processes, in a few decades the world would be faced with unforeseeable consequences. In this context they noted with concern a growing tendency towards external imposition and increased conditionality on the part of some developed countries in dealing with environmental issues;
- Noted that international cooperation in the field of environmental protection called for a global multilateral approach so that all aspects be considered while retaining the development priorities of developing countries and respecting the principle of proportionality in shares and responsibilities with due respect to the sovereign right of every country over its natural resources.

The Heads of State or Government

1. Expressed the readiness of non-aligned countries to intensify and promote international cooperation in the area of environment in order to prevent the disruption of the global ecological balance;

2. Emphasized the need to agree on a concept of sustainable development with a view to promoting effective international co-operation in environmental protection; the concept should necessarily include the meeting of basic needs of all people on our planet, stable economic growth, especially a speedier development of developing countries, as well as improving the quality of life;

3. Urged the adoption of environmentally-sound development strategies and underlined that the definition of such strategies, including the exploitation

of a country's natural resources, were the sovereign right of every country;

4. Stressed that the developed contries which bear the primary responsibility for damage to the environment must also bear the primary responsibility for global environmental protection which includes the provision of additional resources for developing countries;

5. Underlined that international measures to control the use of environmentally damaging substances should be aimed at redressing the existing asymmetry in world consumption and production levels. Regulatory regimes which seek to subject production and consumption of certain susbtances to international control limits must be accompanied by supportive measures to facilitate the adjustment by developing countries to new standards. These measures must in particular include net additional financial resources and access to and transfer of alternative clean technologies. In this context they recommended that the creation of a special international fund to promote international cooperation in the field of environment, to finance research and development of alternative technologies and to bring these technologies within easy reach of developing countries, should seriously be considered;

6. Called for the adoption of effective international measures, including conventions and other relevant legal instruments, to prohibit the dumping of toxic and other hazardous wastes in the territories of other countries. They pledged to maximise the benefits from the Dump Watch already established by the Movement to facilitate wide dissemination of information on the activities of, and clandestine routes traversed by, merchants of toxic and other hazardous wastes. They also proposed that the developed countries should, in the meantime, adopt rigorous adminstrative measures and legislation to ban the export of toxic and other wastes to the territories of other especially developing countries.

7. Noted with serious concern that global climate patterns threaten present and future generations with severe economic and social consequences and emphasized that necessary and timely action should be taken to deal with climate changes and their consequences within a global framewrok, in conformity with General Assembly Resolution 43/53. In this context they called for the preparation and adoption of an international convention on protection and conservation of the global climate on an urgent basis;

8. Called on all countries to refrain from activities which would endanger the quality of the marine environment and ecological conditions. In this regard, they welcomed the measures taken under the auspices of the United Nations Environment Programme (UNEP) and called on all countries with experience in this field to assist UNEP, regional environmental agencies and individual countries in their efforts to protect the world's seas and waterways;

9. Urged all countries, relevant UN bodies and agencies and non-governmental organizations to continue providing and inceasing assistance to countries, especially in Africa, affected by desertification, deforestation, soil eroision, and to help them in their struggle against these phenomena and their harmful consequences;

10. Called on developed countries and relevant international organizations to establish new and strengthen existing mechanisms and funds for stimulating

the transfer to developing countries of 'clean' technologies and technologies for environmental protection and improvement and to earmark additional financial resources for environmental co-operation on concessional terms;

11. Welcomed the proposal for convening of the Second United Nations Conference on Environment and Development in 1992, as an important opportunity to address environmental and development issues in an integrated manner and supported the offer of Brasil to host it. They also stressed the importance of coordination among non-aligned and other developing countries prior to the Conference. For that purpose they recommended the convening of a special ministerial meeting of non-aligned and other developing countries at an appropriate time before the Conference.

ANNEX 8

HEADS OF GOVERNMENT COMMONWEALTH MEETING 1989 KUALA LUMPUR THE LANGKAWI DECLARATION ON ENVIRONMENT

We, the Heads of Government of the Commonwealth, representing a quarter of the world's population and a broad cross-section of global interests, are deeply concerned at the serious deterioration in the environment and the threat this poses to the well-being of present and future generations. Any delay in taking action to halt this progressive deterioration will result in permanent and irreversible damage.

2. The current threat to the environment, which is a common concern of all mankind, stems essentially from past neglect in managing the natural environment and resources. The environment has been degraded by decades of industrial and other forms of pollution, including unsafe disposal of toxic wastes, the burning of fossil fuels, nuclear testing and non-sustainable practices in agriculture, fishery and forestry.

3. The main environmental problems facing the world are the 'greenhouse effect' (which may lead to severe climatic changes that could induce floods, droughts and rising sea levels), the depletion of the ozone layer, acid rain, marine pollution, land degradation and the extinction of numerous animal and plant species. Some developing countries also face distinct environmental problems arising from poverty and population pressure. In addition, some islands and low-lying areas of other countries, are threatened by the prospect of rising sea level.

4. Many environmental problems transcend national boundaries and interests, necessitating a co-ordinated global effort. This is particularly true in areas outside national jurisdiction, and where there is transboundary pollution on land and in the oceans, atmosphere and outer space.

5. The need to protect the environment should be viewed in a balanced perspective and due emphasis be accorded to promoting economic growth and sustainable development, including eradication of poverty, meeting basic needs, and enhancing the quality of life. The responsibility for ensuring a better environment should be equitably shared and the ability of developing countries to respond be taken into account.

6. To achieve sustainable development, economic growth is a compelling necessity. Sustainable development implies the incorporation of environmental concerns into economic planning and policies. Environmental concerns should not be used to introduce a new form of conditionality in aid and development financing, nor as a pretext for creating unjustified barriers to trade.

7. The success of global and national environmental programmes requires mutually reinforcing strategies and the participation and commitment of all levels of society - government, individuals and organisations, industry and the scientific community.

8. Recognising that our shared environment binds all countries to a common future, we, the Heads of Government of the Commonwealth, resolved to act collectively and individually, commit ourselves to the following programme of action:

- advance policies and programmes which help achieve sustainable development, including the development of new and better techniques in integrating the environmental dimension in economic decision-making;
- strengthen and support the development of international funding mechanisms and appropriate decision-making procedures to respond to environmental protection needs which will include assisting developing countries to obtain access to and transfer of needed environmental technologies and which should take account of proposals for an international environment fund/Planet Protection Fund;
- support the work of the UNEP/WMO Intergovernmental Panel on Climate Change (IPCC);
- call for the early conclusion of an international convention to protect and conserve the global climate and, in this context, applaud the efforts of member governments to advance the negotiation of a framework convention under UN auspices;
- support the findings and recommendations of the Commonwealth Expert Group's Report on Climate Change as a basis for achievable action to develop strategies for adapting to climate change and for reducing greenhouse gas emissions, as well as making an important contribution to the work of the IPCC;
- support measures to improve energy conservation and energy efficiency;
- promote the reduction and eventual phase-out of substances depleting the ozone layer;
- promote afforestation and agricultural practices in developed and developing countries to arrest the increase in atmospheric carbon dioxide and halt the deterioration of land and water resources;
- strengthen efforts by developing countries in sustainable forest management and their manufacture and export of higher value-added forest products and, in this regard, support the activities of the International Tropical Timber Organisation's and the Food and Agriculture Organisation's Tropical Forestry Action plan, as well as take note of the recommendations of the 13th Commonwealth Forestry Conference;
- support activities related to the conservation of biological diversity and genetic resources, including the conservation of significant areas of virgin forest and other protected natural habitats;
- support low-lying and island countries in their efforts to protect themselves and their vulnerable natural marine ecosystems from the effects of sea level rise;
- discourage and restrict non-sustainable fishing practices and seek to ban tangle net and pelagic drift of fishing;
- support efforts to prevent marine pollution including curbing ocean dumping of toxic wastes;
- strengthen international action to ensure the safe management and disposal of hazardous wastes and to reduce transboundary movements, particularly to prevent dumping in developing countries;
- participate in relevant international agreements relating to the environment and promote new and innovative instruments which will attract widespread

- strengthen national, regional and international institutions responsible for environmental protection as well as the promotion of active programmes on environmental education to heighten public awareness and support.

9. We, the Heads of Government of the Commonwealth, resolve to take immediate and positive actions on the basis of the above programme. In this regard, we pledge our full support for the convening of the 1992 UN Conference on Environment and Development.

10. We call on the international community to join us in the endeavour.

Issued by Commonwealth Heads of Government at Langkawi, Malaysia.

Langkawi
21 October 1989

ANNEX 9

THE NOORDWIJK DECLARATION ON ATMOSPHERIC POLLUTION AND CLIMATIC CHANGE

1. The composition of the earth's atmosphere is being seriously altered at an unprecedented rate due to human activity. Based on our current understanding, society is being threatened by man-made changes to the global climate.

2. While there are still uncertainties regarding the magnitude, timing and regional effects of climate change due to human activity, there is a growing consensus in the scientific community that significant climate change and instability are most likely over the next century.

Predictions available today indicate potentially severe economic and social dislocations for future generations.

Assuming these predictions, delay in action may endanger the future of the planet as we know it.

3. Fortunately, there is a growing awareness among the world population and their political leaders that action is needed. The basic principle of ecologically sustainable development has gained wide currency following the report of the World Commission on Environment and Development. This principle should be fundamental to efforts to tackle the problem of climate change and atmospheric pollution. The protection of the ozone layer is being addressed by the 1985 Vienna Convention on the Protection of the Ozone Layer and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer. Further strengthening of control measures contained in the Protocol was called for at the London Conference on Saving the Ozone Layer in March 1989 and the first meeting of the parties to the Montreal Protocol at Helsinki in May 1989. A decision will be taken by the second meeting of the contracting parties to be held in London in 1990. The process aims at phasing out the production and consumption of chloroflourocarbons (CFCs) controlled under the Montreal Protocol by the year 2000 by the developed countries. They should also phase out other controlled substances which deplete the ozone layer as soon as feasible. Developing countries should also phase out these substances as soon as possible after their technology and resource needs are met.

4. Global warming is being addressed by the Intergovernmental Panel on Climate Change (IPCC), which was established by UNEP and WMO, and recognized by UN General Assembly Resolution 43/53 on Protection of global climate for present and future generations of mankind. The Hague Declaration of March 1989 put forward challenging ideas for international co-operation, and legal and institutional measures. The 15th session of the UNEP Governing Council and the XLI session of the WMO Executive Council in 1989 requested their executive heads to begin preparations for negotiations on a framework convention on climate; these negotiations should be initiated as soon as possible after the interim report of the IPCC is adopted. This interim report will be reviewed at the Second World Climate Conference in November 1990. The 1989 Economic Summit agreed that a framework convention on Climate change setting out general principles was urgently required and that specific protocols

containing concrete commitments could be fitted into the framework as scientific evidence requires and permits. The Economic Summit also strongly advocated common efforts to limit emissions of carbon dioxide and other greenhouse gases. The July 1988 declaration of the states, parties to the Warsaw Treaty, and the meeting of non-aligned countries in Belgrade in September 1989 also addressed the issue of climate change. The Tokyo Conference on Global Environment and Human Response Towards Sustainable Development was held in September 1989. The Langkawi Declaration on Environment issued by the Commonwealth Heads of Governments in October 1989 stated the need to take new action to address the serious deterioration in the environment, including climate change. Given this base it is now time for governments of all countries to commit themselves to the IPCC, to strengthen and to extend the process of addressing climate change.

5. Measures to limit climate change will have other significant benefits such as reducing acidification, protecting the ozone layer, preserving biodiversity and other natural resources, preventing mean sea-level change and promoting sustainable development.

6. The Conference recognizes the principle of the sovereign right of States to manage their natural resources independently. The Conference also reaffirms that global environmental problems have to be approached through international co-operation. Solving the external debt problem of developing countries, and establishing fair economic and commercial relationships between industrialized and developing countries would assist developing countries in creating appropriate conditions to protect the environment.

7. Climate change is a common concern of mankind. All countries should now, according to their capabilities and the means at their disposal, initiate actions and develop and maintain effective and operational strategies to control, limit or reduce emissions of greenhouse gases. As a first step, they should take those actions which are beneficial in their own right. Industrialized countries, in view of their contribution to the increase of greenhouse gas concentrations, and in view of their capabilities, have specific responsibilities of different kinds: i) they should set an example by initiating domestic action, ii) they should support, financially and otherwise, the action by countries to which the protection of the atmosphere and adjustment to climate change would prove to be an excessive adjustment to climate change would prove to be an excessive burden and iii) they should reduce emissions of greenhouse gases, also taking into account the need of the developing countries to have sustainable development. Developing countries establishing industrial facilities for the first time have a unique opportunity to include up-to-date technologies for controlling the emissions of greenhouse gases.

8. For the long term safeguarding of our planet and maintaining its ecological balance, joint effort and action should aim at limiting or reducing emissions and increasing sinks for greenhouse gases to a level consistent with the natural capacity of the planet. Such a level should be reached within a time frame sufficient to allow ecosystems to adopt naturally to climate change, to ensure that food production is not threatened and permit economic activity to develop in a sustainable and environmentally sound manner. Stabilizing

the atmospheric concentrations of greenhouse gases is an imperative goal. The IPCC will need to report on the best scientific knowledge as to the options for containing climate change within tolerable limits. Some currently available estimates indicate that this could require a reduction of global anthropogenic greenhouse gas emissions by more than 50 per cent. These estimates should be the subject of further examination by the IPCC.

9. While striving to preserve the global environment, it is important to work at the same time to ensure stable development of the world economy, in line with the concept of "sustainable development". Effort and action should include: i) the phasing-out of CFCs controlled by the Montreal Protocol, which are responsible for about one fifth of projected global warming, by national action and international co-operation in the context of the Montreal Protocol. This includes financial assistance and transfer of technology and information. In this connection, it is important that the substitutes for CFCs also should not contribute significantly to the global warming problem, ii) action especially by industrialized countries to limit or reduce CO_2 - emissions, iii) action to reduce deforestation, prevent soil eroision and desertification; increase afforestation, and sound forest management in the temperate as well as the tropical zones, iv) action to limit or reduce the emissions of all greenhouse gases other than CO_2 and their precursors and to increase the sinks for such substances and v) intensified efforts for technological breakthroughs, for example with regards to renewable energy and removal and re-utilization of CO_2.

10. The conference recommends that appropriate fora, including the IPCC, consider the necessity and efficiency of the introduction of the concept of CO_2 - equivalence. This would provide a single parameter to describe the radiative effects of the various greenhouse gases, including CFCs. Such a concept, after taking into account other environmental considerations, creates a basis for negotiations in response measures for different greenhouse gases in the most cost-effective manner.

The Conference further recommends the development of common definitions and the harmonization of methods to calculate CO_2 - emissions.

11. All countries should increase co-operation in developing new, environmentally sound technologies, to improve existing technologies and increasingly to use these technologies in order to limit climate change or adopt to it. Maximum use should be made of existing international organizations, institutions and mechanisms, governmental and non-governmental, for technology co-operation with and transfer to interested countries especially developing countries. Factors that impede effective transfer of appropriate technologies should be identified and measures implemented to overcome these impediments.

12. Progress in reducing atmospheric pollution depends not only on technical and economic issues but also on attitudinal and conceptual changes. All countries, especially industrialized countries, should recognize the need to make their socio-economic activities and life-styles environmentally sound. Improved dissemination of information and better training of personnel is needed, both at the national and international level. Public awareness programmes, including school curricula, should include the issue of climate

change and its connection with the way individuals use energy and other natural resources. Wider public awareness can be supported by increased scientific evidence arising from systematic research and monitoring activities. The Conference calls upon the non-governmental organizations to participate, in co-operation with international, regional and national authorities, in the efforts that are needed to respond to the problems of global warming, more specifically in the field of education and awareness building.

13. Many countries, especially developing countries will require assistance in identifying the causes of anthropogenic climate change, in establishing its extent and effect and also in responding to it. They will need help in acquiring, using, developing and maintaining technologies that are appropriate to their industrial, energy, transport, forestry and agricultural infrastructure. Industrialized countries will take steps to facilitate the transfer to developing countries of technologies to limit the global climate change through financial assistance and other mechanisms to overcome the incremental costs of acquiring and using these technologies. Furthermore, the capabilities of these countries should be increased so that they can develop appropriate technologies themselves. In this context the concept of assured access to appropriate technologies in relation to proprietory rights needs to be explored.

Given this stage of development of the issue of climate change, the Conference more specifically:

Carbon Dioxide (CO_2)

14. *Urges* all countries to take steps individually and collectively, to promote better energy conservation and efficiency and the use of environmentally sound energy sources, practices and technologies with no or minimum environmentally damaging characteristics. These policies should be reflected in short and long term energy policies and be pursued by all relevant sectors, including industry and transport, taking into account the need of developing countries for an adaptation period in order to enable them to meet their technological and other developmental needs. One direct means of allowing markets to incorporate the risk of climate change could be to ensure that the prices of all fuels reflect their full social, long run marginal and environmental costs and benefits.

15. *Agrees* that it is timely to investigate quantitative emission targets to limit or reduce CO_2 emissions and encourages the IPCC, in their interim report due in 1990, to include an analysis of target options.

16. *Recognizes* the need to stabilize, while ensuring stable development of the world economy, CO_2 emissions and emissions of other greenhouse gases not controlled by the Montreal Protocol. Industrialized nations agree that such stabilization should be achieved by them as soon as possible, at levels to be considered by the IPCC and the Second World Climate Conference of November 1990. In the view of many industrialized nations such stabilization of CO_2 emissions should be achieved as a first step at the latest by the year 2000.

Urges all industrialized countries to support the process of IPCC through the investigation of the feasibility of achieving targets to limit or reduce CO_2

emissions including e.g. a 20 per cent reduction of CO_2 emission levels by the year 2005 as recommended by the scientific World Conference on the Changing Atmosphere in Toronto 1988.

Urges all industrialized countries to intensify their efforts in this respect, while ensuring sustainable development and taking into account the specific circumstances of individual countries.

17. *Agrees* that industrialized countries with, as yet, relatively low energy requirements, which can reasonably be expected to grow in step with their development, may have targets that accommodate that development.

18. *Calls* on the IPCC to present the analysis and conclusions referred to above to the Second World Climate Conference in November 1990.

19. *Agrees* that developing countries endeavour to meet future targets for CO_2 - emissions and sinks, with due regard to their development requirements and within the limits of their financial and technical capabilities. International co-operation, whenever available, would be a contributing factor for greater action. New processes or industries to be introduced should, as far as possible, incorporate technologies which are more energy-efficient and produce less pollution than present technologies.

20. *Agrees* that developing countries will need to be assisted financially and technically, including assistance with training, i.e. by strengthening relevant mechanisms to ensure that they will be in a position to manage, develop, and conserve their forest resources in a sustianable and environmentally sound manner. This will also contribute to combatting erosion and desertification. Recognition by the market of the total value of forests, including non-wood values, is a precondition for developing countries' being able to successfully use such financial and technical assistance for sustainable forest management.

21. *Agrees* to pursue a global balance betwen deforestation on the one hand and sound forest management and afforestation on the other. A world net forest growth of 12 million hectares a year in the beginning of next century should be considered as a provisional aim.

Requests the IPCC to consider the feasibility of achieving this aim. To this end; the world deforestation rate should be slowed inter alia through the suppression of acid rain and other pollutants and of fires and through the reduction of pressures on biota. Sound forest management practices should be encouraged and at the same time vigorous forestry programmes should be developed in both temperate and tropical zones; biological diversity should be maintained; strategies addressing climate change issues through forest management and afforestation should be integrated with strategies addressing the sustainability of other forest based values resulting in full multiple-use plans where appropriate, but with due consideration of the people living in or dependent on forest land.

Welcomes the work of the Tropical Forestry Action Plan and the International Timber Trade Organisation in pursuit of these goals.

Chloroflourocarbons (CFCs)

22. *Welcomes* the commitment of the industrialized countries to amend the Montreal Protocol and to phase out the production and consumption of

controlled chloroflourocarbons by the year 2000, and of other controlled ozone depleting substances as soon as feasible.

Urges all countries to become Parties to the Vienna Convention for the Protection of the Ozone Layer and to the Montreal Protocol. To facilitate this broad participation suitable amendments of the Montreal Protocol should be considered urgently by the Parties to the Protocol.

Urges industrialized countries to use financial and other means to assist developing countries in phasing out their production and consumption of controlled substances as soon as possible, by providing them with sufficient means to enable them to meet their target date. The development of alternative technologies and products in developing countries should be promoted.

Other Greenhouse Gases

23. *Recommends* that the development and implementation of specific means of limiting the atmospheric concentrations of greenhouse gases other than CO_2 and CFCs should be energetically pursued, taking into consideration the special situation of developing countries.

Ministerial Meeting

24. *Recognizes* the need to convene a Ministerial Conference to review the interim report of the IPCC. The conference endorses the plan of the organization by WMO, UNEP, UNESCO and ICSU of such a meeting as part of the Second World Climate Conference in November 1990.

Funding

25. *Recommends* that existing institutions for development and financial assistance including the Multilateral Development Banks, Bilateral Assistance Programmes, the relevant United Nations organisations and specialized agencies, and scientific and technological organistions should give greater attention to climate change issues within their environmental and other relevant programmes by providing expanded funding including concessional funding. In addition, regional and subregional co-operation should be reinforced and funded so as to address and implement the required action at that level.

26. *Recommends* that additional resources should, over time, be mobilized to help developing countries take the necessary measures to address climate change and that are compatible with their development requirements.

Further *recommends* that the scope of resources needed must be assessed. Such assessments should inlcude inter alia country studies and the capabilities of existing institutions and mechanisms to meet the financing needs identified, similar to the approaches developed under the Montreal Protocol.

Further consideration should be given to the need for funding facilities including a clearinghouse mechanism and a possible new international fund and their relationship to existing funding mechanisms, both multilateral and bilateral. Such funding should be related to the implementation of a future climate convention and associated protocols. In the meantime the donor community is urged to provide assistance to developing countries to support actions addressing climate change.

27. *Recommends* that, initially, international funding be directed towards:

(i) funding of a CFC phase-out in developing countries in the context of the Montreal Protocol;

(ii) promoting efficient use of energy, including appropriate end use technologies, increasing the use of non-fossil fuels and switching to energy sources with lower greenhouse gas emissions, and the use of renewable energy sources;

(iii) increased financial support for forest protection and forest management improvement, for example through the Tropical Forestry Action Plan (TFAP), the Plan of Action to Combat Desertification, the international Tropical Timber Organization (ITTO) and other relevant international organizations;

(iv) assisting developing countries in planning how to address problems posed by climate change;

(v) supporting developing countries to enable their participation in the IPCC process and the other international meetings on this subject;

(vi) conducting research and monitoring;

(vii) arranging for technology transfer to and technology development in developing countries;

(viii) promoting public awareness, education and institutional and manpower development.

The use of financial resources could subsequently be extended inter alia to major energy sources with little or no environmentally damaging characteristics and for steps to reduce other global man-made emissions of greenhouse gases.

Research and Monitoring

28. *Urges* all countries and relevant organizations to increase their climate change research and monitoring activities and to provide for adequate data bases on emissions. Also *urges* states to co-operate in, and provide increasing support for, international co-ordination of these activities building on international programmes such as the World Climate Programme and the International Geosphere Biosphere Programme, and on the present roles of the UNEP, WMO, ICSU, IEA, UNESCO, IOC, IGBP and other competent international organizations and bodies. The enhancement and strengthening of operational aspects of their work should examined.

Recommends that more research should be carried out by 1992 into the sources and sinks of the greenhouse gases other than CO_2 and CFCs, like methane (CH_4), nitrous oxide (N_2O) and tropospheric ozone (O_3), including further research on the effect of the ocean on the concentration of radiatively active gases in the atmosphere.

Climate Change Convention

29. 1. *Urges* all countries to join and intensify the ongoing work within UNEP and WMO through the IPCC with respect to the compilation of elements for a framework convention on climate change so that negotiations upon it can start as soon as possible

after the adoption of the interim report of the IPCC.

2. *Recommends* that such convention will be framed in such a way as to gain the adherence of the largest possible number and must suitably balanced spread of countries.
3. *Agrees* that to this end the framework convention and associated protocols should commit the parties inter alia to:

   - enhancement of research and systematic observation climate, aimed at detecting and monitoring climate variations and change;
   - action to deal with greenhouse gas emissions and the effects of global warming;
   - address the particular financial needs of the developing countries in the access to and transfer of technology; and
   - strengthen sustainable forest management.

4. *Agrees* further that in developing the framework convention on climate change special attention should be given to ensuring that provision is made for appropriate decision making procedures and powers.
5. *Urges* all involved or to be involved in the negotiations to do their utmost to conclude these negotiations to ensure adoption of the convention as early as 1991 if possible and no later than at the Conference at the United Nations on Environment and Development in 1992.
6. *Considers* that in the preparation of the framework convention and protocols the relevant aspects of the Vienna Convention on the Protection of the Ozone Layer should be taken into account, as well as innovative approaches as may be required by the complex character of the problem.

30. *Recommends* that this declaration and the supporting papers be conveyed to the IPCC at the conclusion of this Conference for further consideration and action.

ANNEX 10

MALÈ DECLARATION ON GLOBAL WARMING AND SEA LEVEL RISE

Male - November 18, 1989

Environmental issues facing the world today clearly demonstrate that organisms and all the elements of nature including land, water and air cannot be exploited without far-reaching implications for the earth and its environment. It has been proved more conclusively than at any other time in history that the welfare of mankind is inextricably linked to the state of the environment. It has also been established that atmospheric concentrations of carbon dioxide and other greenhouse gases have increased over the last two centuries. These increases are seriously threatening to cause climate change, global warming and sea level rise, which have become common concerns of mankind.

There is now a broad scientific consensus that the global mean temperature could rise approximately by 1° to 2°C by the year 2030. It is predicted that even if the increases in atmospheric concentrations of greenhouse gases were to be brought to a standstill immediately, however unrealistic that may be, the global temperature and sea level would continue to rise for decades to come.

Although the entire would would be adversely affected by these processes, low-lying, small, coastal and island States will face a decidely greater predicament. Sea-level rise would cause extensive damage to the land and infrastructure of those countries and even threaten the very survival of some island states. The possibility also exists of an increase in the frequency and/or intensity of natural disasters related to climate change global warming and sea level rise.

Paradoxically the catalyst in this disturbing state of the global environment has been the rapid development of industrialization that was intended to lead to material progress. In view of the fact that the overloading of the atmosphere with greenhouse gases occurred primarily through the actions of the industrialized nations during the past two hundred years, these nations now have a moral obligation to initiate on an urgent basis, international action to stabilize and subsequently reduce emissions of greenhouse gases and to sponsor, as a matter of priority, an urgent worldwide programme of action to combat the serious implications of climate change, global warming and sea level rise. In addition, resources and technology should be made available by the industrialized nations, particularly to the most vulnerable States, which may not have the financial and technical means to address these problems.

A continuing dialogue between the small States and the rest of the world on the issue of sea level rise needs to be initiated. The small States call for an international response, especially from the developed and industrialized nations of the world. The likely effects of sea level rise urgently need to be established more accurately, and an effective international strategy for the small States of the world to cope with those impacts should be agreed upon as a separate issue within a global strategy. In this connection, the WMO/UNEP Intergovernmental Panel on Climate Change (IPCC) is recognized as the main forum for the on-going work on science, impacts and response strategies of climate change.

In the light of the scientific consensus regarding the likelihood of climate change and global warming and deeply concerned over the changing global environment and its possible adverse effects, particularly the threat of sea level rise, the Small States gathered here in Male' from 14 - 18 November 1989, declare their intent to work, collaborate and seek international cooperation to protect the low-lying small coastal and island States of the world from the dangers posed by climate change, global warming and sea level rise.

Therefore, we, the representatives of the small states gathered here:

1. *Decide* to develop a programme of action within the small States, for cooperation and exchange of information on strategies and policies in relation to climate change, global warming and sea level rise which are common concerns of mankind; and in particular, to:
   (a) establish an Action Group, initially comprising of representatives from the Caribbean, South Pacific, Mediterranean and the Indian Ocean regions, to oversee the implementation of the decisions and recommendations of the Small States Conference on Sea Level Rise, to coordinate a joint approach on the issues of climate change, global warming and sea level rise, and to pursue and follow up on global and regional response strategies;
   (b) consider the establishment of a climate and sea level programme and a monitoring network as an important component within the global measuring systems; recognizing the urgent necessity to take initial measures to created a monitoring infrastructure, bearing in mind the specific interests of small developing Island States, to apply to the appropriate United Nations Agencies (in particular WMO, UNEP, UNESCO) for assistance in its implementation;
   (c) mount a campaign to increase awareness of the international community of the particular vulnerability of the small States to sea level rise;
   (d) consider the most effective manner in which the small States can participate in the work of the Intergovernmental Panel on Charge, and seek assistance for such participation; and
   (e) seek assistance from the UN, its Agencies and other appropriate institutions in the implementation of the decisions contained in this Declaration.

2. *Call* upon all States of the world family of nations to take immediate and effective measures according to their capabilities and the means at their disposal, to control, limit or reduce the emission of greenhouse gases, and to consider ways and means of protecting the small States of the world which are most vulnerable to sea level rise.

3. *Urge* all States to take immediate measures to enhance energy efficiency and to formulate plans and strategies for a change over, as far as possible, to alternative, less environmentally harmful sources of energy.

4. *Recommend* that where necessary all States take immediate measures to establish the industrial framework to protect and manage their coastal zones and to enact legislation to facilitate such measures.

5. *Call* upon all States to undertake environmental impact assessment

studies for all development projects, review existing development programmes in terms of environmental impact assessment and strengthen environmental management capabilities.

6. *Recommend* that small coastal and Island States take adequate measures to maintain their aquifers and protect vulnerable natural ecosystems such as coral reefs and mangroves, which may already be at risk, as they can provide natural protection against the adverse effects of climate change, global warming and sea level rise.

7. *Appeal* to all States to embark on intensive afforestation and/or revegetaion programmes with emphasis on the selection of plants and trees suitable for the different solid conditions, and salt-tolerant varieties for the protection of coastal areas.

8. *Recommend* that research be intensified in understanding the complex inter-relationships concerning climate change, greenhouse effect, sea level rise and their implications on the environment and also to determine methods of ameliorating the impacts of these changes on coastal ecosystems.

9. *Urge* the industrialized nations to develop modalities and mechanisms to facilitate funding, technology transfer and training in areas related to the causes and problems associated with the rise in sea level. In this regard, the States facing immediate threat should be assigned a higher priority for assistance.

10. *Support* the call by the developing countries of the world for the strengthening of the existing funding, technology transfer and information mechanisms, not excluding the development of new mechanisms to assist them in implementing measures to control, limit or reduce emissions of greenhouse gases and adapt to and protect themselves from the adverse effects of unavoidable climate change, global warming and sea level rise. Such mechanisms would also help to ensure that the transition to a more and environmentally sound worldwide programme of sustainable development can be achieved.

11. *Call* for negotiations for a framework convention on climate change to start as soon as possible after the adoption of the interim report of the Intergovernmental Panel on Climate Change.

AN INTRODUCTORY APPROACH TO A COMPARATIVE AND THEORETICAL STUDY OF SOME BASIC LEGAL CONCEPTS IN RUSSIAN (RUSSIAN SOVIET FEDERATIVE SOCIALIST REPUBLIC) CRIMINAL LAW.

DR. ĠUŻEPPI SCHEMBRI

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This comparative essay is also an objective criticism of a Soviet school of law and its western counterpart, both believing that substantially, Soviet law is no law at all: the former manifests this belief through its supposition that Soviet law is radically and principally a new 'substantia', a completely new 'essence'. Thus, this school rejects any possibility of evolution, of transformation, of mutual influence between different cultures.

This attitude was greatly enhanced after the 1917 revolution by the dogmatic classist character of this school which in fact successfully changed old terminology to a new one; thus the RSFSR Criminal Code of 1922 excludes the concept of 'mens rea' and the concept of punishment but only by means of new terminology i.e. measures of social protection having a judicial-corrective character took the place of the term 'punishment'. But as correctly asserted by Pashukanis E.B. this did not change the essence of facts. [1]

While this Soviet school based its theoretical foundations on the political and legal necessity of destroying the 'old' and building the 'new', its western partner, ironically enough, upheld the same thesis, but basing itself on an incorrect analysis of the situation evolving in revolutionary Russia concluded that a sine lege society was in formation-a society without law.

According to the author of this essay, Soviet law, although creating the basis of essentially novel legal provisions and a new legal culture (in the same manner as the Napoleonic legal system did for the XIXc) it also integrally forms part, a very active part of Continental legal culture and as such is neither a 'sine lege' system nor is it an immune system, nor a system without roots in the 'old' continental sense. On the contrary, Soviet law is an integral, evolutionary part of this same culture.

The Continental character of the Soviet Russian Criminal Code is formally explicit in the traditional, 'old', structural differentiation of the Code itself. Thus, it is divided in a general and special part, the former giving the basic structure of positive criminal law, while the latter provides for the special character involving the crime composition of specific acts, qualified as being positive criminal acts. Thus the former includes:- the objectives and principles of the Criminal Code, criminal liability, general rules about the application of punishments, the will and age of the offender, attempted offence, impunity, necessary and self-defence, preparatory acts, voluntary desistince, complicity,

The author is using the word Russian for several reasons one being the fact that this essay is based on the Russian Federation (RSFSR) 1961 Criminal Code enacted by the Supreme Soviet of the Russian Soviet Federal Socialist Republic on the basis of the Fundamental Criminal Legislations of 1959-61.

exemption from punishment etc. An important consideration is the fact that the Russian Criminal Code defines each concept. It defines "Crime". One also finds definitions of intention, of negligence, defence, extreme necessity, complicity and others.

As stated above, the special part, as in all Continental codes, is dedicated to the specific crime composition of acts qualified as criminal acts - state crimes, crimes against socialist property, crimes against the life, health, freedom and honour of the person, crimes against the political and labour rights of citizens, crimes against the personal property of citizens, economic crimes, crimes against public trust, crimes against the administration of justice, crimes against public peace, crimes against security, social order and against the health of the population, military crimes, and others.

It is not our intention here to delve deeper into each provision. Suffice it to say that such a formal structure is already a very noted characteristic of the Continental legal culture inherited by the Soviet Russian system.

Limiting ourselves to the general part, one immediately notices that Soviet Russian criminal law is fundamentally based on a defined qualification of the crime composition of each act, which thus is determined as being a criminal act if so defined by the state.

Thus, we find here a very interesting position: whereas in Malta doctrine is radically differentiated from positive law, this doctrine is in the Russian system positivised i.e. made as an integral part of positive law. In other words, one finds a codification of what in our system we are habituated to interpret as being pure doctrine. What is doctrine in our system becomes positive law in the Soviet Russian system.

Hence, differing from the Maltese Code, sec. I. of the Russian Code instead of providing for the penal laws as in the Maltese Code, defines in a positive manner the tasks of the RSFSR Criminal Code i.e. *to protect the social order, the political and economic system, socialist property individual rights and freedoms and the whole socialist legal order, from criminal encroachments.* [2]

Thus, what for the normative school of legal science seem to be extra-legal concepts are themselves normitivised and made positive through their enactment in a Criminal Code.

What for the Maltese system is part of doctrine, becomes in the Russian system a part of positive law. The above definition is in fact an expansion of Carrara's definition - 'promulgata per proteggere la sicurezza dei cittadini' - and in which definition the word 'subjects' is used precisely to convey that crime is punished by the state because it injures also the community at large..." [3]

Sec. I of the RSFSR Code also underlines that in order to implement this above mentioned enactment, the Code must determine which acts are to be so qualified and their corresponding punishments. Thus sec. I gives a positive character to doctrine *and* formalises its normative character. In order thus to afford such "protection" it is the Criminal Code that determines which dangerous social acts are criminal.

Protection as a positive legal concept, is defined as the "tutela" of the objects enlisted in the article concerned is implemented by means of applying the norms found in the Criminal Code.

Social order includes the system of social relations obtaining in the economic field, in social-class and in political spheres. This latter unit is concretely interpreted as including the Communist Party of the USSR, the Soviet Government, social organizations, collectives and independent social organizations.

The USSR economic system reflects the character and form of property and the corresponding system of distribution of wealth.

Besides these objects to be defended and protected sec. I singles out 'socialist property' i.e. the fundamental constitutional basis of the USSR society. This property is reflected in the legal entities of state and "kolhkoz" property, together with union property and co-operative property.

The individualisation of this specific item being afforded special protection is conditioned by s.10 of the USSR Constitution.

The next object to be protected is the person, defined as an active subject in the construction and establishment of society; the concept of person includes also a subject incapable of participating in same. Citizens are so qualified by birth, by acceptance, and by other means regulated by the "Law on USSR Citizenship" (1978). Their protected rights are those provided for by the Constitution - equality in the economic, political, social and cultural life, sex equality and race equality. The rights afforded protection are the right to work, to rest, to health, to education, to use cultural benefits, and to social benefits, and others.

Citizens' freedoms include the traditional freedoms of conscience, of meetings, demonstrations, of expression, of scientific, technological and artistic creativity.

The last element provided for by sec. I. is "the whole socialist legal order" meaning all the positive norms regulating socialist social relations.

Thus, according to sec. I. all the above units are afforded protection against criminal encroachments, the latter expression interpreted as meaning the action (commission and omission) having all the necessary elements composing the crime-structure, which is thereby qualified as such by the Code.

Thus, as one can see the Soviet Russian Code in fact includes concepts which are qualified by the normative school, especially by Beling, Binding and Yescheck, as concepts "having nothing to do with law". [4]

One may recall here that the normative school excludes concepts such as 'social danger', since these have a subjective-assessive character and hence do not belong to law.

Such concepts' normativisation in a Code should naturally create theoretical problems to the German normative school.

The Maltese-Italian school, although based on and implies such objectivity as that found in the Soviet Code, does not expressly 'de jure condito' provide such a character in its system of law. The Maltese legislator on the other hand opted for an adjective formal definition of criminal action as one prosecuted before the courts of criminal jurisdiction, by the Government of Malta, without

positively providing for the requisite of social danger, of socially, harmful consequences (v.sec.3.2.,4.I.) although such concepts are integral, basic and fundamental in the legal system's doctrine.

After defining the objectives of the RSFSR Criminal Code, the Code defines the parametres of criminal liability (sec.3), or rather the basis of criminal liability, which is also left out from being 'codified' in the Maltese system: yet the codified Russian definition is directly based on the same doctrinal concepts accepted by the Maltese school.

Thus, criminal liability arises only if a person is guilty of committing a criminal act and the Russian Code qualifies this as being possible either "intentionally or through negligence". That is, only a person who is guilty of committing a crime' is defined by the Code itself as one committing either intentionally or by negligence a socially, dangerous act provided for by criminal law.

Doctrinally this aspect tallies with the Maltese school, but the latter leaves this aspect in the doctrinal field, while the Soviet system again as above mentioned, 'codifies' the same.

Such a dichotomy exists in all these relative aspects of both schools. Again, in the Maltese system, the Code refrains from giving any definition of 'negligence' and 'intention', and of course as already stated does not touch the definition of criminal liability, being content with subjecting the concept to defect of will, this being ground to exemption from criminal responsibility. The doctrinal 'res ipsa in se dolum habet' is only implied through case-law.

On the contrary, sec.8 of the RSFSR Code defines the complex limitations of 'intention', defining an intentional criminal act as that *situation when the person committing the crime comprehends, is conscious of the socially dangerous character of his act (commission or omission) and foresees the dangerous social consequences and either desired them or consciously allowed their coming into being.* Such definition, as one can note, unites direct and lateral intentions and is directly derived from the Italian classical school and accepted by the Maltese legal system; [5]

The intellectual moment is the consciousness of the dangerous and harmful character of the acts and the foreseeing of the results, the 'volere' is the striving towards the desired end or consciously permitting such results. The correlation between this 'conoscere and volere' may produce direct intention i.e. being conscious of the socially dangerous character of the act, foreseeing the inevitability or possibility of the results and desiring same. Or this correlation may also produce lateral intention i.e. conscious of the socially dangerous character of the act, forseeing the possibility of its consequences, he may not desire (although at the same time he may be consciously permitting) their coming into being. The latter is close to Carrara's positive indirect intention.

Sec.9 further qualifies 'negligence' as an *act committed by a person who foresaw the possibility of socially dangerous results, but carelessly calculated on their being prevented.* This gives rise to criminal presumption. Negligence also includes the situation in which a person does not foresee the possibility of his act's consequences but should have and could have foreseen them. This is termed criminal negligence.

The first part of the above Russian section deals with the situation in which negligence is understood as a particular state of mind manifested by a failure to be alert: the true nature, circumstances, and consequences of a man's acts are prevented from being present in his conciousness. [6] On the other hand, the second part of the Russian section deals with negligence as "un atto di volonta", "a voluntary failure to take care" and as a voluntary failure to foresee." 'Should have' and 'Could have' imply that the Code is not only talking on the 'possibility' of foreseeing but also includes the breach of the duty of taking care. That is, it includes the failure to foresee that which is foreseeable (could) and also the failure to foresee that which ought ot have been foreseen (should).

Sec.3 (criminal liability), sec. 8 (intention) and Sec.9 (negligence) together formulate the important postulates of the crime-composition of an act. Criminal liability is effected from the moment of the completion of the crime. At this point of time one may speak of criminal legal relations "the subjects of which are the official organs representing the state and the criminal (v. Commentaries). This relationship is also reflected in sec.4 of the Maltese Code"... the criminal action is essentially a public action and is vested in the Government by whom it is prosecuted in the name of the Republic of Malta, through the Executive Police or the Attorney General as the case may be according to law".

According to Russian law intention or negligence in the act concerned is present only if this same act has all the required ingredients i.e. has a *complete crime-composition.*

A crime-composition is defined as *the totality objective and subjective ingredients established by criminal law, characterising the specific socially dangerous act as a criminal act.* The objective ingredients include (i) the socialist social relations protected by law and against which the particular, specific act is directed, i.e. the object of the criminal encroachment. ii. the criminal act and the external 'iter' i.e. omission and commission, criminal effects, the legal nexus between the act and the results or effects: sometimes time, place and means are also included as forming part of the objective side of the crime-composition.

The subjective side of crime-composition articulates the psychic relation the person has to the socially dangerous act and its subsequent effects. As stated above, this psychological relationship is by Russian law defined a having the form of either intention or negligence. In fact 'guilt' is defined by Russian law as the psychic, the mental relation of the person to his committing of a socially dangerous act defined as such by criminal law. Due to such definition some conclude that Russian law does not recognise the Continental concept of objective liability, (did not foresee, could not and should not have).

Motive, objective, personality together with guilt form part of the subjective side of the crime-composition.

It is of outmost importance to repeat that according to Russian law, only the totality of all the above mentioned ingredients may give rise to criminal liability.

One, or a couple of the above elements *do not* constitute the complex definition of liability. There has to be the total sum of each ingredient present in the act.

Sec.8 goes on to develop sec. 3 by giving a definition of intention (supra).

As already stated, sec.8 defines two forms of intention: direct and indirect intention.

Direct intention includes the consciousness of the socially dangerous character of the act, the foreseeability of the dangerous effects of the act or omission and the desire of their coming into being. Direct intention as in the Italian-Maltese school is formed of an intellectual and the volition side. The former assists in the knowing of the dangerous character and in the foreseeing of subsequent effects while the latter is necessary to define the 'desire' of such results coming into being. As one can see even here the Soviet Russian school of criminal law is very much dependant on the classical Italian source.

The indirect or lateral intention implies that the offender is conscious of the socially dangerous character of his act or omission, he foresees the corresponding consequences and effects and consciously permits their coming into being. Like the Italian school, the Russian school admits the intellectual and volitional elements in this indirect form of intention.

According to Russian law, indirect intention is possible only in cases of material crime-compositions. In formal crime-compositions indirect intention is not accepted due to the fact that in the completion of such crime-compositions the psychological relationship between the offender and the criminal result is impossible to establish.

The fundamental, basic difference between direct and lateral intention is found in the element of volition. In direct intention, this element in material crime-compositions is expressed by the explicit desire of the coming into being of particular results, foreseen either as the sole aim or objective of the actor or as a means towards an end. In the case of lateral intention foreseen results are not the end, are not the objectives of the offender's acts, are not desired nor required as the completion of his objective.

Russian positive law, although defining Intention as above, does not proceed to define specific and generic intent, nor does it define preconceived or spontaneous intent although these are accepted by Soviet case-law.

Sec.9 qualifies negligence. A crime is committed through negligence *if the offender foresaw the possibility of the resulting socially dangerous effects due to omission or commission, but frivolously (thoughtlessly) relied on their prevention or did not foresee the possibility of their coming into being although he ought to have (should have) and could have foreseen them.*

Thus Russian law defines two forms of negligence: criminal presumption and criminal carelessness.

The former is carefully worded so as to underline that the psychological relationship here is not directed towards the act, but is determined within the parameters of the relationship to the socially dangerous results. This obviously means that acts in this section do not have the same criminal liability burden and as such cannot eg. establish preparation or attempt in crime.

The offender is not conscious of the real and concrete development of the nexus between his behaviour and subsequent results: although he could have been conscious if he had used greater mental care. This is very similar to the traditional theory propounded by Carmignani and Carrara. According to this

school negligence is a subjective fact i.e. a particular state of mind. It essentially consists in a failure to be alert, circumspect, or vigilant. The negligent wrongdoer is-he does not know it, but would have known it were it not for his mental indolence [7]. In fact the Russian Code seems to use Carrara's terminology in defining negligence (the former type) as a voluntary failure to take care in *estimating* the probable and foreseeable consequences of one's acts.

The second form of negligence defined by sec.9 is criminal carelessness, whereby the offender did not foresee the possibility of resulting effects although he ought to/should have and could have foreseen them. Here the central element is the unforeseeability. The element of volition here consists in the fact that although the offender had a real possibility to foresee such results, he did not act upon his mental capabilities to will the necessary acts necessary to prevent such results.

Thus, in contrast to criminal presumption one notes here the objective criteria of "ought to/should have" but this is integrated with the subjective element of "could have".

Following Impallomeni and Maino, the Russian school distinguishes between the various degrees of foreseeability opting for an average criteria to determine the possibility existing in foreseeing, taking into account such elements as the profession, speciality, activity of the offender, the normal standard of care expected from a normal person.

This again is very close to Carrara and to the Maltese school. "When we say that the event was unforeseeable, we do not mean that it was unforeseeable absolutely. We mean only that it was unforeseeable by the standard of care which the law requires every man to use in his actions, ...the amount of prudence or care which the law actually demands is that which is reasonable in the circumstances of the particular case...". [8]

'Nullum crimen, nulla poena sine lege' is effectually enacted in the second part of Sec.3. [9] This provision underlines that only a court sentence can define and determine guilt. As in many continental systems this section is a reflection of constitutional norms. Thus the same principle is provided for in sec. 160 of the USSR Constitution:- "No one may be adjudged guilty of a crime and subjected to punishment as a criminal except by the sentence of a court and in conformity with the law". (v. also sec. 151) "... in conformity with the law" is understood by Soviet jurists as meaning the pronouncing of the sentence in observance with all material and procedural criminal law requirements. This interprtation is detatable.

Thus the guilt of every accused person has to be proved in court and according to law. Russian law underlines that the system established by law for the determination of guilt can only be a court system -- excluding any other organ. Such a situation can be compared with Malta's Constitutional provision stating that" Whenever any person is charged with a criminal offence he shall... be afforded a fair hearing...by an independent and impartial court established by law..." (Sec.39.I.).

Unfortunately the qualifications of "fairness", "independence" and "impartiality" do not figure in the Soviet Russian version.

An interesting digression here can help us understand better this situation. "When in 1921 the Organizational Bureau of the Party Central Committee drafted a circular, which stipulated the right of the Party Committees to impose pre-determining instructions on the Courts, Lenin thought the respective instructions harmful and insisted on a revision of the circular. And in a well known letter to the Political Bureau of the Central Committee of the Russian Communist Party (Bolsheviks), dated March 18, 1922 he wrote this reminder: "That it be confirmed to all Gubernia Party Committees that for the slightest attempt to influence the courts...the CC will expel such persons from the Party...". L. Sobolev, from whose works the above was quoted also states that 'no heed was paid to Lenin's warning'.

In fact today the Party's Resolution "On Legal Reform" stresses that it is necessary...to secure unconditional independence of judges and their subordination to law alone, and to define concrete sanctions for interference in their activity and contempt of court. [10]

The concept that anything the law does not prohibit is allowed, was recently declared as a principle that the XIXth Conference put at the basis of the reform of the legal system.

The Soviet Russian Code, maintaining its positivist character, 'provokes' a definition, a positive definition of 'Crime'.

Primarily it indicates that crime is a violation of the law of the State. "..(act).. encroaching on socialist legal order..as provided for by criminal law...".

Then it goes on to qualify that such law is promulgated for the protection of the safety of the subjects and community; "... (act)... encroaching on the social structure, its political and economic system, on the socialist property, personal and political, labour, property and other rights and freedoms of the citizens...".

This act of encroaching is defined by criminal law as a socially dangerous act (omission or commission). Here one cannot help recalling and not using the extension of Carrara's Classical doctrinal definition which finds its positive enactment in the RSFSR Code. (The second part of Carrara's definition can be found in sec.3).

But the Soviet Russian Code goes further -- it concretises the concept of 'safety of the subjects' and besides the objective danger and harm qualified by the definition, it also, interestingly enough, includes the normative concept of the whole legal order as an element needing the 'tutela'. This implies the fundamental normative theoretical elements of 'material unlawfulness' in the theory of Yescheck H. and the concept of 'legal good' in Dona A. [11]

Thus, sec. 7 defines Crime as that *socially dangerous act (omission or commission) qualified by criminal law, encroaching on the USSR social structure, its political and economic system, on socialist property, on the person, on political, labour, property and other rights and freedoms of citizens and*

also as that socially dangerous act (provided for by the criminal law) which encroaches on the socialist legal order.

Here the author considers a formally very interesting development from sec. 1 concerning the objectives of the Criminal Code, which therein groups the objectivity of all protected objects under one title; whereas sec. 7, in defining Crime, divides these protected objects into two distinct parts with the very strict and strong conjunction (translated poorly) as "as well as". The first part concerns acts involving certain material objectivity broken down into separate distinct departments, while the second part mentions any acts (socially dangerous) that encroach against 'legal order' -- a very normative *doctrine*. Thus, in a certain manner one here notes an interesting 'Carrara-Yescheck' theoretical combination having a very explicit positive manifestation. Such a situation is absent in many Continental Codes such as those of Austria and Malta which opt for only a procedural concept defining crime or the criminal act as eg. that act prosecuted by the courts of criminal jurisdiction (s.3.2.); a public action vested in the Government by whom it is prosecuted (4.1.); and whereby a certain punishment of the offender is demanded. (7.1;3.2)

Thus, although objectivity and harm are essential for the definition of crime in the Maltese legal system, these are left undefined and confined only within a structural concept of crime. [12] The objective material element of social danger is the more underlined, on the other hand, by the Russian Code which besides the explicit sec. 1 and sec. 7, again underlines that an act, even if formally it answers to a crime-composition as provided by the special part of the Code, is nevertheless not included in the definition of a criminal act if due to its small significance it does not present any social danger. [13] Thus the formal elements are not enough to qualify an act as a criminal act. The significance 'level' is decided on the basis of all actual and factual events and circumstances composing the case--character of the act, conditions and means of completion and committion, the absence of harmful results, insignificant damage, together with the important qualification that the actor did not intend otherwise.

The crime and its elements, presuppose that the act is one capable of or has in fact caused a social danger. The legislator sometimes directly links given elements of offences with the causing of definite particular harmful consequences. In fact the unlawfulness of the act, its socially harmful consequences and a causal connection between these constitute the objective side of the offence. [14]

The Soviet school differentiates between the concept of social danger and of social harm. Social harm appertians more specifically to civil, administrative, disciplinary "and similar ..." offences and unlike 'crime' does not always manifest the required level of danger to society in general. [15]

Thus, to conclude this part one may recapitulate by stating that the Soviet school recognises four constituent elements of criminality--social danger, unlaw fulness, guilt, and penal sanctions. These elements of criminality are not to be confused with the structural units of the crime-composition i.e. a) object of the crime; b) subject of the crime; c) objective side of the crime (act, omission, results); d) subjective side of the crime (mens rea, motive and objective).

The positivization of certain classical concepts (supra) has caused a very important critique from the Italian school although as we have already seen those concepts in fact stem from the very same school. Thus, Pagliaro A. and Tranchina G., say that "... le definizioni sostanziali del reato dettate da orientamenti politici sono gravement pericolose per la liberta individuale, quando tendano a sostituirsi alla legge o ad estenderne le incriminazioni. Esse comportono infatti, una decisa rottura del principio di certezza del diritto, in quanto concetti estremamenti vaghi, come quello di "tradimento rispetto agli ideali della comunita" o l'altro di "fatto pericoloso per il sistema socialista" possono essere determinati di volta in volta in modo diverso ...". [16]

Although agreeing with the emminent jurist, the author of this essay has to underline and note that these substantial definitions derive directly from the classical school of legal thought amongst which Carrara and Manzini's theories were fundamental and whose theories inform modern Italian and Maltese legal thought. The difference being that the Soviet legislator opted for these concepts' positive enactment.

The Soviet Russian Code defines its enforcement framework within space and time. The Code bases its provisions on the territorial principle for all crimes committed within RSFSR territory (s.4) and in the opinion of the author on an extreme interpretation of the personal theory for crimes committed by USSR citizens outside USSR territory.

One may recollect that Maltese law provides for the territorial principle in s.5 and even gives a differential definition of such territorial jurisdiction i.e. territory, sea, space, ship, vessel. The same Maltese Code narrows the personal theory for *certain* crimes and integrates this to the 'nationality' principle (citizenship and residence). Thus, a criminal action may be prosecuted in Malta against any citizen of Malta or permanent resident in Malta who becomes guilty of specified offences including those against the person of a citizen or permanent resident of Malta. Russian law does not differentiate territorial aspects of territorial jurisdiction. It gives a general dictum for all crimes committed within USSR territory without feeling the necessity of defining the various aspects of territory presumably because it is recognised that territorial jurisdiction explicitly means and includes territory, sea, air-space, vessels, aircraft etc.

S.4 deals also with the criminal liability of diplomatic representatives and other citizens enjoying immunity. The Code provides that such questions are to be based on the ex territorial principle and is to be solved through diplomatic channels. [17]

Due to its federal system, one can understand the difference of the territory defined in s.4 and s.5.S.4. speaks of crimes within the RSFSR territory (which is the territory of one republic in the fifteen republic federation) and is not applicable to other republics. S.5 concerns the liability of all USSR citizens committing a crime in foreign states who are triable in the RSFSR if brought to trial within RSFSR territory. On the other hand, s.4 applies to all citizens (RSFSR and all other citizens of other USSR republics, foreign citizens and state-less persons, if their criminal act is committed within RSFSR territory).

One should not forget that all republic citizens are USSR citizens.

The territorial parameters are clearly defined in the 'Law on State Frontiers USSR, 1982'. This includes land territory, internal waters, internal sea waters, territorial waters (12 miles), frontier rivers and lakes up to the differentiating line, air-space, military ships, civil ships on the high seas, air ships.

Foreign military ships situated in territorial waters of the USSR are recognised as not appertaining to USSR territory.

The crime committed within RSFSR territory is defined as being either that activity the criminal quality of which commenced and was consumated in RSFSR territory; or when the result of criminal acts committed outside RSFSR or USSR territory happens within RSFSR territory, or in cases where although the criminal acts commenced within RSFSR territory the results ensue outside such territory. The latter case can be found in the Maltese Code with respect to the result of death outside Maltese jurisdiction of a person striken within such jurisdiction (s.211.3); and also s.220.3 concerning grievous bodily harm from which death ensues.

As to s.5, it is Soviet law that is to determine and define acts committed outside Soviet jurisdiction by USSR citizens as criminal acts. The third para. of sec.5 explicitly negates the 'ne bis in infidem' principle previously admitted by the Maltese Code sec. 5.

An application of the 'ne bis in idem' by Soviet law may be possible only by an express court decision. This gives very wide powers to the court in each specific case. But in principle, criminal liability and proceedings against USSR citizens continue their effectivity independently if whether the offender has already been convicted, or has already served his sentence. A very interesting provision of this same sec.5 is the last para., providing for the application of international legal norms stemming from international treaties in case of criminal liability under Soviet law for crimes committed by foreign citizens *outside* USSR territory. Examples of such treaties include the 1973 International Convention on Apartheid. This provides for the cosmopolitan doctrinal attitude for defined criminal acts. This provision is a domestic legal crystallisation of the cosmopolitan school of law and is applicable to crimes against peace and humanity, military crimes, terrorism etc.

It is important to clarify that this provision is applicable only where the international convention provides for the competence of the courts of *any* state-signatory/member of the particular agreement. Foreign citizens are liable only for those crimes committed outside USSR territory which are so provided for by Soviet criminal law.

Differing from some other European Codes, the RSFSR Code provides for the transitory principle of law. The RSFSR Code sec. 6 expressly states that criminality and punishability are determined by the law in force at the time of committing the criminal act.

Extenuation and exclusion of punishability have in determined circumstances a retroactive character. This is in line with Roman and Continental law. Ulpian, one may recall, wrote that wrongs should not be subjected to the punishment imposed by law in force at the time of trial but

to the punishment prescribed by the law in force at the time of the commission of the wrong. [18] But furthermore 'lex non habet oculos retro' and other Roman law provisions declare similar provisions; this applies to laws establishing punishment or aggravating punishment as in most systems of law. The Soviet school of law believes that it is not correct to punish a person for acts which previously were defined as criminal but which at the time of trial have either partly or completely lost their dangerous character, thus having a new penal status.

Sec. 6 is integrally linked to the constitutional provision in art. 160 stating that "No one may be adjudged guilty of a crime and subjected to punishment as a criminal except by the sentence of a court and in conformity with the law." This provision is enhanced by sec.6 of the Code underlining that an act may be qualified as criminal only in conformity to positive law and if so defined during the moment of commission of the wrong. Thus, the Russian provision manifests the generally accepted norm that wrongs should not be subjected to the punishment imposed by law at the time of trial but to the punishment prescribed by law at the time of the commission of the wrong.

Thus the first part of sec.6 finds a reflection in the Maltese Constitution sec.39.8"... No person shall be held to be guilty of a criminal offence on account of any act or omission that did not at the time it took place, constitute such an offence...". This is in fact a manifestation of the principle nullum crimen, nulla poena sine lege. *Soviet law knows cases in which the principle of retroactive application of entenuating circumstances was limited in its operation. Thus the newly enacted law providing for the maximum period of fifteen years deprivation of liberty was not to apply for special grave crimes and for special dangerous recidivists convicted* before the passing the passing of the Fundamental Criminal Legislation. The retroactivity of extenuation or exclusion provisions found in the second part of the RSFSR Code Sec. 6 is essentially found also in sec. 27 of the Maltese Code "... if the punishment provided by the law in force at the time of trial is different from that provided by the law in force at the time when the offence was committed, the less severe kind of punishment shall be awarded.".

Soviet law established the moment of the consumation of the particular crime as the essential point of reference in order to determine whether the new or old law is to be applicable. Thus the moment of the coming into force of the new law is regarded in reference to the moment of the final act of the crime. Of course this holds good except for those situations that are afforded retroactivity according to sec.6.

The application of retroactivity is a mandatory one for the courts. Investigating personel and inquiry organs may stop the proceedings subject to agreement with the public prosecutor.

Soviet law as above stated recognizes cases in which the principle of retroactivity was not applied i.e. in which the extenuating provision was limited in its operation. Thus, the RSFSR Criminal Code provided a maximum period for deprivation of liberty for special grave crimes and for specially dangerous recidivists-fifteen years substituted the previous twenty five. But sec. 2 of the Law concerning the confirmation of the RSFSR Criminal Code, 27th October

1960 states that this particular section, i.e. sec. 24 does not apply or rather is not applicable to persons convicted before the enactment of the Fundamental Criminal Legislation if the conviction included special, dangerous state crimes, banditry, intentional homicide with aggravating circumstances and other grave crimes. This limitation was qualified by the provision that this only concerns sentences and court decisions that came into force before the coming into effect of the RSFSR 1960 Code.

It thus, *seems* that Soviet law, like Italian law, maintains that repeal should have the effect of cancelling the effects of conviction and of remitting any unexpired or outstanding portion of the sentence or penalty *after* the offender has already been tried and sentenced. [19]

'Minor' is defined by the RSFSR Code as a person under 16 years of age. As a protection to the minor, Soviet law defines a criminal act against such a person as involving an aggravating circumstance including in some cases a specially grave' punishability.

The 16 year limit is the general age limit defining a minor in sec. 10. Yet, the same section establishes a 14 year limit for liability involving certain specified crimes. There are certain grave criminal acts whose character the Criminal Code believes the minor is capable of understanding and comprehending-wilful homicide, intentional and grave bodily harm, rape, theft, extreme hooliganism, grave crimes against the state and against social and personal property are some examples.

When the minor is the active agent of a criminal act, the RSFSR Code establishes a special procedure of certain qualified norms in determining punishment and the circumstances necessary for exemption.

Like Italian law, Russian law, possibly under the influence of sociological legal concepts, believes that "nei confronti dei minori, dunque la pena ha perduto quasi del tutto il carattere di castigo o di espiazione, per assumere una funzione di prevenzione sociale e di rieducazione ...". [20] This is based on the well accepted attitude that there is the "prezunzione assoluta di assenza di capacita di intendere e di volere" within the age limit as qualified and differentiated by law.

This age differentiation, is regarded as a privilege granted for the reasons above mentioned and it is further complemented by the fact that Russian law holds that in such cases the minor had acted in such a manner by reason of his intellectually retarded capabilities (not in any way connected to insanity). In case of such a court determination which also takes into account the gravity of the act, the court may apply the norms related to disciplinary educative measures. This is also applied when, in relation to a person who is under eighteen years of age, the Court is satisfied that the criminal act is not one of grave social danger and that such a minor can be corrected without applying any penal procedure.

The Court has a positive obligation determined by sec. 32 of the Fundamentals which states that it has to subject punishment to the objectives and principles of correction and positive up-bringing.

Until the eighteen year limit a person is deemed to be under a special type of protection and 'status'. The eighteen year limit, for example, implies

that such a person, although fully responsible as from his 16th year, cannot be subjected to capital punishment; nor can his loss of personal liberty exceed ten years. Such persons have the 'privilege' to be granted a special form of conditional liberty and/or a possible subsequent change in punishment.

All this, one may repeat, depends on the court's estimation of the social danger manifested by the minor's act and of the minor's character. This is similar to the other Italian doctrine which underlines that "se il soggetto e socialmente pericoloso, gli saranno inflitte le misure di sicurezza del riformatorio guidiziario o della liberta vigilita". [21] Similar but not identical, it may be useful to recall that Italian law while defining the 14 year limit as one composed of absolute 'doli incapax' like the Russian Code, it defines the 14 - 18 year period as one involving the principle of diminished responsibility. Maltese law defines the 'doli incapax' as an element applicable to a 9 year limit. It conditionally grants the same regime to the 14 year limit if the act is "done without mischievous discretion". The 14 - 18 year old period is deemed to be 'doli capax' but involves an extenuation of punishment (1 - 2) due to the privileged treatment afforded.

Sec. 2 speaks of exemption from criminal responsibility; and as in other sections, the Soviet legislator deems it important to define same, unlike his Maltese collegue. This is defined as *a situation in which a person at the time of the perpetration of a socially dangerous act could not give an account of his actions or control them, either due to a chronic mental disease, or to a temporary disarray of mental activity, imbecility or other unhealthy condition.* This definition is important since like the Italian variant, and unlike the undefined Maltese version the fact that "il vizio di mente deve essere la conseguenza di una malattia" is explicitly enacted. [22] The author must here underline that the Russian section is not implying "ogni deviazione nel funzionamente normali" as Pannain interprets the Italian version.

Russian law differentiates between two closely interacting conditions i.e. medical and juridical criteria both of which are necessary in establishing the exemption from responsibility.

The medical criteria includes the objective presence of mental disease within the limits imposed by sec.2 i.e. chronic mental disease, temporary disarray of mental activity, imbecility and other unhealthy condition.

The first one (eg. schizophrenia, epilepsy) has to be of a grave and of a relatively uncurable character, of a protracted type and to have a deteriorating tendency.

Temporary disarray (eg. pathological intoxication, alcoholic psychosis, mental shock) has to be qualified as a psychological disease which is of a short duration and has the possibility of cure or betterment. Imbecility is a complete intellectual lesion, a psychic defect. It hinders a correct evaluation of one's actions and disturbs an objective appreciation of events. This disease is classified either as being from birth or as having progressively developed during childhood. Examples are, idiotism, imbecility, and debility. Here exemption is not of an automatic nature.

The last aspect i.e. 'other unhealthy conditions' is meant to include only

those grave defects or diseases which may violate the person's psychological activity and does not necessarily and solely imply completeness of the sickness concerned. Thus, one may here include psychological changes caused by deaf-muteness, psychopathy, and mental disorders caused by infectous diseases. The medical criteria is not enough to determine the exemption status of the offender. Besides this, the RSFSR Code, like Italian law, differentiates between the juridical criteria's elements i.e. the accounting capability and the controlling capability, "... could not give account ... or control them ...". Both these elements are separated by an 'OR' due to the now well accepted fact that there are mental diseases which exclude the capacity of 'intendere' and 'volere' as in insanity but there is a majority of mental situations which exclude either the 'intendere' or the 'volere'. Thus, imbecillita, cretinismo, demenza are defined, at least by Italian law, as appertaining to the former, while peromania cleptomania and related diseases, to the latter.

This juridical side thus constitutes an intellectual side i.e. the inability to account for one's acts, and a volitional side i.e. the inability to control same. The juridical aspect requires one of these aspects. The inability to account for, is interpreted by Russian law as an inability either to know, to realise the nexus between behaviour and the corresponding results or the inability to realise the socially dangerous character of behaviour.

The inability to control one's acts is understood as an inability due to disease to act otherwise, even if the person knows of the dangerous character of his acts.

Differing from the Italian school, neither Russian law nor Maltese law explicitly provide for 'visio parziale' and for a corresponding level of diminished responsibility.

Hence, Russian law, as most systems of Continental law, recognises "insanity as an excuse not only when it deprives the victim of his power of distinguishing the physical and moral nature and quality of his act charged as an offence, but also when it deprives him of his faculty of choice so as to exclude a free determination of his will in relation to those acts...". [24]

This may make us conclude that Russian law does not like Italian and Maltese law, admit of the doctrine of Feuerbach and Metzger who qualify these violations of law as rea independently of their punishabilty or otherwise.

According to Russian law, this forms the theoretical basis for the application of compulsory measures of a medical character which conceptually are differentiated from the concept of 'punishment' (sec.58-61). These measures are applicable only to persons suffering from defective psychological elements. Thus, these measures cannot be applied to persons qualified as suffering from sec.2 qualification re: "...other unhealthy conditions".

This attitude seems to be different from the concept of "custodia aggiuntiva" in Italian law or that of "strict custody" in Maltese law, which debatably seems to consider strict custody as a substitute to punishment. [25]

Para. 2 of this section makes interesting reading since it positively enacts that a person committing a criminal act while in a state of liability will not be subject to punishment (note the difference--to punishment and not to criminal liability as in the first paragraph) if he becomes mentally sick or suffers from

such a disease before the pronouncement of sentence. In such situations Russian law here recognises the possibility of suspended proceedings.

Such a person will be 'afforded' the same compulsory measures of a medical character. The difference here consists in the fact that if such a person is cured he may be liable to punishment.

A direct minute provision in sec. 12, states that a person committing a crime while in a state of alcoholic intoxicaiton (drunkenness) is not exempt from criminal liability. This specific type of intoxication is not included in sec. 38 which qualifies circumstances having extenuating or diminishing responsibility. On the contrary, as in the old English law this situation is included as a possible, facultative aggravating estimation. According to the 'Commentary' the Soviet legislator is providing for the physiological or simple alcoholic intoxication which is differentiated from the pathological. The former is deemed to have that required psychological link with the surrounding circumstances and events. Aggression and extreme, acute reactions caused by this normal, simple intoxication is, according to Soviet law, still within the sphere of consciousness and volition. In fact Soviet law, like Italian law, believes that one should not admit any exemptive effect especially when intoxication is voluntary and thus the cause has its origins in a voluntary misconduct. The Russian section does not positively distinguish between accidental and voluntary, habitual or pre-determined situations as does Italian law. It only gives one generic provision.

The Soviet school of law defines alcoholic intoxication as a *psychological situation created by the intake of alcohol, and is manifested by a depression of the person's capacity to account for his actions or to control them.* Note the word 'depression'. Russian law does not express a clear provision for cases defined by Italian law as accidental i.e. "... Ricorre quando al soggetto che si e ubria cato non si puo rivolgere rimprovero, neppure di semplice leggerezza per tale suo stato ... [26]. Neither does it, at least explicitly, provide for situations caused by the "malicious or negligent act of another person..." as the Maltese Code does.

Russian positive law seems to find common ground with Italian law only in ubriachezza volontaria when "... essa si verifica non solo quando l'agente ha voluto ubriacarsi ma anche quando lo ha fatto per imprudenza o negligenza". [27]

Drunkenness is also included as an aggravating circumstance when it is 'present' in the performance of an official or professional duty, or when the person concerned is performing a function qualified as connected with a source of extreme danger. Unlike Maltese or Italian law the latter of which differentiates between accidentale parziale, volontaria, preordinata abituale, cronica. The Soviet court in certain circumstances has a wide latitude and power to consider intoxication as aggravating or not.

As in many countries, Soviet law applies these provisions related to alcohol intoxication also to conditions caused by the intakes of narcotics or exciting drugs.

The Code section itself does not mention narcotic intoxication; but persons under the influence of narcotics (stupefacenti and narcotici) are not exempted from criminal liability. Although in certain cases the above mentioned medical measures are applied as in other cases touching on the 'insanity' border, the court has the power to declare such persons as persons possessing limited capability and thus subjects them to a special guardianship regime and procedures. [28]

The Soviet legal doctrine of 'defence' as a basis exempting liability (infra) is, as in Italian law, applicable to all acts. Thus, the provision concerning 'defence' is included in the general part of the Code under the title of 'necessary defence'. One may recall that the Maltese Code provides for 'legitimate defence' only in connection to homicide and bodily harm, implying a rather restrictive attitude permitting the notion of defence only within a framework of personal injuries: although one must underline that case-law seems to extend such effects to other offences. [29]

The RSFSR section 13 starts by underlining the absence of a criminal act in such cases. In other words an act falling under the elements as envisaged by the Special Part of the Code but committed in 'necessary defence' *is not a criminal act,* i.e. it is not a question of exemption from liability as in other cases, but a negation of the criminality of the act. One finds the same position in the Maltese Code, "... No offence is committed...".

Thus, although there exists a difference of opinion, the author believes that 'necessary defence' in RSFSR law is not a situation exempting from criminal liability or from punishability, with the violation remaining a 'rea' as in the Metzger theory, but on the contrary, an act which cannot be defined as a criminal act. This is essentially different from being non-punishable as for example in Sec. 52 of the Italian Code.

Soviet criminal legislature has many times qualified *necessary defence as being socially beneficial and qualifies such an act as a subjective right directed towards one's defence and towards the defence of social interests.* Besides being a subjective right, Soviet law sees necessary defence as a moral duty and obligation of each citizen and for certain specified officials responsible for the protection of public order, property etc., necessary defence is a juridicial obligation, the non-fulfilment of which gives rise to criminal liability.

Sec. 13 defines necessary defence as being defence in protecting the interests of the Soviet State, social interests, interests of the person. This section also includes defence of the rights of persons defending, as well as defence from socially dangerous encroachments.

This wide qualification, of course manifests the Soviet doctrine's attitude in believing that 'necessary defence' is not only a factor of personality, but is itself a social-legal institute creating a 'sui generis' legal call for activity in the fight against criminality. [30] One must here underline that although necessary defence is not only a right but a moral obligation calling each citizen to act against anti-social violations and to assist in the defence and protection of the public and social order (v.USSR Constitution s.65) the Code does not establish any legal liability if a person refuses to act accordingly.

Thus, RSFSR law provides that within the notional parameters of this section, the offence requiring 'lawful defence' action includes not only acts which are directed against 'rights' but also includes offences committed by acts directed against the State's interests, social interests and against the interest of the person.

Although this may sound too ideologically burdened, one should compare and recall that the Italian school of law provides that "oggetto dell'offesa deve essere un 'diritto' ..." including thereto a 'diritto proprio' and 'diritto altrui'. Interesting enough, according to Italian doctrine 'diritto altrui' implies *also* a right that may not at the moment of the act be recognised as such. [31] This expansive interpretation of right approaches the concept of 'interest' in Soviet law although this has, in the opinion of the author a rather more expansive nature, enabling the court (to have the possibility) to qualify and disqualify any criteria it deems fit or unfit for the definition of 'necessary defence'.

Both Maltese and Italian law qualify that the offence has to be of an unjust and unlawful character, "... cioe contraria ai precetti dell'ordinamento giuridico...". [32] This unlawfulness is only implied by the RSFSR Code definition by means of the words 'socially dangerous encroachments' as inserted in the structure defining the situations in which 'necessary defence', *is* lawful. The absence and the qualification of the word 'unlawful' may on the one hand cause a certain confusion with the concept of 'jus necessitatis' (infra) and on the other hand implies that this section may not cater for cases in which an offence may be tolerated although not positively provided for. In fact, court case-law and criminal law doctrine have established certain criteria in defining 'lawfulness' of the defence. Soviet law has differentiated between those conditions constituting lawfulness, as those that are related to the offence itself, and those conditions related to the defence proper: the former included the notions of 'social-political essence', 'time' and 'reality-actuality' of the offence. Thus an offence has to be of a socially dangerous character causing harm to the interests enlisted in sec.13. This element implies that such an offence may not necessarily be of an illegal (unlawful), character or burdened by the 'mens rea' in order to bring into effect section 13. This means that 'necessary defence' is permitted against offences committed by non responsible persons, by minors for example. Further, this attitude implies that sec.13 is effective even against 'encroachments' which have the necessary elements qualifying the act as criminal missing. One must here mention the fact that this above mentioned interpretation has strict qualifications.

The offence has to be of an immediate character, i.e. the objects provided for are subject to harm or a real, direct, immediate threat is created. 'Necessary defence' is not admitted in cases other than those having the 'sudden' and 'immediate' character. Neither is it admitted if it is called to before any such offence had been committed, nor if the act is an act of lawful correction or of a performance of duty.

The offence or encroachment has to be real. This means that there must exist circumstances which together form an objective reality of the offence and not just or simply existing in the imagination of the person defending. Although this *seems* to be contradicting the subjective theory (proclaiming, as in Maltese law that in deciding whether there was actual necessity of self-defence, the test

should be subjective. The danger against which the accused reacted should be viewed not necessarily as it was in truth and in fact, but rather as he saw it at the time), Soviet law recognizes the notion of 'apparent defence', which may lead to negligence or to exemption from liability--depending on the circumstances of the particular case.

The latter differentiation i.e. conditions of lawfulness realted to the defence is concerned with the volume of the protected interests, the relationship between the defence and the offence and the protection of persons who may become victims of the caused harm.

Thus all citizens have the right to protect and defend the qualified interests as in sec. 13 independently of whether such offences are directed against the defending person, or against the state interests or against other persons. This is subject to the condition that the act of defence must be directed solely at the offender and any harm caused must be caused to the same.

The third condition in this paragraph concerns the principle of proportionality which is explicitly stated in the last sub-para. of sec.13. This section recognises only an explicit, clear disproportionality between the character of the defence applied and the character of the offence's danger as qualifying for the definition of 'excess of the limits of necessary defence'. It is interesting to note that an excess of such limits may be recognised as a circumstance diminishing the responsibility. [33]

Before concluding our discussion concerning sec. 13 it is important to note that whereas the Maltese and Italian Codes speak of "imposed by actual necessity" and "per esservi stato costretto dalla necessita", respectively the RSFSR provision does not positively speak of such necessity. This may in fact create a debatable ground concerning questions bordering between 'necessity' and 'provocation'. This problem is enhanced by the fact that the first part of sec. 13 (re: protected interests) *seems* to cater for cases which are caused or created by the agent's own initiative, this being directed towards the protection or defence of the section's qualified interests (state, social, person). In fact Saharov A.B. states that necessary defence is permissable in any cases of socially dangerous character which are threatening the above mentioned interests and rights, *and can also be of a preventive nature* against socially dangerous acts *which have not yet formed* the corresponding necessary crime composition i.e. have not yet become crimes. This is a dangerously expansive interpretation and the element of 'actuality' is underminded (supra). 'Actuality', although difficult to define in the first part of the section is recognised by Soviet law as being the actuality of danger as in Italian law--il *pericolo* deve essere attuale, presente o imminente-- but in Maltese law it is the *necessity* that must be actual. This may of course be implied by the title of the section itself--necessary defence, but a defence may be necessary without being actual, contrary it seems, to the provision of 'jus necessitates' (infra).

The RSFSR Code, like the Italian Code, provides for 'jus necessitates', in sec. 14 and sec. 54 respectively. Under Maltese law the situation is debatable since "... it is essential in order that there may be exemptions from punishment, that the agent should have been constrained to the deed by an external force which he could not resist; the coercion must proceed from without ...", although

as Mamo A., continues "... the court would take the extremity of the offender's situation into account by reducing the sentence". [34] Thus other impulsions may serve only to mitigate punishment but not to exclude liability altogether. Contrary to this, the RSFSR Code removes 'jus necessitatis' from the notion of crime. Thus, as in the case of 'necessary defence' the Code states that an act, even if it corresponds to the crime-composition as envisaged in the Special Part of the Code *is not a criminal act* if it is committed in a state of extreme necessity.

An act is qualified as being committed under 'extreme necessity' when *it is committed in order to eliminate a danger threatening the interests of the Soviet State, the interests of society and those of the person or threatening the rights of the person concerned or those of other citizens.* The elimination of the danger is subject to the fact that the danger within such circumstances could not have been eliminated by other means and if the harm caused by the defence is of a lesser significance or degree than the prevented harm.

As in the 'necessary defence' provision we again note in sec. 14 the dichotomy of 'community interests' and 'personal interests'. This is a radically expansive development of the classical doctrine of 'jus necessitates' which is restricted to when *a person* is "... costretto dalla necessita di salvare se o altri dal pericolo attuale..." (Sec. 54 of the Italian Code). One must qualify the Italian definition since "... danno grave alla persona non e da intendere in maniera ristretta, e cioe con riferimento ai soli danni alla vita ed alla incolumita individuale, ma in senso piu ampio, e cioe con riferimento a tutti quei danni che possono incombere sulla persona ...". [39] This expansive interpretation of harm to the person was even further expanded by the Russian provision to include the interests of the State and the community. According to Soviet legal doctrine this institute affords citizens the necessary possibility to participate in the protection of the legal order in the cases where a conflict of legal protective interests arises and in which the causing of harm to one side of these interests is the sole and only way to defend and protect the other more important and significant interests.

The act, according to Soviet and Italian law, has to be caused by the absolute necessity and if "il pericolo non sia altrimenti evitabile ...". Thus, the danger has to be actual. Here, actually permits probability and to make this clear, the Codice Zanardelli excluded the notion of 'pericolo imminente'. It is here that Soviet law differs from the Italian. Soviet legal doctrine provides that the danger must be *already threatening.* It must have already originated and has not ended. It must be actual and real.

Soviet law provides for several sources of danger which may create a situation of extreme necessity-natural calamities; physiological and pathological processes; animal attack; sources of extreme danger in different mechanisms; the human causing, or threatening to cause, harm to legally protected interests; and others.

Danger has to be real and not imaginary nor apparent. In the latter case criminal liability is excluded only when the person concerned errored in good faith and neither should nor could have foreseen that the danger was not real.

In Italian law the 'stato di necessita' operates if the harm caused by the

defence is less *or at least equal* to the harm eliminated. The RSFSR Code provides only and exclusively for the former situation i.e. when the harm is of a lesser degree. Thus, according to Russian law, the harm caused has to be of a less grave character than the original harm to be eliminated. Contrary to the Antolisei's theory that the state is not interested in what 'particular' harm was caused, if at least an equal one is eliminated, the Russian provision shows that the state *is* interested, so much so that it provides only for those cases in which the harm caused is of a lesser degree and it does not provide for harm equality as does Italian law. The question of the relationship between the harm caused and the harm eliminated is a question of fact. Again, here the Soviet law has to take the social-political factor into account i.e. the social-political content of the interest harmed and the interest which was threatened by the danger. Soviet doctrine states that in balancing interests involving life and property, life has to be given legal privilege. Since Soviet law does not admit of harm equality, it is an accepted and recognised fact that saving one's life by causing the death of another person is not accepted as a case of extreme necessity and is in fact a criminal act.

Thus, one may conclude here that the causing of greater harm to eliminate a lesser harm or danger is qualified as an act having a dangerous social character. Furthermore, if the original harm is not eliminated, criminal liability subsists for the harm caused in trying to eliminate the former. The motive to eliminate harm is however accepted by Russian law as an element affording diminishing responsibility.

The court has discretion in applying a latitude of possibilities when the harm caused to eliminate danger causes harm to third party's rights. Soviet doctrine underlines that sec. 14 is applicable to all citizens but it cannot be applicable to a certain category of people in the performance of their duties as for example, military-service persons, police-executive, and others.

The RSFSR Code does not speak of 'costringimento psichico' as does sec. 54 of the Italian Code and in a certain sense section 33 of the Maltese Code as well and it is debatable (supra) whether the first part of sec. 14 may infer the possibility of application in a situation of need "lo stato di bisogno" as in Italian law.

Sec. 15 of the RSFSR Code explicitly provides for criminal laibility for the preparation of a crime and for an attempt of the crime. The section positively separates both situations. It defines 'preparation' as the *finding of the means or measures to be taken or the devicing of the means or instruments or the intentional creating of conditions for the criminal act.* Punishment is provided in the Special Part of the Code. Thus, here the Soviet legislator's intention is radically different from that of the Continental. In fact 'preparation' in Soviet law is slightly similar to the provision given in Maltese section related to 'conspiracy' (sec.57.2). Preparation, in fact according to Soviet law includes for example, the working out, the devising of a common design (in complicity), the determination, the qualification of the persons, participants, members chosen and the participant's instigation and incitement. Although Maltese law does not recognize preparation as a criminal act, Maltese positive law seems linguistically to be accepting this attitude in relation to complicity: thus by

Maltese positive law a person shall be deemed to be an accomplice in a crime if he "... knowingly aids or abets the perpetrator or perpetrators of the crime in the acts by means of which the crime is *prepared* or completed ...".

This apparent contradiction was mitigated by Mamo A.'s assumption that in this case by the word 'preparation' is meant preparation which is followed at least by a commencement of the execution. This is a necessary attitude since according to Maltese law "there cannot be complicity unless there has been at least an attempted offence ...". [36]

Now, to continue our discussion concerning attempt and preparatory acts. Russian law differentiates three main stages of the criminal 'iter' i.e. the preparatory stage, the attempt and the completion of the crime. These stages are recognised as such in crimes having an objective, and having present the notion of direct intention.

Preparatory acts are defined by Russian law as *those objective and subjective elements listed in the first part of the section which form per se an intentional behaviour of a socially dangerous character, which in itself creates the necessary conditions towards the subsequent committing of the crime.*

The RSFSR Code, like the Maltese Code is a certain respect, recognises that for particular acts, the above mentioned actions constitute in themselves independent compositions of other qualified crimes, as for example certain crime against the safety of the state, banditry, and others. According to Soviet law, in these latter crimes there is no possibility of attempt, since the preparatory stage overlaps with the crime completion.

Similarly, Maltese law provides that the mere agreement on a mode of action whatsoever directed against the safety of government (sec.55,56) is a crime in itself, which is aggravated by any preparatory measures taken for the carrying of the crime into effect.

One must state that Soviet doctrine is conscious of the fact that the working out of a common design, the elimination of obstacles and all other acts directed to the creation of necessary conditions permitting the completion of the crime *do not always create an immediate danger,* neither may they be assumed to be establishing the actual presence of danger and furthermore do not as yet at such a stage form the substantial part of the crime-composition. But Soviet doctrine underlines that it is the existence of such acts that secures the necessary conditions for the consummation of the crime in question. Due to this fact and within such parameters determining the level of 'necessary conditions', the court is given powers to determine liability and punishment in cases that involve preparation. The court has to take account of the character and level of social danger created by such acts; the degree of consummation of the criminal intent and the causes preventing the completion of the crime. Thus, here within the notion of 'preparatory acts' the determining role in establishing liability is not only the degree of danger but the criminal intention present.

Many authors believe that due to this relative exclusion of the difference between preparatory and executive acts Soviet law comes closer to the Italian provision regulating 'attempt'.

Attempt is by the RSFSR Code defined as an *intentional act immediately*

directed towards the committing of the crime, if such a crime is not completed due to causes independent of the will of the offender. Thus attempt is that stage of activity of a criminal character having intentional encroachment as its basic element directed against an object which is protected by law, subsequently putting such an object in immediate danger of being harmed but stopping short of causing harm due to causes which do not depend on the will of the person concerned. According to Soviet doctrine the difference between preparatory acts and attempt is the fact that during the latter there is the development of an actual encroachment on a concrete object. This doctrinal explanation is close to the Maltese 'commencement of the execution of the act' but per se is left unprovided for by the provisions of the RSFSR Code. Furthermore Soviet law recognises the notion of completed and uncompleted attempt.

The act within the concept of attempt is interpreted as being that act 'immediately' directed towards the committing of the crime, which is provided for in the Special Part of the Code and part of the integral objective side of the criminal act. Another element of attempt is that such act must have put the object protected in immediate danger.

As one can note, the RSFSR provision does not, positively provide for the 'idoneita' of the act as in Italian law (and not idoneita of the means as Mamo states). It seems that the former provides for teleological iter of the act, while the Italian provides for the ''non equivocita'' character of the acts. In fact the Italian Code speaks of the univocita and of the idoneita of the acts, the unequivoal and sufficient/suitability character of the acts. The author is inclined to believe that the Russian version of the words 'direct' and 'immediate' are in fact manifesting the element of 'univocita' but not necessarily 'idoneita' although this may be implied.

In fact Italian positive law has counterbalanced its elimination of the difference between the preparatory act and the executive act by providing instead for the univocita of the acts determining the criminal intention.

The author believes that the same situation can be inferred from the RSFSR provision. [37]

The RSFSR Code, unlike the Maltese provision but similarly to the 1889 Italian Code speaks only of ''independent of the will' leaving out 'fortuita' for much the same reasons as those explained by Mamo A. Further, Italian positive law instead of providing for 'volonta' gives the positive qualification of ''quando l'azione non si compie o l'evento no si verifica ...'', i.e. ''qualunque causa tranne lo stesso recedere della volontà del soggetto dall' azione ...''. [38]

Theoretically for Russian law, the punishment for a preparatory act and for attempt is the same as that of the completed crime. But case-law has shown that for the former a ''less severe punishment'' is inflicted.

This equalization of liability seems to be unfair although the provision goes on to qualify that in inflicting the punishment the court is bound to take into consideration the character and degree of social danger of the acts committed, the degree or rather the level of the achieved criminal intent and the causes that hindered and prevented the completion of the crime.

This aspect if analysed on a theoretical level conflicts with sec. 49 of the Italian Code which provides for an exemption of punishment *ex conditio jure*

and with the implied position of exemption of punishment in cases of the use of impossible means in attempt. In practice the expression 'socially dangerous act' may help to extenuate the punishment in Soviet law, but also having a dangerous nuance.

Voluntary desistence (sec. 16) is provided for by a separated section. It is substantially similar to the Maltese and Italian provisions: *a person who voluntarily desists from the completion of the crime is criminally liable only if the factually committed acts form a crime composition of a different crime.* The formulation here has created an anomaly in the sense that it gives the impression that a person voluntarily desisting may be liable for *this* attempted crime if the acts committed by him do form *another different crime.*

Of course this may be only a linguistic anamoly since in reality the offender is liable only *for* the acts already committed and if these form the necessary crime-composition. Thus, if the factually committed acts do not form part of a positively defined crime, then, the offender is exempt from liability. As in Italian law, "... nei casi di desistenza volontaria ... il colpevole soggiace soltanto alla pena per gli atti compiuti, qualora questi constituiscono per se un reato diverso". [39] which seems to be the source of the Russian provision.

By 'voluntarily', Soviet law understands a final discretion in the desistance from any acts directed towards the completion of the crime; an important element is the fact that the offender is conscious of the possibility of a successful result of his criminal act. If desistance is caused by the apparent impossibility to complete the crime, then the offender is still liable. This latter case is regarded by Soviet law as being of a forced desistance and not of a voluntarily character.

As in Maltese law, motive plays no part in determining the existence of desistance.

Although the objective side of this desistance is qualified as 'forbearance' or 'inaction' (i.e. a complete and final discontinuance of the already initiated acts directed towards a criminal activity), such forbearance is not always enough to bring about the exemption of liability. In case social dangerous consequences resulted from such acts, than a mere inaction will bring about liability. The desistance here has to take a very active form of action in order to prevent the birth of such results. This position is clear especially when one analyses 'complicity': and 'inaction' by the instigator will not be enough to exempt him from liability subsequent to the crime committed by the principal--a direct active intervention to prevent the commission of the crime is necessary.

Other crimes positively require a denouncement act in addition to the act of desistance.

Soviet law accepts the juridical reason for impunity in these cases, basing its acceptance as does Maltese law, on the fact that the will "to commit the crime...is negatived by a contrary determination of the same will of the agent ...". And as in the above paragraph, one can see that the Soviet provision is very similar to the Maltese one in that the latter also includes forebearance from doing any further acts, as well as the counter action directed to prevent any effects ensuing.

Like Italian and Maltese law, Soviet law recognises, though not positively the concept of 'recesso attivo' i.e. when "il colpevole ha condotto a termine l'attivita esecutiva e desiderando, per riflessioni o fatto sopraggiunto, evitare il verificarsi dell'evento, agisce per impedirlo ...". [40]

The difference from the Maltese position is that while the latter includes the counter action of the agent directed *to undo the acts already done* A. exempting from liability, the Italian and Soviet provisions "non importa l'impunita, ma solo una diminuzione della pena ...".

Complicity is defined in sec. 17 as the intentional joint participation of two or more persons in committing a crime. This is very similar to the Favata definition that "... concorso di persone nel reato si ha quando piu persone concorrono nel medesimo reato...". [41]

The Russian school of legal thought underlines that complicity includes (a) plurality of agents, (b) realisation of the objective element of crime as envisaged in the special part of the Code, (c) a casual link and 'contribution' to the event, (d) the 'volonta' in participating, (e) the consciousness of participating in a common design and (f) the awareness of availing of the common realisation.

Since, Soviet law like English law believes that a collaboration between persons or groups increases the danger of their actions, a crime committed in complicity is an aggravating circumstance (v.RSFSR Criminal Code s. 39). Subject to the totality of circumstances envisaged in the above six characteristics Soviet doctrine divides complicity into simple and complex.

Simple complicity implies the activity of co-principals while complex complicity includes the different roles played by different agents i.e. principal, organiser, instigator, accomplice. All participants are linked to the principal by having a causal relationship to the crime. Thus, the accomplice assists the principal in the consummation of the crime, or the instigator strenghtens the principal's intention and desire while the organiser commands and organises the crime. Thus, sec. 17 establishes the liability of the principal together with the liability of those persons who, although do not commit directly the criminal act, create the necessary conditions for the principal's action.

The persons involved are regarded as accomplices only if their action and the action of each is considered as being of social danger i.e. it plays an essential role in the criminal act or in the conclusion of the criminal result. Russian legal doctrine recognises that complicity may be composed of omission and commission.

Joint participation is defined by Russian doctrine as a material side of the act and includes--(a) the acts of each accomplice are necessary conditions for the actions committed by the others; (b) the criminal result is common and integral to all the accomplices; (c) the acts of each is integrally linked in a causal relationship to the common criminal result.

The subjective side consists in the intention. As in Maltese law, legal responsibility is based on the 'mens rea' participation in committing a socially dangerous act having the crime-composition of a provision defined by law.

Punishment is effected according to the level and characteristics peculiar

to the particular participation of the person per se. The court has to take account of the factual role and participation of each, the activity manifested by each and the persistence involved in the consummation of the act. Soviet law of complicity-punishment is based on an individualistic approach and hence sec. 17 does not equalise, at least in a positive sense, the principal and the accomplices' liability as Maltese law does. On the contrary sec. 17 obliges the court to take into account the concrete and individual role of each participant.

Soviet case-law accepts the principle that personal circumstances are not communicable. It also accepts as Maltese positive law does that any aggravation of crime can be imputable only to the person who commits the act.

Sec. 17 recognises the following as co-participants to the crime: the principal, who is the person directly committing the crime; the organiser who is the person organising the committing of the crime or who leads/heads its commitment; and the instigator who is, the person who persuades; the accomplice, who is differentiated from co-participant is the person who promotes the crime by means of advices, instructions, allotment of means or by the elimination of impediments. The accomplice is also that person who prior to the act promises to harbour the criminal, the means used and the instruments used for the completion of the criminal act or to hide any tracks of the crime or the objects received or acquired by the criminal act.

This section is also applicable to the corresponding sections related to (a) criminal group, (b) criminal organization, (c) criminal gang. (v. sec. 72-77). Soviet law, like Maltese law separates complicity from other acts which though being somewhat and even closely linked to the crime are not conditional for its commission and/or consummation, eg: concealment-harbouring, misprision, connivance. The latter two notions are provided for separately in sec. 18 and sec. 19.

These provisions create liability only for cases specially provided for in the Special Part of the RSFSR Code.

Sec. 18 (Harbouring-concealment) underlines that this section is applicable only for that concealment-habouring which was not promised prior to the crime, implying complicity-liability for such promise. This is similar to the Maltese and Italian position stating that "if before the fact a promise is made of some help to be given after the fact then that promise becomes a form of complicity because it encourages the author to perpetrate the offence ...".

For certain particular types of acts of complicity, RSFSR law like Italian law punishes the act of complicity not only when factual acts are implemented or a result ensues but also for the mere fact of appertaining to such an 'organization'. This is also present in Maltese law especially in sec. 63-83 where the Code speaks of crimes against the public peace, in sec. 58 re:conspiracy and in sec. 83 concerning the promotion of political object by use or display of physical force.

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MARITAL RAPE: THE MISUNDERSTOOD CRIME

DR. JOANNE CATANIA

Introduction

Concern over the marital rape exemption has definitely increased in state judiciaries - unfortunately this does not equally apply to the state legislatures. Rape within marriage has been legally endorsed for more than one hundred years in America and to date, in most of the states this behaviour is legally protected, making the marital rape exemption the rule rather than the exemption [1] despite the twentieth century's enlightened views of marriage and female equality. Statistics are alarming [2], but appalling as they might sound, they seem to fail to persuade some who refuse to believe there is such a crime as marital rape. [3]

Increased awareness about rape has come about as women have gained more equality and as women's groups have strived to bring the public's attention to the fact that rape is not caused by the woman herself, but is the result of violence committed upon her by a violent person. It is precisely because of this long-standing and erroneous belief that rape is a sexual rather than a violent crime that it has been extremely difficult for legislatures, juries and the courts to deal rationally with the subject.

This papter will analyze: (1) the history of the marital rape exemption and the common law authority thereto, including a critique of the theories that have served to justify it, (ii) marital rape as a social crisis in America, (III) statutory and judiciary responses, (IV) constitutional considerations, and (V) possible statutory reforms.

1. History of Marital Rape Exemption and the Common Law Authority Thereto

The marital rape exemption owes its origin to English common law in the seventeenth century with Lord Matthew Hale's declaration that, "the husband cannot be gulity of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract." [4] Despite the fact that the marital rape exemption was an assertion with no fundamental judicial authority for support, this became the authority for the spousal immunity in both England and the United States. [5]

English cases subsequent to Hale's statement demonstrate that the marital rape exemption was not absolute in England even at the time. English common law presumed a wife impliedily consents to sexual intercourse with her husband; it also provided the wife with a revocable consent. Revocation of a wife's consent

was strictly limited and as a prerequisite required a mutual separation agreement or a court-ordered separation. Thus, "under English common law, there never existed and *absolute irrevocable* marital (rape) exemption that would protect a husband from a charge of rape in all circumstances." [6]

Early American cases did follow the English case law, but did not follow the exceptions which allowed a wife's consent to be revoked. In 1857, a Massachusetts court stated in *Commonwealth v. Frogerty,* [7] apparently the first American court to consider the Hale doctrine, that marriage was a defense to the charge of rape. [8] In 1905, a Texas case, *Frazier v. State,* [9] carried Hale's principle further and stated, consent is that "which she gives when she assumes the marriage relation, and which the law will not permit her to retract in order to charge her husband with the offense of rape." [10] However, this blind and unwarranted subscription to Hale's doctrine seems to have come to a halt in *State v. Smith,* [11] where the court concluded that it was "a bare, extra-judicial declaration made some 300 years ago, " [12] and found no authority to support it. [13]

In that case, Albert Smith, who was indicted for the rape of his wife sought to dismiss this count of the multicount indictment on the grounds that the common law excluded husbands from the charge of rape even if they had forcible sexual intercourse with their wives. [14] He further argued that New Jersey's rape statute codified that common law spousal exception and that it could not be altered by the court. At trial court level, the rape count of the indictment was dismissed [15] on the grounds that the court had no authority to end the marital exemption which had become an implied part of the rape statute of New Jersey. [16] Such a prerogative, according to the court, belonged exclusively to the legislature.

Following an amendment to the New Jersey rape statue in 1979, expressly providing that marriage to the victim was not a defense to the charge of rape, [17] the Supreme Court of New Jersey reversed the trial court's dismissal and reinstated the rape count against the defendant. Hale's implied consent doctrine was dismissed in the following manner:

> "Without deciding whether an exemption existed in any situations at all, we think that it was not meant to exist during the entire legal duration of a marriage. Therefore, we decline to apply mechanically a rule whose existence is in some doubt and which may never have been intended to apply to the factual situation presented by this case."[18]

Therefore,

> "A man separted from his wife - and perhaps one not separated - could not invoke an outdated and doubtful rule to avoid prosecution for rape simply because he was still legally married to his victim." [9]

Another landmark decision in this respect was *Commonwealth v. Chretien,* [20] wherein the Court of Massachusetts declared that no common law marital rape exemption exists in that state's rape statutes and husbands thus can be prosecuted for rape of their wives. The court found that the legislature's enactment of domestic violence legislation in 1978 expressed the legislature's intent ot criminalize marital rape.

These two decisions have already proved invalubale as regards cases challenging the existence of a common law marital rape exemption, and now stand as the leading case law on the issue in the United States. They have made it clear that regardless of whether such an exemption existed at common law, there is no place in today's society, given today's laws, for such an anachronistic concept.

New rationales were used to support Hale's principle after it was discovered that the principle lacked legal foundation - rationales which, although archaic in nature, unfortunately endured in American and English law for decades. Each of them will be examined in turn.

A - Marriage Contract Implies Permanent Consent

This is by far the most commonly used justification. [21] Surprisingly, even in the light of the movement for women's equality, a 1984 Virginia Supreme Court decision, [22] while invoking this theory, declared that a wife must prove beyond a reasonable doubt that she revoked her implied consent through a "manifest intent" to terminate the marital relationship."[23]

Logically, even if one were to accept the implied consent theory, it is unrealistic to assume that the wife also consents to both violence and injurty. [24] Granted, both the wife and husband agree to have intercourse as part of the marriage consummation, but their personal sexual autonomy is not completely extinguished. [25] A well-reasoned opinion of Justice Wachtler of the New York Court of Appelas in *Liberta,* [26] found the implied consent to be "untenable." [27] Moreover, the consent doctirne effectively gives a husband the opportunity to take the law into his own hands with violence and force in order to make his wife comply with her alleged "implied consent" when he should peacefully seek a divorce or other similar relief in domestic courts. [28]

This theory appears more ludicrous in the light of the fact, that even if the wife could impliedly consent, the husband's remedy for a breach of contract would be in the form of damages, not a "forced (specific) performance." [29] As the *Smith* court rightly pointed out, this theory puts married women in a worse position than single women because the latter can charge rape against men who force them into sexual intercourse even if they have consented to intercourse with those men on previous occasions. [30] Given monogamy as a societal goal, the court noted that the acceptance of the contract theory could result in the bondage of the wife. [31]

When husband and wife are separated, the implied consent doctrine becomes irrelevant, because it is groundless to argue that the wife's implied consent still exists to have sexual intercourse with a man, her husband, with whom she no longer cohabits. Fortunately, many state statutes uphold a wife's revocation of consent when the couple has severed their union but the

requirements needed to establish revocation of consent and separation vary from state to state. [32]

B - Wife as Property of Her Husband

Indeed, before the passage of the Married Women's Property Acts, a married woman was unable to perform acts of civil life; wives viewed as their husband's chattel, deprived of all civil identity. [33] This theory is however, anachronistic in today's society especially in the light of the fact that women can own and control property separately from their husbands. Thus, it would logically follow that public policy which supports the marriage relationship must necessarily extend to the woman's right to control her body. [34]

In *Trammel v. United States,* [35] The Supreme Court rejected the archaic notion that the wife was a husband's chattel, [36] which goes to show that this theory is no longer accepted in American jurisprudence. Logically, it should also cease to be a justifiaction for the marital rape exemption. However, because the view of the women as the chattel of men has been relegated to history in American case law and in as much in America's tort low, it follows that rape laws should also change from protecting a man's property interests to guarding a woman's safety and privacy interests. [37]

C - The Unities Treaty

Blackstone articulated this doctirne in his *Commentaries.*

> "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated (into her husabnd.)" [38]

A husband cannot therefore be guilty of rape because he cannot be gulity of raping himself. This concept, fallacious on its face, has been abolished in most States. [39]

D - "Separate Spheres" Ideology

This theory gradually displaced the unities theory as the legal justification for sexual inequality. Under this vision of social relations, men inhabit the public realm of politics and the marketplace and women inhabit the private realm of the family. Women were no longer naturally inferior, but naturally different. This ideology helped shaped the notion that any legal intrusion upon the woman's sphere constituted an illegitimate public invasion of the private sphere. The private subordination of women was therefore accomplished by the absence of laws restraining male power. In this unregulated sphere, men were free to rape their wives. Although the nineteenth amendment, [40] Title VII of the Civil Rights act of 1964, [41] and the 1971 case *Reed v. Reed,* [42] represent legal signposts on the road to full disintegration of the separate spheres ideology, the vitality of the marital rape exemption testifies to the continuing influence of this ideology on the formation of legal doctrine. [43]

E - The Marital Rape Exemption Promotes Spousal Reconciliation

This is a more recent justification suggested for the marital rape exemption and is based on the rationale that allowing a wife to bring criminal charges against her husband for rape would impede any possibility of reconciling the marriage. This argument is undeniably fallacious on its face because it is the violence resulting from the rape, not the wife's attempt to find protection under the law, which unravels the marriage. [44] Moreover, this policy argument assumes that there remains a marriage to be reconciled and that the violence of rape is an injury from which a wife can recover and adjust. Yet even if a marriage could be reconciled and the perpetrator forgiven, it does not necessarily follow that a wife who declines reconciliation should be prevented from charging her husband with rape. [45]

It is true that the states have an interest in the physical protection of individuals as well as the family, but this state interest is not furthered by the marital rape exemption.

F - The State Should not Interfere with Marital Relationships

The assertion that the state's interest in promoting family harmony comes before that of protecting individuals is illogical. Although promoting harmony in marriage is a legitimate state interest, "there is no rational relation between allowing a husband to forcibly rape his wife and these interests." [46] As Justice Harlan stated in his dissenting opinion in *Poe v. Ullman,* [47] the family is sacred, but it is not beyond regulation "and it would be an absurdity to suggest either that offenses may not be committed in the bosom of the family or that the home can be made a sanctuary of crime." [48]

G - The Marital Rape Exemption Eliminates Fabricated Charges

The fear here is that if a divorce is pending, the possibility for bringing a charge of rape against the husband would give women great power and wives would not forego the opportunity to retaliate. This proposition is overwhelmingly pregnant with misconceptions.

(i) The possibility that married women will file charges is no greater than the possibility that unmarried women will do so;
(ii) The American judicial system is capable of determining and dismissing fabricated charges;
(iii) False charges can be asserted for any crime;
(iv) Rape trials are extremely embarassing for the victim and therefore it is unlikely that the revengeful wife would use this shameful, embarassing and self-incriminating channel for her retaliation;
(v) Abuse of the opportunity to charge husbands with rape has not occurred in jurisdictions that have abrogated the marital rape exemption. In fact, Oregon district attorney Peter Sandrock confirms that Oregon experienced no "flood" of marital rape cases since dropping its marital rape exemption in 1977. [49]

H - The Marital Rape Exemption Presents Insurmountable Problems of Proof

Although this seems to be a more plausible justification at first sight, it is still no excuse for disallowing a ravaged wife her constitutional right to seek a remedy at law. When has difficulty to prosecute determined what a crime is? Treason, conspiracy, child abuse, and incest are difficult to prove, but there is no outcry to decriminalize them.

I - Alternative Remedies Available

Although remedies for other injuries to a woman's body are available, such as assault and battery, none of these remedies punishes for the oppressive violence of the crime of rape. Assault and battery are different from rape because the latter crime involves a special humiliation and special violation.

The alternative remedies argument fails to recognise the fact that rape in marriage does not diminish the rights violated, and also that alternative remedies fail to protect the wife from further abuse. An appropriate deterent to this type of violent behaviour is not presently available.

J - Marital Rape is a Less Heinous Crime

Another justification offered for the marital rape exemption is that when performed by a spouse, rape is less serious than when performed by a stranger. This argument, however, seems to ignore the fact that, in most cases, a marital or acquaintance rape will be more traumatic for the victim than stranger rape. [50] Moreover,

> "When you are raped by a stranger you have to live with a frightening memory. When you are raped by your husband, you have to live with the rapist." [53]

Marriage certainly does not mitigate rape's trauma, because it is a crime of violence - this theory is supported by the severe penalties associated with rape when contrasted with the lesser penalites for assault and battery. Therefore, a rape within the confines of marriage is no less heinous than stranger rape merely because the victim and rapist are married.

II. Marital Rape as a Social Crisis in America

These archaic and poorly reasoned rationales supporitng descriminilization of marital rape seem anachronistic in the progressive atmosphere of the twentieth century. Despite the momentum that the women's movement has gained throughout the past two decades, especially as regards the raging battles for equal pay, equal opportunity, relief from sexual harassment and the right to abortion, the marital rape issue was surprisingly ignored and remained very much "the crime in the closet." [52] As researcher Nicholas Groth points out, marital rape

> "may be the most predominant type of sexual offense committed...because of prevailing attitudes and legal codes, it goes largely undetected. Like other family problems, it is kept within the

> family and both mental health and criminal justice agencies have traditionally been cautious of 'interfering' in family matters." [53]

This ignorance was fostered, in large part, by the failure to report marital rape incidents to authorities and the afflicted wives' fear of reprisal. Only until recently, it was no small oversight to state that none of the states in the whole of the United States criminalized marital rape, and therefore women had no legal motivaiton to report it, especially if it would expose their marital problems or if they were unsure whether they could legally prove a rape had occurred. [54]

Fortunately, the situation is not so precarious today since a few states have abolished the implied or explicit marital rape exemption from their statutes. [55] Indeed, the law in most states protects a man from prosecution for the rape of his wife (as will be examined in Part III.) The marital "right" to rape one's wife is expressed in state criminal statutes, which typically define rape as "forced sexual intercourse with a female not the wife of the perpetrator." According to Black's Law Dictionary [56] however, the definition of rape is "unlawful sexual intercourse with a female without her consent." Moreover, several courts and scholars have determined rape to be sexual intercourse without consent.

Underlying these misconceptions in the crime of marital rape is a failure or refusal to acknowledge that rape is not a crime of sex but a crime of violence. It is the violence, outrage and injury to the victim, not the sex which demands criminal punishment. It is the coercion by the forecful penetration and threats against another's will which is the essence of rape. [57] Indeed, modern writers on the subject agree that the greatest harm of rape is the psychological injury, in addition to the physical injuries, resulting from the domination and denial of freedom. [58] Moreover, "marital rape is frequently quite violent and generally has more severe, traumatic effects on the victim than other rape." [59] Stranger rape is a devastating, one-time occurrence, marital rape frequently involves a seires of devastating occurrences, often spanning years. One study found that fifty-two percent of the victims of marital rape suffer severe long-term effects [60] as compared to thirty-nine percent of the victims of stranger rape. [61]

A married woman certainly relinquishes some autonomy, but she most certainly does not exchange her autonomy for a license by her husband to commit violence upon her body. Violence and marriage are strange bedfellows, but several studies have revealed that most battered woman have also been sexually assaulted, often because the wife conceded to intercourse in order to avoid being beaten. [62] The idea is certainly revolting, but violence and marriage do collide behind closed doors in our society.

Rape of a woman by her husband is not a bizarre, unusual or isolated act. Rather, marital rape is a problem of seirous magnitude and consequence, as we can infer from the above consideration. Professor Richard Gelles, sociologist at Rhode Island University, who has done extensive research on battered women, has estimated that the number of women in the United States who are raped by their husbands, as part of a beating or a sequel to it, could be well over two million. [63] The understanding of rape as violence is

tantamounting to resolving the central issue of whether thec rime of marital rape should be penalized.

III.Statutory and Judicial Responses

Marital rape law reform has proved to be slow and legislators remain indifferent. Unfortunately, even when legislatures have attempted some reform, most have failed to achieve total abolition of the marital rape exemption - which should be the ultimate goal for all states. It is difficult for women to lobby for this kind of legislation as Sherly Chase proves in disclosing details of the strategy and the cumbersome process that she and her dedicated entourage of women (and a few men) used to outlaw marital rape through the legislature, in the state of Connecticut. [64] This problem comes mainly in the women's attempt to relate to male legislators the physical and emotional horrors that have been committed by husbands. A form that was drawn up by a Montana legislator as a joke and circulated to other senators during a campaign for a marital rape law, demontrates why women might encoutner problems. [65] (See Appendix 1)

To date, only ten states expressly allow prosecution of husbands for marital rape under all cirumstances. [66] State rape stuatutes thwart prosecution for marital rape in various ways. Traditionally, rape has been defined as nonconsentual sexual intercourse by a man with a female, not his wife. Some states explicitly incorporate a marital rape exemption by defining rape in this manner, [67] while other states refer simply to intercourse with a female or person and then define that term to exclude the wife or spouse of the actor. [68]

In states with marital rape exemptions, the scope of the exemption depends upon the perceived stability of the underlying marriage. States generally regulate the scope of the exemption through the definition of "not married" under the statute. For example, some states define "not married" so as to allow prosecution only if the parties were living apart at the time of the incident. [69] Other states allow prosecution only if the parties at the time of the incident were separated by court order, [70] or were living apart and one spouse had filed a petition for annulment, divorce, separation, or separate maintenance. [71]

In Alabama, Illinois, and south Dakota, a husband is subject to prosecution for rape only if a final divorce decree existed at the time of the incident; a wife separated from her husband under agreement or court decree has no legal recourse. [72] Several states allow prosecution for husbands for charges of first or second-degree rape, but disallow prosecution for lesser sexual offenses. [73] The California statute is interesting in that it does not simply eliminate the spousal exception from the definition of rape but sets out various conditions that must be met beofre either spouse can charge the other with rape. Penal Code Section 262, Subsection 2(b) requires that the victim report the crime withing 30 days. A person convicted of spousal rape need not register as a sex offender, as a person convicted of rape of a nonspouse must. The legislature also expressly refused to extend to spousal rape subsections that define rape as an act of intercourse in which a person is prevented from resisting because he or she is administered a narcotic, intoxication, or anesthetic substance by or with privity of the accused. Thus, if a spouse is legally unable to consent,

under the influence of a narcotic substance, that spouse in unable to revoke his or her 'consent', this clearly means that the contractual consent theory is alive and well in the California Penal Code. [74]

As the above legislative update indicates, there has certainly been some improvement as regards the outlawing of marital rape in several states - but more needs to be done in order to reach the ultimate goal, which is the criminalization of marital rape *in all circumstances.* At this point, it would be interesting to give an overview of the latest case-law on the subject, and in doing so to detect the courts' attitude in handling such cases.

Most of the legal changes in this respect have occurred since 1979 when John Rideout of Salem, Oregon, was acquitted of raping his wife, Greta, in a trial that attracted nationwide attention. At that time, laws dating to the seventeenth century, when a woman was viewed as the legal property of her husband, were still in effect in nearly all 50 states. The Rideout trial marked the beginning of a trend toward equal treatment of marital and non-marital rape.

The traditional elements of the crime of rape are three, but a fourth is often included in the marital rape exemption. They are: (1) carnal knowledge, penetration, or intercourse (2) force and (3) nonconsent. The fourth element some courts included was that the victim could not be the wife of the perpetrator. [75] For many years, the fact that prosecutrix and defendant were not married was very important, even if later this fact was only necessary as evidence to prove there was consent to the common law crime of rape. However, the courts were instrumental in eroding this common law marital rape exemption doctrine, and then bringing down the elements of rape to only three. In *State v. Smith* [76] as has already been pointed out above, the Court levelled an unprecedented attack on the common law marital rape exemption, even after analyzing the history and doubtful validity and existence of the alleged common law exemption, it concluded that it was now no longer a part of the rape statute so as to exempt defendant-husband from prosecution and conviction for rape of the spouse. Although the Court expressed a strong disapproval of the common law exemption, it relegated its abolition to the state legislature. [77] Although the New Jersey court limited its decision to the facts of the *Smith* case, it left no doubt as to it its distaste for the common law exemption.

In a similar case, *Commonwealth v. James K. Chretien,* [78] which involved the interpretation of a rape statute that did not contain an express spousal exemption, a husband was convicted of raping his wife while the two were living apart and a final divorce decree was pending. [79] The court held that the common law applied to husbands only when the marriage relationship had been severed by a divorce judgement *nisi.* Therefore, if the marriage had been severed a husband could be convicted for marital rape. [80] The court here spoke about an "intent" of the legislature's comprehensive revision of the rape laws in 1974, to criminalize marital rape and eliminate any spousal exemption. The decision went further than that of the New Jersey court, since it did not limit the opinion to only more rapes occurring after the entry of a preliminary divorce decree or occurring after the spouses had separated. By holding that

the 1974 revisions eliminated the spousal exemption altogether, spouses in ongoing marriages, even while still living together, are subject to prosecution under the 1974 revised Massachusetts rape statute.

Unfortunately, both the New Jersey and Massachusetts courts refused to decide the threshold question of whether Hale's doctrine constituted part of the common law - both courts based their holdings on the assumption that the exemption was part of the common law. However, the importance of these two cases lies in that they constitute a break-away from the long unchallenged belief that a marital rape exemption exists under common law.

A more recent move away from the common law's absolute marital exemption occurred in 1983, when a New York court struck down New York's statutory marital rape exemption because it violated equal protection rights guaranteed in both the state and federal constitutions. [81] Indeed, *People v. DeStefano,* was the first case in this country to examine the constitutionality of an express statutory marital rape exemption. It is a landmark case in that it lays the groundwork for future constitutional challenges to the marital rape exemption. [82] The court examined the traditional justifications for the marital rape exemption and concluded that none of them constituted a government interest sufficient to meet any of the three tests associated with equal protection analysis. The court held the "implied consent" theory invalid because of the recognized constitutional right of a woman to have an abortion and use birth control without her husband's approval. It concluded that the "logical extension of more rights is that a woman has the right to refuse the physical act that leads to pregnancy and that a woman's right "to individual autonomy and to control procreation are but part of the more comprehensive right to bodily integrity." [83]

Another significant case in this respect is *State v. Rider,* [84] where the Florida Court of Appeals held that Florid's sexual battery statute, which contains no express spousal exemption, does not incorporate a common-law exemption. In the *Rider* case, the spouses were living together as husband and wife at the time of the rape. No divorce or serparation proceedings had been initialted, and no temporary restraining order or separation agreement existed. The first Florida case to address the marital rape exemption was *Florida v. Smith,* [85] and there it was held that no common-law exemption exists in Florida, but it was unclear whether this would be applied only to separated spouses. The Court of Appeals in *Re Rider* adopted a broad interpretation of *Re Smith* and refused to distinguish between spouses living together and those living apart for purposes of eliminating the marital rape exemption. The *Rider* decision, like the 1981 Masachusetts case of *Commonwealth v. Chretien,* (above) expressly held that no common law marital exemption exists even in the case of cohabiting spouses. Thus, the Florida cases are extremely significant in states that have no express statutory exemption, for they suggest that when courts in those states adjudicate marital rape cases they are not confronted with a choice of *applying or abolishing* a legitimate common law doctrine, but with *adopting* an antiquated doctrine of dubious origins that is incompatible with 20th century legal and societal concepts of marriage and women's autonomy. [86]

Two recent Virginia Supreme Court cases have established a very limited exception to the common law concept of spousal rape immunity: *Weishaupt v. Commonwealth*, [87] and *Kizer v. Commonwealth*. [88] In the first case, the Virginia Supreme Court held that a common law marital exemption does not apply when there has been a 'defacto' end to the marriage. The court refused to decide whether a common law exemption should be abandoned altogether, limiting its holding to the particular facts of the case. In *Re Weishaupt,* the husband and wife had maintained separate residences and refrained from any sexual contact. After approximately eleven months of continuous separtion, the husband attempted to have sexual relations with his estranged wife. The court rejected defendant's contention that the English common law contained an absolute marital rape exemption which should apply in Virginia, on the ground that the implied consent to sexual relations in a marriage could be revoked. The court also held that in the light of recent cases in Virginia establishing a woman's independent control over her property, she should have the same protection and control over her physical person. [89] The court also found that the Virginia no fault divorce statute "embodies a legislative endorsement of a woman's unilateral right to withdraw an implied consent to marital sex." [90] If the state failed to recognize the wife's ability to unilaterally withdraw the implied consent to marital sex, then it would have to deny the wife's statutory right to withdraw from the marriage contract. [91] The court also stressed three requirements for the recognition of unilateral revocation of consent:

1) intent to terminate the marital relationship by living separate and apart from her husband
2) refraining from voluntary sexual intercourse with her husband
3) conducting herself in a manner that establishes a *defacto* end to the marriage. [92]

Recently however, in *Kizer v. Commonwealth,* the Virginia Supreme Court clarified *Re Weishaupt* so as to significantly limit the impact of that decision. In *Re Kizer,* the couple had not consistently maintained separate residences, though they were living apart at the time of the alleged rape. The marital history was replete with trial separations and attempts to make the marriage work. After a lengthy separation period, the husband gained entrance to the apartment and had forcible sexual intercourse with his wife. The majority opinion noted that, under *Re Weishaupt,* the wife's revocation of consent must be demonstrated by her manifest intent to terminate the marital relationship. The court found evidence to show a violation of the rape statute, but insufficient evidence to satisfy the third element required to show the requisite intent. Although the couple had lived separate and apart and refrained from voluntary sexual intercourse, the commonwealth failed to demonstrate that the wife had, in light of all the circumstances, conducted herself in a manner that established a *de facto* (or actual) end to the marriage. The majority concluded that a wife's conduct must be such that the husband perceived, or reasonably should have perceived, that the marriage actually was ended in order to meet the third *Weishaupt* requirement. [93]

In Virginia, therefore, the additional proof of violence required to rebut the presumption of consent is replaced by the requirement that a wife manifest her intent to end the marriage. A married woman must not only provide sufficient evidence to sustain a conviction under the rape statute, but must also provide the requisite intent by satisfying the three factual requirements established in *Re Weishaupt*. The result of the Supreme Court's clarification of that third requirement, however, is to place a much more arduous burden on a victim of spousal rape than that borne by a victim of rape by a stranger or even a fiancé. [94]

Georgia too has lately joined the growing list of states that recognize marital rape as crime. In *Warren v. Georgia,* [95] the court refused to read a marital rape exemption into the Georgia rape statue, concluding that the implied consent theory is "without logical meaning and obviously conflicts with our constitutional and statutory laws and our regard for all citizens of this state."

Women's rights organizations were particularly pleased by the New York court decision in *People v. Liberta,* [96] where the New York Court of Appeals held that New York's rape statue violated equal protection. [97] The decision declared that a married woman has the same right to control her own body as does an unmarried woman. The New York decision is unequivocal, whereas most other states, even the more progressive ones, have retained some differences between marital and non-marital cases. For example, some states allow prosecution in marital cases only if the woman was subjected to actual physical abuse before being raped - not just the threat of physical harm. Other states consider marital rape as a second degree felony, while non-marital rape may be prosecuted as a first-degree folony. According to Judge Wachtler, the chief judge of the New York Court of Appeals, "there is no rational basis for distinguishing between marital rape and non-marital rape. To do so is to violate the constitutional guarantee of equal protection under the law."[98]

The New York decision is also significant because it appears to be the first time that the highest court in any state invalidated an explicit statutory exemption for marital rape. "We recognize that a court should be reluctant to expand criminal statutes due to the danger of usuring the role of the legislature," Associate Judge Wachtler wrote for the court, "but in this case, overriding policy concerns dictate our following such a course." [99]

From that which has been discussed above, it may be fairly inferred that the courts have been more responsive than the state legislatures to the seriousness of the crime of marital rape. They have certainly served as catalysts for the gradual erosion of the common law marital rape exemption and the traditional policy justifiaction of the crime of marital rape. Laura X, director of the National Clearinghouse on Marital Rape in Berkely, California, said that winning a court case is a much easier process than lobbying a state legislature. [100] One hopes that other state courts follow suit to *Re Liberta,* and that gradually all state legislatures will endorse marital rape as a crime.

IV. Constitutional Considerations

The constitutional problems inherent in nearly all rape statutes must also

be examined and analyzed before the marital rape exemption could be justified. Part IV focuses on a rights-based argument as a means both for challenging the constitutionality of the marital rape exemption and for achieving gender equality. The constitutional right to equal protection of the law and the constitutional right to privacy agruably threaten the constitutionality of the marital rape exemption.

The second part of Part IV agrues that although a rights-based approach, is a powerful one to take in court to render the exemption invalid, it may not be the wisest legal avenue by which to challenge the marital exemption, because it fails to identify marital rape as part of the broader problem of women's subordinaiton. [101] The gender discrimination approachf might, however, very well serve this purpose, especially after the Supreme Court's decision in *Personnel Adminsitraotr v. Feeney.* [102]

A (i) - The Marital Rape Exemption Violates Equal Protection

The equal protection clause of the United States Constitution guarantees that individuals who are similarly situated will be similarly treated. The equal protection clause does not prevent discrimination; it requires that a classification cannot be arbitrary, cannot unfairly restrict fundamental rights, and cannot be founded on discriminatory criteria. Therefore, statutory schemes which deny identical tratment for identical acts are ripe for equal protection challenges. [103] A statute which treats males and females differently violates the equal protection clause unless the statute's classification scheme is substantially related to an important governmental interest. [104]

Classifications based on marital status, those which treat married individuals differently from unmarried individuals for the same crime, are subject to the middle tier scrutiny afforded gender classifications. [105] In *Eisenstadt v. Baird,* [106] the Supreme Court found a classification scheme discriminating against unmarried persons to be unconstitutional. More than a decade after *Eisenstadt* was decided, a lower court held that New York's marital rape exemption violated the rights of married women. [107] In this landmark case, the court rejected all the traditional policy arguments for sustaining the marital rape exemption and found there was no governmental interest protected by the marital rape exemption. [108]

Other courts that have considered equal protection challenges to their marital rape exemptions have steadfastly held to the argument that only females can become pregnant and that the state's primary legitimate interest is the pregnancy prevention of young, often unwed women, [109] in order to show that gender-based classification was substantially related to the achievement of the governmental objective and therefore within constitutional limits. However, following this rationale, the courts failed to analyze the definition for the crime of rape, and it overlooked the fact that rape is not merely intercourse but a crime of violence. Following this line of reasoning, the statute's purpose should be to prevent the violent intrusion of a person's body, and thus prevention of pregnancy is not a governmental interest substantially related, nor rationally related, to the achievement of preventing violence and intrusion.

In the past, courts were more prepared to uphold gender-based rape

statutes upon finding of an important governmental interest that is substantially related to the gender-based classification scheme. [110] However, lately, a trend of holdings that statutes with marital rape exemptions violate the equal protection clause of the fourteenth amendment has emerged. [111] Hopefully, this step in the right direction on the part of the courts, will be coupled with willing and apt responses on the part of the state legislatures.

A(ii)- The Marital Exemption Violates the Right to Privacy

Although the constitution does not explicity guarantee a right to privacy, the Supreme Court has established the constitutional status this right in such cases as *Griswold v. Connecticut,* [112] *Eisenstadt v. Baird,* [113] and *Roe v. Wade.* [114] In Eisenstadt, the Court refined the contours of personal privacy to mean "the right of the *individual*...to be free from individual governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." [115]

The right to privacy has been held to protect bodily integrity, [116] reproductive freedom, [117] and individual autonomy. [118] The marital rape exemption allows a husband to violate his wife's bodily integrity. It allows him to impregnate her against her will in denial of her reproductive freedom. And perhaps most importantly, the exemption extinguishes a married woman's autonomy in one of the most personal and intimate of all human interactions. The state thus violates the privacy rights of married women by allowing their husbands to rape them without fear of prosecution.

State laws that interfere with the right to privacy in this way must be narrowly tailored to further a compelling state interest. [119] Some of the state interests behind marital rape (which have already been examined) include respecting marital privacy, encouraging the reconciliation of spouses and obviating the evidentiary problem of proving lack of consent in marital rape claims but none of these withstands the test of intermediate scrutiny and therefore fall short of satisfying a strict standard of judicial review. [120]

A second challenge to the marital rape exemption within the ambit of the right to privacy is that is unconstitutionally burdens the privacy rights of all women. [121] Specifically, the marital rape exemption falls within the doctrin of "unconsitutional conditions" which holds that a state may not condition the receipt of government benefits upon the nonassertion of a constitutional right. [122] The marital rape exemtpion unconsitutionally conditions women's receipt of governmental benefits in two distinct ways. First, the exemption conditions the benefit of marriage upon women's forfeiture of their rights to bodily integrity, procreative freedom, and individual autonomy. [123] Second, the exemption works in reverse by conditioning the benefit of protection from rape upon women's forfeiture of their fundamental right to marry. [124] Thus, the exemption forces all women to surrender either their right to marry or their right to privacy. Strict scrutiny is applied by the courts in such cases, and since as has been indicated, none of the traditional rationales for the marital exemption withstand intermediate scrutiny, they would certainly fail this higher level of review. In short, because the state has no compelling governmental interest in permitting marital rape, only statutes which eliminate the marital

rape exemption can withstand constitutional scrutiny based on the right to privacy. [125]

B - Limitations of Rights Approach and a Possibly More Successful Alternative Under ***Personnel Administrator v. Feeney***

Undeniably, the rights approach as a challenge for the constitutionality of the marital rape exemption provides a powerful argument. But a strategy based on the gender discrimination approach precisely because of its broader political perspective might be a wiser medium to ensure the outlawing of the marital rape exemption.

In the sphere of sexuality, the values of security and freedom were and still are at loggerheads. In the context of marital rape, a woman's right to marital privacy (individual security) confronts a man's right to marital privacy (freedom from state intrusion.) The rights approach offers no perspective to help us decide whether the man's right to marifal privacy is more or less fundamental than the woman's right to bodily integrity. Besides, the rights approach seems to ignore the only true ground of decision in this context: the reality of women's sexual subordination to man. A rights approach individualizes the problem of marital rape by defining it in terms of individual rights. The evil of marital rape must be corrected because it is the sexual subordination of one group in society to another rather than because it is a violation of individual rights. This facilitates the creation of bonds among women who would be thus empowered as a group - the way is thus paved for a challenge based on the gender approach.

In *Personnel Administrator v. Feeney,* [126] the Supreme Court announced a test for evalutating gender-neutral statutes that allegedly discriminate on the basis of sex. *Feeny* asks whether the facially neutral law reflects covert discriminatory intent. The answer is in the affirmative if (i) adverse effects and (ii) legislative history reveal such intent

The marital rape exemption must therefore be examined under these two miscroscopes. Women, unarguably suffer adverse effects when they are raped by their husbands. The exemption indirectly sanctions sexual violence against women and thus perpetrates the myth of the powerless, subordinate female. Also, the exemption perpetuates "archaic and overbroad" generalzations concering the proper roles of the sexes. [127] In recent cases, the Supreme Court has made clear that laws promoting gender stereotypes must be subject to heightened scrutiny, because they freeze biology into social destiny. [128]

The primary evidence of discriminatory intent is derived from the historical background and legislative history of a law. We must have proof, therefore, that the legislative adopted the marital rape exemption at least in part "because of" its adverse effects upon women. Although legilative records of the adoption of marital rape exemption are not available, judical opinion and treatises from the nineteenth century confirm that the marital rape exemption was codified from the common law which was in turn based on Hale's doctrine of implied consent. This theory, as discussed above, reflects a discriminatory vision of women as property and as naturally destined for life in the private sphere. This discriminatory purpose clearly constituted the basis for the exemption at the time of the adoption and served as the exemption's primary rationale well into

the twentieth century. The contemporary justifications for the marital rape exemption, although different in form from their nineteenth century predecessors, continue to reflect an underlying adherence to an ideology of female inferiority. [129]

The marital rape exemption has passed both tests - there is proof of adverse impact and legislative intent. For these reasons, it must be unconstitutional.

V. Possible Statutory Reform

Marital rape is definitely out of the closet and there is not even an outside chance that it will be shoved back again. Whether changes in rape laws come about by court decisions or legislation, advocates agree that marital rape must be made a crime in all fifty states.

Statutes avoiding all archaic policy justifiactions and explicitly providing punishment for marital rape are needed throughout the nation. The most enlightened approach would settle equal protection problems with a gender-neutral sexual offense which punishes both men and women for any penetration, however slight, and for all other deviant sex crimes.

New Hampshire has lately revised its sexual assaults and related offenses statute. [130] A cursory look at this newly amended statute gives an idea of how an enlightened statutory approach should be. The statute is gender neutral and specifically disallows the traditional marital rape exemption. Since the perpetrator is defined as a "person" [131] then both male and female victims are afforded equal protection under the law.

The statute also provides for appropriate graduated penalties for varying levels of sexual assault. Most importantly, however, the statute explicitly states that "(a)n actor commits a crime under this chapter even thought the victim is the actor's legal spouse." [132] This specific language leaves no doubt that the common law marital rape exemption is no longer part of New Hampshire's law; and it will serve to quash arguments that the statute was silent on the issue because it was not intended to punish spouses.

More and more states should subscribe to this approach and reform their statutes accordingly. Making sure that the three important elements of (1) gender neutrality, (2) gradation of penalties, (3) explicit abolition of the marital exemption are included therein in clear-cut language. Cohabitors and voluntary companions should be included in the definition of "legal spouse".

Conclusion

The role of criminal law in our society is to label those behaviours which are so reprehensible that a civilized society will not tolerate them. As this paper has analyzed, marital rape is very much a reality in our society. It is not only the role of social scientists to acknowledge and deal with this reality, but it is primarly the duty of the state legislatures and the courts to protect women, as a group from such a crime of violence. The evolution of women's status from chattel to full-fledged person with all the rights and responsibilities of citizenship forces the legal system to rethink many of its platitudes and policies, and to help shape attitudes that view rape as a violent act in *any* context - marital

rape is therefore no exception. The time has to come to realize that no legal, political or moral justifications exist to allow a man to use force to invade his wife's bodily privacy.

Ironically, the legacy of Hale's flippant and unfounded statement that a husband cannot rape his wife [133] continues to ravage American women - even though some progressive states [134] have realized and endorsed its anachronism and unconstitutionality. Unfortunately, however, even though the case for total reform of archaic American rape laws is compelling, most legislatures are unwilling to correct the evils fostered by the marital rape exemption. The courts in some states have been more responsive, albeit slow, in taking the initiative. By focusing upon the harm done to women as a group, and identifying the issue as inequality, American legislatures and courts must first acknowledge rape for what it is - a crime of violence to which no individual, married or single should be subjected - and then proceed to abolish, in no unclear terms, the marital rape exemption and provide for prosecution of marital rape.

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New York has removed its marital rape exemption through judicial action. See People v. Liberta, 64 N.Y. 2d 152, 474 N.E. 2d 567 (1984), cert. denied, 105 S. Ct.2029 (1985). The Georgia judiciary has held that its rape statute, which is silent on marital rape, does not implicitly incorporate the common law exemption. See Warren v. State, 225 Ga. 151, 336 S.E. 2d 221 (1985).

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2. Also, Russell infers that more than 1 in every 7 women who have ever been married have been raped in marriage. Id. at_____

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Dr. Joanne Catania graduated LL.D. from the University of Malta in 1988 and is now furthering her studies abroad.

APPENDIX I

FORM DRAWN UP BY MONTANA LEGISLATION

Due to a situation in Oregon in which a man is on trial for raping his wife, the following "consent form" is being furnished as a public service for Montana's males.
It is recommended that no sexual contact be made by Montana's males with their wives until this form has been filled out and signed.
Remember, tonight she may be willing, but tomorrow YOU MAY BE CHARGED WITH RAPE.

Agreement

I, _____, do hereby on this _____ day of _____

(Check one)

_____ Beg
_____ Request
_____ Agree
_____ Grudingly agree (please pull down my nightgown when you're through)

to have sexual relations with my husband between the hours of _____ and _____

_____
(Signed)

Public Service Form No. 61600.

Legally, this form is but a one-time agreement, of course. Any sexual contact other than on the above date and at the above time shall require a new agreement.

Additional copies of this form can be obtained from State Senator Pat Regan. Detach form on dotted lines.

Interview

HIS HONOUR CHIEF JUSTICE PROFESSOR HUGH. W. HARDING B.A., LL.D., F.R. Hist.S., F.S.A.

THE EDITOR* OF THE LAW JOURNAL *DRITT* INTENDS TO HAVE A NUMBER OF INTERVIEWS WITH PROMINENT FIGURES IN THE LEGAL FIELD. HEREUNDER, IS THE INTERVIEW HELD WITH HIS HONOUR CHIEF JUSTICE PROFESSOR HUGH W. HARDING, B.A., LL.D., F.R.Hist.S, F.S.A.

QUESTION: Your Honour, your father, the late Judge William Harding, is considered a prominent figure in the legal field. In what way did he influence your choice to take up the legal profession?

ANSWER: When my father became a judge I was only eight years old. Since I was the only son, it is natural that I was very close to him and that I was influenced by the fact that he was a legal man by profession.

As you are probably aware, my father was a judge for almost 30 years. Naturally, this influence lasted throughout my life. At one stage, however, my father did not wish me to join the legal profession because he used to point out to me that it was a very hard life. But things took their natural course and I found myself in the legal profession.

Q.: How did he welcome the fact that you joined the legal profession?
A.: I think that, in the long run, he was very pleased because, on the whole, I made a success of it.

Q.: Is there anything in particular about the way your father exercised his profession which you have admired so much that you adopted yourself?
A.: What I most admired in my father was that he was always prepared for his Court sittings. He knew his cases inside out and, therefore, everything moved like clockwork. All the cases on his list were heard, along with the witnesses, without their having to turn up again. Everything moved with the greatest precision.

In this, of course, he was helped by his vast legal knowledge and his great experience over the years. He was chairman of the Statute Law Revision Commission, set up in 1936, which was responsible for the six volumes of the *Laws of Malta* published in 1942 during the War years. That edition not only contained a translation of the original legislation in Italian into English, but also a translation of our laws into Maltese.

In other words, the Statute Law Revision Commission not only carried out a codification of our laws but also this massive work of translating them into two languages. As you will be aware when you exercise your profession, the task when translating a law is very difficult because one has to weigh each and every word in the light of the interpretation given by the several Court judgements over the years.

I would imagine that all this work contributed to my father's extensive legal knowledge which made it easier for him to direct a Court sitting to the satisfaction of the parties involved.

Q.: What did you adopt from all this?
A.: I learnt that it is necessary to prepare yourself for a Court sitting in this

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way, you can save a lot of time, avoid unnecessary adjournments and direct lawyers. Moreover, when they know that the judge is prepared, they have, in turn, to be more prepared themselves.

Q.: In 1949 you were called to the bar. This means you had to undergo the first part of your studies towards the end of the Second World War. Is there any particular experience which you would recall about his period?

A.: My studies began in 1942. This, of course, was a terrible period in Malta. There was one air raid after another and most lectures were interrupted. We used to rush down to what was then called a "shelter"; it was not really a shelter because it consisted of a corridor behind the main altar of the Jesuits' church in Valletta. It was thought that the thick walls would save us from the bombs. Events, however, proved that even walls that thick could not withstand a direct hit.

So, really, my memories of that period are the air raids and studies in between raids. Although we were studying under this strain, I think, being young, we could withstand it with the greatest of ease and we were always a happy group, very much bound to one another.

Q.: Nearly all graduates have some happy memories of University life. What are your memories? Was there any particular activity which you used to look forward to?

A.: The law course then was a very small one. Originally, there were only 18 of us, going down to 16 students. Naturally, the smallness of the course made us very close to one another. We got on very, very well. We used to organise hikes, picnics and other social actvities and we have kept in touch throughout life, even to the present. Whenever there is some particular occasion, we make it a point to meet because we have learnt to respect one another over the years.

In those days, the students used to have a club in a building just opposite the University. Naturally, we used to rush there in between lectures. At that time I was particularly keen on table tennis and I also took an active part in the debates organised by the Għaqda tal-Malti. There was also an English Literary Society whose president was Professor O. Fogarty who was the soul and spirit of the University at that time. He inculcated in us quite a lot of good principles. Being young, in your teens, a lecture by such a professor was bound to leave its mark!

I remember I was the *Law Journal* editor in 1946 and 1947. We used to have a biography of a distinguished Chief Justice with a portrait in almost every issue. I myself remember that I had written the biography of Sir Michelangelo Refalo. There were others about Sir Ignazio Bonavita, Sir Adrian Dingli, Sir Antonio Micallef and Sir Giuseppe Carbone.

Q.: Besides your studies at the University of Malta and the University of London, you have also carried out research work in Palermo and Naples in Italy. What did this research consist of?

A.: After being appointed lecturer at the Unviersity, I was requested by the University to carry out research to establish what documents existed in Palermo and Naples which could affect the legal history of Malta.

Q.: How much time did you spend in Italy?
A.: About six months in all during which I found a lot of original material in Palermo and very little in Naples because most of the original documents, I have been told, had been destroyed during the war. In fact, the Archivio di Stato of Naples was being reconstructed with copies of the original documents.

As regards Palermo, there is a wealth of material dating before 1530. These documents are to be found in big volumes along with, of course, other documents relating to Sicily. These volumes belonged to the *Regia Cancelleria* and the *Protonotaro del Regno* and there I found the *Capitoli* which the *Universitas* of Malta, the *Universitas* of Gozo and the *Universitas* of the Jewish community in Malta used to send over for the Placet of the Sicilian king.

I am definitely of the opinion that, if anybody wants to write the history of Malta before 1530, he should examine thoroughly the documents which exist in the Archivio di Stato of Palermo because, unfortunately, in Malta we have very few documents relating to this period. I imagine this was due to the fact that we led here a hazardous existence, owing to the raids which we used to get from Corsairs.

Q.: Between 1950 and 1980 you have delivered lectures in the History of Legislation at the University of Malta to Law students. Why this aspect of legal studies in particular?
A.: Since childhood, I was always interested in history and, when I became a lawyer in 1949, there was a vacancy in the Chair of History of Legislation which, at that time, was called "History of Legislation in England and in Malta", since the professor who occupied this chair, Professor Giuseppe Degiorgio, an excellent man, had been unfortunately killed in a car accident in London.

As soon as I got the Government Travelling Scholarship, since I was first in my course, I proceeded to London and, there, I carried out researches in Maltese Legal History, both in the British Museum as well as in the Public Record Office (PRO), mainly in the PRO, where one finds all the documents relating to the Bristish Period of our history.

The researches I carried out in Legal History were under the supervision of a tutor, Professor T. Plucknett, who was then President of the Royal Historical Society of London, an authority in his field. He was the man who showed me how to carry out researches and how to make use of those researches because there is an art in reproducing the results of one's researches.

Besides carrying out this research, I attended lectures in Criminal Law by Professor Glanville Williams who, as you know, wrote an excellent book on Criminal Law. I also worked in Chambers in the Middle Temple, with English barristers who specialised in matters relating to the drafting of legislation.

Q.: In 1964 you were chosen as a Commissioner for the Independence referendum. What were your specific duties in that referendum?
A.: I was not only an Independence referendum commissioner, but also an Electoral Commissioner in 1962, 1966 and 1971. The duties which we had

to carry out are those laid down in great detail in the relative laws. I think you will agree with me that there is no need to mention all the duties once they are laid down in the law.

However, speaking generally, the duties were to conduct, together with my colleagues, the elections and the referendum. On the whole, the members of the Independence Referendum Commission were the same members of the 1962 Electoral Commission -- mostly lawyers. I believe there was Dr. Vincent Scerri, later Judge Scerri, Dr. George Vassallo and others.

Q.: Your Honour you have been in office since 1987. How do you approach your main responsibilities as Chief Justice?

A.: The Chief Justice presides over a number of Courts: the Court of Appeal, which has two branches; the Civil Hall; and the Commercial Hall. He presides also over the Court of Criminal Appeal and, last but not least, he presides over the Constitutional Court.

There is a tremendous backlog of work in these Courts due to many reasons which I don't think I need enter into here. My main aim is to strive, together with my colleagues, to reduce this backlog as much as possible.

Q.: In your opinion, what is required to facilitate the course of justice in our Courts? Some believe there should be other Courts, if necessary in a separate building. Do you agree?

A.: I am definitely against the idea of having other Courts in a separate building. The reason in that this will definitely produce procrastination in the administration of justice. Lawyers will be rushing from one area to another of Valletta, trying to cope with cases in both buildings. Parties will get confused about where to go and it will be difficult, for example, for a lawyer to get in touch with a fellow lawyer in order to appear before a judge and to avoid any clashes resulting from different cases in the different Courts.

Also, it might be difficult for a lawyer to find the legal procurator. As a result of all this, cases will be put off and further delayed. I am stressing this point of view because this is exactly what happened when we had two Courts in the Auberge d'Italie in Merchants Street, whereas the Courts of Magistrates and Judicial Police were housed in Old Bakery Street near the Auberge de Baviere. The result was lawyers rushing from one part of Valletta to another and judges waiting to hear cases or putting off cases. The closer the Courts are, the quicker will be the administration of justice.

Regarding the first part of your question, that is a million dollar question! I think that the solution is that everyone must pull his weight; not just the judges, magistrates and lawyers but also the civil servants concerned with the administration of the Courts.

Q.: Your Honour, you are a fellow of the Society of Antiquaries of London. What can you tell me about this society?

A.: The Society of Antiquaries is one of the leading societies in the world. It is a prestigious society and it has a very limited membership because, to join, you have to possess certain qualifications. The society dates back to Queen Elizabeth I and it is housed in a lovely building next to the British Academy. It publishes books and has been doing so for a very long time. It has a very good library in which there are also some documents relating in Malta.

One of your publications is entitled "Maltese Legal History Under 'sh Rule (1801-1836)". Do you intend to publish further studies that ld go beyond 1836?

This publication was based on original documents which I came across ıg my researches in the Public Record Office. I have in my possession of the documents relating to the same subject for the period 1836 up to ıst the end of the last century. I have already started writing the second and I think I have arrived at Chapter Seven. I had to stop writing because udicial duties take up most of my time but I intend to take it up later on fe, God permitting. As you know, when you write something following kamination of documents, you have got to dedicate a lot of time to decide to present the result of your researches.

Your hobby is mainly reading. What do you enjoy reading most?

Jnfortunately, I do not have many hobbies and, as you say, my only hobby ading. What I read is mostly history. Of course, I like the occasional ctive novel.

Any particular author?

Yes, definitely! I have my own pet author, Agatha Christie. I consider books to be excellent.

Last question: what advice would you give to students of Law at the versity about their future legal profession?

My advice is that Law students should endeavour to be honest, precise ıeir dealing not only with lawyers but with whoever they get in touch, to be punctual and precise in their work.

Unfortunately, most lawyers are unpunctual by nature and this is ething that should be eradicated because, when a person is punctual and ıs appointments, things move along better.

But, of course, my main advice is that a lawyer should be honest in his ings and that he should not forget that, in terms of the law, he is an officer ıe Court and, therefore, he has a part to play to ensure that justice is ıinistered.