

Bangkok Principles, of a provision for the constitution of a tribunal for determining any controversy on the right of return of refugees. Commenting on the proposal, the Observer for the Office of the UNHCR stated at the Tenth (Karachi, 1969) Session of the Committee: "Actually, it is not for the first time in history that such a proposal is made. The establishment, after World War I, of Mixed Conciliation Commissions and Mixed Arbitral Tribunals for the settlement of disputes between Germany and Poland on questions of nationality, option, domicile and compensation for the population concerned may be viewed as an interesting example of possible solutions. As far as I could find out from existing documentation, these Commissions and Tribunals dealt with thousands of cases to the satisfaction of the States concerned. I believe, however, that this matter requires a thorough study so that more concrete proposals may be elaborated upon with regard to this important question".²¹

The aforesaid question was considered by the Committee also at its Eighth (Bangkok, 1966) Session. The Delegate of Ceylon stated that in "regard to the question whether any provision should be made for ensuring the implementation of the right of repatriation, it is the view of my Delegation that the main objective in regard to refugees is to encourage and assist in every way possible their early return to the countries of their origin. Of course, one method is by the conclusion of bilateral arrangements for mutual assistance in their repatriation. The other is to set up international machinery to implement the right of repatriation in conjunction with the Convention which regulates such right. We think, the latter is the more satisfactory course".²² The Delegate of Japan was

21. Verbatim Record of Discussions on the subject, held at the Tenth (Karachi, 1969) Session of the Committee, for the Meeting of 23 January 1969.

22. See Record of Discussions on the subject at the Eighth (Bangkok, 1966) Session of the Committee.

of the view that the circumstances were not ripe for making any recommendation on this question.²³ The Delegate of Pakistan was of the opinion that it was not practicable at that time to make any provision in that respect.²⁴ The Delegates of Ghana, India, Indonesia and Thailand were of the view that this question should be kept pending and might be examined by the Committee at a suitable time, and it was so decided.²⁵

While considering the question of a provision in regard to the tribunal to settle the controversies relating to the right of return, one important aspect of the matter, which the Committee might examine, is that relating to the scope of the tribunal. In this connection, it may be stated that, in cases where political circumstances existing in the country of origin do not warrant repatriation of refugees, or where the country of origin is reluctant to receive the refugees, "specific performance" of the right of return or repatriation would be neither desirable nor feasible. In such situations the appropriate remedy open to the country of asylum or the refugee concerned against the country of origin, may be a claim for compensation on the ground of denial of the right of return or repatriation. At the Eighth (Bangkok, 1966) Session of the Committee, while commenting upon Article V of the Bangkok Principles, the Delegates of Ceylon, Japan, Pakistan and Thailand expressed the view that compensation should be payable also in respect of denial of the refugee's right of return to the State of which he is a national.²⁶

In the aforesaid cases the proposed tribunal would examine any controversy relating to the right of return or repatriation only in the context of compensation claims. To that extent it will resemble a compensation tribunal—a matter

23. *Ibid.*

24. *Ibid.*

25. *Ibid.*

26. *Ibid.*

which is discussed in detail in the next chapter of the present Study. However, in cases where the country of origin is prepared to receive the refugees, the proposed tribunal may adjudicate upon controversies relating to compliance with various rights and obligations relating to repatriation of refugees.

The other questions in this regard which the Committee may consider are—whether the proposed tribunal should be constituted on an *ad hoc* basis pursuant to an agreement between the countries concerned, or it should be a permanent tribunal; the composition of the proposed tribunal; whether its jurisdiction should be compulsory or that an optional clause be provided for in regard to its jurisdiction; and other rules of procedure of the proposed tribunal.

Material concerning some of the compensation tribunals has been collected in the next chapter of the present Study. The Committee may examine the same while considering the above-mentioned matter.

CHAPTER VIII

RIGHT TO COMPENSATION

1. Provision relating to right to compensation in the Bangkok Principles

Article V of the "Principles concerning Treatment of Refugees" adopted by the Committee at its Eighth (Bangkok, 1966) Session, provides as follows in regard to the right to compensation :

1. A refugee shall have the right to receive compensation from the State or the country which he left or to which he was unable to return.
2. The compensation referred to in paragraph 1 shall be for such loss as bodily injury, deprivation of personal liberty in denial of human rights, death of dependants of the refugee or of the person whose dependant the refugee was, and destruction or damage to property and assets, caused by the authorities of the State or country, public officials or mob violence.

2. Comments on the said provision

The word "country" in the aforesaid provision was added at the Eighth (Bangkok, 1966) Session of the Committee on the proposal of the Delegate of Iraq. The Delegate of Ceylon was opposed to its inclusion in Article V and it was decided to record a note to that effect.¹

The Delegate of Ghana expressed the view that the provisions of Article V represented progressive development of international law.²

1. See Record of Discussions on the subject at the Eighth (Bangkok, 1966) Session of the Committee.

2. *Ibid.*

3. Dissenting notes on Article V of the Bangkok Principles and suggestions for improvement

- (i) The Delegates of India and Japan to the Eighth (Bangkok, 1966) Session of the Committee expressed the view that the words "deprivation of personal liberty in denial of human rights" should be omitted from paragraph 2.³
- (ii) The Delegates of Ceylon, Japan and Thailand at the Bangkok Session suggested that the words "in the circumstances in which the State should incur State responsibility for such treatment to aliens under international law" should be added at the end of paragraph 2.⁴
- (iii) The Delegates of Ceylon, Japan, Pakistan and Thailand represented the view that compensation should be payable also in respect of the denial of the refugee's right to return to the State of which he is a national.
- (iv) The Delegate of Ghana, at the Eighth (Bangkok, 1966) Session of the Committee, felt that the provisions of paragraph 2 were not clear. He was of the view that there should be some connection between the instances mentioned in the paragraph and the event that led to a person becoming a refugee.⁵ Similar views were referred by the Delegates of Ceylon, India and Indonesia and a note to this effect was recorded.
- (v) The Government of Pakistan, in their letter dated 5 January 1968 addressed to the Secretary of the Committee, suggested inclusion, in Article V of the

3. *Ibid.*

4. *Ibid.*

5. *Ibid.*

Bangkok Principles, of a provision for payment of compensation to refugees who are desirous of returning to their country.

- (vi) At the Tenth (Karachi, 1969) Session of the Committee, the Delegate of Japan suggested that the Committee should consider the question of providing for a compensation tribunal.

4. The legal basis for payment of compensation

In traditional international law, in the absence of an international agreement providing differently, compensation can be claimed by a State for violation of legal rights of its nationals by another State. Dr. P. Weis points out that "diplomatic protection of citizens purports to prevent the violation of the citizens' rights or to secure redress for such violation. The State does not represent the citizen who has suffered injury to his right but asserts its own rights which have been violated in the person of its national".⁶ As such, only a bilateral international agreement between State A and State B or a multilateral treaty to which State B is a party, may provide a legal basis for a compensation claim by State A against State B, the former pursuing the claim on behalf of the nationals of the latter. International protection of refugees takes place under the provisions of a treaty. Dr. P. Weis points out that the "High Commissioner's office acts under instructions from the General Assembly or the Economic and Social Council and, to the extent to which the function of protection is based on treaty, under Article 35 of the U.N. Refugee Convention, the Office is under an obligation to the States parties to the treaty to afford protection".⁷ However,

6. In his article on "The Office of the United Nations High Commissioner for Refugees and Human Rights", *Revue des Droits de l'Homme* (Human Rights Journal), Vol. 1-2, 1968.

7. *Ibid.*

an individual refugee may claim compensation from his country of origin, either under an international agreement providing for the same, to which such country is a party, or under the relevant municipal legislation of such country.

At the Eighth (Bangkok, 1966) Session of the Committee the Delegate of Ceylon stated that in "regard to the question of compensation, of course, where the municipal law of the State provides the machinery for enforcement of the right of compensation, no problem arises. The refugee can prosecute his claim before such court or tribunal. The question arises only where there is no such provision. How does the State acquire the right to espouse the cause of refugees? According to the traditional international law, a State cannot make a claim in respect of an aggrieved person who is not its national both at the time of the claim as well as at the time when the injury was sustained. In view of peculiar circumstances in which the refugee is placed, we think that the State granting asylum should have the right to take up the cause of refugee"...⁸

Paragraph 1 of Article V of the Bangkok Principles, adopted by the Committee, provides for the right of a refugee "to receive compensation from the State or the country which he left or to which he was unable to return". It does not provide for the right of the State of asylum to claim compensation in that regard. The Committee may consider whether, and under what circumstances, to provide for such a right of the State of asylum. This may be necessary at least to enable it to espouse the claims of the refugees who are enjoying asylum in its territory and who have been denied their right of return by their country of origin.

5. From whom to claim compensation

Paragraph 1 of Article V of the Bangkok Principles provides that the compensation is to be claimed "from the State

8. See Record of Discussions on the subject at the Eighth (Bangkok, 1966) Session of the Committee.

or the country which (the refugee) left or to which he was unable to return". At the Eighth (Bangkok, 1966) Session of the Committee, the Delegate of Thailand posed the question in regard to "election of the body from whom to obtain compensation. Supposing two authorities exist over one territory—one can be referred to as a State, another as a country—now must the refugee elect to go to one or to the other? Can he not go to both? If he gets compensation from both, then it is not "or the country", but it will be "and the country" or "and/or" whatever it is. Do we release the responsibility of the State or the country when compensation has been given by one or the other"?⁹ In this regard, the Delegate of Ghana expressed the view that the expression "and/or" can be translated into municipal language to mean jointly and severally. Jointly and severally he proceeds, he chooses, he may proceed against both or he may elect one. It may be difficult to use the expression "and/or" in some Article, but since this one is in connection with the compensation, I do not think that it will bring any complication at all. It will be entirely for the refugee to decide against which entity he may proceed".¹⁰

With a view to avoid confusion in this regard, the Committee may consider the question of election of the body from whom to obtain compensation.

6. Grounds for claim of compensation

As already stated, the Government of Pakistan, in their letter dated 5 January 1968 addressed to the Secretary of the Committee, suggested inclusion, in Article V of the Bangkok Principles, of a provision for payment of compensation to refugees who are desirous of returning to their country. It has been discussed in the previous chapter of the present Study that, in the event of denial of the right of return of the refugee by the country of origin, the appropriate remedy is to provide

9. *Ibid.*

10. *Ibid.*

for compensation in that regard. At the Eight (Bangkok, 1966) Session of the Committee, the Delegates of Ceylon, Japan, Pakistan and Thailand expressed the view that compensation should be payable also in respect of denial of the refugee's right to return to the State of which he is a national.¹¹

The Committee may consider including the words "denial of the refugee's right to return to the State of which he is a national or the country of which he is a habitual resident" between the words "shall be for" and the words "such loss as" in paragraph 2 of Article V of the Bangkok Principles.

The other grounds for payment of compensation are set out in Article V, para 2, of the Bangkok Principles and the Notes to that Article. The Committee may consider whether any amendment of the grounds stated in para 2 of Article V is necessary.

7. The question of providing for a compensation tribunal

At the Tenth (Karachi, 1969) Session of the Committee, the Delegate of Japan suggested that the Committee should consider the question of providing for a compensation tribunal.

The aforesaid question was considered earlier by the Committee at its Eighth (Bangkok, 1966) Session. The Delegate of Ceylon referred to the right of the refugee to "make a claim before a competent international tribunal" as also "the right of the country of asylum to take up the cause of the refugee before an international tribunal". However, he considered it to "be more satisfactory if the question of compensation were settled through an International Organization entrusted with the task".¹² The Delegate of Japan was

11. *Ibid.*

12. *Ibid.*

of the view that the conclusion on the question of implementation of the right of compensation of the refugee "is very delicate and difficult from the point of view of international law. How to implement the right of compensation of the refugee *vis-a-vis* his country of origin". He did not think that circumstances at that time were ripe for making any recommendation.¹³ The Delegate of Pakistan was of the opinion that it was not practicable at that time to make any provision in this respect.¹⁴ The Delegate of India was "not sure whether such a tribunal will effectively provide protection to the refugees, particularly when the State of origin does not respond either by entering appearance before the tribunal or by implementing its award. We should, therefore, perhaps be more pragmatic and leave the choice of compensation tribunal to the States concerned so as to accord with the realities and requirements of the particular situation".¹⁵ The Delegates of Ghana, Indonesia and Thailand were of the view that this question should be kept pending and might be examined by the Committee at a suitable time.¹⁶

The Committee decided "to postpone consideration of the question as to whether any provision should be made for ensuring the implementation of.... the right to compensation which has been provided for in the articles on the rights of refugees".¹⁷

At the Tenth (Karachi, 1969) Session of the Committee the Delegate of Japan stated, "At the Bangkok Session we said that the time was not ripe enough for consideration of the problem of compensation tribunal. But now, I think, we must consider the matter seriously. I think the intention of

13. *Ibid.*

14. *Ibid.*

15. *Ibid.*

16. *Ibid.*

17. *Ibid.*

the Distinguished Delegate of UAR is different when he said about International Compensation Tribunal. He meant that it should be established by the agreement of the nations concerned. I am speaking on that premise so that we may consider the concept as a judicious one, and I hope that it may become possible to be realised. The problem is how we might find ways and means to bring this enlightened judicious concept into reality, because it is right to have compensation courts, but how to realise the agreement between the nations directly concerned on the matter is a difficult problem".¹⁸

A survey of some of the existing treaties and conventions and other materials, dealing with matters of compensations is indispensable to a dispassionate consideration of the question of setting up of an international tribunal to deal with the compensation claims in regard to the refugee problem. A sample survey of this nature has been attempted below under the following categories:

- I. Bilateral treaties, setting up international tribunals, which act primarily as channels of negotiations between the States concerned in matters relating to compensation;
- II. Bilateral treaty, setting up an international tribunal, which acts as a means of conciliation between the States concerned, in matters relating to compensation;
- III. Bilateral treaties, providing for arbitration tribunals to settle disputes relating to compensation;
- IV. Bilateral treaty, providing for adjudication by the International Court of Justice in compensation matters;

18. Verbatim record of discussions on the subject at the Tenth (Karachi, 1969) Session of the Committee, for the Meeting of 23 January 1969.

- V. Bilateral treaties, providing for municipal remedies or setting up municipal tribunals for purposes of compensation matters; and
- VI. Bilateral treaties providing for compensation, but establishing no machinery for settlement of compensation claims.
 - I. *Bilateral treaties setting up international tribunals, which act primarily as channels of negotiations between the States concerned in matters relating to compensation:*
 - (i) & Conventions between the U.S.A. and Panama, signed 28 July 1926 and 17 December 1932, establishing the American-Panamian General Claims Commissions.
 - (iii) Agreement between Yugoslavia and Czechoslovakia, of 4 September 1947,¹⁹ reviving an existing mixed Commission. Article 4 of the Agreement provided that the representatives of the two Governments concerned might establish a special mixed body to be responsible for determining the amount payable and the method of payment.
 - (iv) The 1948 agreements on compensation for nationalized British property between the U.K. and Poland,²⁰ establishing a Mixed Commission, with functions to discuss general questions of compensation to British claimants, to formulate proposals for standard rules and formulae for the assessment of compensation and to discuss the method of payment and questions of transfer of compensation to British claimants.

19. *United Nations Treaty Series*, Vol. 112 p. 91.

20. *U.N.T.S.*, Vol. 87, p. 3.

- (v) The Agreement of 5 May 1949²¹ between Denmark and Poland setting up the Danish-Polish Commission to "achieve a solution in each individual case" (in terms of Article 10 of the Agreement).
- (vi) The Agreement of 23 May 1949²² between Italy and Yugoslavia, setting up the Italian-Yugoslav Commission to determine the value of nationalized Italian property.
- (vii) Agreement between Turkey and Yugoslavia of 5 January 1950, setting up a joint commission, which was to settle the procedure to be applied for the determination of compensation, and then to fix the amount of compensation according to the 'real value' of the property, rights and interests.
- (viii) Agreement of 12 June 1952, between the U.S.A. and Japan establishing the U.S.—Japan Property Commission.²³

II. Bilateral treaty setting up an international tribunal, which acts as a means of conciliation between the States concerned in matters relating to compensation.

Treaty of Peace between the U.S.A. and Italy of 10 February 1947²⁴—Article 83 of the Treaty established the U.S.-Italian Conciliation Commission.

III. Bilateral treaties providing for arbitration tribunals to settle disputes relating to compensation:

- (i) Treaty of Friendship, Commerce and Navigation of 1854 between Great Britain and Chile, providing

21. *U.N.T.S.*, Vol. 87, p.79.

22. *U.N.T.S.*, Vol. 150, p.179.

23. *U.N.T.S.*, Vol. 138, p.183.

24. *U.N.T.S.*, Vol. 29, p.126.

for full indemnity or compensation and for the final determination of any dispute in that regard by the Government of a third friendly Power.

- (ii) Arbitration Agreement Treaty made by Portugal with France, Britain and Spain, providing for an arbitration tribunal within the framework of the Permanent Court of Arbitration.
- (iii) Agreement of 28 February 1947 between Sweden and Poland, setting up a Mixed Commission, with the task of interpreting the Agreement. The Commission could act in individual cases only if negotiations between the Polish authorities and the Swedish claims break down.
- (iv to vii) France concluded compensation agreements with four States following the nationalisation of gas and electricity undertakings in April 1946. These are (a) with Belgium on 18 February 1949,²⁵ (b) Switzerland on 21 November 1949, (c) U.K., on 11 April 1951,²⁶ and (d) Canada on 26 January 1951.²⁷ All these follow a common pattern. Compensation under the first agreement was to be calculated according to Articles 10, 11, 12 and 14 of the French Law of 8 April 1946 as amended. The agreements contained an arbitration clause regarding any difficulties which might arise in connection with interpretation or application and which were not settled by direct negotiation. The parties agreed that the decision of the arbitration tribunal would be final and binding upon them.

25. *U.N.T.S.*, Vol. 31, p.173.

26. *U.N.T.S.*, Vol. 106, p.3.

27. *U.N.T.S.*, Vol. 233, p.65.

IV. Bilateral treaty providing for adjudication by the International Court of Justice in compensation matters :

The U.S.-China Treaty of 1949, providing for 'prompt payment of just and effective compensation', and for compulsory adjudication by the International Court of Justice of disputes which are not settled diplomatically.

V. Bilateral treaties providing for municipal remedies or setting up municipal tribunals, for purposes of compensation matters :

- (i) Treaty of 1850 between U.S.A. and Switzerland, under which nationals of one of the two countries residing or established in the other were to be placed on an equal footing with nationals of the country of residence in matters of compensation.
- (ii to iv) Treaties concluded by the U.S.A. with Nicaragua in 1867, Salvador in 1870 and Orange Free State in 1871, providing for national treatment in the matter of compensation.
- (v) Convention of Commerce, Navigation and Establishment between France and Greece of 1929, providing for most-favoured-nation treatment.
- (vi & vii) Under two protocols between Switzerland and Czechoslovakia concluded in 1946 and 1947, Swiss interested persons were given the right of direct access to the appropriate Czech authorities "so as to be able to take all the necessary steps to protect their rights and submit a claim for compensation or make any other proposals for an accepted settlement".
- (viii) Agreement of 19 March 1947 between Belgium and Czechoslovakia.²⁸

28. *U.N.T.S.*, Vol. 23, p. 35.

- (ix) 1947 Commercial Treaty between Poland and Czechoslovakia providing for national treatment on reciprocal basis.²⁹
- (x) Agreement of 4 November 1949 between Czechoslovakia and the Netherlands.
- (xi) Treaty of Commerce between India and Afghanistan of 4 April 1950, providing for real and just compensation.³⁰
- (xii) Agreement between Czechoslovakia and France of 1950.
- (xiii) Treaty of Amity and Economic Relations of 1951 between the U.S.A. and Ethiopia, providing for fair and equitable treatment.³¹
- (xiv) Treaty between the U.S.A. and Japan of 1951,³² providing that compensation was to be in an effectively realisable form and should represent the full equivalent of the property taken, and, finally that 'adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof'.
- (xv) Treaty of Commerce, Establishment and Navigation between the U.K. and Iran of 2 March 1959, providing for equitable treatment to nationals and companies of the other party in the matter of expropriation and to make prompt and adequate compensation, and containing a most-favoured-nation clause.

29. *U.N.T.S.*, Vol. 85, p. 212.

30. *U.N.T.S.*, Vol. 167, p. 105.

31. *U.N.T.S.*, Vol. 206, p. 41.

32. *U.N.T.S.*, Vol. 206, p. 143.

VI. Bilateral treaties relating to compensation matters, establishing no machinery for settlement of the claims:

- (i) The 1930 Convention on Establishment between Turkey and Switzerland providing for fair compensation payable in advance.
- (ii) Agreement between France and Poland of 19 March 1958, under which the compensation paid by the Polish Government was in the form of bituminous coal in respect of French interests affected by the Polish Nationalisation Law of 3 January 1946.
- (iii) A similar Agreement between Poland and Belgium was concluded in February 1948, under which Poland undertook to deliver 4,600,000 tonnes of coal to Belgium.
- (iv) The U.S.-Yugoslav Agreement of 19 July 1948, under which the Yugoslav Government transferred the sum of 17 million dollars to the U.S. Government in full settlement of all claims of the U.S. nationals respecting property and rights and interests in property which had been nationalised or subject to other taking by the Yugoslav Government between 1 September 1939 and the date of the Agreement.³³
- (v) Agreement of 17 September 1948 between Switzerland and Yugoslavia, providing for payment of lump-sum compensation.
- (vi to x) Five agreements which the U.K. concluded with Yugoslavia (1948),³⁴ Czechoslovakia (1949),³⁵ Poland (1954),³⁶ Bulgaria (1955),³⁷ and Hungary (1956),³⁸

33. *U.N.T.S.*, Vol. 34, p. 195.

34. *U.N.T.S.*, Vol. 81, p. 133.

35. *U.N.T.S.*, Vol. 263, p. 405.

36. *U.N.T.S.*, Vol. 204, p. 137.

37. *U.N.T.S.*, Vol. 222, p. 349.

38. *U.N.T.S.*, Vol. 249, p. 19.

under which lump-sum compensation was to be paid in instalments over a period of years.

- (xi) Agreement of 25 June 1949 between Switzerland and Poland, providing for lump-sum compensation.
- (xii) Agreement of 22 December 1949 between Switzerland and Czechoslovakia, providing for lump-sum compensation.
- (xiii) Protocol of 12 May 1949 between Denmark and Poland providing for lump-sum compensation.³⁹
- (xiv to xvi) Agreement concluded by Switzerland with Yugoslavia and Poland of 16 November 1949, and Hungary of 31 March 1951, providing for lump-sum compensation.
- (xvii) An agreement for compensation in kind was concluded privately in 1950 between Swiss shareholders in one of the principal Hungarian electricity enterprises and the Hungarian Government.
- (xviii) Lump-sum compensation Agreement of 2 June 1950 between France and Czechoslovakia.
- (xix) Franco-Hungarian Agreement of 12 June 1950, providing for lump-sum compensation.
- (xx) Under an agreement with Rumania signed on 3 August 1951, Switzerland accepted a lump-sum of 42,500,000 francs.
- (xxi) Agreement of 14 April 1951 between France and Yugoslavia, providing for lump-sum compensation.
- (xxii) Agreement of 30 September 1952 between Belgium and Czechoslovakia, providing for lump-sum compensation.

39. *U.N.T.S.*, Vol. 87, p. 179.