ASIAN AFRICAN LEGAL CONSULTATIVE COMMITTEE

THIRD SESSION

COLOMBO

1960

ISSUED BY

The Secretariat of the Asian African Legal Consultative Committee.
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INTRODUCTORY

Establishment and Functions of the Committee :

The Asian Legal Consultative Committee, as it was originally called, was constituted by the Governments of Burma, Ceylon, India, Indonesia, Iraq, Japan and Syria as from the 15th day of November , 1956, to serve as an advisory body of legal experts, to deal with problems that may be referred to it, and to help in exchange of views and information on matters of common concern between the participating countries. In response to a suggestion made by the Prime Minister of India, which was accepted by all the participating countries in the Asian Legal Consultative Committee, the Statutes of the Committee were amended with effect from the 19th April, 1958, so as to include participation of countries in the African continent. Consequent upon this change in the Statutes the name of the Committee was altered and it was renamed as the Asian-African Legal Consultative Committee. Membership of the Committee is open to the countries in the Asian-African continents in accordance with the provisions of its Statutes.

The United Arab Republic upon its formation by merger of Egypt and Syria became an original participating country in the Committee in place of Syria. Sudan was admitted in the Committee with effect from the Ist day of October, 1958 and Pakistan from the Ist day of January, 1959.

The Committee is governed in respect of all matters by its Statutes and the Statutory Rules. Its functions as set out in Article 3 of the Statutes are :—

(a) Examination of questions that are under consideration by the International Law Commission, and to arrange for the views of the Committee to be placed before the said Commission;

(b) Consideration of legal problems that may be referred to the Committee by any of the participating countries and to make such recommendations to Governments as may be thought fit;

(c) Exchange of views and information on legal matters of common concern; and

(d) To communicate with the consent of the Governments of the participating countries, the points of view of the Committee on international legal problems referred to it, to the United Nations, other institutions and international organizations.

The Committee meets once annually by rotation in the countries participating in the Committee. Its first Session was held at New Delhi, the second Session at Cairo and the third Session in Colombo. The fourth Session is scheduled to be held in Tokyo. The Committee maintains a Permanent Secretariat at New Delhi for conduct of day to day work. A section of the Secretariat is charged with the collection of material and preparation of background papers for assisting the Committee in its deliberations during the Sessions. The Committee acts in all matters through its Secretary who is advised by a body of Liaison Officers appointed by each of the participating countries. The Liaison Officers normally meet once a month or as often as necessary.

Office Bearers of the Committee and its Secretariat :

The Committee during its First Session elected the Member for Burma, Hon'ble Chief Justice U Myint Thein, and the Member for Indonesia, Hon'ble Chief Justice Dr. Wirjono Prodjodikoro, respectively as the President and the Vice-President of the Committee for the year 1957-58. During the Second Session, the Committee elected the Member for United Arab Republic, H.E. Mr. Abdel Aziz Mohamed, President of the Cour de Cassation, as the President and the Member for Ceylon, Hon'ble Chief Justice Mr. H.H. Basnayake as the Vice-President of the Committee for the year 1958-59. At its Third Session the Member for Ceylon, Hon'ble Chief Justice Mr. H.H. Basnayake was elected President and Chaudhuri Nazir Ahmed Khan, Attorney-General of Pakistan was elected as the Vice-President of the Committee.

The Committee at its First Session decided to locate its Permanent Secretariat at New Delhi (INDIA). The Committee also decided during its First and Second Sessions that Mr. B. Sen, Hon. Legal Adviser to the Ministry of External Affairs, Government of India, should perform the functions of the Secretary of the Committee.

Co-operation with other Organizations :

The Committee maintains close contacts with and receives published documents from the United Nations, the Specialised Agencies, International Law Commission, the Council of Jurists within the Pan American Union and the Arab League. The Committee is empowered under the Statutory Rules to admit to its Sessions Observers from international and regional inter-governmental organizations.

First Session of the Committee :

The Committee held its First Session at New Delhi from the 18th till the 27th April, 1957. The Session was inaugurated by the Prime Minister of India and was attended by Delegations from Burma, Ceylon, India, Indonesia, Iraq, Japan and Syria, the then participating countries in the Committee. At that Session the Committee had before it for consideration 10 questions which had been referred to it by the various participating countries in the Committee. These were :

(i) Functions, privileges and immunities of diplomatic envoys or agents including questions regarding enactment of legislation to provide for diplomatic immunities. (Referred by India and Japan).

(ii) Principles for extradition of offenders taking refuge in the territory of another including questions relating to desirability of conclusion of extradition treaties and simplification in the procedure for extradition. (Referred by Burma and India).

(iii) Law relating to the Regime of the High Seas including questions relating to the rights to sea-bed and subsoil in the open sea. (Referred by Ceylon and India).

(iv) Status of Aliens including the questions of responsibility of States regarding treatment of foreign nationals. (Referred by Japan).

(v) Restrictions on Immunity of States in respect of commercial transactions entered into by or on behalf of States and by State Trading Corporations. (Referred by India).

(vi) Law of the Territorial Sea. (Referred by Ceylon).

(vii) Questions relating to Dual Citizenship. (Referred by Burma).

(viii) Ionospheric Sovereignty. (Referred by India).

(ix) Questions relating to Reciprocal Enforcement of Foreign Judgments in Matrimonial Matters. (Referred by Ceylon).

(x) Questions relating to Free Legal Aid. (Referred by Ceylon).

During the Session, however, the item relating to the status of aliens was withdrawn and items (iii) and (vi), viz., the law relating to the Regime of the High Seas and the Law of the Territorial Sea were not pressed for consideration. The remaining items were discussed in the Committee and preliminary reports were drawn up and submitted to the Governments of the participating countries on three of the subjects, viz., Diplomatic Immunities, Principles of Extradition and Immunity of States. All the subjects were carried forward for further consideration at the next Session.

Second Session of the Committee :

The Second Session of the Committee was held in Cairo from the 1st to the 13th of October, 1958. The session was inaugurated by the Minister of Justice in his capacity as the Personal Representative of the President of the United Arab Republic. The session was attended by Delegations from Burma, Ceylon, India, Indonesia, Iraq, Japan, Sudan and the United Arab Republic. Observers representing the Governments of Cambodia, Philippines and Thailand as also the representatives of the Arab League—an inter-governmental organisation—were admitted to the meetings of the Session.

During this session the Committee had before it five main subjects for consideration, viz. Diplomatic Immunities, Principles of Extradition, Immunity of States in respect of Commercial Transactions, Dual Nationality and Status of Aliens. It also discussed briefly the questions relating to Free Legal Aid and Reciprocal Enforcement of Foreign Judgements in Matrimonial Matters. The Committee had also before it the reports of the 9th and 10th Sessions of the

International Law Commission for consideration. The Law of the High Seas and Territorial Waters as also Ionospheric Sovereignty had not been included in the Agenda of the Session.

The Committee finalised its report on Diplomatic Immunities and on Immunity of States in respect of Commercial Transactions. These reports were submitted to the Governments of the participating countries. Final conclusions were not reached on the other subjects which were discussed at the Cairo Session.

Third Session :

The Third Session of the Committee was held in Colombo from January 20 to February 4, 1960. It was attended by the delegations of all the participating countries in the Committee except Sudan which was unable to be represented. In addition the Government of Iran was represented by an Observer. The Session was inaugurated by the Minister of Justice, Ceylon, in his capacity as the personal representative of the Prime Minister.

The Committee at this Session considered the comments of the Governments on its Reports on Functions, Privileges and Immunities of Diplomatic Envoys, and Immunity of States in respect of Commercial Transactions which the Committee had finalised during its Second Session in Cairo. The Committee confirmed the view it had taken in its Report with regard to restrictions of Immunity of States in respect of Commercial Transactions. It, however, made certain changes in its Report on Diplomatic Immunities having regard to the comments received from the Governments of the participating countries.

The Committee gave detailed consideration to the subjects of Status of Aliens and Extradition on which it was able to draw up provisionally the Principles governing the subjects in the form of Draft Articles. The Committee discussed the subject of Status of Aliens, which had been referred to it by the Government of Japan, on the basis of a Memorandum presented to it by the Committee's Secretariat and information supplied by the Governments of the participating countries regarding their laws and State practice with regard to entry, treatment and deportation of foreigners.

The discussion on Extradition was based on the Draft of a Multilateral Convention presented by the Government of the United Arab Republic and a Memorandum submitted by the Committee's Secretariat. The provisional recommendations of the Committee on these two subjects are being submitted to the Governments of the participating countries, and it is expected that the Committee will consider these subjects again at the fourth Session in the light of the comments that may be received from the Governments of the participating countries.

The Committee also generally considered questions relating to Dual Nationality and the recommendations of the International Law Commission on Arbitral Procedure. It decided to postpone consideration of the Law of the Seas in view of the U. N. Conference of Plenipotentiaries which had been convened to meet in Geneva in March 1960. The Committee did not find sufficient time to consider the reports presented to it by the Rapporteurs appointed by it on the subject of Legal Aid and Enforcement of Foreign Judgments in Matrimonial Matters.

The Committee decided to take up at its next Session the question of Legality of Nuclear Tests and the legal aspects of certain Economic Matters namely, Conflict of Laws in respect of International Sales, and Relief against Double Taxation.

Fourth Session :

It has been decided to hold the Fourth Session of the Committee at Tokyo in March 1961.

ASIAN - AFRICAN LEGAL CONSULTATIVE COMMITTEE

(COLOMBO – SESSION)

From January 20 to February 4, 1960.

Delegations of the Participating Countries.

BURMA:

Member and Leader of the Delegation :	H. E. Sithu Dr. Htin Aung, Envoy-Extraordinary and Minister Plenipotentiary.

CEYLON:

Member and Leader of the Delegation :	Hon. Mr. H. H. Basnayake Q.C., Chief Justice of Ceylon.
Alternate Member :	Hon. Mr. Justice T.S. Fernando Q.C., Judge, Supreme Court of Ceylon.
Principal Adviser :	Dr. H W. Tambiah Q. C., Commissioner of Assizes, Ceylon.
Advisers :	Mr. G. P. A. Silva, First Assistant Secretary, Ministry of Justice.
	Mr. L. G. Weeramantry, Advocate of the Supreme Court.
	Mr. R. S. Wanasundera, Crown Counsel, Ceylon.
	Mr. S. Amarasinghe, Barrister-at-Law and Advocate of the Supreme Court.
	Mr. M. S. Alif, Solicitor, Proctor of the Supreme Court.
	Mr. W. S. L. de Alwis, Assistant Secretary, Ministry of External Affairs.

INDIA :

Member and Leader of the Delegation :	Mr. M. C. Setalvad, Attorney General for India.
Alternate Member : (Leader of the Delegation for part of the Session)	Hon. Mr. Justice S. K. Das, Judge, Supreme Court of India.

Advisers :	Mr. V. S. Deshpande, Additional Legal Adviser, Ministry of Law, Government of India.
	Mr. D. N. Bansal, First Secretary, High Commission of India, Colombo.

INDONESIA :

Member and Leader of the Delegation :	H.E. Dr. Ahmad Subardjo Djoyoadi-suryo, Ambassador of Indonesia to Switzerland.
Alternate Member :	Dr. S. H. Tajibnapis, Acting Chief of the Legal Division, Department of Foreign Affairs, Djakarta.
Advisers :	Mr. Zahar Arifin, Second Secretary, Indonesian Embassy, New Delhi.
	Mr. Mochtar Koesdemaatmadja, Lecturer in International Law, Bandung University.

IRAQ :

Member and Leader of the Delegation :	Mr. Abdul Amir El-Egaili, Attorney-General of Iraq.
Alternate Member :	Dr. Hasan Al-Rawi, Legal Adviser, Ministry of Foreign Affairs, Iraq.
Adviser :	Mr. Adnan Raouf, Second Secretary, Embassy of Iraq, New Delhi.

JAPAN :

Member and Leader of the Delegation :	Dr. Kenzo Takayanagi, President, Cabinet Commission on Constitutional Reforms, Japan.
Alternate Member :	Prof. Zergo Ohira, Professor of Law, Hitosubashi University.
Advisers :	Mr. Toshio Mitsudo, Counsellor, Embassy of Japan, New Delhi.
	Mr. Kenichi Yanagi, Secretary, Embassy of Japan, Colombo.

PAKISTAN :

Member and Leader of the Delegation :	Chaudhuri Nazir Ahmad Khan, Attorney-General of Pakistan.
Alternate Member :	Mr. Nazrul Islam Chaudhury, Secretary, High Commission of Pakistan, New Delhi.

SUDAN :

NOT REPRESENTED.

UNITED ARAB REPUBLIC :

Member and Leader of the Delegation :	Mr. Hafiz Sabiq, Attorney-General of the United Arab Republic.
Alternate Member :	Dr. Izzedine Abdullah, Dean, Faculty of Law, University of Ein Shams.
Advisers :	Mr. Mohammed Hafiz Ganem, Professor of Public International Law, University of Ein Shams.
	Mr. Jabir Abdul Rahman, Professor, Faculty of Law, University of Cairo.
	Dr. Nizar Al Khayyali, Advocate, Syrian Region, U. A. R.

OBSERVER

IRAN :

Mr. Achmad Mirfendereski,
Counsellor, Embassy of Iran,
New Delhi.

Secretary to the Committee :	Mr. B. Sen, Senior Advocate of the Supreme Court of India, and Hon. Legal Adviser to the Government of India, Ministry of External Affairs.
Chief Organising Officer of the Third Session :	Mr. G. P. A. Silva, First Assistant Secretary, Ministry of Justice, Ceylon.

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*Liaison Officers of the Participating Countries in the Committee**

BURMA	U Hla Oung, First Secretary, Embassy of Burma, New Delhi.
CEYLON	Mr. N. Balasubramaniam, Second Secretary, Ceylon High Commission, New Delhi.
INDIA	Dr. B. Rajan, I F.S., Deputy Secretary, Ministry of External Affairs, Government of India, New Delhi.
INDONESIA	Mr. Zahar Arifin, Second Secretary, Embassy of Indonesia, New Delhi.
IRAQ	Mr. Sayeed K. Hindawi, First Secretary, Embassy of Iraq, New Delhi.
JAPAN	Mr. Toshio Mitsudo, Counsellor, Embassy of Japan, New Delhi.
PAKISTAN	Deputy High Commissioner, Pakistan High Commission, New Delhi.
SUDAN	Mr. E.M. Elamin, First Secretary, Embassy of Sudan, New Delhi.
UNITED ARAB REPUBLIC	Mr. Abbas Seif El-Nasr, Counsellor, Embassy of the United Arab Republic, New Delhi.

*As on 1st June, 1960.

SECRETARIAT OF THE COMMITTEE

Secretary	* Mr. B. Sen Senior Advocate of the Supreme Court of India, Hon. Legal Adviser to the Ministry of External Affairs, Government of India.
Deputy Secretary	Vacant
Assistant Secretary	Mr. L. R. Saravanamuttu
Research Officers	Mr. P. Velayutham Mr. N. Nettar
Administrative Officer	Vacant
Private Secretary	Mr. S. Gopalan
Assistants	Mr. Kishori Lal Mr. D. S. Mohil Mr. M. S. Bhatnagar

Office of the Secretariat :

176 F BLOCK, RAISINA ROAD, NEW DELHI.
TEL: 35227, 43143

* Holds office as Secretary to the Committee in an honorary capicity by arrangement with the Government of India.

ASIAN - AFRICAN LEGAL CONSULTATIVE COMMITTEE

THIRD SESSION

AGENDA

I. Administrative & Organisational Matters.

1. Election of the President and Vice-President.
2. Adoption of the Agenda.
3. Admission of new Members in the Committee.
4. Admission of Observers to the Session.
5. Consideration of the Secretary's Report.
6. Planning of future work of the Committee including the question of priority to be given to the subjects taken up for consideration.
7. Further consideration of the Draft Articles on Immunities & Privileges of the Committee
8. Consideration of the question of staff structure of the Secretariat, the conditions of service of staff members including their salaries and allowances.
9. Consideration of the question of printing and publication of the proceedings of the Committee's Sessions.
10. Date and place of the Fourth Session.

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(A) Consideration of the Report of the 11th Session of the International Law Commission.

(B) Consideration of the Subject of Arbitral Procedure on the basis of a Questionnaire prepared by the Secretariat of the Committee.

III. Matters Referred by the Governments of the Participating Countries Under Article 3 (b) of the Statutes.

(a) Diplomatic Immunities :

Consideration of the comments received from the Governments on the Final Report of the Committee on Diplomatic Immunities.

(b) Immunity of States in Respect of Commercial Transactions :

Consideration of the comments received from the Governments on the Final Report of the Committee on Restrictions on Immunity of States in respect of Commercial Transactions.

(c) Dual Nationality :

Consideration of the Draft Convention prepared by the Government of the United Arab Republic on Dual Nationality on the basis of a Report prepared by the Secretariat of the Committee.

(d) Status of Aliens :

Consideration of the Draft Articles on the Status of Aliens prepared by the Secretariat of the Committee.

(e) Extradition :

Consideration of the Draft of a Model Convention and Bilateral Treaty prepared by the Secretariat of the Committee.

(f) Law of the Seas :

(i) Consideration of a Report prepared by the Secretariat of the Committee on the work done in the Conference of Plenipotentiaries held in Geneva in 1958.

(ii) Regime of the High Seas, Territorial Sea and Rights to Sea-bed and Subsoil.

IV. Matters of Common Interest Referred by the Governments of Participating Countries under Article 3 (c) of the Statutes.

(a) Reciprocal Enforcement of Foreign Judgments in Matrimonial Matters :

Consideration of the Rapporteur's Report together with a Draft Convention on the subject.

(b) Legal aid :

Consideration of the Rapporteur's Memorandum

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Introductory Note

The subject of diplomatic immunities and privileges was referred to the Committee by the Governments of India and Japan under the provisions of Article 3 (b) of the Statutes of the Committee. The Government of India by a written Memorandum presented on the subject requested the Committee to consider three specific questions, namely :

(1) Whether it is desirable to undertake legislation to provide for immunities to foreign diplomatic missions and officers so as to incorporate in the municipal law of a State the principles of international law in this regard;

(2) If it is considered desirable to have recourse to legislation in the matter of immunity, whether such legislation should be declaratory of the principles of international law or should it be a comprehensive piece of legislation;

(3) Whether in cases where disputes arise regarding the extent of the immunity, the matter should be left to the decision of the courts of a country or whether it should be decided by the Foreign Office and its decision given by means of a certificate be regarded as conclusive.

The Government of Japan, however, desired that the Committee should consider the entire subject of the Functions, Privileges and Immunities of Diplomatic Agents and recommended the principles which should be followed by the participating countries in the Committee in these matters.

During the First Session held in New Delhi the Committee considered the subject on limited aspects on the basis of the Memorandum presented by the Government of India, and adopted an Interim Report on the subject. The Committee recommended a further study of the whole subject on the basis of the Japanese Memorandum and appointed the Member for Japan as Rapporteur. During the Second Session held in Cairo the Committee considered the subject on the basis of the Rapporteur's Report, the Draft Articles prepared by the International Law Commission, the Harvard

Research Draft and the Havana Convention on the subject. The Committee adopted a Report containing a provisional draft of a Convention on Diplomatic immunities and privileges.

The Report of the Committee as adopted in the Cairo Session was circulated among the Governments of the participating countries for their comments and the subject was further discussed at the Third Session in Colombo in January 1960 in the light of the observations received from the Governments. The Committee reconsidered the provisions of the draft adopted at the Cairo Session Article by Article and made certain amendments to some of the Articles in the light of the comments received from Governments. The Committee decided that its Report containing the draft of a Convention as amended at the Colombo Session should be submitted to the Member Governments as the Final Recommendations of the Committee on this subject and that the subject of diplomatic immunities and privileges should be removed from the Agenda of its future Sessions unless the Government of any participating country wished the Committee to consider any further questions on the subject. The Committee directed its Secretariat to make available copies of the Final Report to the United Nations under the provisions of Article 3 (d) of the Statutes of the Committee, and authorized its Secretariat to make available copies of this Report to the Conference of Plenipotentaries, which is being convened by the United Nations for the consideration of the subject of Diplomatic Immunities and Privileges.

It may be stated that though the Committee formulated the principles concerning the nature and extent of Diplomatic Immunities and Privileges in the form of a Draft Convention, it decided that the question as to whether a country should adopt the principles by means of a Convention or domestic legislation should be left to the Governments of the participating countries themselves. The Committee was of the opinion that as long as the immunities and privileges were accorded to the Diplomatic agents in the participating States it was not of much consequence as to the method by which such immunities aud privileges were granted. The Committee's recommendations are broadly on the same lines as that of the International Law Commission. The Committee, however, took a different view on two major questions. The International Law Commission had recommended that the immunities and privileges of a Diplomatic agent should be accorded on a basis of reciprocity. The Committee by majority decided that whilst reciprocity could be the basis for grant of privileges, the concept of reciprocity should find no place in matters of Immunities of a Diplomatic agent as these were to be granted to an envoy as a matter of right under international law. The Committee was also of the view that it was too premature to make any recommendation regarding the method to be adopted for settlement of disputes between States in the matters of diplomatic immunities. It considered the recommendations contained in Article 45 of the Draft prepared by the International Law Commission to be inappropriate for adoption.

ASIAN-AFRICAN LEGAL CONSULATATIVE COMMITTEE

GOVERNMENT OF INDIA
MINISTRY OF EXTERNAL AFFAIRS

Memorandum on Diplomatic Immunities

The question on which the views of the Asian-African Legal Consultative Committee are solicited are :

(i) Whether it is desirable to undertake legislation to provide for immunities to foreign diplomatic missions and officers so as to incorporate in the municipal law of a state the principles of international law in this regard.

(ii) If it is considered desirable to have recourse to legislation in the matter of immunity, whether such legislation should merely be declaratory of the principles of international law or should it be a comprehensive piece of legislation.

(iii) Whether in cases where disputes arise regarding the extent of the immunity, the matter should be left to the decision of the courts of a country or whether it should be decided by the Foreign Office and its decision given by means of a certificate be regarded as conclusive.

It is well settled that under international law and in accordance with the usage of nations, there is an obligation cast on a state to grant certain immunities to the diplomatic representatives of other countries. The practice varies from state to state regarding the method by which such immunities are granted. In some countries the rules of international law regarding the position of an envoy is recognised in the common law of the land whilst in others specific statutory provisions have been enacted to give force to these rules of international law in the municipal law of the country. From the point of view of international law it does not appear to make any difference as to what method a state adoptes in discharging its duties and obligations regarding immunities of foreign envoys and the duty is discharged as long as a state in practice allows the usual immunities to foreign ambassadors and their staffs as are admissible under international law. The question of enactment of legislations

to provide for diplomatic immunity has arisen as it is possible that on some occasion doubts might arise as to the legal basis and foundation of the diplomatic immunities since international law as such does not grant any immunity, but the rights have to be given by the municipal law of the country in compliance with its international obligations. It is generally considered that international law as such is not binding on the municipal courts of a state ; so far as the courts are concerned, international law is the body of doctrines regarding international rights and duties of states which have been adopted and made part of the law of the land. It would be observed that in countries where no legislation exists on the question of diplomatic immunities, the rights are granted as part of the common law of the land and are recognised by the courts as such. In the case of newly independent countries it may be doubtful as to whether the common law of the land can be said to contain within it the principles of international law relating to diplomatic immunity to foreign representatives. Although it is true that in fact all the newly independent countries in actual practice grant such immunities as a diplomatic representative is entitled to receive under international law and practice, it is for consideration whether the basis for granting of such immunities should not be put on a proper legal footing.

The position in some of the countries of the world in this connection may be considered.

In the older Commonwealth countries it would appear that the rules of International Law relating to diplomatic immunities are recognised as part of the common law of the land. In the United Kingdom, however, there is a statutory provision on the subject known as the Diplomatic Privileges Act 1708 which deals with the question of immunities from civil jurisdiction but the act is merely declaratory of the position in common law. In so far as immunity from criminal jurisdiction and other types of immunities are concerned, they are based purely on common law and no statutory enactment exists. In Canada and Australia, the position is that the general principle touching the position of a foreign envoy is regarded as part of the common law of the land as it has been so adopted by the common law of England which has been imported into those countries. There is, however, a legislative enactment in the United Kingdom to provide for

immunities to representatives of other Commonwealth countries. Similar legislations have also been undertaken in some of the other Commonwealth countries. In the remaining countries of the Commonwealth the position is that whilst usual immunities are accorded to the diplomatic representatives, no declaration about the basis for grant of such immunity in so far as their municipal laws are concerned is available either in the pronouncements of the national courts or in executive statements. In the United States of America, the matter is provided for by positive law set forth in sections 252 to 254 of title 22 United States Code which is a codification of sections 25, 26 and 27 of the Act of April 30, 1790 (1 Statutes 117). In the case of South American countries, the matter appears to be governed by the Havana Convention of the 20th February 1928 concerning functions, immunities and duties of diplomatic representatives in so far as the signatories to that Convention are concerned. But these countries also grant similar immunities to representatives of other states. In Europe, the practice appears to vary to a considerable extent. Whilst in Norway, Sweden, Netherlands and Turkey, there is no statutory law in force on this subject, the Constitutions of the laws of Portugal, Belgium, Germany, Czechoslovakia, Hungary and U.S.S.R. contain provisions dealing with certain aspects of diplomatic immunities. In the Asian countries there does not appear to be any statutory law on this question except in Iraq where the certificate issued by the Foreign Ministry about the diplomatic status or immunity of a person is by law made conclusive and binding on the courts. In the African countries also there are no statutory laws in force in this regard except in Ethiopia where a treaty is considered to be a part of the law of the land.

On the second question it is to be pointed out that there is some divergence of views amongst writers on international law and in the practice followed by various countries and in the decisions of national courts as regards the actual extent of immunity that is to be granted to foreign envoys and their staff under international law. There appears to be a great deal of conflict on the question of immunity in respect of trading and other private activities of a diplomatic officer and with regard to immunities of subordinate diplomatic staff. For instance whilst in practice the U.K. and the U.S.A.

allow complete immunity in respect of acts of a diplomatic officer, the Italian court of Cessation had as early as in 1922 taken the view that the absolute immunity put forward from historical times is now ended and is one of the political doctrines that have been superseded and that the acts which a diplomatic agent does outside his public functions have no relation to the exercise of sovereignty and consequently it is not necessary for them to be protected by the principle of immunity in respect of such acts. A similar decision was taken by the Supreme Court of Poland, and the practice followed in U. S. S. R. is to restrict diplomatic immunity as far as possible. As regards the subordinate diplomatic staff, there is much divergence of opinion both in practice and amongst text writers as to the extent to which immunity is enjoyed by such staff. In Great Britain, U. S. A., Germany, Austria and Hungary complete immunity is accorded to such subordinate staff who are not nationals of the receiving state. In France such immunity is granted if they form an integral part of the mission and are invested with public character. In Switzerland subordinate chancery personnel other than the head of the Secretariat staff are not exempt from the jurisdiction of the local courts. In Japan the position has been that subordinate officials could not be sued whilst their employment continued (See Emperor v. Chiang, Ann. Digest 1929-30, page 205). In South America the tendency appears to be to restrict the immunities in respect of such personnel though in Argentina, the servant of the British Ambassador had been held to be exempt from jurisdiction in one case (In re Kosakiew Ann. Digest 1941-42, page 114). U. S. S. R. takes the extreme view of excluding altogether all minor officials and servants from jurisdictional immunity. In view of this divergence in international practice and lack of unformity in international law in these respects, it is for consideration as to whether it would be desirable to have a comprehensive legislation in each country so as to provide specifically the immunities which a diplomatic representative or his staff was entitled to under the municipal law of the state. It should, however, be mentioned that so far, perhaps with the exception of the U.S.S.R., no country had adopted any comprehensive legislation on this subject. Even U.S.S.R. refers back to international law and practice in many of its statutory provisions on diplomatic immunities. The PAN AMERICAN Convention on diplomatic immunities concluded in Havana

in 1921 does, however, contain a comprehensive code on the subject.

As regards the third question, the matter which appears to have attracted the attention of foreign offices of a number of countries is: how a claim to immunity should be established by a diplomatic representative before a national court when the occasion arises and what method should be adopted to decide the question of actual extent of immunity if a dispute arises on that question. For a number of years the practice had been for a diplomatic representative on any given occasion, to prove his status before a court in which a claim or suit was pending against him and to leave to the decision of the national court of the question of the extent of immunity. However, in recent years it has been felt that such practice is not in keeping with the dignity of a diplomatic representative which has to be preserved in accordance with international practice and comity of nations. On the one hand it seems rather strange that a diplomatic officer should be required to prove before a court that he is entitled to immunity whilst he is claiming exemption from the jurisdiction of that very court. But on the other hand the procedure and practice of every court or tribunal requires some formal proof of the fact that the person belongs to the class entitled to be exempt from the jurisdiction of the court. In Great Britain it is now the usual practice of the courts to accept as conclusive the statements made to them by the executive as to the existence of certain facts of international law nature. The long line of cases decided by the English courts show that gradually the courts have come to rely more and more on the attitude of the executive on international questions. In some cases the judge himself sends for information from the Secretary of State for Foreign Affairs; in some others the Attorney General appears in court and presents a certificate issued by the Foreign Office; whilst in some instances the Foreign Office communicates its certificate to the judge on the application of the Ambassador. In the United States of America the courts have also adopted the practice of accepting the views of the executive as conclusive on matters of international relations. The prevalent practice is for the Attorney General to file a "suggestion" in the court at the request of the State Department and the "suggestion" is regarded by the courts as conclusive and binding both on fact and law. The

"suggestion" is issued by the State Department on the application of the aggrieved Government if the Department is satisfied that the claim to immunity is well founded both on facts and law. The Department has, therefore to consider on the material placed before it the question as to whether under the existing practice the Government of the United States would recognise the claim to immunity. This type of scrutiny appears to be much more satisfactory than a public hearing in a court of law as the Department can examine each case from the point of view of existing practice. The procedure adopted is as follows :

When litigation is commenced or threatened, the Ambassador presents a note to the Secretary of State setting out the facts upon which immunity is claimed and requesting the Secretary of State to cause them to be conveyed to the court. The Secretary of State conveys to the Attorney General a copy of the note with a request that it should be communicated to the court and the court be informed that the Department of State accept as true the statement of facts alleged therein. Since 1941 the "suggestion" has become an affirmative announcement of the fact that the claim to immunity is well founded. The "suggestions" of State Department amount to recognition and allowance of the claim to immunity is taken as conclusive on the matter. Sometimes, however, the Department of State leaves it to the courts to determine the question and in such cases the courts are free to do so. Then courts in the Continental countries regard a communication from the Protocol Department of the Foreign Office which deals with both status and immunity as conclusive evidence. There are a number of cases in France where the Ministry of Foreign Affairs had either intervened or had been approached on questions relating to immunity. In Austria it is also the practice to obtain the views of the Ministry of Justice on questions of immunity and the opinion of the Minister is legally binding on the courts. In Czechoslovakia also courts apply for a declaration from the executive in such matters and are bound by such declaration. In Netherlands reports provide instances of intervention by the executive at the request of the foreign power and in Norway the practice is to require a certificate from the Ministry of Foreign Affairs in support of claim to immunity.

In view of the practice that has grown up today in various countries of the world, it is for consideration whether the member countries of the Asian-African Legal Consultative Committee should adopt a practice whereby the courts will be bound by a certificate of the Foreign Ministry not only as to the status of the person but also on the actual extent of the immunity. Since there is divergence of views amongst text writers on international law and in the practice of various national courts in the matter of interpretation of international law it might be more satisfactory for the executive to decide the question of the actual extent of immunity allowable in a country than to leave it to the decision of the courts. It is to be observed that in England and in America the courts themselves had established the practice of looking up to the executive in the matters of immunity but since it takes a considerable time for the courts to establish any practice to to be followed as precedent, it is for consideration whether a certificate of the Ministry of Foreign Affairs when issued should be made conclusive and binding on the courts by means of legislation.

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

MEMORANDUM OF THE GOVERNMENT JAPAN

Functions, Privileges and Immunities of Diplomatic Envoys

The question of functions, privileges and immunites of diplomatic envoys, is currently under consideration by the International Law Commission. It is hoped that the Asian-African Legal Consultative Committee, which is a body of legal experts of Asian African countries, would take up this question in order to cooperate with the Commission in its task of codification. In this connection, it is also hoped that the Committee, for its future study, would consider the topics enumerated in the attached list, and consolidate its views on the various topics.

February 20th, 1957.

Ministry of
Foreign Affairs
Tokyo

FUNCTIONS, PRIVILEGES AND IMMUNITIES OF DIPLOMATIC ENVOYS AND OFFICIALS

I. Conception of Diplomatic Envoys.
Subsidiary Organ of the Head of a State.

II. The right of a State to send (and receive) diplomatic envoys (Right of Legation)—State—Belligerent Party.

III. Kinds and Classes of Diplomatic Envoys.
(1) Envoys Ceremonial.
(2) Envoys Political—Permanent envoys—Temporary envoys—Representatives to international congresses and conferences.
(3) Four classes — Ambassador Extraordinary and Plenipotentiary—Envoy Extraordinary and Minister Plenipotentiary — Ministers Resident—Charges d' Affaires.
(4) Problem of unifying titles of Ambassadors and Ministers.
(5) Diplomatic corps.

VI. Reception of Diplomatic Envoys.
(1) Refusal to receive an envoy on individual ground—Persona non grata.
(2) Problem of limiting the number of members of a diplomatic mission.

V. Appointment of Diplomatic Envoys.
Letter of Credence (lettre de creance) — Full Powers.

VI. Diplomatic Privileges and Immunities.
A. Persons entitled to diplomatic privileges and immunities.
(1) Diplomatic Envoys.
(2) The Retinue of a Diplomatic Envoy.
(a) Members of mission.
(i) Diplomatic officers with rank of counsellor, secretary or attache.

(ii) Subsidiary members below diplomatic officers.
(1) Nationality.
Nationals of the sending State.
Nationals of the receiving State.
Nationals of third States.
Persons of dual nationality.
(2) Other conditions—Lucrative business.
(b) Families of Envoys and of members of mission.
(1) Nationality.
(2) Other conditions—Lucrative business.
(c) Private Servants.
(1) Nationality.
(2) Other conditions—Lucrative business.
(d) Couriers.
(3) Representatives to international congress and conferences and the members of their suits.

B. Conditions to enjoy diplomatic privileges and immunities.
(1) Duration of privileges and immunities.
(2) Waiver of privileges and immunities.
(3) Privileges and immunities in time of war and other emergencies.

C. Contents of privileges and immunities.
(1) Inviolability of the dignity of a diplomatic envoy.
(2) Inviolability of the person of a diplomatic envoy.
(3) Inviolability and protection of the office and residence of a diplomatic envoy.
(4) Inviolability of archives.
(5) Inviolability of the property of a diplomatic envoy.
(6) Immunities from jurisdiction.
(a) Immunities from criminal jurisdiction.
(b) Immunities from civil jurisdiction.
(c) Immunities from subpoena as Witness.

(7) Exemption from police.

(8) Exemption from taxes.

VII. Position of a diplomatic envoy travelling through the territory of third States.

VIII. Termination of Diplomatic Mission.

(1) Recall by the home State.

(i) Resignation of an envoy—His Transference to another post—Dismissal by his home State—A letter of recall (lettre de recreance).

(ii) Outbreak of a serious conflict between the sending and the receiving State.

(iii) Misconduct of an envoy.

(2) Promotion to a higher position—A new letter of credence.

(3) Outbreak of war.

(4) Change of the head or government of the sending or receiving State—A new letter of credence.

(5) Death of an envoy.

FIRST SESSION OF THE ASIAN - AFRICAN LEGAL CONSULTATIVE COMMITTEE

Interim Report of the Committee on Functions, Privileges and Immunities of Diplomatic Envoys or Agents

The Committee at its sixth meeting held on Tuesday the 23rd April, 1957, took up for consideration Item I of Part III of the Agenda-functions, privileges and immunities of diplomatic envoys or agents including questions regarding enactment of legislation to provide for diplomatic immunities—which had been referred by the Governments of India and Japan.

2. The Committee considered the two Memoranda on the subject presented by the Governments of India and Japan and gave particular attention to the three questions which have been specifically set out in the Indian Memorandum, namely :

(i) whether it is desirable to undertake legislation to provide for immunities to foreign diplomatic missions and officers so as to incorporate in the municipal law of a state the principles of international law in this regard ;

(ii) if it is considered desirable to have recourse to legislation in the matter of immunity, whether such legislation should merely be declaratory of the principles of international law or should it be a comprehensive piece of legislation ;

(iii) whether in cases where disputes arise regarding the extent of the immunity, the matter should be left to the decision of the courts of a country or whether it should be decided by the Foreign Office and its decision given by means of a certificate be regarded as conclusive.

3. The Committee took note of the statement made by the Member for India and the views of the Delegations of India, Japan, Indonesia, Burma, Ceylon and Iraq, on the specific questions raised in the Indian Memorandum and also generally on some of the other aspects of Diplomatic Immunity.

4. The views expressed by the various Delegations may be summarised as follows :

(1) The Indian Member considered that in principle legislation was desirable but he felt that unless there was some wider and common measure of agreement on the extent of immunity to be conferred, it would be futile to think of legislation. In his view it was necessary first to decide as to what should the legislation contain. On the third point raised in the Indian Memorandum he was of the view that having regard to the general practice prevailing in many countries, it would perhaps be desirable to embody the question of conclusiveness of Foreign Office Certificates in domestic legislation of all countries.

(2) The views expressed by the Japanese Member were that domestic legislation of a comprehensive kind was undesirable. He felt that if each country undertakes such legislation, it might lead to confusion. On the other hand he suggested the adoption of an international convention or conclusion of multilateral treaties between states which would ensure uniformity in the practice relating to diplomatic privileges and immunities. On the third point, the Japanese Delegation explained the prevalent practice in Japan, according to which the Foreign Office in fact decided the questions relating to claims of immunity, though in theory it was for the courts to do so. The courts were guided by the views of the Foreign Office in such matters. This the Delegation considered to be satisfactory.

(3) The view of the Indonesian Delegation was that domestic legislation on the subject of immunities was desirable but it should be only with regard to certain essential matters and not a comprehensive one. The Delegation felt that if agreement about the essentials could be reached between the various countries, it would be possible to have uniformity in domestic legislation on the subject. In view of this, the Indonesian Delegation supported the views of the Delegation of Japan regarding adoption of an international convention. As to the third question

raised by the Government of India, the Indonesian Delegation supported the idea that a certificate of the Foreign Office on the question of immunity be regarded by the courts and other authorities as conclusive and binding. The Indonesian Delegation also made two other points, namely.

(a) that there should be a definite distinction between immunities on the one hand and privileges on the other. In the view of the Indonesian Delegation diplomatic representatives are entitled to immunities as a matter of right without which no diplomatic relations are possible whereas privileges could be regarded as grants which could be left to the discretion of the Foreign Office concerned;

(b) that although in the matter of privileges reciprocity was desirable, such reciprocity was not always possible and was dependent on special conditions prevalent in the countries concerned.

(4) The Delegation of Burma felt that having regard to the diversity of practice in the matter of diplomatic privileges and immunities it would be advantageous to have domestic legislation by way of clarification of the practice followed by a country in these matters. With regard to the third point in the Indian Memorandum, the Delegation was of the view that the Foreign Office Certificate ought to be made conclusive as questions relating to the status of a diplomat and the extent of his immunity are within the special knowledge of the Foreign Office and no judicial decision appeared to be necessary on these matters. In addition to these points, the Delegation raised a further question as to whether in the present context, it was necessary to maintain the archaic distinction between diplomatic and consular personnel.

(5) The Delegation of Ceylon considered it desirable to have a uniform practice with regard to diplomatic immunities and privileges but felt that the Committee should first consider the subject very carefully.

(6) The Delegation of Iraq agreed with the view that legislation was necessary, but felt that before any such step was attempted, it would be essential to collect further materials.

5. The conclusions which could be drawn from the discussions in the Committee appear to be as follows :—

(1) There was agreement in principle among the Delegations of Burma, Ceylon, India, Indonesia and Iraq on the need for domestic legislation on this subject but at the same time it was agreed that it would be difficult to undertake comprehensive legislation at present. The view of the Delegation of Japan, however, was that domestic legislation on this subject was undesirable as it may lead to confusion. The Delegation considered that the proper course to adopt was to have a convention or a multilateral treaty between states which would specify the agreed extent of diplomatic immunities and privileges.

(2) There was general agreement between the Delegations of Burma, India, Indonesia and Japan that a communication from the Foreign Office as regards the privileges and immunities of diplomatic personnel ought in practice to be regarded as conclusive and binding on the courts and other authorities. The Delegation of Ceylon whilst agreeing that such a communication ought to be conclusive in criminal matters felt that the position needed to be further examined with respect to enforcement of civil rights by private persons against diplomatic personnel.

(3) It was agreed between all Delegations that before any legislation or international convention could be undertaken, it would be necessary to collect more data.

6. The Committee having considered the statements and views noted above put forward by various Delegations represented at this session is of the opinion that it will be necessary for the Committee to make a further study of the subject before it would be in a position to make its final recommendations to the Governments of the participating countries.

7. The Committee accordingly decides that the Member for Japan be appointed Rapporteur to make a further study and collect information and material on the subject and to request the Rapporteur to prepare a draft convention on the basis of the Havana Convention of 1928 and to make the draft available to the next session of the Committee if possible. The Committee further directs the Secretariat to render all assistance to the Rapporteur in the collection of the necessary material and data.

8, The Memoranda submitted by the Governments of India and Japan would form part of this report.

ASIAN - AFRICAN LEGAL CONSULTATIVE COMMITTEE.

Final Report of the Committee on Functions, Privileges & Immunities of Diplomatic Envoys or Agents

(AS REVISED IN THE THIRD SESSION)

1. The Committee at its second, third, fourth and fifth meetings of the Cairo Session held on Thursday, Friday and Saturday the 2nd, 3rd and 4th of October, 1958, considered item 1 of Part III of the Agenda—Functions, Privileges and Immunities of Diplomatic Envoys or Agents—which had been referred by the Governments of India and Japan.

2. The Committee had before it the two memoranda on the subject presented by the Governments of India and Japan during the First Session, as also the draft articles on Diplomatic Immunities adopted by the International Law Commission during its 9th and 10th sessions. The Harvard Draft Convention, the Havana Convention on Diplomatic Officers, and the Report prepared by the Rapporteur were also placed before the Committee.

3. The Committee had considered this subject during its First Session in New Delhi on the basis of the three questions formulated in the Indian memorandum which were in the following terms :

(1) Whether it is desirable to undertake legislation to provide for immunities to foreign diplomatic missions and officers so as to incorporate in the municipal law of a state the principles of international law in this regard ;

(2) if it is considered desirable to have recourse to legislation in the matter of immunity, whether such legislation should merely be declaratory of the principles of international law or should it be a comprehensive piece of legislation ;

(3) whether in cases where disputes arise regarding the extent of the immunity, the matter should be left to the decision of the courts of a country or whether it should be decided by the Foreign Office and its decision given by means of a certificate be regarded as conclusive.

4. The Committee drew up an interim report at that session in the light of discussions. The conclusions which could be drawn from the discussions held during the First Session were as follows :

(i) There was agreement in principle among the delegations of Burma, Ceylon, India, Indonesia and Iraq on the need for domestic legislation on this subject but at the same time it was agreed that it would be difficult to undertake comprehensive legislation at present. The view of the delegation of Japan, however, was that domestic legislation on this subject was undesirable as it may lead to confusion. The delegation considered that the proper course to adopt was to have a convention or a multilateral treaty between states which would specify the agreed extent of diplomatic immunities and privileges.

(ii) There was general agreement between the delegations of Burma, India, Indonesia and Japan that a communication from the Foreign Office as regards the privileges and immunities of diplomatic personnel ought in practice to be regarded as conclusive and binding on the courts and other authorities. The delegation of Ceylon whilst agreeing that such a communication ought to be conclusive in criminal matters felt that the position needed to be further examined with respect to enforcement of civil rights by private persons against diplomatic personnel.

(iii) It was agreed between all delegations that before any legislation or international convention could be undertaken, it would be necessary to collect more data.

5. The Committee recommended a further study of the subject and appointed the Member for Japan as Rapporteur to collect information and materials and prepare a draft of a convention on diplomatic immunities and privileges.

6. The first question which the Committee considered during the Second Session (Cairo) was the necessity or otherwise of having a Convention between the participating countries in the Committee on the subject of diplomatic

immunities. It was generally agreed between the various delegations that as long as the immunities and privileges were accorded to the diplomatic agents in the participating states it was not of much consequence as to the method by which such immunities and privileges were granted. It was unanimously decided that the Committee should formulate the principles dealing with the nature and extent of diplomatic immunities and privileges in the form of a draft convention, but the question as to whether a country should adopt these principles by means of a convention or domestic legislation should be left to the Government of the participating country itself.

7. The draft of a convention containing the principles on the nature and extent of diplomatic immunities and privileges as approved by the Committee was set out in the annexure to the Committee's report.

8. The Committee decided to make no recommendation regarding the method to be adopted for settlement of disputes between states in the matter of diplomatic immunities. Article 45 of the Draft prepared by the International Law Commission was considered as being inappropriate for adoption since the Governments held divergent views on the matter and it was difficult to reach agreement and make an agreed recommendation on the question.

9. Three questions were specifically raised in the course of discussions. These were :

(a) Whether the concept of reciprocity should be adopted in regard to immunities and privileges of a diplomatic agent.

(b) Whether a distinction should be made between a home—based national of the sending State and a locally recruited person who is also a national of the sending state employed as a member of the subordinate staff in a diplomatic mission.

(c) Whether and to what extent a certificate of the Foreign Office should be treated as conclusive and binding in matters of diplomatic immunity.

10. As regards the first question, the delegation of India was of the view that the immunity of a diplomat was absolute

under international law and as such the concept of reciprocity should not enter on the question of diplomatic immunity. The delegation was for discouraging the present trend in restricting immunity of diplomats on the basis of reciprocity. The delegation was, however, in favour of having reciprocity in the matter of privileges as it felt that privileges were not essential to performance of diplomatic functions and was a matter of comity. The delegation of Indonesia supported the views of the delegation of India . The other delegations were however, of the view that immunities and privileges both should be granted on the basis of reciprocity.

11. The delegations were of the view that no specific answer was required on the second question since articles 36 and 37 of the draft convention (Annex) sufficiently dealt with the principles relating to immunities and privileges of subordinate staff of diplomatic missions.

12. As regards the third question, the delegations were of the view that a certificate of the Foreign Office in so far as questions of fact were concerned such as the status of the person or the extent of immunities or privileges admissible to the diplomatic agent concerned under the practice followed by the state should be conclusive and binding since these were matters within the particular knowledge of the Foreign Office. In so far as questions of law were concerned, the majority of the delegations were in favour of leaving the matter to the courts.

13. The Report of the Committee as adopted in the Cairo Session was circulated among the Governments of the participating countries for their comments and the subject was further discussed in the Colombo Session in the light of the observations received from the Governments. The Verbatim Reports of the discussions are appended to this Report.*

14. The Committee endorsed its earlier recommendations contained in paragraphs 6, 8, 11, and 12 above. As regards the point mentioned in paragraph 10 the Delegations could not reach agreement on the question whether the grant of Diplomatic Immunities should be on the basis of reciprocity. The Delegates of India, Indonesia, Japan and the United Arab

*Verbatim reports are omitted from the Printed Summary Edition.

Republic were of the view that the concept of reciprocity should not enter into the question of Diplomatic immunities as Diplomatic Envoys were entitled to immunity as a matter of right under International Law. The Delegate of Ceylon was of the view that there was no question of reciprocity in respect of immunities as enumerated in these Articles which were considered to be the minimum necessary for the performance of Diplomatic functions. Any grant of Immunities to Diplomatic Agents other than those enumerated in these Articles should be on the basis of reciprocity. The Delegates of Burma maintained that the grant of immunities shall be on the basis of reciprocity. The Delegates of Iraq and Pakistan had no particular views in the matter. All the delegates were, however, agreed that reciprocity was a proper basis on the question of grant of privileges.

15. The Committee also made alterations in some of the Articles in the Draft Convention in the light of the comments received from the Governments. The Draft convention incorporating the amendments is annexed hereto and the provisions of the Convention shall be regarded as the final recommendations of the Committee on the subject in so far as principles are concerned.

16. The Delegate of Pakistan whilst taking part in the deliberations and endorsing the Committee's recommendations clarified that he did so in his individual capacity as he could not express the views of his Government since they did not have sufficient time to consider the matter.

B. Sen.
Secretary to the Committee.

ASIAN - AFRICAN LEGAL CONSULTATIVE COMMITTEE.

DRAFT OF A CONVENTION

Concerning Diplomatic Immunities & Privileges

(As adopted in the Colombo Session)

Preamble

Recalling that the peoples of all nations have long had the practice and conviction of respecting the status of diplomatic envoys;

Considering that an international convention regarding the rights and duties of diplomatic agents would contribute greatly to the promotion of good neighbourly relations among the States;

Considering that the immediate purpose is to reach an agreement on general provisions embodying the well-defined trend in international relations, taking into account the special usages and practices of the various states;

The States participating in the Asian-African Legal Consultative Committee have agreed upon the following principles on the immunities and privileges of Diplomatic Agents :—

Definitions

Article 1

For the purpose of the present draft convention, the following expression shall have the meaning hereunder assigned to them:

(a) The 'head of the mission' is the person charged by the sending State with the duty of acting in that capacity;

(b) The 'members of the mission' are the head of the mission and the members of the staff of the mission;

(c) The 'members of the staff of the mission' are the members of the diplomatic staff, of the administative and technical and the services staff of the mission;

(d) The 'diplomatic staff' consists of the members of the staff of the mission having diplomatic rank ;

(e) A 'diplomatic agent' is the head of the mission or a member of the diplomatic staff of the mission ;

(f) The 'Administrative and technical staff consists of the members of the staff of the mission employed in the administrative and technical service of the mission ;

(g) The 'service staff' consists of the members of the staff of the mission in the domestic service of the mission ;

(h) A 'private servant' is a person in the domestic service of the head or of a member of the mission.

Establishment of Diplomatic Relations and Missions

Article 2

The establishment of diplomatic relations between States, and the permanent diplomatic missions, takes place by mutual consent.

Functions of A Diplomatic Mission

Article 3

The functions of a diplomatic mission consist inter alia in :—

(a) Representing the sending State in the receiving State ;

(b) Protecting the interests of the sending State and of its nationals in the receiving State ;

(c) Negotiating with the Government of the receiving State ;

(d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State ;

(e) Promoting friendly relations between the sending State and the receiving State ;

(f) Developing economic, cultural and scientific relations.

Appointment of the Head and Staff of the Mission.

Article 4.

The sending State must make certain that the agreement of the receiving State has been given for the person it proposes to accredit as head of the mission to that State.

Appointment to more than one State

Article 5.

Unless objection is offered by any of the receiving states concerned, a head of mission to one State may be accredited as head of mission to one or more other States.

Article 6.

Subject to the provisions of Article 7, 8 and 10, the sending State may freely appoint the other members of the staff of the mission.

Appointment of Nationals of the Receiving State

Article 7.

Members of the diplomatic staff of the mission may not be appointed from among persons having the nationality of the receiving State except with the express consent of that State, which may be withdrawn at any time.

Reservation :

In the view of the Government of the United Arab Republic it is necessary to have the express consent of the receiving State to appoint any person having the nationality of the receiving State to any of the offices of a foreign Diplomatic Mission whether Diplomatic or otherwise.

Persons Declared 'Persona non Grata'

Article 8.

1. The receiving State may at any time notify the sending State that the head of the mission, or any member of the staff of the mission, is 'persona non grata' or not acceptable. In such a case, the sending state, according to circumstances, shall not send such person, or shall recall him or shall terminate his functions with the mission.

2. If a sending State refuses or fails within a reasonable time to comply with its obligations under paragraph 1, the

receiving State may refuse to recognise the person concerned as a member of the mission.

Notification of Arrival and Departure.

Article 9.

The arrival and departure of the members of the staff of the mission, and also of members of their families, and of their private servants, shall be notified to the Ministry of Foreign Affairs of the receiving State. A similar notification shall be given whenever members of the mission and private servants are locally engaged or discharged.

Limitation of Staff

Article 10.

1. In the absence of any specific agreement as to the size of the mission, the receiving State may refuse to accept a size exceeding what is reasonable and customary, having regard to the circumstances and conditions in the receiving State, and to the needs of the particular mission.

2. The receiving State may also, within similar bounds and on a non-discriminatory basis, refuse to accept officials of a particular category.

3. The receiving State may decline to accept any person as military, naval, or air attache, or any person performing such functions without previous agreement.

Offices away from the Seat of the Mission

Article 11.

The sending State may not, without the consent of the receiving State, establish offices in towns other than those in which the mission itself is established.

Commencement of the functions of the head of the mission.

Article 12.

The head of the mission is considered as having taken up his functions in the receiving State either when he has notified his arrival and a true copy of his credentials has been presented to the Ministry of Foreign Affairs of the receiving State, or when he has presented his letters of credence,

according to the practice prevailing in the receiving State, which shall be applied in a uniform manner.

Charge d'Affaires Ad Interim.

Article 13.

1. If the post of the head of the mission is vacant or if the head of the mission is unable to perform his functions, the affairs of the mission shall be handled by a charge d'affaires ad interim whose name shall be notified to the government of the receiving State.

2. In the absence of notification, the member of the mission placed immediately after the head of the mission on the mission's diplomatic list shall be presumed to be in charge.

Classes of Heads of the Mission

Article 14.

1. Heads of mission are divided into three classes, namely :

(a) That of ambassadors ; or nuncios accredited to heads of State ; or High Commissioners exchanged between Commonwealth Countries.

(b) That of envoys, ministers, inter nuncious and other persons accredited to heads of State ;

(c) That of charges d'affaires accredited to Ministers for Foreign Affairs.

2. Except as concerns precedence and etiquette, there shall be no differentiation between heads of mission by reason of their class.

Article 15.

States shall agree on the class to which the heads of their missions are to be assigned.

Precedence

Article 16.

1. Heads of mission shall take precedence in their respective classes in the order of date either of the official notification of their arrival or of the presentation of their letters of credence, according to the rules of the protocol in

the receiving State, which must be applied without discrimination.*

2. Any change in the credentials of a head of mission shall not affect his precendence in his class.

3. The present regulations are without prejudice to any existing practice in the receiving State regarding the precedence of the representative of the Pope.

Mode of Reception.

Article 17.

A uniform mode shall be established in each State for the reception of heads of mission of each class.

Use of Flag and Emblem

Article 18.

The mission and its head shall have the right to use the flag and emblem of the sending State on the premises of the mission, and on the residence and the means of transport of the head of the mission.

Accommodation.

Article 19.

The receiving State shall either permit the sending State to acquire on its territory the premises necessary for its mission, or ensure adequate accommodation in some other way.

Inviolability of the Mission Premises

Article 20.

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, save with the consent of the head of the mission.

*1. In the view of the Government of the United Arab Republic it would be desirable to have uniformity of practice in the matter of precedence of Heads of Missions among the participating countries in the Committee and that precedence should date from the presentation of a copy of the letter of credence to the Ministry of Foreign Affairs of the Receiving State,

2. In the case of High Commissioners exchanged between Commonwealth Countries the letter of Introduction should be considered to be letter of Credence for the purposes of this Article.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

3. The premises of the mission and their furnishings shall be immune from any search, requisition, attachment or execution.

Reservation by India and Japan :

Nothing in this Article shall prevent the receiving State from entry into the premises of the Mission for taking appropriate steps to ensure the safety of human life jeopardised by civil commotion, aerial bombardment, fire or other natural calamity.

Further Reservation by India :

Nor shall it affect the right of the receiving State to enter the premises to apprehend its nationals who are fugitives from local justice and have taken shelter therein.

Exemption of Mission Premises from Taxes.

Article 21

The sending State and the head of the mission shall be exempt from all national, regional or municipal dues or taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.

Reservation by Ceylon and Iraq :

The exemption from taxation shall not extend to cases where premises are leased to foreign States.

Inviolability of the Archives.

Article 22

The archives and documents of the mission shall be inviolable.

Facilities.

Article 23

The receiving State shall accord full facilities for the performance of the mission's functions.

Free Movement.

Article 24

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the mission freedom of movement and travel in its territory.

Freedom of Communication.

Article 25

1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending state, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher, provided that in the case of installation and use of a wireless transmitter for purposes of such communication the permission of the receiving State shall be necessary.

2. The official correspondence of the mission shall be inviolable.

3. The diplomatic bag may not be opened or detained.

4. The diplomatic bag may contain only diplomatic documents or articles intended for official use.

5. The diplomatic courier shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to arrest or detention, whether administrative or judicial. The diplomatic courier shall at all times have on his person a document testifying to his status. The diplomatic bag shall bear a conspicuous mark to show its quality as such.

Exemption from Taxation, Fees and Charges Levied by a Mission.

Article 26

The fees and charges levied by the mission in the course of its official duties shall be exempt from all dues and taxes.

Personal Inviolability

Article 27.

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all reasonable steps to prevent any attack on his person, freedom or dignity.

Inviolability of Residence and Property

Article 28.

1. The private residence of diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.

2. His papers, correspondence and, except as provided in paragraph 3 of article 29, his property, shall likewise enjoy inviolability.

Immunity from Jurisdiction.

Article 29.

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction save in the case of:

(a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of his Government for the purposes of the mission ;

(b) An action relating to a succession in which the diplomatic agent is involved as executor, administrator, heir or legatee ;

(c) An action relating to a professional or commercial activity exercised by the diplomatic agent in the receiving State, and outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. Measures of execution may be taken in respect of a diplomatic agent only in the cases coming under sub-para-

graphs (a), (b) and (c) of paragraph 1. Such measures should, however, be taken without infringing upon the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

5. The provisions contained in clauses (1) to (4) of this article shall be subject to the provisions of Article 37.

Waiver of Immunity

Article 30

1. The immunity of its diplomatic agents from jurisdiction may be waived by the sending State.

2. In criminal proceedings. waiver must always be express.

3. In civil or administrative proceedings, waiver may be express or implied. A waiver is presumed to have occurred if a diplomatic agent appears as defendant without claiming any immunity. Thc initiation of proceedings by a diplomatic agent shall preclude him from invoking immunity of jurisdiction in respect of counter-claims directly connected with the principal claim.

4. Waiver of immunity of jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgement for which a separate waiver must be made.

Exemption from Social Security Legislation.

Article 31

The members of the mission and the members of their families who form part of their households, shall, if they are not nationals of the receiving State, be exempt from the social security legislation in force in that State except in respect of servants and employees if themselves subject to the social security legislation of the receiving State. This shall not exclude voluntary participation in social security schemes in so far as this is permitted by the legislation of the receiving State.

Exemption from Taxation

Article 32

A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, save :—

(a) Indirect taxes incorporated in the price of goods or services;

(b) Dues and taxes on private immovable property situated in the territory of the receiving State, unless, he holds it on behalf of his Government for the purpose of the mission.

Reservation by Ceylon and Iraq.

The exemption from taxation shall not extend to cases where premises are leased to foreign States.

(c) Estate, succession or inheritance duties levied by the receiving State, subject, however, to the provisions of Article 38 concerning estates left by members of the family of the diplomatic agent;

(d) Dues and taxes on income having its source in the receiving State;

(e) Charges levied for specific services rendered.

(f) Subject to the provisions of article 21, registration, court or record fees, mortgage dues and stamp duty.

Exemption from personal services and contributions.

Article 33

The diplomatic agent shall be exempt from all personal services or contributions.

Exemption from customs duties and inspection.

Article 34

1. The receiving State shall, in accordance with the regulations established by its legislation, grant exemption from customs duties on :—

(a) Articles for the use of a diplomatic mission;

(b) Articles for the personal use of a diplomatic agent or members of his family belonging to his household, including articles intended for his establishment.

2. The personal baggage of a diplomatic agent shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemption mentioned in paragraph 1, or articles the import or export of which is prohibited by the law of the receiving State. Such inspection shall be conducted only in the presence of the diplomatic agent or in the presence of his authorised representative.

Acquisition of Nationality

Article 35

Members of the mission, not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State.

Persons entitled to Privileges and Immunities

Article 36

1. Apart from diplomatic agents, the members of the family of a diplomatic agent forming part of his household and likewise the administrative and technical staff of a mission, together with the members of their families forming part of their respective households, shall if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 27 to 35.

2. Members of the service staff of the mission who are not nationals of the receiving State shall enjoy immunity in respect of acts performed in the course of their duties and exemption from dues and taxes on the emoluments they receive by reason of their employment.

3. Private servants of the head or members of the mission shall, if they are not nationals of the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over such persons in such a manner as not to interfere unduly with the conduct of the business of the mission.

Diplomatic Agents who are Nationals of the Receiving State.

Article 37.

1. A diplomatic agent who is a national of the receiving State shall enjoy inviolability and also immunity from jurisdiction in respect of official acts performed in the exercise of his functions. He shall enjoy such other privileges and immunities as may be granted to him by the receiving State.

2. Other members of the staff of the mission and private servants who are nationals of the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State should exercise the jurisdiction over such persons in such a manner as not to interfere unduly with the conduct of the business of the mission.

Duration of Immunities and Privileges.

Article 38.

1. Every person entitled to diplomatic privileges and immunities shall enjoy them from the moment he enters the territory of the Receiving State on proceeding to take up his post or, if already in its territory, from the moment when the appointment is notified to the Ministry of Foreign Affairs.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

3. In the event of the death of a member of the mission not a national of the Receiving State or of a member of his family, the receiving State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country, and the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall be levied only on immovable property, situated in the receiving State.

Duties of third States

Article 39.

1. If a diplomatic agent passes through or is in the territory of a third State while proceeding to take up or to return to his post, or when returning to his own country the third State shall accord him inviolablity and such other immunities as may be required to ensure his transit or return. The same shall apply in case of any member of his family enjoying diplomatic privileges or immunities who are accompanying the diplomatic agent, or travelling separately to join him or to return to their country.

2. In circumstances similiar to those specified in paragraph 1, third States shall not hinder the passage of members or administrative, technical or service staff of a mission, and of members of their families through their territories.

3. *Third States shall accord to official correspondence and other official communication in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. They shall accord to diplomatic couriers in transit the same inviolability and protection as the receiving State is bound to accord.

Conduct of the Mission and its Members towards the Receiving State

Article 40.

1. Without prejudice to their diplomatic privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.

2. Unless otherwise agreed, all official business with the receiving State entrusted to a diplomatic mission by its Government, shall be conducted with or through the Ministry for Foreign Affairs of the Receiving State.

3. The premises of a diplomatic mission must not be used in any manner incompatible with the functions of the mission as laid down in the present convention or by other rules of general international law, or by any special agreements in force between the sending and the receiving State.

*The Indonesian Delegation reserved their position on this clause.

End of the Function of a Diplomatic Agent- modes of termination.

Article 41

The function of a diplomatic agent comes to an end, inter alia :

(a) If it was for a limited period, then on the expiry of that period, provided there has been no extention of it ;

(b) On notification by the Government of the sending State to the Government of the receiving State that the Diplomatic agent's functions has come to an end (recall) ;

(c) On notification by the receiving State, given in accordance with Article 8, that it considers the diplomatic agent's functions to be terminated.

Facilitation of Departure

Article 42

The receiving state must, even in case of armed conflict grant facilities in order to enable persons enjoying privileges and immunities to leave at the earliest possible moment, and must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

Protection of Premises, Archives and Interests

Article 43

If the diplomatic relations are broken off between two States, or if a mission permanently or temporarily recalled :

(a) The receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives ;

(b) The sending State may entrust the custody of the premises of the mission, together with its property and archives, to the mission of a third State acceptable to the receiving State.

Reciprocity in respect of Immunities and Privileges.

Article 44

The privileges of a diplomatic agent shall be accorded on the basis of reciprocity.*

Non-discrimination.

Article 45

1. In the application of the present rules, the receiving State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place :

(a) Where the receiving State applies one of the present rules restrictively, because of a restrictive application of that rule to its mission in the sending state ;

(b) Where the action of the receiving State consists in the grant, on the basis of reciprocity, of greater privileges and immunities than are required by the present rules.*

*The delegations could not reach agreement on the question whether the grant of Diplomatic Immunities should be on the basis of reciprocity. The Delegates of India, Indonesia, Japan and the United Arab Republic were of the view that the concept of reciprocity should not enter into the question of Diplomatic Immunities as Diplomatic Envoys were entitled to immunity as a matter of right under International Law. The Delegate of Ceylon was of the view that there was no question of reciprocity in respect of immunities as enumerated, in these Articles which were considered to be the minimum necessary for the performance of Diplomatic functions. Any grant of immunities to Diplomatic Agents other than those enumerated in these Articles should be on the basis of reciprocity. The Delegate of Burma maintained that the grant of immunities shall be on the basis of reciprocity. The Delegates of Iraq and Pakistan had no particular views in the matter. All the Delegates were, however, agreed that reciprocity was a proper basis on the question of grant of privileges.

IMMUNITY OF STATES IN RESPECT OF COMMERCIAL TRANSACTIONS

CONTENTS

IMMUNITY OF STATES IN RESPECT OF COMMERCIAL TRANSACTIONS

Introductory Note

The subject of Immunity of States in respect of Commercial Transactions was referred to the Committee by the Government of India under the provisions of Article 3 (b) of the Statutes of the Committee. During its First Session held in New Delhi in 1957 the Committee considered the subject on the basis of a Memorandum presented by the Government of India and adopted an Interim Report on the subject. As the majority of the delegations were favourably inclined to consider a restriction on the immunity of foreign States in respect of commercial transactions, a detailed questionnaire on the various aspects of the subject was prepared by the Secretariat. During the Second Session held in Cairo in 1958 the subject was further considered on the basis of the questionnaire prepared by the Secretariat and the delegations expressed their views in the form of answers to the various questions posed in the questionnaire. As there was a large measure of agreement among the delegations on the various questions, the Committee adopted its Final Report on the subject and presented the same to the Governments of the participating countries for their comments.

During the Third Session held in Colombo in January 1960, the Governments of the participating countries through their delegations present at the Session made their comments on the Committee's recommendations and these observations were taken note of and fully discussed at the Colombo Session. It was unanimously agreed that the recommendations contained in the Report adopted at the Cairo Session did not require any alteration. The Committee decided that its Report as adopted at the Cairo Session, together with the notes presented by the delegations of Indonesia and the United Arab Republic at the Third Session, should be submitted to the Governments öf the participating countries as the Final Report of the Committee and that the subject of Immunity of States in respect of Commercial Transactions should be removed from the Agenda of its future Sessions unless the Government of any participating Country wished the Committee to consider any further questions on the subject. The Committee directed the Secretariat to make available

copies of the Final Report to the United Nations under the provisions of Article 3 (d) of the Statutes of the Committee.

The recommendations of the Committee on this subject appear to be on the same lines as the practice followed in the Western European countries and the United States of America.

ASIAN - AFRICAN LEGAL CONSULTATIVE COMMITTEE

GOVERNMENT OF INDIA
MINISTRY OF EXTERNAL AFFAIRS

Memorandum on State Immunity.

The question referred for the views of the Asian African Legal Consultative Committee is whether a foreign state should be regarded as immune from the jurisdiction of the courts of a country in respect of liabilities arising out of commercial and other transactions which do not strictly fall within the ambit of "governmental activities" as traditionally understood.

1. It is to be observed that many of the states to-day do not confine their activities to the normal functions of a state as hitherto understood. Some of them not only own and control all means of production and distribution inside the state, but also enter into trading contracts with merchants in foreign countries in the exercise of their state functions. Such contracts are usually entered into on behalf of the state or a Government department or a state trading organisation by an official of the Embassy of the state concerned, or by a Government official specially deputed for the purpose. Many such contracts have been entered into with merchants or companies in India and other participating countries by or on behalf of foreign states and the question for consideration is whether the doctrine of 'state immunity' should be applied in respect of claims against foreign states arising out of such transactions so as to exclude the jurisdiction of local courts. According to the traditional doctrine of sovereign immunity in international law, no sovereign state can be subjected to the jurisdiction of the courts of another state and this means that no foreign state or an official organ of that state can be sued in the courts of another state in respect of any of its liabilities without its express consent. The foreign state can, however, always bring in an action against the individual in respect of their liabilities arising out of the same contract or agreement. As an individual or a company has no status in international law, he cannot approach any international forum for redress of his grievance. The only step he can take is to approach his own Government to prefer a claim on the foreign Government on his behalf. International claims are

very cumbrous in procedure and results are often doubtful and again it is impracticable for a Government to make an international claim for every breach of contract. From time to time traders entering into contracts with foreign states have insisted on insertion of a clause in the contract to the effect that the foreign Government would agree to arbitration in the country of the trader. In law, however, even this clause is of no avail as no execution can be levied by the courts to enforce an arbitration award if the foreign state raises a plea of 'sovereign immunity' and this plea, it would appear can be raised at any stage inspite of the clause in the contract. (See Duff Development Corporation V Government of Kelentan, 1924 A.C. 797). It may be mentioned that many states voluntarily submit themselves to arbitration or jurisdiction of the courts in respect of such claims. There is no dispute regarding the right of a state to claim immunity in respect of acts done in the performance of its governmental or public functions. There is also no question as to the immunity of the diplomatic representatives, but the question which seriously arises for consideration is whether a foreign state should enjoy complete immunity from the jurisdiction of the courts of a country in respect of acts which are not necessary for Governmental functions.

2. The practice followed in some of the European countries and in the United States of America is set out hereunder for consideration of the Consultative Committee :-

In so far as Britain is concerned, the Government had, except in the early case of the Parlement Belge (5 P. D. 197), refrained from taking up any definite stand and have left the matter to the courts to decide. From the decided cases it is clear that in England although so far no sovereign state has been subjected to the jurisdiction of the courts of the country, the judges of the highest tribunal (The House of Lords) have often doubted the correctness of indiscriminate application of the doctrine of sovereign immunity in respect of trading activities of a state. There is no decision of the English courts which affirmatively lays down the principle that a state is immune from the jurisdiction in respect of its activities which fall outside the sphere of "acts of state". Two of the learned Law Lords in the Christina case 1938 A. C. 485, have observed that it is no part of the law of the land that an ordinary foreign trading vessel, owned by a foreign sovereign is immune

from jurisdiction, and Evershed M. R. in the Dollfus V The Bank of England 1950, All England Reports 753, referring to the judgement in the Christna case stated "sharing Lord Maugham's misgivings, I think the extent of the immunity should be jealously watched". As regards the U. S. A., no conclusive view has so far been taken by the courts on this question. In fact, two decisions of the U. S. Supreme Court, namely, the Pesaro case (271 U. S. 562) and the latter case of Mexico V Haffman (324 U. S. page 30) appears to be somewhat in conflict. The Mexico case, however, establishes one principle which is gaining ground in almost all the countries i. e. the courts will be guided by the attitute of the Executive Branch of the Government in matters of immunity. The views of the U. S. State Department appears to be in favour of restricting immunity in respect of commercial transactions of foreign states as set in a recent communication from the Legal Adviser of the State Department to the Attorney General of the United States. The views expressed there are consistent with the past attitude of the U. S. Government which is borne out by the following statement of the Secretary of the State Kellogg to the Attorney General. "It has long been the view of the Department of State that agencies of foreign Governments engaged in ordinary commercial transactions in the United States enjoy no privileges or immunities not appertaining to other foreign corporations, agencies and individuals doing business here". (See Hackworth's Digest, Volume II Page 481). There is one principle which can be gathered from the decisions of the U. S. courts (although there is no authority of the Supreme Court of U. S. on this point) i. e., if the organisation claiming immunity has a separate juristic existence apart from the State, it will not be entitled to the immunity although it may represent a foreign Government in certain matters.

The views taken by the courts of France, Italy and Egypt, appear to be more decisive. The highest court of the French Republic (Cour de Cassation) in a decision given as early as 1929, rejected the claim to immunity put forward by the Russian Trade Delegation in a suit for breach of contract and damages. The U. S. S. R. had emphasised that the action against the Trade Delegation should be dismissed on the ground that the foreign trade in Russia was a State monopoly, exercised under the authority of Peoples Commissariat through governmental organisations, including trade delegations abroad. The court held that the widespread

functions in all fields on the part of the Russian Trade Delegation could only be regarded as ordinary trading transactions which had nothing in common with the principles of State Immunity (See USSR V Association France Export. Annual Digest 1929-30, case No. 7 and Chaliapine V USSR. Annual Digest 1935-37 No. 225). The Italian courts have drawn a distinction between the public acts of a state (Jure Imperii) and those falling within private acts such as trading activities. The court of Rome in Storelli V the Government of French Republic had held that there was an implied waiver of immunity in cases where the foreign State had instituted relationships giving rise to ordinary business intercourse through an agency established by its own representatives. In Egypt, the Commercial Tribunal of Alexandria in a judgement delivered on the 29th March 1943 held that the immunity of foreign States from jurisdiction was limited to acts done in the exercise of their sovereign power. The court held that contracts made by Commissariat General, an organ of the Spanish Republic, for the purchase in Egypt of 2000 tons of rice was an ordinary commercial transaction and the fact the Commissariat General was an organ of the State, did not deprive the transaction of its commercial character. The decision of the Egyptian mixed Court of Cassation in the Egyptian Government V Palestine State Railway was also to the same effect.

There is no general agreement even among text writers on this question. Fenwick in his "Treaties in International Law" advocates complete immunity as in his view a State jurisprudentially is one and the acts of a State can have but one end in view, that is, the defence of public interest and, therefore, all the acts are public acts. The arguments advanced by the learned author in support of this theory are: (i) citations of foreign sovereign in the courts of another state are contrary to custom and equality of all states, (ii) distinction between public and non-public acts is becoming increasingly meaningless in modern society. On the other hand Fauchile, Hyde and De-laPradelle advocate the theory of qualified immunity and the arguments advanced by them are (i) grant of immunity is of an exceptional nature and should be confined to the rational underlying the subject of immunity, (ii) old cases of absolute immunity were formulated to meet the needs of Mediaeval civilisation and (iii) it is possible to make differentiation between the acts done in pursuance of

public interest and military purposes and those which are done for mere commercial purposes.

From a review of the position as prevalent in other countries, it is clear that it is neither the accepted principle of the law of nations, nor has it been affirmatively laid down by any country that a sovereign State is immune from jurisdiction of courts in respect of its commercial and other non-governmental activities. On the other hand there is considerable authority in the opposite direction. If it is decided to adopt a practice restricting the grant of immunity to foreign states in respect of their trading activities, no objection could legitimately be taken. Even on principle it appears that the time has now come when a distinction between the various forms of state activities for the purposes of immunity is desirable and indeed essential. The activities that are undertaken by modern states cannot be regarded as state activities in the sense it was understood and it would indeed be stretching the point too far if the principle of sovereign immunity was applied to all such activities undertaken by a state today. If a sovereign state chooses to trade, it should be in no better position than an individual or company engaged in foreign trade. To allow immunity in such cases will result in unduly putting a sovereign state in a better position than a trading individual or a company for which preferential treatment there is no warranty in international law or usage. It has already been observed that many states do not take shelter behind the cloak of sovereign immunity in respect of trading transactions and it may well be asserted that a state by taking upon itself the role of a trader must be deemed to have waived its claim of immunity in respect of such transactions.

FIRST SESSION OF THE ASIAN AFRICAN LEGAL CONSULTATIVE COMMITTEE

INTERIM REPORT OF THE COMMITTEE ON

Restrictions on Immunity of States in respect of Commercial Transactions entered into by States or State Trading Corporations.

The Committee at its seventh meeting held on Wednesday, April 24, 1957, considered Item No. 5 of Part I of the Agenda, which was referred by the Government of India.

2. The Committee considered the Memorandum presented by the Government of India and specially considered the question formulated in such Memorandum. The question was:

(a) should a foreign state be regarded immune from the jurisdiction of the courts of a country in respect of liabilities arising out of commercial and other transactions which do no strictly come within the orbit of "governmental activities' as trade is generally understood.

3. The Committee took note of statements made by the Member of India and the views of the Delegation of Burma, Ceylon, Indonesia and Japan on the specific question raised in the Indian Memorandum. The Committee also noted that the Delegation of Iraq and Syria wished to give further consideration to the question.

4. A brief summary of the views expressed by the several Delegations is as follows :-

(1) The Indian Member considered that in principle this was a question of immunity of states, but immunity from legal process should not be extended to commercial activities of states as in such ventures no question of dignity of sovereign states arises. If a state enters the area of trade activities, it should be prepared, if the occasion so arises, to suffer the same processes of law as a citizen would be subjected to. He also observed that there was no uniform or settled practice in different countries, but it could be stated that the weight of opinion is against extending immunity from suits on matters

of commerce and trading. He recalled that in England the courts have not expressed any clear opinion, but in the U.S.A. the executive government of that State decides whether in a particular case such immunity should be available and also the limits of immunity. He expressed as his view that with states participating more and more in commercial functions, it is desirable that the immunity should not operate on such non-governmental activities.

(2) The Delegate of Burma in agreeing with the views expressed by the Delegate of India observed that if a state pursues activities other than governmental, the idea of sovereignty as relating to such activities should not exist.

(3) The Delagate of Ceylon emphasised that the principles underlying immunity of states is not the dignity attaching to sovereignty but the provision of facility to transact government business, and immunity should not extend to cover non-governmental activities like trade and commerce, whether such states are monarchies or any other form of government. In these activities states and individuals should be treated alike.

(4) The Delegate from Indonesia expressed himself in favour of the immunity of processes in courts of foreign countries enjoyed by states. It was recognised that in the present situation of most countries, a state should not seek immunity from process in its own court, though historically at different times sovereigns had claimed immunities and in most countries today the states are subject to jurisdiction of courts in their own countries. It was argued that such waiver of immunity limited only to the courts established by the state itself is commendable, but withdrawal of immunity from states sought to be proceeded against in foreign courts would result in embarassed international relations and also involve inconvenience to the defendent states as they would have to contend with difference in procedure, language and laws. It was, therefore, urged that immunity of states from process of foreign countries should be upheld.

(5) The Delegate of Iraq noted the arguments put forward, but wished for time to consider the matter further.

(6) The Delegate of Syria took up the same position as the Delegate of Iraq.

(7) The Delegate of Japan supported India, Burma and Ceylon. His view was that when a state goes to market, it should subject itself to be laws of the market.

5. The conclusion is that majority of Delegations favour the view that no immunity should be granted though no final opinion is put forward by two of the Delegations. The position of the Delegate of Indonesia, however, is definitely in favour of retention of immunity of states from process in foreign courts.

6. The recommendation of the Committee is that the question be further considered and the decision be taken at its next session.

7. The memorandum presented by the Government of India will form part of this report.

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

Final Report of the Committee on Immunity of States in respect of Commercial and other Transactions of a Private Character.

(AS REVISED IN THE THIRD SESSION)

This subject was referred for the opinion of this Committee by the Government of India during its First Session. The question referred was whether a Foreign State or a State Trading Organization should be regarded as immune from jurisdiction of the Courts in respect of commercial and other transactions which do not strictly fall within the ambit of "Governmental Activities" as traditionally understood.

2. It is observed that many of the states today do not confine their activities to the traditional functions of a State. Some of them not only own and control means of production and distribution inside the state but also enter into trading contracts with merchants in foreign countries in the exercise of their state functions. Such contracts are usually entered into on behalf of the state or a government department or a state trading organization. It is being increasingly realised that the doctrine of sovereign immunity of foreign states was not meant to include these new and extended functions which are being assumed by the governments at present. The State Department of the U.S.A. declared in 1952 that they would advise that immunity of foreign states and sovereigns should not be granted in respect of activities of this nature. The majority judgment of the U. S. Supreme Court delivered by Justice Frankfurter in the Republic of China case in 1955 gave expression to this modern trend in restricting sovereign immunity. A similar view was expressed by Lord Justice Denning in Rahimtullah *versus* the Nizam of Hyderabad—an English House of Lords decision of 1957. Judge Lauterpacht in the 1955 edition of "Oppenheim's International Law" also lends support to this view. Professor A. G. Hanbury, writing in "Current Legal Problems" in 1955 was also of the view that the traditional doctrine of sovereign immunity is getting out of date. The views taken by courts in Egypt, France, Germany and Switzerland (as set out in the Memorandum presented by the Government of India) appear to go even further along this modern trend. In these circumstances it was thought to be opportune for the Asian African Nations to consider if they

should also place restrictions on the immunity granted to foreign states in respect of such activities.

3. The question was generally considered by the delegations of the participating countries during the First Session. A brief summary of the views expressed by the several delegations was given in the interim report of the Committee. As the majority of the delegations were favourably inclined to consider a restriction on the immunity of foreign states in respect of commercial transactions, a detailed questionnaire on the various aspects of the subject was prepared by the Secretariat. During this session delegations have expressed their views in the form of answers to the various questions posed in the questionnaire. A summary of the discussion on the basis of the questionnaire is annexed to this Report.

4. All the delegations except that of Indonesia were of the view that a distinction should be made between different types of state activity and immunity to foreign states should not be granted in respect of their activities which may be called commercial or of private nature. The Indonesian delegate, however, adhered to the view that immunity should continue to be granted to all the activities of the foreign state irrespective of their nature provided they were carried on by the government itself.

5. All the delegations were agreed that a state trading organisation which is part of the government and is not a separate juristic entity should be treated on the same footing as the government proper. All the delegations were also agreed that where a state trading organisation has an entity of its own under the Municipal Laws of the state, immunity should not be available to it.

6. The majority of the delegations were agreed that the trade representative of a government would not be entitled to immunity for the same reason and on the basis that a foreign government would not be so entitled. The Indonesian delegation was, however, of a contrary view.

7. Regarding the method of claiming immunity by sovereign states the majority were of the view that the certificate of the Foreign Ministry should be given considerable weight. The minority took the view that a certificate of the

Foreign Office, if given, should be conclusive and binding on the courts.

8. It was recognised by all delegations that a decree obtained against a foreign state could not be executed against its public property. The property of a state trading organisation which has a separate juristic entity may, however, be available for execution.

9. The Committee having taken the view of all the delegations into consideration decided to recommend as follows :-

(i) The State Trading Organisations which have a separate juristic entity under the Municipal Laws of the country where they are incorporated should not be entitled to the immunity of the state in respect of any of its activities in a foreign state. Such organisations and their representative could be sued in the Municipal Courts of a foreign state in respect of their transactions or activities in their State.

(ii) A State which enters into transactions of a commercial or private character, ought not to raise the plea of sovereign immunity if sued in the courts of a foreign state in respect of such transactions. If the plea of immunity is raised it should not be admissible to deprive the jurisdiction of the Domestic Courts.

10. The Committee noted that the Government of the United Arab Republic are of the opinion :-

(a) That a foreign State should not enjoy immunity, except in public transactions undertaken by it in its capacity as an international entity, excluding any legal transaction similiar to the usual civil activities undertaken by individuals and private entites.

(b) That neither a commercial representative of a foreign government, nor any State Trading Organisation belonging to it, which have an independent juridical entity, may enjoy immunity in commercial transactions.

(c) That all questions of immunity of a foreign State, its representatives or State Trading Organisation belonging to it, should be left to the decision of courts, sufficiently considering certificates issued by ministries for Foreign Affairs in compliance with the courts demand.

(d) The foreign judgments should not be enforced on the State's public property, in an absolute manner. Nevertheless, the State Trading organisations belonging to the State, and having an independent juridical entity are not immune, and law suits against them and their representatives may be brought to the courts of a foreign State, concerning their transactions and activities of the last mentioned State.

(e) That although the plea of immunity should be left to the decision of national courts alone, yet, litigations relating to commercial transactions of the State, may be referred to arbitration.

(f) That a multilateral convention on enforcement of judgement against a foreign State is premature.

11. The memorandum presented by the Government of India on the subject, the Interim Report of the Committee adopted during the First Session and a summary of Discussions on the subject during the Cairo Session as edited by the Secretariat shall form Annexes to this report.

12. The recommendation contained in clause (1) of paragraph 9 was adopted unanimously. The Delegation of Indonesia dissented on the recommendation contained in clause (ii) which was agreed upon by all other Delegations.

B. SEN
Secretary to the Committee.

ANNEXURE

Summary of Discussions on State Immunity at the Second Session on the Basis of a Questionnaire prepared by the Secretariat.

The question referred to the Committee for consideration was whether a foreign state should be regarded as immune from the jurisdiction of the courts of a country in respect of liabilities arising out of commercial or other transactions which do not strictly fall within the ambit of 'governmental activities' as traditionally understood. The matter was discussed at the First Session on the basis of a Memorandum prepared by the Government of India and an Interim Report was drawn up. The U. A. R. delegation submitted a Memorandum on the subject to the Second Session.

Opening the general discussion, the Iraqi delgete, who had been elected Rapporteur-General, stated that the discussions at the last Session revealed that the majority of the delegates were of the opinion that States should not be immune from jurisdiction in such matters. He said that Article 18 of the Civil Procedure Code of his country provided that Iraqi Courts should have general jurisdiction over all persons including judicial people in the Government. He was of the view that Iraq should not be immune from the jurisdiction of foreign courts with regard to activities of a purely commercial or private character.

The U. A. R. delegate said that until the beginning of the first World War, the principle of absolute immunity of States formed a rule of International Law and this principle was accepted in all countries. After the war, however, the situation began to change. Some States drew a distinction between activities which fell within the sphere of 'governmental activities' as traditionally understood and activities which fell within the sphere of commercial transactions. Such a distinction was readily accepted in France but in other countries, such as Britain, it was accepted with difficulty. In France, since the judgment of the *Cour de Cassation* in 1929, the principle of immunity became qualified; French Courts accepted the view that immunity should be qualified, not only in the sphere of commercial activities but even in the sphere of private acts. In Egypt there is no general rule but the Courts appear to have accepted the view that the principle of immunity is

qualified and foreign governments are not immune in respect of all their private acts.

The Indonesian delegate was of the opinion that it was extremely difficult to distinguish between different State activities and that the adoption of any such distinction would necessitate an examination of every activity of the State to determine whether it was private or public. This would mean that the Sovereign Immunity of the State itself would be limited.

The meeting then proceeded to deal with the questionnaires in the following order :—

I. Sovereign Immunity-General Aspects.

Question No. 1 : Do you consider the Doctrine of Sovereign Immunity to require granting of immunity from jurisdiction in respect of all forms of State activity, or are you in favour of the view that this doctrine is limited in its application to acts which are traditionally regarded as public acts of the State ?

Burma said that the doctrine of Sovereign Immunity was considered as absolute in Burama, but she hoped that it would be limited in its application. Ceylon was of the opinion that its application should be limited to public acts of the State only. India was in favour of distinction between public and private activities and thought that immunity should be restricted as far as commercial activities are concerned Iraq thought that a State should be subject to commercial or private acts. Japan and the U. A. R. were of the opinion that the doctrine should be limited in its application to public acts of the State. Indonesia give her answer in the general statement.

Question No. 2 : If you are in favour of drawing a distinction between different types of State activity for the purposes of immunity from jurisdiction, what in your opinion should be the basis for this distinction ?

Burma, Ceylon, India and Indonesia thought that there should be a distinction. Iraq and Japan were of the opinion that the State's activities could be divided into two parts : (a) Public activities and (b) Private activities. The U. A. R. said

that the basis of such a distinction should be the differentiation between the acts performed by the State in its capacity as a soverign power and other acts even if these are non-commercial transactions.

Question No. 3 : Do you agree with the view expressed by some that a State by entering into trade assumes the role of a private individual, and in respect of such transactions its waiver of immunity should be presumed ?

Japan and the U. A. R. answered the question in the affirmative. Iraq did not think that the State assumed the role of a private individual by entering into trade or other private activities; the State remained a public authority regardless of what activity it entered into. Ceylon and India agreed with Iraq. Burma did not think that any presumption would arise.

Question No. 4 : Has your Government either in its practice or in any declaration of policy made its position known on this question *i. e.* whether it regards the Doctrine of Soverign Immunity as absolute or subject to limitations ?

Iraq, Burma, Indonesia and Japan said that their Governments had not declared their policy on this matter. The U. A. R. said that though there was no official declaration, the trend of practice was to limit State Immunity.

Question No. 5 : Are there any decisions of the courts in your country on this issue ? Has any foreign State been sued in your country ?

Iraq, Burma, Ceylon, Indonesia and Japan answered in the negative. India said there was a decision in 1955. The U. A. R. said that there were decisions of her Courts limiting State Immunity on the basis mentioned in her answer to question 2; some foreign State had also been sued on the same basis.

Question No. 6 : Do you consider the doctrine of qualified immunity suitable for adoption at present ?

Iraq, Burma, Ceylon, India, Japan and the U. A. R. answered the question in the affirmative, whilst Indonesia made no comment.

II. Governmental Activities of a Quasi-Public Charcater.

Question No. 1 : Does your Government engage in the purchase of materials or equipment in foreign countries which are needed for public services, or public utilities or for the maintenance of food supplies within the country ?

All the delegations answered the question in the affirmative.

Question No. 2 : If so, how are such transactions conducted ? Are there transactions negotiated through Government officials and entered into the name of your Government or are they conducted by state trading organizations of your country.

Iraq, Burma, Ceylon and India said that such transactions were conducted by Government officials. Indonesia said that they were organized by the Government through a commercial firm. The U. A. R. said that they were conducted by Government officials or companies controlled by the Economic Development Organization. Japan answered the question in the negative.

Question No. 3 : Do you consider any claim arising out of such transactions against a Government to be outside the jursidiction of the local courts ? Would it, in your opinion, make any difference, if the transactions were entered into in the name of a State Trading Organization and not in the name of the Government ?

Iraq, Burma, Ceylon, India aud Japan answered both questions in the negative. Indonesia answered the first question in the affirmative and second in the negative. The U. A. R. was of the opinion that claims arising out of transactions of this type (*e. i.* purchase of materials and equipment for public services etc.) directly carried on by the Government would fall outside the sphere of local jurisdiction but claims arising out of transactions performed by State Trading Organizations or similar organizations should not be granted immunity.

Question No. 4 : Have your Government ever had occasion to raise the plea of immunity in respect of any claim arising out of such transactions either before the foreign courts or in respect of arbitration proceedings ?

All the delegates answered the question in the negative.

Question No. 5 : Is there any policy statement of your Government or any pronouncement by your courts in regard to a plea of immunity by a Foreign State in your country in respect of any claim arising out of such a transaction ?

All the delegates answered the question in the negative.

III. Government Activities of a purely 'Private' or 'Commercial' nature.

Question No. 1 : Does your Government own ships which are run for commercial purposes or own News agencies which also function abroad ? Does your Government undertake Banking or Insurance business in foreign countries ?

[Iraq said that her Government had recently established a Maritime Transport Corporation and that her Government carried on banking activities in some Arab countries. Burma said that her Government owned a few ships but did not have news agency of banking activities. India said that in her country corporations, substantially owned by the Government ran ships for commercial purposes. Indonesia said that the Indonesian Shipping Company was a Government-owned Company; the Bank of Indonesia had branches in London and Singapore and the Insurance Company was backed by Government capital. Ceylon and Japan answered both questions in the negative. The U. A. R. answered the first part of the question in the affirmative and said that there were companies controlled by the Economic Development Organization conducting banking and insurance business in some of the Arab countries.]

Question No. 2 : If such activities are undertaken by your State, are they conducted directly by the Government or through State Trading Organizations ?

[India and Indonesia said that such activities were conducted by State Trading Organizations and Egypt said that they were couducted by the Economic Development Organization. Burma said that she ran her shipping though shipping bodies which were part of a State Organization, Iraq said that such activities were conducted by a Government Corporation. Ceylon and Japan said that the question did not arise in their countries.]

Question No. 3 : Do you consider the doctrine of Sovereign Immunity applicable even to transactions of this nature ? Should there by any distinction in principle between such activities undertaken directly by a Government and those which are done through Trading Organizations ?

[Burma, Ceylon, India and Japan, answered both questions in the negative. Iraq answered the first question in the negative and said that the second question did not arise in her country. Indonesia said that a distinction should be made between government activities and activities of a State Trading Organization. The U. A. R, said that such transactions were not granted immunity even if they were carried out by the State itself.]

IV. State Trading Organizations.

Question No. 1 : Are there any State Trading Organizations in your country ? If so, are they regarded as an integral part of your Government or are they separate juridical entities under your laws having their own capital, balance sheet, and profit and loss account ?

Ceylon and Japan said that they had no State Trading Organizations. India and Indonesia said that they had several such State Organizations Burma said that she had two big State Organizations, the Timber Organization and the Agricultural Marketing Body. Iraq said that though she did not have any State Organizations, she had public ones which conducted their activities on an independent basis. The U. A. R. said that she had companies owned by the Economic Development Organization which constituted separate juridical entities with their own capital, balance sheets, and profit and loss accounts.

Question No. 2 : Would you regard State Trading Organizations which are not separate juridical entities, their funds and assets abroad to be immune from jurisdiction ? Do you consider transactions entered into by such organizations to be on the same footing as transactions made directly by a Government in its own name ?

[Iraq and Burma said that there were no such State Organizations in their countries but if the question did arise they would be treated on the same footing as the Government.]

Ceylon and India answered the first part of the question in the affirmative and the second part in the negative. Indonesia answered both parts of the question in the affirmative. The U. A. R. said that the granting of State Immunity to State Trading Organizations, which were not separate juridical entities, depended on the nature of the purposes underlying their transactions.

Question No. 3 : In cases where the State Trading Organization has an entity of its own under the municipal laws and is empowered to function at its own risk though under the supervision of the Government, would the doctrine of sovereign immunity be applicable in respect of the organization, its funds, assets and claims arising out of transactions entered into by it in its name ?

All the delegates answered the question in the negative.

Question No. 4 : If a private trading corporation was taken over by the State, could the State claim immunity in respect of the transactions done by the Corporation before and/or after such nationalisation ?

Iraq, Burma, Ceylon, India, Indonesia and Japan said that no immunity should be granted. The U. A. R. said that immunity should be granted only in respect of transactions carried out after the nationalisation.

V. Position of Government Trade Representatives or Agents and Representatives of State Trading Organizations.

Question No. 1 : Do you consider the representatives of a Government whose sole functions are in the sphere of Trade such as Trade Delegations, Missions or Trade Commissioners entitled to (a) any personal immunity and (b) immunity in respect of trading transactions entered into by them on behalf of their Governments ?

Iraq said that regarding (a) reciprocally certain immunities could be granted but regarding (b) no immunity should be granted. The U. A. R. answered both parts of the question in the negative. Indonesia said that regarding (a) immunity was not granted but regarding (b) theoretically they could be immune. Burma, Ceylon, India and Japan expressed the same views as Iraq.

Question No. 2 : Do you consider a Diplomatic Officer entering into a commercial transaction on behalf of his Governmemt to be entitled to diplomatic immunity in respect of such transactions ?

Burma, Ceylon and India answered the question in the negative. Indonesia and Japan answered the question in the affirmative. Iraq answered the question in the affirmative and said that it was necessary to grant dipomatic agents such immunity in order to safeguard their proper functioning. The U. A. R. said that a diplomatic officer was not entitled to immunity regarding such commercial transactions because he was not acting in this repect in his capacity as a diplomatic agent.

Question No. 3 : Are the representatives of State Trading Organizations not having separate juristic entity entitled in your opinion to immunity in respect of their official acts including entering into transactions on behalf of the organizations ?

Iraq, Burma, Ceylon, India, Indonesia and Japan answered the question in the negative. The U. A. R. said that the application of immunity to the representatives of State Trading Organizations, not having separate juridical entity, depended on the nature of the purposes of such transactions.

Question No. 4 : Do you consider the representatives of State Trading Organizations having a separate entity entitled to any immunity at all ?

All the delegates answered in the negative.

Question No. 5 : Do you consider a private individual employed by a State or a State Trading Organization for negotiating a particular transaction, entitled to plead his principal's immunity as a bar to local jurisdiction ?

Iraq, Burma, Ceylon and India were in doubt whether an immune person could be sued. Indonesia said that such a person could be granted immunity. The U. A. R. said that the application of immunity depended on the nature of the transaction as aforesaid. Japan answered the question in the negative.

VI. Suits against Foreign States, State Trading Organizations and their Representatives.

Question No. 1, : In cases of suits against a foreign State, a State Trading Organization or their representatives

where a plea of immunity is raised, how in your opinion should such a plea be decided... should it be left to the courts to come to a decision or should a certificate from the Foreign Office be treated as conclusive on the issue ?

Iraq, Burma, Ceylon, India, Indonesia and Japan were of the opinion that it should be left to the courts to come to a decision but a certificate from the Foreign Office should be obtained and the certificate should be given due weight. The delegations of India and Indonesia were of the view that the certificate might be treated as conclusive and binding on the Courts. The U. A. R, said that it should be left to the discretion of the Courts.

Question No. 2: In case where a suit is held to lie against a foreign State Trading Organization on whom should the service of summons be effected when the State concerned has only Diplomatic or Consular representative in the country where the suit is filed ?

Iraq and Burma said that in the case of a State having a diplomatic representative there was no difficulty, but if there was no diplomatic representative it should be left to the Foreign Office to decide as to how the service was to be effected. Ceylon said that it should be based on the terms and the law of contract. India said that it should be done through an agent if this was not possible, it could be posted. Indonesia and Japan said that it should be done through diplomatic channels or through the head of the organization. The U. A. R. said it could be done through diplomatic channels.

Question No. 3 : In cases where a decree is passed how in your opinion should it be executed against the foreign State ? Can the public property of a foreign State situated within the jurisdiction of the court be attached or sold in execution of such a decree even though under general principles of International Law such properties are immune from seizure ?

Iraq answered the question in the negative. Burma did not answer. Ceylon, Indonesia and Japan said that it should be done through diplomatic channels. The U. A. R. said that when a decree is passed against a foreign government, it could

be made on its private assets abroad, depended on the law of the foreign State or the law of the State making the decree.

Question No. 4 : What would be the position in cases of execution of decree against State Trading Organizations ?

Iraq, Ceylon, India and Indonesia said that as there was no difference between the State and a State Trading Organization with regard to granting immunity, the position would be the same with regard to the execution of decrees. Burma and Japan said that if the State Trading Organization was a distinct entity, they would not hesitate to seize its property if it was situated within their country. The U. A. R. said that the execution of foreign decree could be made against a State Trading Organization having a separate judicial entity. In the case of a State Trading Organization not having a separate judicial entity, the rules applicable to a foreign State would be applicable.

VII. Steps Towards Solution of the Problem

Question No. 1. : In view of the fact that opinions vary on the question of application of the Doctrine of Sovereign Immunity in respect of commercial or quasi-commercial transactions of a State would you be in favour of conferring jurisdiction of an international tribunal to decide suits arising out of such transactions rather than on the Municipal courts ?

Iraq said that she would have no objection provided it was universally agreed to. Burma, Ceylon, India and Japan suggested the drawing up of a contract providing for arbitration. Indonesia said that in view of the fact that municipal courts were slow, she preferred an international tribunal as its decisions would be made much quicker. The U. A. R. suggested that municipal courts should remain competent regarding pleas of immunity but the parties could be allowed to resort to arbitration.

Question No. 2 : In view of the difficulty in the execution of judgments that may be pronounced against foreign States would you be in favour of a multilateral convention whereby States who are parties would agree (a) to waive immunity in respect of claims arising out of specific categories of transactions entered into by a State or a State Trading

Diplomatic Representative, (c) to satisfy any decree that may be passed against it or a State Trading Organization, (d) to reciprocally enforce such decrees through its own courts and (e) to allow its property or the properties of the State trading agency, as the case may be, to be attached or sold in execution.

Iraq said that she agreed that such a convention was concluded. Burma, Ceylon, India Indonesia and Japan said that it should be done by bilateral agreement. The U. A. R. said that the conclusion of such a multilateral convention was premature in the present state of international relations.

COMMENTS OF THE GOVERNMENT OF INDONESIA

ON

Immunities of States before Foreign Courts.

(Submitted to the Third Session)

The views of Indonesian Government regarding the question of the Immunities of States before Foreign Courts are essentially the same as the views which were expressed by the Indonesian Delegation at the Second Session of the Committee. They may be summarised as follows :—

States should be immune from legal proceedings before Foreign Courts for all their acts, regardless of whether such acts are of a public or private character.

To distinguish between the two kinds of State acts would not be extremely difficult but it is also fraught with serious complications, as the adoption of any such distinction would necessitate an examination of every activity of the State in order to determine whether it is of a public or private character. Such an examination by a Foreign Court would in the opinion of the Indonesian Government already mean a limitation of the sovereign immunity of the State itself. The principle of of immunity before Foreign Courts should in its view, therefore, be upheld for all the activities of the State irrespective of its nature provided that the activities were carried out by the Government itself.

State Trading Organisations which are a part of the Government and who do not have a separate juristic entity should in its view be treated on the same footing as the Government itself and should, therefore, be granted immunity. Likewise Trade Delegations, Trade Missions, Purchasing Delegations or Missions, Diplomatic Officers and Trade Representatives or Commissioners should be entitled to immunity in respect of any transactions entered into them on behalf of their Government. Only State Trading Organisations which do have a separate juristic entity should not be immune from legal proceedings in Foreign Courts.

Should a foreign decree be passed against such Trading Organisations it should be possible to excute it against them. Finally as regards the solution of the problems resulting from the immunity of States from the jurisdiction of Foreign Courts the Indonesian Government is of the view that the best way to achieve this is through the conclusion of bilateral agreements.

ASIAN - AFRICAN LEGAL CONSULTATIVE COMMITTEE

STATUS OF ALIENS

CONTENTS

STATUS OF ALIENS

Introductory Note

The subject of Status of Aliens was referred to the Committee by the Government of Japan under the provisions of Article 3(b) of the Statutes of the Committee. During the Second Session held at Cairo the subject was generally discussed on the basis of the Memorandum presented by the Government of Japan and the views of the various delegations were ascertained on the basis of a questionnaire prepared by the Secretariat of the Committee. The Committee decided that the subject needed further study and consideration and directed the Secretariat to prepare a report on the subject in the light of the discussions held during the Cairo Session. The Secretariat accordingly collected the relevant material and drew up its Report in the form of Draft Articles together with Commentaries setting out the relevant State practice and judicial decisions. During the Third Session held in Colombo in January 1960 the Committee discussed the subject in detail on the basis of the Draft Articles prepared by the Secretariat and consolidated its views on the various topics of the Subject. The Draft Articles embodying the general principles concerning the admission and treatment of aliens, as provisionally recommended by the Committee at its Third Session, are being submitted to the Governments of the participating countries for their comments. The subject will be further considered at the Fourth Session of the Committee in the light of the observations received from the Governments.

It may be mentioned that this was probably the first time when an Inter-Governmental Organisation considered the question of treatment of aliens in all its aspects. The Committee's provisional recommendations can be said to contain certain new concepts on the law on the subject. The Committee rejected the theory of "Minimum Standard of Treatment" for foreigners which had been developed during the 19th century and recommended the concept of "Equality of Treatment" together with the nationals of a State. The Committee's views appear to be based on the fact that in the context of modern society the doctrine of the Minimum Standard of Treatment has become somewhat outmoded. In the course of discussions the view which found favour was that in the context of the United Nations Charter and the Declara-

tion of Human Rights every State was expected to accord a fair treatment to its own nationals, which should be taken note of whilst formulating principles on the treatment of foreigners. The Committee accordingly felt that the rule of according a minimum standard of treatment to foreign nationals irrespective of the way a State treated its own subjects has become out of date, and recommended that foreigners should receive treatment on the basis of equality with a country's own nationals. Foreigners reside in a country for their own ends and they should be satisfied if they receive the same treatment as the nationals of that country. Another important feature of the Committee's provisional, recommendations is that the questions of admission, treatment and expulsion of foreigners should be governed by a country's laws, regulations and executive orders which may be in force and be subject to the considerations of the national security of the State.

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

MEMORANDUM OF THE GOVERNMENT OF JAPAN ON STATUS OF ALIENS

The question of status of aliens is one of the topics selected from those listed in the provisional agenda for codification by the International Law Commission at its first session. This question is also of common concern to Asian countries. It is hoped that the Asian-African Legal Consultative Committee would take up this question. In this connection it is also hoped that the Committee, for its future study, would consider the topics enumerated in the attached list, and consolidate its views on the various topics.

February 20th, 1957.

Ministry of
Foreign Affairs,
Tokyo.

Status of Aliens

I. Definition of the term "alien".

II. Entry of aliens.

(1) Restriction on entry.

(2) Entry of fugitives.

Extradition—Kinds of extraditable crimes—Refusal to extradite—Right of Asylum.

III. Status of alien residents.

A. Status under public laws.

(1) Obligation to register.

(2) Personal duties—obligatory military service—Compulsory education—Liability to taxes.

(3) Suffrage—Status to be public officials,

B. Status under private laws.

(1) Respect of human rights and fundamental freedoms—Freedom of thought and conscience—Freedom of religion—Freedom to choose and change one's residence.

(2) Protection of person and property.

(i) Extent of protection.

National treatment — Most — favoured—nation treatment.

(ii) In case of nationalisation of property.

(iii) State responsibility for damages.

(iv) Protection of nationals abroad by home state.

(3) Restriction on business activities.

IV. Departure of aliens.

(1) Freedom of departure—The case when departure is not admitted.

(2) Enforcement of departure.

(i) Conditions of expulsion.

(ii) Proceedings of expulsion.

ASIAN - AFRICAN LEGAL CONSULTATIVE COMMITTEE.

DRAFT ARTICLES TOGETHER WITH EXPLANATORY NOTES ON THE STATUS OF ALIENS.

(Prepared by the Secretariat of the Committee)

Article 1

Definition of the term 'Alien'

(1) An alien is a person who is not qualified to be a citizen of the country concerned under its laws in force relating to citizenship or nationality.

(2) A person of Dual or Multiple Nationality is not to be regarded as an alien in any of the countries of which he is a national.

Commentary

There is no comprehensive statutory definition of the term 'alien' in any of the text books or in the national legislations of various countries. According to the information in the possession of the Secretariat there does not appear to be any comprehensive statutory definition of the term 'alien' in any of the participating countries. The suggested definition in this Article would be applicable generally. It should be mentioned that owing to historical reasons the citizens of the Commonwealth Countries and those of Eire are not regarded as aliens in the United Kingdom. This, however, is a special feature of the British Nationality Laws and need not be taken into account in any general definition of the term "alien". According to the Institute of International Law, "all those are considered aliens who have no actual right of nationality in a State, without distinction as to whether they are simply passing through, or are resident or domiciled, or whether they are refugees or have entered the country of their own free-will".[1] An alien would include not only foreign nationals but also stateless persons. In the United Kingdom, the wife of an alien is held not necessarily an alien.[2] The question whether the status of a person is that of an alien or not is exclusively determined by the law of the State concerned. The rights and liabilities incidental to such status must also be determined by the territorial laws of the State Concerned.[3]

1 Resolutions of the Institute of International Law, J. B. Scott., p. 109.
2 Halsbury's Law of England, 3rd Ed., London, 1952, Vol. I, p. 498.
3 Re Adam (1837), I Moo, P. C., 460; Gout v. Cimitian, (1922), I A.C. 105.

CONDITIONS GOVERNING THE ADMISSION OF ALIENS.

Article 2

Admission of Aliens in General.

(1) Except in cases where there are treaty provisions to the contrary, the admission of aliens will be at the discretion of the receiving State and in accordance with the provisions of its municipal laws.

(2) A State admitting aliens into its territory may lay down by law or executive orders in accordance with its own Constitution conditions for entry of Aliens into its territory.

(3) An alien should not normally be admitted unless he is in possession of valid travel documents issued by the State of which he is a national.

(4) A State may whilst admitting alliens into its territory make a distinction between persons on a temporary sojourn and those who wish to be admitted for permanent stay.

(5) A State may restrict or prohibit temporarily the entry of all aliens or certain categories of aliens in times of war or national emergency.

Commentary

In general a State is acknowledged to enjoy the broadest right to regulate the admission of foreigners to its territory. According to the generally accepted views of writers on international law, which is also borne out by the practice of the States and the decisions of national and international tribunals, it is the sovereign right of a State either to admit or to exclude an alien from its territory. The very fact that conclusion of treaties and conventions between States was considered necessary for the purpose of ensuring in advance the admission of the nationals of a contracting country into the territory of the country or countries parties to the treaty shows, that in the absence of such treaties the right of admission for their nationals could not be demanded.

Emrich de Vattel observes : "a sovereign may prohibit entrance into its territory, either to all foreigners in general

or to certain persons, or in certain cases or for certain particular purposes, according as the welfare of the State may require".[1] According to Brierly, a State is not bound to admit aliens into its territory. Hackworth considers that a State is under no duty in the absence of treaty obligations to admit aliens into its territory. If it does admit them it may do so on such terms and conditions as may be deemed by it to be consonant with its national interests.[2] Lord McNair says : "Apart from treaty stipulations to the contrary a State has a right to exclude all aliens including stateless persons or particular categories of such persons."[3] According to Oppenheim, "Apart from special treaties of commerce, friendship and the like, no State can claim the right for its subjects to enter into and reside on the territory of a foreign State. The reception of aliens is a matter of discretion and every State is by reason of its territorial supremacy competent to exclude aliens from the whole or any part of its territory".[4]

State Practice

In Burma, admission of aliens is permitted only after their compliance with the rules and laws of Burma on the subject. The State has the right at will to grant or refuse entry visas to foreigners who wish to enter its territory. In Ceylon, aliens are not admitted unless they are in possession of a valid passport and the requisite visa. In India, aliens are admitted only when they carry with them valid passport duly visaed. The conditions of entry into Indonesia and Iraq are exactly the same and the governments have the sole discretion in the matter of granting visas. Entry of foreigners in Japan is regulated by the Immigration Control Law Order III of April, 1951. Aliens with valid passports and visas are permitted in Japan in keeping with her State policy and she grants visas to foreign nationals only on the basis of reciprocity. Matters relating to admission of aliens are under the jurisdiction of the Immigration Office and the Ministry of Justice. In the Egyptian and Syrian Regions of the U. A. R., the admission of aliens is regulated by the Egyptian Law No. 74 of 1952 and the Decree

1 Le Droit Des Gens, 1758, trans, C. G. Fenwick, : The Classics of International Law.

2 G. H. Hackworth: Digest of International Law, Vol. III pp. 717 & 718.

3 Lord McNair : International Law Opinions Selected and Annotated, 1956, Vol. II, p. 105.

4 Oppenheim : International Law Vol. I 8th Ed. pp. 678-678.

No. 54 of January, 12th of 1952 respectively. In the Egyptian region aliens may enter the country on obtaining an entry visa and the State enjoys the discretion in granting or refusing entry visas. In the Syrian region of the U. A. R., no foreigner has the right to enter and travel unless he carries a valid passport duly visaed.

In the United Kingdom and the United States of America as in several other States, the right to admit, exclude or deport aliens has been regarded as an incident of territorial sovereignty. The British State practice also indicates that apart from treaty stipulation to the contary, a State has a right to exclude aliens (including stateless persons) or particular categories of such persons.[1]

In the leading case of Attorney-General for Canada v. Cairn, Lord Atkinson delivering the judgment of the Privy Council, quoted with approval the following passage from Emerich de Vattel's "Law of Nations"—"One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it and to expel or deport from the State, at pleasure, even a friendly alien especially if it considers his presence in the State is opposed to its peace, order and good government, or to its social or material interests."[2]

The State practice of Canada has been pointed out by the Supreme Courts of New Brunswick in 1906 in the case of Papageorgiouv v. Turner, in which Justice Barker declared that "The power of prohibiting aliens' entrance into a country is one which is recognized and acted upon by all civilized countries." The above view was elaborated by the Canadian

1 Lord McNair : International Law Opinions, Vol. II. p 105, Vattel : Law of Nations, Vol. I. S 231 : S. 125.

2 Documents, Public Record Office (The United Kingdom), F.O. 83 2207 : U. S. A. F. O. 83 2277 : France.
Musgrave *v.* Chun Teeong Toy, (1891) Appeal Cases, 272.
Attorney-General for Canada *v.* Cain (1896) Appeal Cases 542 & 546.
Rex *v.* Home Secretary *ex parte* Chateau-Thierry (1917), 1 Kings Bench Division, 922
Rex *v.* Superintendent of Chis Wick Police Station, *ex parte* Sacksteder (1918), 1, Kings Bench Division, 578. In re Lannoy (1942), 1, All England Reports, 574, 2. All England Reports 232.
Rex. *v.* Secretary of State for Foreign Affairs and Secretary of State for the Colonies.
Ex parte Greenberg and others (1947) 2. All England Reports, 550.

Chief Justice in 1919 in a leading case. The Chief Justice said, "The Parliament of Canada, acting well within its right, has prescribed the conditions upon which an alien may enter or be permitted to remain in Canada.[1]

The laws of the United States as to admission and exclusion of aliens and immigration in general may be found in 8 United States Code.[2] Mr. Justice Grey in the course of the opinion of the Supreme Court of the United States in the case of Nishimura Ekiu v. United States has laid down the following dictum which is often quoted : "It is an accepted maxim of International law, that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.[3] According to the practice of the United States, "Those conditions may obviously embrace the terms of permitted sojourn or residence. These may, for example, be exemplified by a statutory requirement that aliens residing within the national domain for or after a specified length of time, apply for registration and be finger-printed.[4] In the view of the Legal Adviser of the United States Department of State, in the absense of treaty obligations, a State is not to bound to admit aliens to its territories.[5]

In 1933, the Supreme Court of the United States declared that "the power of Congress to prescribe the terms and conditions upon which aliens may enter or remain in the United States is no longer open to serious question."[6] In recent years the courts of United States have very often affirmed the traditional view. In 1953, Mr. Justice Clark of the Supreme Court of the United States stated that "Courts

1 Papageorgiouv v. Turner (1906) 37 N. B. R. 449. Rex v. Alamazoff (1919), 47 D. L. R. pp. 533-535. Order in Council P. C. 2115 of September 16, 1930, as amended by Order in Council P. C. 6229 (1951) S. O. R. 19, December 28, 1950.
Re Leong Ba Chat (1952) 4 D. L. R. 715.

2 United States Code, S. 100-299 and 1101-1362.

3 142. U. S. 651, 659 (1892).
Gong Yue Ting v United States, 149, U. S. 698, 705-707. Lem Moon Singh v United States, 158 U. S. 538. Turner v Williams, 194 U. S. 279. : Moore, J. B. : Digest of International Law, Vol. IV pp. 71-80.

4 Hackworth, G. H. : Digest of International Law, Vol. III, S. 277. : Hyde, C. C. : International Law Chiefly As Interpreted And Applied by the United States, 1951, Vol I, pp. 216-217.

5 Hackworth, G.H. : Digest of International Law, Vol. III, p. 717.

6 United States ex rel Volpe v Smith. 289 U. S. 422, 425.

have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the government's political department largely immune from judicial control (alien's) right to enter the United States depends on the Congressional will....."[1]

The views taken by the courts in Argentina,[2] Australia,[3] Belgium, Egypt[4], Germany (West)[5], Eire[6], Mexico[7], Panama[8], and South Africa[9] are to the same effect.

Confirming the view that a State has the right to prohibit or condition the entry and sojourn of aliens within its borders, "International Regulations on the Admission and Expulsion of Aliens" adopted by the Institute of International Law on September 9, 1892 reads as follows: "The law of nations has not yet forbidden a State to exercise the largest discretion in establishing tests of undesirability of aliens seeking admission to its territory, and to that end, to enforce discrimination of its own devising".[10]

The Havana Convention on the Status of Aliens, signed in 1928, also recognizes this right. Article 1 of the Convention declares that "States have the right to establish by means of laws the conditions under which foreigners may enter and reside in their territory." Further, the International Conference on Treatment of Foreigners held at Paris in 1929 approved the following provision in this regard: "Each of the High Con-

1 Shaughdessy v United States *ex rel* Mezei, (1953), 345 U. S. 206; 96L Ed. 956; 73S. Ct. 625.

2 The King v. Carter; *Ex-parte* Kish (1934), 52 C.L.R. 221.

3 Erisina v Egyptian Government (1931), Gazette des Trubanux Mixtes d' Egypte, XXII (1931-32) p. 353.

4 Residence of Alien Trader Case, Neue Juristische Wochenschrift (Germany) 7 (1954), p. 1822.

5 The State (At the prosecution of Hermann Geortz v. The Ministers of State (1947) Irish Law Times Reports (1948), p. 34.

6 In re Carlos Wunchs (1935) 46 Semanario Judicial 5 Epoca 3799. In re Wong (1949) Semanario Judicial de la Federation 5a Epoca Vol. 99, part 3. 2254.

7 In Lay v. La Nacion (1939), 37 Registro Judicial 22.

8 Van In Rensburg. v. Ballinger, (1950) 4 S. A. R. p. 427.: Mohamed v. Principal Immigration Officer. 1951 3 S A.R. p. 884.. Hoosain v. Van Der Metwe, N. o. and others (1935) 3 S.A.R. 535(c). Harneker v. Gaol Supdt. (1951) 3 S.A.R. 430. (c).

9 *Annuaire de l'Institut de Droit International*. XII, p. 226; Scott, J. B.: Resolutions of the Institute of International Law, p. 104.

10 Hudson, M.O.: International Legislation, Vol. IV, p. 2374.: Briggs, H.W.: The Law of Nations-Cases, Documents and Notes, (1953),

tracting Parties remains free to regulate the admission of foreigners to its territorry and to make this admission subject to conditions limiting its duration, or the rights of foreigners to travel, sojourn, settle, choose their place of residence, and move from place to place".[1]

Furthermore, the several agreements and conventions since 1920, providing for the admission of refugees, the latest of which is the Geneva Convention on the Status of Refugees, of July 25, 1951, also recognizes the right of a State to regulate the admission of aliens to its territory. The Convention adopted by the General Assembly of the United Nations in February 1946 on the privileges and immunities of the United Nations provides, ***inter alia***, for the special privileges including immunity from arrest, inviolability of documents, and freedom from alien's registration for representatives of Member States or organs of the United Nations, is another instance of the view that entry of aliens would be possible only on the basis of permission or consent of the State concerned.

Article 3

The Right of Asylum

In the absence of a treaty to the contrary, a State shall have the right to offer or provide in its territory asylum to political refugees or to political offenders.

Commentary

The right of political asylum was developed during the 19th century, largely under the influence of the Belgian practice. Belgium laid down the principle of non-extradition for political offences in an Extradition Law of the year 1833. This provision had great influence on the development of the law of extradition among the States. Many countries incorporated the Belgian principle into their extradition treaties ***verbatim*** or with only insignificant variations.[2] The State's right to grant asylum in its territory to aliens fleeing from political, racial or religious persecution in their country follows from the exclusive character of its territorial jurisdiction. "In the absence of extradition treaties stipulating to the contrary, a State is under no legal duty to refuse

1 League of Nations Doc. C.I.T.E. 62-II-5, pp. 419-421.

2 Oppenheim: International Law, Vol. I (1957) p. 679.

admission to a fugitive alien to its territory or in case he has been admitted, to expel or deliver him up to the persecuting State. On the contrary, States always upheld their competence to grant asylum if they choose to do so." If in the matter of the grant of asylum, the jurisdiction of a territorial State is restricted, such a restriction could be possible only from a relevant treaty between the parties concerned.[1]

What is called "the right of asylum" is nothing more than the liberty of every State to offer asylum to any one asking for it. In the view of most of the States, the right of a State to grant asylum has been recognized on account of its humanitarian character. Thus Article 3 of the convention on Political Asylum adopted in December 1933 by the Pan-American Conference characterizes political asylum as "an institution of a humanitarian character."

The right of asylum so-called does not mean that the individual has the right to claim the protection of asylum nor does it mean the corresponding legal duty to grant it as a State has the right to decide whether or not to grant asylum to an alien. Inspite of the fact that in recent times the constitutional provisions of some countries, e. g. France, Italy, Yugoslavia,[2] have attempted to grant at least minimum protection to political refugees, such provisions have no object other than to define the powers of the national authorities in the matter. Further, from the fact that the Constitutions of several countries expressly provide for the right of asylum to persons persecuted for political reasons, one cannot deduce the existence of such a right as a general principle of law recognized by civilized nations and as such forming part of international law. In the Asylum Case (1950) between Columbia and Peru, the International Court of Justice denied the existence of the right of a refugee to claim asylum under customary international law even among the Latin American countries.[3]

Asylum may be territorial, i. e. granted by a State on its territory ; or it may be an extra-territorial right extending to embassies, consular premises, international headquarters, warships and merchant vessels. The differences between the

1 In re Fabijan, Annual Digest and Report of Public International Law Cases, 1933–34, pp. 360-372.

2 French Constitution (Preamble), Italian Constitution (Article 10), Yugoslav Constitution (Article 31).

3 Schwarzenberger, G. : International Law, Vol. I, 3rd ed 1957, pp. 257-270.

principles applying to the two kinds of asylum flow from the fact that the power to grant territorial asylum is an incident of territorial sovereignty itself, whereas the granting of extra-territorial asylum is rather a derogation from the sovereignty of the territorial State in so far as that State is required to acquiesce in fugitives' enjoying protection from apprehension. Both types of asylum have certain common features as they involve an adjustment between the legal claims of State sovereignty and the demands of humanity.[1]

State Practice

While the laws of Indonesia, Iraq and U. A. R. have specifically provided for the grant of asylum to political refugees, those of Burma, Ceylon, India and Japan are silent in this regard. But inspite of the absence of such legal provisions, Burma and Japan granted asylum to political offenders. According to Iraq and U. A. R., asylum to political refugees is a well established institution under customary international law. The participating countries of the Committee are of the view that the right of asylum is nothing more than the liberty of every State to grant political refugee asylum requested for it, that the fugitives have no enforceable right in international law to enjoy asylum and that the only international legal right involved is that of the State of refugee itself to grant asylum.

The argument that Article 14(1) of the Universal Declaration of Human Rights, approved by the General Assembly of the United Nations on December 10, 1948, which states that "Everyone has the right to seek and enjoy in other countries asylum from persecution" is not acceptable to the States of the Committee. In their view, as in the view of most of the States, the Universal Declaration of Human Rights is not a legally binding instrument, and that it does not impose any duty on a State to grant asylum to refugees and that a State is under no duty to receive large number of persecuted aliens into their territories.

As regards the question of surveillance of a political refugee by the receiving State there does not appear to be unanimity among the Members of the Committee. The laws

1 Lauterpacht, H. ; British Year Book of International Law, 1944, pp. 48-89.

of Burma and Ceylon are silent in this regard. The law of Japan does not admit of surveillance of political offenders at all. Both India and the U. A. R. are not in favour of surveillance of political refugees. Iraq and Indonesia take the line that it may be resorted to, if it became necessary.

When a political refugee misuses the hospitality of the host State, Burma, Ceylon and Japan maintain that he may be deported. According to Indonesia and Iraq, he could be tried and punished just like any other criminal offender. Moreover, Iraq would not hesitate to deport him if it becomes necessary. The U. A. R. takes the line that the State should draw his attention to such impropriety before a decision on the need for strict surveillance could be taken. If he still persisted in such unwarranted political activities, he could be deported but such deportation should not amount to extradition in disguise.

The practice of several other States also confirms the above view that every State has the right under the law of nations to offer asylum to political refugees from other countries, unless it has accepted some particular restriction in this regard.

The attitude of the United States on asylum has been given expression in an Executive Order of December 1, 1932, which declares that : "There is no law of asylum of general application in international law. Hence, where asylum is practised it is not a right of the legate State but rather a custom invoked or consented to by the territorial government in times of political instability."[1] Further, the United States while signing the Havana Convention of 1928, by which the 21 American republics agreed to grant asylum to certain political offenders, reserved the right not to recognize the so-called "doctrine of asylum" as part of international law. The American delegation stated as follows : "The delegation of the United States of America in signing the present Convention establishes an explicit reservation placing on record that the United States does not recognize or subscribe to as part of international law the so-called doctrine of asylum."[2]

The terms of the Havana Convention were again defined in the Montevideo Convention signed on December 26, 1933,

1 Hackworth, G. H. : Digest of International Law, Vol. II, p. 623.
2 Hudson, M. O. : International Legislation, Vol. IV, p. 2415.

Article 1 of which lays down : "It shall not be lawful for the States to grant asylum in legations...to those accused of common offences who may have been duly prosecuted or who may have been sentenced by ordinary courts of justice, nor to deserters of land sea forces." Political asylum is not subject to reciprocity but under Article 2, "judgment of political delinquency concerns the State which offers asylum".[1]

In order to avoid an implied recognition of the "doctrine of asylum" as a part of international law, the United States of America refrained from signing the Montevideo Convention.

The Headquarters Agreements of the United States and of the specialized agencies contain provisions to the effect, that these international institutions should not grant asylum to offenders in their premises, as against the territorial State. These agreements prohibit granting asylum even on humanitarian grounds, for instance, Section 9 (b) of the Agreement between the United Nations and the United States of America signed on June 26, 1947 at Lake Success provides as follows : "Without prejudice to the provisions of the General Convention on Article IV of this agreement, the United Nations shall prevent the headquarters district from becoming a refuge either for persons who are avoiding arrest under the Federal State, or local law of the United States or are required by the Government of the United States for extradition to another country or for persons who are endeavouring to avoid service of legal process."

The International Law Commission has selected the Right of Asylum as one of the fourteen subjects suitable for codification but it appears that no progress on the subject has so far been made.

Article 4

Discrimination as regards Admission of Aliens

(1) A state should not, however, refuse entry to an alien only on the ground of his religion, colour or political belief.

1 In re Bamburger and In re Kaplengst : Annual Digest and Report of Public International Law Cases 1929-30 Case No. 188. In re Pavelic and Kwaternik (1954) : Ibid. (1954) p. 372.

(2) The entrance or sojourn of aliens may not be made subject to the collection of discriminatory or excessive conditions or taxes.

Commentary

The discrimination shown against the citizens of particular states in the matter of reception of aliens has been a controversial issue among states. Exclusion upon purely personal grounds, such as was put into effect by the United States laws prior to 1921, being directed against the citizens of all states without discrimination, gave rise to no international controversy. The exclusion of certain types of immigrants, such as idiots, paupers etc., was not contested either, as being a domestic question, pure and simple. But legislation that marks discrimination against aliens residing in, or emigrating from particular geographical areas, or against those belonging to a particular race, as the United States policy of exclusion of Chinese and Japanese immigrants, as well as the inhabitants of other specified sections of the continent of Asia are in the view of Hyde, "tokens of arrogance that defy explanation and produce resentment on the part of the States whose nationals happen to be singled out for exclusion".[1]

State Practice

As regards the admission of aliens, no discrimination whatsoever is practised in Burma, Ceylon, India, Indonesia, Iraq and the U. A. R. on grounds of race, colour, sex, or religion.

According to Japan where there is lack of reciprocity discrimination is permissible. No information is available about the practice in other participating countries. Sub-section (c) of Section 38 of the Canadian Immigration Act authorises the Governor in Council to "prohibit for a stated period, or permanently the landing in Canada, or the landing at any specified port of entry in Canada, or immigrants belonging to any race deemed to be unsuited to the climate or requirements of Canada, or of immigrants of any special class, occupation or character"[2]. The Order in Council P. C.

1 Hyde, C. C.: International Law, (1950), Vol. I, p. 218.

2 Re Munshi Singh, British Columbia Court of Appeal, 1914, 20 B. C. R. 243. Markenzie, Norman and Laing, Lionelh, Canada and the Law of Nations (1938), pp. 269-272.

2115 of September 6, 1930, as amended by Order in Council P. C. 6229 (1951) S. O. R. 19 of December 27, 1950 affirms the said prohibition of landing in Canada of any immigrant of any Asiatic race. It appears that both the United States and Canada permit admission of quota immigrants, i.e., admission of specified number of immigrants from each country as decided by the receiving State concerned. Australia and South Africa have provisions in their laws to exclude people of certain races as prohibited immigrants.[1] South Africa's practice of discrimination against non-whites is well known. Even in the matter of admission of aliens possessing technical skill, South Africa discriminates against certain races. Panama imposes heavier re-entry tax only on Chinese.[2] In Brazil the Constitutions of 1934 and 1937 both incorporated laws for the quota system ; and subsequent decree laws conferred special privileges only on Portuguese under the Constitution of 1946. The matter is left to be regulated by ordinary law.

It should be observed that States protest against such discrimination only on the basis of merely the inferential right following from the established principles of the equality of States. In short, to exclude all aliens impartially raises no issue of discrimination whereas the exclusions of the citizens of a particular State or region or race denies to that State a right or privilege accorded to others. In the view of Fenwick "the exclusion of certain races as being unassimilable is, ...a political rather than a legal question".

Article 5

Excludable Aliens

(1) Admission may be refused to any alien in a condition of vagabondage, beggary or mendicancy or to one who may be suffering from an incurable or contagious disease of a kind likely to endanger the public health of the country or one who is strongly suspected of serious infractions of law committed abroad against the lives or security of individuals or against public property or one who has been previously expelled from another State, as well as to such aliens as may have been convicted of extraditable criminal offences.

1 The Immigration Restriction Act 22 of 1913 of South Africa. The Australian Immigration Acts 1901-1930. Ex parte Gurwitz (1937). Natal P. D. 185.

2 Lay v. La Nacion (1939) 37 Registro Judicial 227.

(2) Admission may be refused to an alien if in the opinion of the receiving State the entry or residence of such a person in the country is likely to affect prejudicially the interests of its national security or public order.

(3) Admission may be forbidden to indigent persons and those of advanced age who have no adequate means of supporting themselves, unless their support is sufficiently guaranteed at their place of destination.

Commentary

From early times the right to exclude aliens has been generally recognized, as every independent State, by reason of its unrestricted territorial jurisdiction or supermacy has full power to exclude aliens from the whole, or any part of its territory.

But in practice, however, in modern times the exclusion of aliens as such is rare. The factors of commerce, travel, enlightenment and the realization of the worth and the status of individual have inevitably operated to restrain the undoubted power of each independent State in this regard.[1] In the words of Borchard: "A Government that would seek today to take advantage of its right to exclude all aliens would violate the spirit of international law and endanger its membership in the international community."[2] Thus the right of total exclusion is, however, more theoretical than real, as in actual practice, no State can be assumed to be desirous of cutting itself off from all intercourse with the outside world. It is the self-interest of every State that is a powerful incentive to permitting such intercourse, as without it the State itself would be excluded from the current of international life. Should it do so it might reasonably be held to have forfeited its position as a member of the international community. When it was asserted by the older jurists that there was a legal "right of intercourse" as between States, all that was meant, consistent with the law was that by custom some degree of commercial and social intercourse had come to be regarded as a normal condition of present day international life. This is an entirely different matter from an obligation on the part of a particular State to receive all or any of those

1 Hall : International Law, Sixth Edition (1909) p. 211.

2 Borchard, E. M : The Diplomatic Protection of Citizens Abroad (1915) pp. 46-47.

who only come with the intention of becoming permanent residents.[1]

The question of exclusion on the ground of religion has pratically disappeared from the modern world. Prior to the sixteenth century, when one faith was prevalent in Western Europe, there was a complete religious solidarity. When that solidarity was shattered by the sweeping tide of the Reformation, there was for a long time in many States a feeling of hostility towards those following a different religion. The successful culmination of the Reformation and the bringing of people's minds to the doctrine of freedom of religious worship has changed the people's outlook towards religion. The question of religion has been displaced by factors of race, politics and economics. It may be noted that the immigration policies of several States have recently shown a reversion to the practice of excluding aliens for racial, political or economic reasons.

The total exclusion of immigrants may at any time become unaviodable for some States which feel that the number of immigrants to their territories has exceeded the capacity for beneficial assimilation. Under those circumstances, the general principle of the right of exclusion could be given effect to without giving rise to legal grounds of protest from other States. The exclusion laws of States which reflect the exercise of the full measure of the privilege by a territorial sovereign could be challenged merely on grounds of policy than on those of law.[2] As regards the undesirable alien, international opinion is now generally unanimous that on sanitary and moral grounds he should be kept out or turned out.

State Practice

In keeping with the traditional view, Iraq and India claim unlimited discretion in the matter of exclusion of aliens from their territories. They do not think that they will have to assign any reason for such exclusion. Only unobjectionable non-immigrant aliens are admitted into the countries of the Committee. Admission for permanent settlement is generally not easy. Indonesia and the Egyptian Region of the U. A. R. permit foreigners for permanent residence only if the latter

1 Fenwick, C. G : International Law, Third Edition, (1948), pp. 267-268.

2 Hyde, C. G : International Law 1950 vol. I p. 218

are considered to be capable of contributing to the culture or the wealth of the country. Aliens are allowed to enter the Syrian Region of the U. A. R. only if they undertake not to seek employment in Syria until after they are granted the permit of residence.

The Participating Countries of the Committee claim the right to exclude certain categories of aliens for political, economic, health, moral and other reasons, but not on racial grounds. Burma and Egypt exclude the entry of unskilled labourers and those likely to threaten the public security and the general morality of the country. Undesirable persons are not allowed to enter Ceylon, Indonesia, Iraq and Japan. Indigent people, those suffering from incurable disease, those who are guilty of extraditable crimes, those who had been previously expelled from Syria, those who are likely to endanger the security of the country, prostitutes and their associates and the smugglers of opium, hashish and other narcotic drugs are not permitted to enter the Syrian Region of the U. A. R. But she admits aliens who seek entry into Syria for obtaining medical treatment, provided they have sufficient funds to support themselves while in Syria and that they have obtained the special permission for the purpose from the Ministry of Foreign Affairs.

The Immigration laws of the United States generally exclude the following aliens: Mentally defective, Paupers or Vagrants, Diseased persons who are mental or physical defectives, Criminals, Polygamists, Anarchists, Members of unlawful organizations, Prostitutes and Procurers, Contract labourers, Persons likely to become a public charge, Persons previously deported, Persons excluded from admission and deported, Persons financially assisted to come to the United States, Stowaways, Children unaccompanied, Natives of the Asiatic Barred Zone, Illiterates and Accompanying aliens in certain cases.[1] The United States excludes or conditions the entrance of immigrants, and by the Immigration Act of 1924 restricted each admitted nationality to a quota based on the ratio of that nationality to the population under the census of 1890 with provision for adjustment in 1927. The Immigration Act of 1924, in undertaking to restrict immigration in a way designed to safeguard the existing racial composition

1 Hyde, C.C: International Law, 1950, Vol. I, pp. 221-226.

of the United States, affects adversely immigration also from south-eastern Europe. As the discrimination is indirect, and due to conditions which do not reflect upon the character of the immigrants from the praticular country the "quota system" has not given rise to valid legal protests.[1] Further, the partial exclusion of alien immigrants by the United States has been acquiesced in by other States in so far as it has been applied to peoples of all nationalities alike. In December 1943, the United States repealed its Chinese Exclusion Acts.

Under the laws of the United Kingdom, undesirable foreigners are not permitted to enter her territories. The undesirable aliens according to her laws and regulations are those who had been convicted of a felony or misdemeanour or had been in receipt of parochial relief. They also exclude alien immigrants who are diseased and who have not the means of decently supporting themselves or their dependents.

The practice of other States also indicates that normally certain classes of aliens are excludable for example, aliens who are physically, morally or socially unfit or unsuitable have been generally denied admisson into the territory of a State in accordance with their respective municipal laws. The Law 81 of 1876 of Argentina denied entrance to immigrants who were found to be physically unfit to work.[2] Again, aliens suffering from trachoma were not permitted to enter Argentina.

Article 6

Classification of Aliens

(1) Aliens may be classified into two groups depending on whether they intend to enter the country for a permanent or a temporary stay.

(2) A State should without special restrictions, admit aliens seeking entry for purposes of transit tourism or study, and such entrance may be permitted with the understanding that they are forbidden to make their residence in the country permanent, provided that the prohibition shall be notified to individual concerned in writing.

1 Hackworth, G. H: Digest of International Law, Vol. III, 741 ff.
Hyde, C. C. : International Law, 1951, Vol. I. pp. 226-228.
Parker G. H.W: "United States Immiration Act of 1924"

2 In re Bertone (1932,) 164 Fallos de la Corte Suprema, 290.
Macia Y Gassol 1928 (1928)
In re Blas Hernandez (1935):
In re Zlanik (1938):
In re Chaccal (1938), 64 Jurisprudencia Argentina 432.

Commentary

Most states make a distinction between aliens who intend to settle down in the state, and those who intend only to travel in the country as tourists. No alien is allowed to settle in the country without having asked for and received a special authorization for the purpose. Tourists are normally permitted to enter provided they satisfy the routine police and visa regulations of the country concerned.[1]

State Practice.

Burma and Iraq permit the entry of both the classes of foreigners without any distinction. India and Indonesia differentiate between tourists and permanent settlers. On the whole the laws relating to entry of non-immigrant aliens are less stringent. Immigration to Ceylon is generally not permitted. The Laws of Ceylon make no distinction between tourists in her domain whether they are for a short or for a prolonged visit. Japan makes a distinction between permanent residents, the aliens who enter for residence and those who enter as tourists. In the Egyptian Region of the U.A.R. a distinction is made between mere visitors and those who are going there for permanent settlement. Its immigration policy admits only those who are likely to contribute to the culture or the national wealth of the country, and such persons are provided with special residence permits. Further in order to attract tourists to the country she also shows them certain concessions, such as exemption from certain fees. The customs formalities dealing with them are not cumbersome, and they are not required to pay certain taxes as in the case of other aliens. There are no differences between these two classes in the Syrian Region of the U. A. R., except in the matter of fees payable for the visa and certain taxes that the aliens are required to pay.

According to the United States Immigration Act of 1924, S 13(c), no alien ineligible to citizenship shall be admitted to the United States except such as previously lawfully admitted are returning from a temporary visit abroad," and those who are entering for professional or educational purposes.[2]

1 Oppenheim, L : International Law, Vol. I. (1958) Eighth Edition, p. 676.
2 43, U. S. Stat. 162, the Code of Laws of the U.S.A. lit. 8. S 213.

Some states permit the entry of aliens for permanent settlement only if they are skilled technicians. The Mexican Immigration Law admits to Mexico alien technicians who cannot be replaced by Mexicans.[1] As regards foreigners seeking jobs in Singapore, rules permit the entry of only foreign specialists for specific periods. Entry permits are granted to such foreign specialists only when suitable nationals are not available.[2]

Article 7

(1) Without prejudice to the competence of a State to regulate the right of sojourn and residence, which shall include the liberty to compel an alien to comply with its requirements as to registration, an alien shall be entitled to travel freely, sojourn, circulate or reside in the territories of the State in conformity with the laws and regulations applying therein.

(2) In times of national emergency, however, a state shall have the right to impose reasonable restrictions on such right of movement and residence of aliens.

Commentary

It is an accepted rule of international law and practice that a State has the right to condition the entrance and sojourn of aliens within its borders. Aliens may be admitted with the understanding that they are to have only certain privileges; for example, the privilege of study or travel, but not the right to engage in business or any other occupation reserved for the nationals. Further it is not uncommon for a state to require the registration of foreign nationals sojourning or residing in its territory. Oppenheim says: "A State can, as Great Britain did in former times, and again during the First World War and since, compel them (aliens) to register their names for the purpose of keeping them under control and the like".[3] In support of this he cites the following Act of Great Britain: Act for the Registration of Aliens, 1836 (6 & 7 Willian 4, C. 11), Alien Registration Acts, 1914 and 1919, and the Aliens Order, 1920. Such right is inherent in its right to regulate the admission of aliens to its territory. This view is supported by Mr. Justice Gray's dictum in the case of Nishimura Ekiu

1 In re Carlos Wunchs, 1935. The Supreme Court of Mexico.
2 The Hindustan Times, Delhi, dated 23rd February, 1959.
3 Oppenheim, L : International Law, Vol. I (1958) Eighth edition p. 67.

v. United States, in which he stated the maxim of international law, that every sovereign nation has the power as inherent in sovereignty, and essential to self-preservation, ...to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. Those conditions may obviously embrace the terms of permitted sojourn or residence. These may, for example, be exemplified by a statutory requirement that aliens residing within the national domain for or after a specified length of time, apply for registration.....".[1]

State Practice

As far as the Secretariat is aware, registration of aliens is necessary in all the countries participating in the Committee. There are legal provisions in these countries in this regard. Under the Aliens Registration Law, an alien entering Japan must notify his presence to the mayor of the city concerned within 60 days of his arrival. This he does in the form of a request for permission to stay. Any change of address too will have to be notified within 15 days. Foreigners in the Egyptian Region of the U. A. R. are required to notify their presence to the Foreigner's Department of Egypt. They are to furnish the authorities with all the relevant information required by the latter, especially the purpose and the possible duration of the visit. A Residence Card must be obtained in case the stay of an alien over sixteen, exceeds six months. As regards the aliens obligation to register at every town he visits during his stay in the host state the practice varies with each state. While an alien in the U. A. R. is normally expected to notify the authorities the change of address, he is not required to do so in Burma, Ceylon, Iraq and Japan. Even in the U. A. R. exceptions to the general rule are permissible, for instance, tourists are not required to notify change of address. Inspite of the fact that registration at each and every place he visits is not necessary in India, he is expected to keep the authorities informed of his movements in the country. A visiter to Indonesia is required to register only at the place of entry, but the hotel or boarding house owners with whom he stays during his travel are obliged to enter his name in the register they are expected to maintain.

1 142 U.S. 651, 659 Hyde, C.C. : International Law Chiefly as Interpreted and Applied by the United States, (1951). Vol. I. pp. 216-217.

In the United States of America, the prevalent practice is best explained in the judgment of the Supreme Court as "the United States Congress having the right, as it may see fit, to expel aliens of a particular class, or to permit them to remain, has undoubtedly the right to provide a system of registration and identification of the members of that class within the country, and to take all proper means to carry out the system which it provides".[1]

Several States of United States of America have dormant on their Statute books laws passed during 1917-1918, empowering the governor to require registration when a State of War exists or when public necessity requires such a step.[2] States, like Pennsylvania, have passed registration laws more recently ; e. g. S. C. Act (1940), No. 1014, Sec. 9 P. 1939. N. C. Code (1939), Secs. 198(a) (b). The Pennsylvania Alien Registration Act of 1939 provided for the limitation, regulation and registration of aliens as a distinct group for the protection of inhabitants and property. It may be noted that in several States of the United States of America even municipalities insisted upon local alien registration. Aliens need not carry cards, and can only be punished for wilful failure to register.

Section 31, of the U. S. Act of Congress approved on June 28, 1940, makes it obligatory on the part of every alien "now or hereafter in the U. S. 14 years of age or older, who remains in the U. S. for 30 days or longer, to apply for registration and to be finger printed." Provision is also made in the same section for the registration by parents or legal guardians of alien children under 14 years of age.

In the United Kingdom normally the Secretary of State may make regulations with respect to the landing and embarking of aliens, the conditions to be imposed upon them, the exemption of any person or class of persons from all or any of the requirements laid down, and generally for prescribing anything required or permitted to be prescribed. In addition to or in substitution for the general restrictions on aliens, an alien or a class of aliens may be subjected to certain special restrictions which the Secretary of State may deem

1 149 U. S. 698, 705-707 ; Briggs, H. W. ; Law of Nations.

2 Conn. Gen. States, (1930), tit. 59, Sec. Fla. Comp. Gen. Laws (1927), Sec. 2078 ; Iowa Code (1939). Sec. 503 ; La. Gen. Stats. (DART 1939). tit. 3, Sec. 282 ; Me. Rev. Stats (1930), ch. 34, Sec. 3; N. H. Pub. Laws (1926)ch. 154 ; N. Y. Cons. Laws (Executive Law), Sec. 10.

it necessary in the public interest to order (Aliens Order, 1920, art.(11) (1). Such special restrictions may relate to residence, reporting to the police, registration, (An additional restriction is imposed by the Direction dated 18th September, 1939, S. R. & O. 1939 No. 1059, which requires an alien to furnish particulars as to his business address to the Registration officer); occupation, employment, the use or possession of any machine, apparatus, arms and explosives or other article, as well as other matters deemed necessary. The Aliens Order of 1920 deals with the following subjects : duty of householders, registration, particulars to be supplied by the alien, exemption from registration, registration certificates and the duties of keepers of premises.

As regards the particulars to be supplied by an alien, it lays down that, "Every alien who has attained the age of sixteen years and who has a residence (Aliens Order, 1920, art. 20 (2)) in the United Kingdom must comply with the following requirements as to registration; (i) he must, as soon as may be, furnish to the registration district in which he resides certain prescribed particulars[1] and also must establish to the satisfaction of the officer his nationality and identity[2], except where he can satisfactorily explain his inability to do so (Aliens Order, 1920, art. 6 (1) (a)); (ii) he must furnish the registration officer with all information required for maintaining the accuracy of the register, and in particular, where any circumstances occur which render the particulars previously furnished by him inaccurate, he must within forty-

1 The particulars required are; name, sex, present nationality and how and when acquired and previous nationality (if any); date and country of birth, profession or occupation, date, place, and mode of arrival in the United Kingdom; address of residence outside the United Kingdom, photograph (which is not furnished by the alien may be taken by the registration officer) government services, name of country served, nature and duration of service and rank or appointments held; particulars of passport or other document establishing nationality, or identity ; signature (in characters of alien's language if required and finger-prints if required; any other matters or which particulars are required by the registration officer (Aliens Order, 1920, Sch. (1). An additional requirement is the address of place where the alien carries on any business, trade or occupation, or employment. The alien must give his name in full and not the name by which he is generally known, and if he omits to give his name in full with intent to conceal his identity he commits an offence (Silverman v. Hunt (1915), 31 T.L.R. 410 Registration under the Aliens Order 1920 does not prevent an alien from acquring an English domicile. Sanelli v. Zanelli (1948), 64T. L. R. 556.

2 This is done by producing a passport duly furnished with a photograph or some other satisfactory document (Aliens Order, 1920, art. 6 (1) (a).

eight hours supply the registration officer with particulars of those circumstances (Aliens Order, 1920, art. 6 (1) (b)). If the registration officer requires it, he must supply a recent photograph; (iii) he must, if about to change his residence, furnish to the registration officer of the registration district in which he is then resident particulars of the date on which and the place to which he proposes to move; and if his new residence is in a different registration district, he must within forty-eight hours of arriving in the new district report his arrival to the registration officer of that district (Aliens Order, 1920, art. 6 (1) (c)); (iv) he must, whenever absent from his residence continually for more than two months, keep the registration officer informed of his address and every change of address, and must also inform him of his return to his residence (Aliens Order; 1920, art. 6 (1) (b)).

Where an alien, who has attained the age of sixteen years, has no residence in the United Kingdom he may supply to a registration officer the name and address of a person being a British subject resident within the registration officer's district, and if the registration officer is satisfied as to the respectability and good credit of that person, then the alien is deemed to be resident at that address ; in such a case all the provisions applicable to a resident alien apply, save that the alien must keep the British subject and not the registration officer informed of his current address, and the British subject must on demand furnish to the registration officer all information in his possession as to the alien (Aliens Order, 1920, art. 6 (2)). An alien who does not supply the name and address of such a British subject must attend at the office of a registration officer and furnish him so far as possible with all the particulars that would be required if he were resident in his district, and must report to the registration officer of any other district in which he stays for more than twenty-four hours. And he must notify the registration officer to whom he last reported of any intended change of address (Aliens Order, 1920, art. 6 (2)).

The requirements relating to the furnishing of particulars must also be complied with forthwith after landing by an alien who, being able to land without leave of an immigration officer, lands in the United Kingdom from a ship or aircraft coming from a place in the specific area, if he last entered the specified areas by landing in the Republic of Ireland and

since so doing has not previously landed in the United Kingdom (Aliens Order, 1920, art. 5a (1) (2); Aliens (No. 2) Order, 1952, S. I. 1952 No. 636. art. 11(3).[1]

Article 8

Aliens, Personal Freedoms

(1) In conformity with the local laws and regulations that may be applicable, aliens shall enjoy the following rights and privileges on a footing of equality with the nationals :-

(a) Freedom of speech and expression ;

(b) Freedom from arbitrary arrest ;

(c) Freedom to practice his own religion.

(2) Aliens shall enjoy on a basis of equality with nationals protection of the local laws.

(3) Aliens shall be entitled to free and ready access to the courts of law and to the protection of Executive and Police authorities. They shall enjoy in this respect the same rights and privileges as nationals. They shall on the same conditions enjoy the benefit of legal assistance.

(4) A State admitting aliens into its territory shall be free to regulate by law or executive orders professional or business activities of the aliens resident therein.

(5) A State shall be free to regulate by law the conditions under which an alien will be free to seek employment.

(6) An alien shall not enjoy the right of suffrage.

(7) A State may also by law prohibit political activities on the part of an alien.

Commentary

An alien who enters the territory of a State whether for the purpose of trade or travel, or even when he prolongs his sojourn indefinitely, becomes subject to its laws exactly in the same way as the nationals of that state. In a world of today a large and increasing number of persons travel and sojourn

1 The Statutes, Third Revised Edition, Vol. XV, London (1950), pp.

abroad for reasons of health, recreation that is tourism, education, trade etc. The existence of an ORDER PUBLIC INTERNATIONAL which has been developed on a juridical and historical basis is considered as the *sine qua non* of international legal relations among States. In keeping with that there exists a recognized international standard of conduct in respect of treatment of an alien, with which in certain circumstances it becomes the duty of the State to comply.[1] When aliens are admitted, the rules of international law protect them against the arbitrary action of the host State, "as international law imposes upon that State certain obligations which under the sanction of responsibility to the other States it is compelled to fulfil. The establishment of the limit of rights which the State must grant the alien is the result of the operation of custom and treaty, and is supported by the right of protection of the alien's national State. This limit has been fixed along certain broad lines by treaties and international practice. It has secured to the alien a certain minimum of rights necessary to the enjoyment of life, liberty and property, and so has controlled the arbitrary action of the State."[2]

Every State must grant to foreigners at least equality before the law with its own subjects, as far as safety of person and property is concerned. In accordance with recognized principles of international law, applied between States, aliens are not entitled to political rights and are not therefore subjected to corresponding civic burdens. A State may exercise large control over the pursuits, occupations and modes of living of its inhabitants. In so doing it may doubtless subject also resident aliens to discrimination without necessarily violating any principle of international law. A State may reasonably exercise rigid control over the practice of learned professions within its territory. Thus it may prescribe tests of fitness of persons to be permitted to practice and that regardless of their nationality. It is not under any obligation to accept as assurances of fitness the degrees conferred by foreign institutions of learning, and especially certificates issued by those not functioning under governmental supervision or enjoying local official recognition. The territorial

1 The Year Book of World Affairs, 1948, pp. 292-93.
2 Borchard, Edwin M. : The Diplomatic Protection of Citizens Abroad (1915) pp. 27, 43.

sovereign is normally free to decide for itself on the extent and mode of recognizing the attainment of persons trained in foreign countries.

Hackworth says : "Numerous statutory provisions have been enacted in the various States excluding aliens from engaging in certain professions, trades and occupations such as accountancy, architecture, medicine, engineering, law, pharmacy, teaching, auctioneering.....etc. These enactments have generally been defended on the ground that they represent a justifiable and necessary exercise of the police power."[1]

Oppenheim says that "apart from protection of person and property, and apart from the equal protection before courts of the rights enjoyed by aliens by virtue of the law of the land every State can treat aliens according to its discretion except in so far as its discretion is restricted through international treaties. Thus, a State can exclude aliens from certain professions and trade..... Before the First World War there was a tendency to treat admitted aliens more and more on the same footing and citizens' political rights and duties, of course, excepted..... But this is no longer the case..... In practically all countries the restrictions are now, in a period of economic nationalism, much more severe."[2]

According to Briggs : "Although it is impossible to define with precision the scope and permissible limitations of all the rights—civil, economic, public and private enjoyed by aliens, it is important to note that the sufficiency of national legislation and practice on the point of international law is always subject to the test of the international minimum standard of treatment as determined by diplomatic practice and the jurisprudence of international tribunals."[3]

It has been held in the decided cases and by text-book writers that aside from fundamental rights of life and liberty, the alien must be granted certain rights pertaining to his legal personality (*e. g.* rights of contract, acquisition of personal

1 Hackworth : Digest of International Law, Vol. III, p. 618.
2 Oppenheim, L : International Law. Vol. I.

property, marriage and family rights) rights of access to courts and to judicial protection for his person and property.[1]

State Practice

Aliens are normally permitted to enjoy in the Member Countries of the Committee personal freedoms and essential civil rights on terms of equality with the nationals. There are safeguards against their arbitrary arrest. In case of arrest, either by means of *Habeas Corpus* proceedings as obtaining in Burma, Ceylon and India, or through petitions to the judicial or executive authorities as in the case of Indonesia or by means of the procedure known as "objections against provisional detainment" as prevalent in Iraq and the U.A.R., aliens could release themselves from imprisonment. An alien could have free access to their law courts and he is absolutely free to choose any counsel he likes. In case of denial of justice in the U.A.R. even a judge is liable to be tried for it as a criminal offence.

As regards the right of speech and religion, practice among these countries varies. In Burma, Ceylon, Indonesia and Japan, they are entitled to as much freedom of speech and religion as their respective nationals. In Iraq, they enjoy these rights subject to the discretion of the executive authorities in this regard. While the aliens are permitted in the U.A.R. to enjoy freedom of speech in equal measure with the nationals, in regard to freedom of religion, they are entitled to national standard of treatment only along with the national minorities, subject to the condition that it does not adversely affect the public order and general morality in the country. Though the Constitution of India guarantees to aliens as well, freedom of conscience, their freedom of speech is not safeguarded. In none of these countries aliens could with impunity indulge in subversive activities.

As a rule aliens are not entitled to the right of suffrage in these countries. As regards alien's employment

1 Mackenzie, Norman : The Legal Status of Aliens in Pacific Countries : An International Survey of Law and Practice concerning Immigration, Naturalization and Deportation of Aliens and Their Legal Rights & Disabilities (Oxford, 1937).
Annual Digest and Reports of Public International Law Cases, Position of Aliens.
Borchard, Edwin M. : The Diplomatic Protection of Citizens Abroad 73 ff.

opportunities, in Ceylon, India and Japan no exclusion is practised, but in Burma, Indonesia and Iraq, he is excluded from certain professions. While Burma and Iraq employ aliens only to temporary posts, Japan favours foreign experts for short periods. Foreigners are permitted to enter government service in Ceylon, India and Indonesia but in Burma and Iraq this is possible only in respect of temporary posts, as permanent posts are normally reserved for their nationals. As between aliens, no discrimination is practised in all countries except in Ceylon. The U. A. R. claims absolute discretion in this regard.

As regards the standard of treatment accorded to aliens, while Burma, India and Indonesia are in favour of the national standard, Iraq is in favour of adding qualifications to the same. While Japan would like to conform to the requirements imposed by international law on Human Rights, Ceylon favours the line that the State must be free to impose restrictions at its discretion in the interests of vital national interests. Though the U. A. R. is in sympathy with the national standard of treatment, in its view the State must also be free to practise discrimination against aliens, if it becomes necessary in the interests of public order and morality of the State. Further, so long as his basic rights are ensured, in the view of the U. A. R., the alien must not grumble against this discrimination.

It may be observed that in the Roberts Claim (1926) the International Claims Commission held that equality of treatment of a foreigner as compared with nationals is not enough. The adequacy of the application of the national standard must be measured in the light of the minimum standard of international law. It said that facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of maltreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of the authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization. In its view, in cases of this kind compliance with international law makes it necessary for a State to "accord to aliens broader and more liberal treatment than it accords to its own citizens under its municipal law."[1] Further, it may

1 2, United Nations Reports of International Arbitral Awards, pp 77 & 80.

be noted that the Permanent Court of Arbitration held in the case of the North Atlantic Coast Fisheries in 1910, the French Claims against Peru in 1921 and the Norwegian Shipowners' Claims in 1922, that municipal law which is contrary to international law connot be pleaded before an international tribunal as an excuse for the non-fulfilment by a State of its obligations under international law. The Permanent Court of International Justice also has affirmed this rule. In its view, a State is estopped from pleading before the Court that the non-fulfilment of its international obligations or the violation of an international treaty is due to its constitution, or acts of omission on the part of its legislative, judicial and administrative organs or any self governing body under its control.[1] Furthermore, it has been maintained both by the Permanent Court of International Justice and its successor the international Court of Justice that municipal law cannot prevail either over the obligations of State under international customary law, including the minimum standard of international law or over its obligations under international treaty law.[2] A violation of

1 Mavrommatis Jerusalem Concessions Case (Judgment on merits) decided by the Permanent Court of International Justice in 1925, Series A, pp. 42-43.

The Lotus case (judgment decided by the Permanent Court of International Justice in 1927, Series A, p 24.

Chorzow Factory Case (Claims for Indemnity-judgment on jurisdiction decided by the Permanent Court of International Justice in 1927, Series A, p. 33.

Advisory Opinion delivered by the Permanent Court of International Justice in the Case of Danzig Railway Officials (1928), Series B, p 26.

The Case of Free Zones of Upper Savoy and the District of Gex (Second Phase Order), decided by the Permanent Court of International Justice in 1930, Series A, p. 12.

Judgments, Orders and Advisory Opinions of the Permanent Court of International Justice in the cases of Treatment of Polish Nationals in Danzing, Advisory Opinion (1932). Series A, B, p. 24

And Free Zones of Upper Savoy and the District of Gex (Judgment 1932) Series, A, B, p. 167.

2 The Case of German Interests in Polish Upper Silesia (judgment on merits) decided by the Permanent Court of International Justice in 1926, Series A, pp. 21-24, 42, & 46.

The Case of Chorzow Factory (Claims for Indemnity-Judgment on Jurisdiction), decided by the Permanent Court of International Justice in 1927, Series A, p. 27.

In the Advisory Opinion on German Settlers in Poland, delivered by the Permanent Court of International Justice in 1923, Series B pp 25 & 36–37 : In the Advisory Opinion on the Greco-Bulgarian Communities, delivered by the Permanent Court of International Justice in 1930, Series B, p. 32.

Reports of Judgments of the International Court of Justice 1949, p 180 ; Reports of Judgments of the International Court of Justice, 1953, pp. 121 & 125.

international law does not cease to be so because State applies the same treatment to its own subjects also.[1] It may be added that in the Chevreau Claim case decided in 1931 between France and the United Kingdom, failure by the United Kingdom to respect human dignity of the alien was considered as not in keeping with State's duty under international law. The Arbitrator held that although there was probable cause for the arrest of M. Chevereau by the British forces in Persia, his detention and subsequent deportation to India and Egypt took place under circumstances which justify a claim in international law.[2] The principles involved in the case of Chevreau Claim which among others, have been applied by different international Commissions may be briefly stated as follows:

(1) The arbitrary arrest, detention or deportation of a foreigner may give rise to a claim in international law. But the claim is not justified, if these measures were taken in good faith and upon reasonable suspicion, especially if a zone of military operations is involved.

(2) In cases of arrest, suspicions must be verified by a serious inquiry, and the arrested person should be given an opportunity to defend himself against the suspicions directed against him, and particularly to communicate with the consul of his country, if he requests it. If there is no inquiry, or if it is unnecessarily delayed, or, in general, if the detention is unnecessarily prolonged, there is ground for a claim.

(3) The detained person must be treated in a manner fitting his station, and which conforms to the standard habitually practised among civilized nations. If this rule is not observed, there is ground for a claim.

Broadly speaking, a State may exercise control over the religious training and worship of the inhabitants within its border.[3] States having an established religion or church,

1 The Case of German Interests in Polish Upper Selesia (Judgment on Merits), decided by Permanent Court of Justice in 1926, Series A. 7 p. 32. The case of Peter Pazmany University (Judgment) decided by the Permanent Court of International Justice in 1933, Series A/B, 61, p. 243.

2 4, United Nations, Reports of International Arbitral Awards, pp. 1113 1131. 27 American Journal of International Law, (1933).

3 Mr. Buchanan, U. S. Secretary of States to the Rev. Baird, October 22, 1845 : Moore J. B. : Digest of International Law Vol. II, 171 : Mr Fish, U. S. Secretary of State to Mr Delaplaine, Charge d' Affairs at Vienne, June 2, 1875, Moore, J. B. Digest of International Law Vol. II, 172.

Continued on next page.

generally accord to resident aliens, who may dissent from its doctrines, a large measure of religious freedom. It is not uncommon among States to secure freedom of conscience and worship for their nationals in other lands, by means of treaties, if the local laws do not provide for the same. A State may forbid the teachings or practices of aliens, in so far as they are considered to be contrary to public morals, or subversive of its political institutions ; and it may also determine for itself whether the religious activities of aliens, are of such a character. In 1935, the U. S. Department of State declared that "while we are naturally solicitious of the right of American citizens to give expression in a proper manner to their religious beliefs wherever they may be, we of course can no more insist upon a privilege in this respect, if contrary to local law then we can insist upon their right to practise a prefession, or to carry on a business that is declared by that law to be contrary to the policy of the State.[1]

Recent treaty practice among States are indicative of this. Thus the bilateral treaty between the U. S. and Germany of December 8, 1923, acknowledged the privilege of freedom of worship of nationals of the Contracting Parties, in their respective territories, "provided their teachings or practices are not contrary to public morals."[2] Similar provisions are found in the Treaty of Friendship, Commerce and Consular Rights, between the United States of America and Norway of June 5, 1928[3] and the Treaty between the United States of America and Poland of June 15, 1931.[4] Further, Article 4 of Convention between the United States of America and Great Britain and Iraq of January 9, 1930, gives expression to the same right of the territorial severeign.[5]

The United States is inclined to the view that its citizens abroad must be allowed the enjoyment of the same

Mr. Evorts, U. S. Secretary of State to Mr. Kasson, Minister to Austria-Hungary, May 19, 1879 : Moore, J. B. : Digest of International Law, Vol. II, 174.

Mr. Blaine, U. S. Secretary of States, to Hicks, Minister of Peru, December 5, 1890, Moore. J. B. : Digest of International Law, Vol. II, 178.

1 Hackworth, G.H. : Digest of International Law, Vol. III p. 647.

2 U. S. Treaty, Vol. IV, 4191-4193.

3 U. S. Treaty, Vol. IV, 4527-4529.

4 Ibid., 4572-4574.

5 Ibid., 4335-4337.

privileges of religious freedom as are accorded to the nationals of other States.[1] The U. S. States practice points to the fact that inspite of her deep interest in religious freedom, it normally does not intervene on behalf of its nationals in foreign lands except in cases, where the religious persecution is concerned to be directly injurious to rights of the nation or of its nationals.[2]

The Treaty of Friendship, Commerce and Navigation, between the United States and the Italian Republic signed in Rome on February 2, 1948, secures the permission for the nationals of the either Contracting Party, to exercise liberty of conscience and freedom of worship. Further this treaty permits the nationals of the parties the right to bury their dead, within the respective territories, according to their religious customs in suitable and convenient places.

Under the laws of Burma, Ceylon, India, Indonesia, Japan and U. A. R., the foreigners enjoy equal degree of freedom of religion as are exercisable by their own nationals. Aliens in Iraq enjoy this freedom, which as in the case of the freedom of speech, is subject to the discretion of the executive authorities of Iraq. In the U. A. R. the freedom of religion of the foreigner is subject to the interests of public order or general morality of the State.

As regards the rights of an alien to practise any profession, Mr. Wilson, the United States Assistant Secretary of State observed in 1937, "the Congress of the United States has deemed it necessary to limit the right of aliens to participate in certain professions and industries, especially those related to the merchant marine and public communications."[3] Such action is not believed to have been violative of any requirements under international law. The United States has acknowledged the propriety of the application of this principle with respect to Americans seeking to practise a learned profession in a foreign State, provided of course, the public regulations were applied impartially to American residents, and that there were no discrimination favourable to those of other alien nationalities. Thus in 1933, the United

1 Mr. Root, U. S Secretary of State to Mr. Lieshman, Minister to Turkey, December 14, 1905, U. S. Foreign Relation, 1906 II, 1377.
2 Moore, J. B, : A Digest of International Law Vol. VI, pp. 362-365.
3 Moore, J. B. : A Digest of International Law, Vol. IV, p. 13,

State Department of State declared that it recognized the right of the several Mexican States to prescribe rules and regulations relating to the practice of medicine, so long as they did not discriminate against American citizen as such. In America, the practice of a particular profession, such as that of law is possible only by those who owe allegiance to the State. Thus, admission to the legal profession in several States of the United States, or of the territorial possessions thereof, is becoming conditional upon certain things, i. e. the possession by the applicant of American nationality. It is said that there is a tendency, moreover, to establish similar prerequisites for eligibility for the practice of certain other professions as well. For example, in the State of New York, the issuance of a certificate of certified public accountant requires that the applicant therefor must be a citizen of the U. S. or a person who has declared his intention of becoming such citizen.[1] Thus a State may lay down the conditions under which learned professions may be practised within its borders and in the course of so doing it may confine the privilege of practice to individuals who are its own nationals. The United States has not infrequently undertaken by treaties to accord the nationals of other States residing in its territories the same measure of protection for their persons and property, and the same rights and privileges for their commerce and navigation, as are possessed by the "natives".

The United States concluded in the inter-war period a series of commercial treaties. These treaties set out in great detail the privileges concerning occupations that were made available to the nationals of each of the contracting States permitted to enter the territories of the other.[2]

As regards political rights, the final Act of the Meeting of the Foreign Ministers of the American Republics of July 1940 declared, that the generally recognized principles of the exclusions of foreigners from the enjoyment and exercise of strictly political rights implies the prohibition for foreigners to engage in political activities within the territory of the State, in which they reside.

It may, however, be noted that the Uruguayan Constitution of 1934 contains a provision, which is normally

1 Chill's Consolidated Laws of New York, 2nd ed. Chicago 1930, p. 786.
2 Hackworth : Digest of International Law, Vol. III, p. 618.

unusual that the citizenship is not a prerequisite of suffrage and that all persons who have lived in Uruguay for 15 years shall have the right of suffrage.

State practice reveals that several States in modern times have come to concede to aliens substantially the same privileges, as distinct from political rights which are enjoyed only by citizens of the State. Article 5 of the Inter-American Convention on the Status of Aliens, signed at Havana on February 20, 1928, declares that "States should extend to foreigners, domiciled or in transit through their territory all individual guarantees extended to their own nationals, and the enjoyment of essential civil rights without detriment....."

Since 1948, the United Kingdom has entered into a number of bilateral Social Security Agreements with France, Luxembourg, Sweden, Germany aud Israel, securing on a reciprocal basis to the nationals of either Party benefits under the Social Security legislation of the other party.[1] She concluded in 1954 a more restricted convention on social insurance with Switzerland.[2] In 1957 the United Kingdom entered into a convention on "Social Insurance" with Italy ; and one on "Unemployment Insurance" with Germany. She signed a convention on behalf of Northern Ireland with Denmark in 1957 regarding the reciprocal payment of compensation in respect of "Industrial Injuries".[3]

A Convention dealing with the treatment of person and property of nationals of members of the Council of Europe was signed in 1955 under the auspices of the Council of Europe. The fifth chapter of the Convention, provides for "Individual Rights" of the aliens. This chapter grants the nationals of the other Contracting Parties, who have been locally resident for at least five years, the right to participate, where appropriate, in non-political elections, e.g., those held by Trade Associations. In addition, the nationals of the Parties are to be permitted to act as arbitrators, if the parties to a dispute so wish. Further, "in so far as access to education is under State control", nationals of the Parties are to be treated on an equal footing with local nationals.

1 U. K. Treaty Series No. 19 (1949) Cmd. 7651 ; Ibid No. 17 (1955) Cmd. 9409, Ibid No 46 (1957), Cmd. 192; Ibid No. 3 (1957), Cmd. 78 : Ibid No. 1 (1957), Cmd. 199; Ibid No. 1 (1957), Cmd. 112.

2 Ibid No. 36(1954), Cmd 9152.

3 Ibid No. 1(1957), Cmd. 77 : Ibid No. 2(1957), Cmd. 11 : Ibid No. 13(1957), Cmd. 76.

Right to Property

Article 9

(1) A State shall provide due protection to aliens in respect of their rights to property in its territory.

(2) Vested property rights of aliens which are duly acquired in accordance with the municipal laws shall be respected.

(3) A State shall, however be, at liberty to acquire or nationalise foreign owned property for a public purpose upon payment of due compensation.

(4) A State shall not discriminate between a national and an alien in the matter of expropriation of property or on the question of payment of compensation.

Commentary

States enjoy exclusive right to regulate matters pertaining to the ownership of property of every kind which are situated within their territories. It is an established principle of international law that every State has the right to regulate the condition upon which property within its territory, whether real or personal, shall be held or transmitted.[1] A State may be unwilling to permit the succession to and retention of title of immovable property within its borders by persons other than its own national, or by aliens who are non-residents. No rule of international law prescribes a different course, it is said describing qualified duty of State to respect the property of aliens, Oppenheim says: "The Law of most States permits far-reaching interference with private property in connexion with taxation, measures of police, public health, and the administration of public utilities..... fundamental changes in the political system and economic structure of the State far-reaching social reforms entail interference, on a large scale, with private property." As regards the evolution of property rights among the European States, Wheaton says : "The municipal laws of all European countries formerly prohibited aliens from holding real property within the territory of the State. During the prevalence of the feudal system, the acquisition of property in land involved

1 Mr. Gresham, U. S. Secretary of State, to Mr. Huxton, Dec. 20, 1893; Moore: Digest of International Law, Vol. II, 33.

the notion of allegiance to the prince within whose dominions it lay, which might be inconsistent with that which the proprietor owed to his native sovereign. It was also during the same rude ages that the *jus albinagii or droit d' aubaine* was established, by which all the property of a deceased foreigner (movable and immovable) was confiscated to the use of the State, to the exclusion of his heirs, whether claiming *ab intestato*, or under a will of the decedent. In the progress of civilization, this barbarous and inhospitable usage has been, by degrees, almost entirely abolished. This improvement has been accomplished either by municipal regulations, or by international compacts founded upon the basis of reciprocity. Previous to the French Revolution of 1789, the *droit d'aubaine* had been either abolished or modified by treaties between France and other States, and it was entirely abrogated by a decree of the Constituent Assembly in 1791 with respect to all nations without exception and without regard to reciprocity. This gratuitous concession was retracted and the subject placed on its original footing of reciprocity by the Code Napoleon, in 1803 ; but this part of the Civil Code was again repealed by the Ordinance of the 14th July, 1819, admitting foreigners to the right of possessing both real and personal property in France and of taking by succession *ab intestato*, or by will, in the same manner with native subjects.

"The analogous usage of the *droit de de'traction*, or *droit de* (*jus detractus*) by which a tax was levied upon the removal from one State to another of property acquired by succession or testamentary disposition, has also been reciprocally abolished in most civilized countries".[1]

As regards the principle of vested rights or acquired rights in the State practice at the present time, Dr. G. Schwarzenberger observes : "It would be mistaken to assume that these structural changes meant the end of the minimum standard of international law for the protection of private property abroad. Most of the written constitutions in the post War period attest at least to the lip-service that States still paid to the principle of the sanctity of private property. Even the Soviet Union had to work her passage home into the nexus of international trade by accepting in a series of treaties

1 Wheaton : Elements of International Law, 8th ed. by Dana, 138–39.

stringent and orthodox formulations of the rights of new investors in that country...The World Court made it clear beyond doubt that once the international standard had been violated, it was irrelevant if the State concerned applied the the same treatment to its own nationals. Non-discrimination was not to be regarded as a justification for the breach of the minimum standard of international law.

Nevertheless, the growing recognition of the need for a vast increase in the State activities and for extensive State control of economic life and of the overriding right of States to limit the freedom of nationals and foreigners alike by means of unilateral exchange regulations indicated a profound change in outlook. It found vivid expression in inconclusive debates on this subject in the League of Nations, in the divisions of expert opinion on the legality of the Rumanian land reform and in the deadlock between the United Kingdom and the United States on the one hand and Mexico on the other, over the nationalization of the British-and-U. S. owned Mexican oil companies. The position then taken by both Anglo-Saxon powers may be summed up in the words of one of the notes of the United Kingdom Government to that of Mexico : "His Majesty's Government in the United Kingdom do not question the general right of a Government to expropriate in the public interest and on payment of adequate compensation, but this principle does not serve to justify expropriations essentially arbitrary in character." A defeatist tendency became noticeable to accept as inevitable a relaxation of absolute into relative standards and to exchange the traditional standards in favour of those of national or equitable treatment."

In Burma, Ceylon, India and Indonesia, aliens are permitted to hold and inherit real property. On the basis of reciprocity, Japan allows foreign ownership of real property. Iraq imposes restrictions on alien ownership of agricultural land. In the U. A. R., under the Land Reform Law no foreigner can own agricultural land more than 200 acres per head. This restriction does not apply to buildings and properties of like nature. Succession to or inheritance of real property by foreigners is permitted provided the ceiling of 200 acres per head is not exceeded. In the Syrian Region of the U. A. R., no alien could acquire buildings without the permission of the authorities. Further, no foreigner can acquire

agricultural lands unless they devolve on him by way of inheritance.

While under the laws of Burma, Japan and the U. A. R., aliens could not be the sole or part owners of ships which sail under their national flags ; in Ceylon, India and Indonesia, there are no such restrictions. On the basis of reciprocity aliens in Iraq are permitted to be sole or part owners of ships registered in Iraq.

Expropriation of foreign owned property for public purposes is permissible only against compensation under the laws of the countries in the Committee. In Iraq any criminal's property, including that of an alien, could be confiscated without any discrimination between nationals and aliens.

The European Convention on Establishment signed in 1955 by the members of the Council of Europe regulates the treatment of person and property of their nationals in the territory of other parties. Chapter II, on "Exercise of Private Rights", establishes the basic principle of "national treatment" for nationals of one party in the territory of another "in respect of the possession and exercise of private rights". This principle is qualified by permitting the parties to maintain such limitations as already exist in their law on the right of aliens to acquire or own certain classes of property. However, new restrictions may not be introduced unless dictated by "imperative reasons of an economic or social character or in order to prevent monopolisation of the vital resources of the country." This determination of the existence of these reasons is again a matter within the discretion of each party. Chapter III entitled "Judicial and Adminstrative Guarantees", assures to nationals of each party in the territory of another "full legal and judicial protection of their person and property and of their rights and interests." They are entitled to obtain free legal assistance under the same conditions as local nationals ; and they are not to be obliged to provide security for costs in legal proceedings simply because they are aliens.[1]

1 Miscellaneous No. 1 (1957), Cmd. 41. The International & Comparative Law Quarterly, 1958.

Taxation of Aliens and Their Liability for Forced Loans Etc.

Article 10

(1) An alien resident in a State shall be liable in the same manner as the nationals of that State to payment of taxes on his income and property.

(2) Likewise a resident alien shall be liable to pay Inheritance Taxes and Death Duties in the same manner as nationals of the country.

(3) A State shall not, however, levy any discriminatory taxes or forced loans on resident aliens.

Commentary

In the absence of a treaty providing to the contrary, an alien is liable equally with the national of a State for taxation and public charges and generally no contention to the contrary appears to have been made by States. It is held by writers of renown that if an individual goes to a State, lives therein and reaps the benefits of the governmental machinery of that State, he should be called on to pay the same share of the expenses of running that organization as other persons who are within the State.[1]

Further, as a rule a State has the power to impose taxes upon property within its jurisdiction, whether belonging to its own nationals or not. All immovable and movable property within the territory of a State, regardless of the residence or nationality of the owner, is normally subject to taxation. Hyde holds the view that no principle of international law forbids the territorial severeign to impose, in some instances, a heavier burden upon the interests of such individuals than is placed upon those of its own nationals. Where the person or the property in question is a proper subject of taxation, the species of tax and the amount to be collected falls within the domestic jurisdiction of a State. Foreigners who have chosen to take up their residence, to purchase property or to carry on business in a foreign State, thereby place themselves under the jurisdiction of the laws of that country, and they may be required to contribute or bear their fair share of the general public burdens, which are

1 Foulke, Roland : A Trearise on International Law. Vol. II. p. 24.

properly imposed upon them and other members of the community alike. As a general proposition, the right to tax includes the power to determine the amount of the tax to be levied, and the objects for which that amount shall be expended. These are powers incident to sovereignty, the exercise of which, unless abused, cannot in general be made the subject of diplomatic remonstrance. Oppenheim says that a State has wider powers over resident aliens than those aliens who are merely travelling about the country or stay only temporarily on the territory, in regard to the payment of rates and taxes.[1]

Leading English and American decisions have also affirmed the right of States at international law to tax property physically within their jurisdiction belonging to non-resident aliens.[2]

Aliens in Burma, Ceylon, Iraq, Japan and the U. A. R. are not subjected to payment of any contributions or forced loans. All the countries of the Committee extend to the foreign national standard of treatment in respect of taxation, including rates payable for public utility services and estate duty.

Mr. Cadwalader, United States Assistant Secretary of State, stated in 1875 : "The levying of a tax, however, by a foreign Government upon property within its jurisdiction whether belonging to American citizens or not, is not a reason for the interposition of this Government when the tax is in other respects properly imposed." Mr. Hamilton Fish stated in 1874 on the general subject of the taxation of American citizens abroad. According to him as long as a tax is uniform in its operation, and can fairly be considered a tax and not a confiscation or unfair imposition, no successful representation can be made to a foreign Government on behalf of the parties complaining and that complaints of excessive taxation and more properly questions for submission to local courts. Mr. Hamilton Fish in his despatch to Mr. Cushing, U. S. Minister to Spain on January 12, 1876 observed in the following terms : "A State may without violating any requirement of international law, tax persons as such who,

1 Oppenheim : International Law, Vol. I, 8th ed. p. 680.
2 Winans V. Attorney General (1910) A. C. 27 ; Burnet V. Brooks (1933) 288 U. S. 378. Peterson T. Lowa 245 U.S. 170-174.

regardless of their nationality, have by reason of the closeness of their connection with its territory established such a relationship with it as to justify the inference that they are residents thereof."

In the matter of taxation, the existing State practice in so far as it is manifested by conventional arrangements tend to place foreign nationals generally upon an equal footing with nationals. For instance, Article 7 of the Treaty of April 26, 1857 between the U. S. A. and Denmark (8 Stat. 340), renewed in 1857 (II Stat. 719), reading as follows : The United States and His Danish Majesty mutually agree, that no higher or other duties, charges, or taxes of any kind, shall be levied, in the territories or dominions of either party, upon any personal property, money or effects, of their respective citizens or subjects, on the removal of the same from their territories or dominions reciprocally, either upon the inheritence of such property, money, or effects or otherwise, than are, or shall be payable in each State, upon the same, when removed by a citizen or subject of such State respectively. Under Art. 1 of the treaty between the United States and Germany of December 8, 1923 : "The nationals of either High Contracting party within the territories of the other shall not be subjected to the payment of any internal charges or taxes other or higher than those that are exacted of and paid by its nationals." Several treaties between the United States and several other countries contain similar provisions providing for national standard of treatment to the nationals of the contracting parties in the territories of the other.

Aliens, Liability for Compulsory Police, Fire Brigade and Military Service

Article 11

(1) Aliens may not be obliged to perform police, fire-protection or military duty for the protection of the place of their residence against natural catastrophies, or dangers of a similar character.

(2) Aliens may not be compelled to enlist themselves in the armed forces of the State.

(3) Aliens, however, may if permitted voluntarily enlist in police, fire-brigade or military services under the same conditions as nationals.

Commentary

According to Lord McNair, aliens can lawfully be compelled to serve in auxiliary forces such as militia parties, national and civil guards.[1] But aliens are not capable as a rule to be incorporated into the military service of the country in which they are resident for the time being, but they can, if permitted, voluntarily enlist in the armed forces of the State of residence. They are, however, subject to call for service in the militia or local police to maintain social order, provided the duty is police duty and not political in its nature.

In view of Phillimore, if a foreigner is required to enrol himself exclusively for strictly civil and municipal purposes of protecting property from depredation, it is not unreasonable or contrary to international comity. But if the aliens are compelled to serve as part of an army against a military force it would be violation of international comity. Bluntschli and Hall express their views in the matter in the following terms :-

1. It is not permissible to enrol aliens, except with their own consent, in a force to be used for ordinary national or political objects.

2. Aliens may be compelled to help to maintain social order, provided that the action required of them does not overstep the limits of police, as distinguished from political action.

3. They may be compelled to defend the country against an external enemy when the existence of social order of the population itself is threatened, when in the other words, a State or part of it is threatened by an invasion or ravages of uncivilized nations"[2].

According to Hyde "there seems to be no objection to the exaction from a neutral national of various civic duties of quasi-militaty character such as service in a temporary civic guard which all residents are by law required to join."

1. Mc Nair, Lord : International Law Opinions (1956) Vol, II. p. 115.
2. Annual Digest and Reports of Public International Law Cases, 1943-45, pp 211-212.

State Practice

In the countries participating in the Committee, foreigners are not liable to serve in police, fire-brigade or military services in times of national catastrophies or danger not resulting from war, but in Burma, Ceylon and the U. A. R., they can volunteer for such services. Also in time of war, they are not expected to render military service in these countries. In Egypt, they could volunteer for such service for which they will be remunerated.

As regards the practice of United States in this regard, Hamilton Fish, the U. S. Secretary of State, expressed the following views : "I do not perceive any good reason why a government (in the absence of treaty stipulations) may not require from domiciled foreigners the discharge of such civic duties as service upon juries, in the ordinary municipal arrangements for the prevention and extinguishment of fires, and other duties of like character."[1] The same view was given expression to by the British Law Officers in 1876. They stated that British subjects resident in and under the protection of the laws of a foreign country are, unless under treaty exemptions, liable to military service and other burdens imposed upon the inhabitants in consequence of war. The principle upon which they form this opinion is that, where a man chooses to live for his own advantage, he must with the benefit take the burdens to which the natural subjects of the State are liable, whether those burdens take the shape of taxes, loans, personal service, or the requisition of any part of his property for military operations entered into by the country.

The State practice of several other countries also points out that aliens can be lawfully compelled to serve in case of need, under the same conditions as nationals, in the police force, fire-brigade, national civic guards and other domestic forces of similar character.

1. Moore, J.B. : A Digest of International Law, Vol. IV pp. 58-59; Mr. Fish. Sectary. of State to Mr. Wing, April 6, 1871, Ms. Inst. Ecuador, I, 263, Mr. Fish, Secertary of State, to Mr. Mariscal, April 1, 1876, to Merican Leg. VIII. 51.

Right of Protection by the Home State of the Alien

Article 12

(1) A State shall be deemed to be under a legal duty to afford foreign nationals within its domain means of redress for any injuries suffered by them which shall not be less adequate than the mean of redress available to its nationals.

(2) A State shall not normally become liable to pay damages or compensation to another State, for any injuries suffered by its nationals in the former State, unless and until all the local remedies available to the injured alien have been exhausted.

(3) The right of protection belonging to the home State of an alien in another State shall be exercised through diplomatic channels and only after the local remedies have been exhausted and found inadequate or unsatisfactory.

(4) Since the naturalized aliens are the nationals of the new State concerned, the ex-home State of such naturalized aliens, shall have no right of protection over such nationalized aliens in the State of adoption.

International Responsiblity of States Concerning Treatment of Aliens

Article 13

(1) A State shall be responsible if any injury to a foreign national results from the wrongful act, omission or negligence of one of its superior authorities, within the scope of the office or function of such authority, provided such act, omission or negligence amounts to a breach öf an international duty on the part of the State.

(2) A State shall be responsible for an injury to an alien resulting from the wrongful act, omission or negligence of one of its subordinate officials or employees in the discharge of his official functions, if justice is denied to the aggrieved alien or if, having failed to provide adequate redress to the injured alien, the State has neglected to reprimand the official or employees concerned.

(3) (a) A State shall be responsible, if an injury to the life, person or property of an alien results from its failure

to exercise due deligence to prevent the wrongful act or omission of a private individual or if the State within which the injury occurred has unlawfully refused or neglected to afford proper judicial redress.

(b) The same rule shall apply in cases where an injury is sustained by an alien through the wrongful act or omission of an official acting outside the scope of his office or function.

(4) A State shall be responsible even if an injury to an alien is attributable to one of its political sub-divisions, regardless of the extent to which the Central Government according to its constitution, has control over the sub-division concerned.

Commentary

Although aliens come under the jurisdiction of the State of residence, nevertheless they continue to remain under the protection of their home State. It is a well known customary rule of international law whereby every State has the inherent right of protection over its nationals within the borders of the State. An alien, provided he possesses some nationality, must be afforded protection for his person and property. The home State of the alien has, by its right of protection a claim upon such State as allows him to enter its territory that such protection shall be afforded, and the host State as observed elsewhere cannot rightly maintain that it does not provide any protection whatever even to its own citizens. Under international law, there is no duty incumbent upon a State to exercise its protection over its nationals in other States. Hence, the matter is left to the discretion of every State and no citizen abroad has by international law a right to claim or demand protection from his own State. Therefore Borchard says that, "The Government is the sole judge of what claims it will enforce and of the manner, time, means and the extent of enforcement. It may refuse to present a claim at all. After espousal of a claim the government may abandon it, submit it to arbitration or make any other disposition thereof which it deem expedient in the public interest, e.g. the government may compromise it, or release it, without compensation or for a consideration of benefit to the general public."[1] Though for

1. Borchard : Diplomatic Protection of Citizens Abroad (1915) p. 366.

political reasons sometimes States may not be inclined to exercise their right of protection over their nationals in other States, still every State legitimately can exercise this right when one of its nationals suffers injury abroad in his person or property, either by the State itself on whose territory such person or property is for the time being, or by the officials or nationals of such State. As regards the State's right of protection over its nationals abroad, Elihu Root remarked: "As between countries which maintain effective government for the maintenance of order within their territories, the protection of one country for its nationals in foreign territory can be exercised only by calling upon the government of the other country for the performance of its international duty, and the measure of one country's international obligation is the measure of the other country's right. The rule of obligation is perfectly distinct and settled. Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection and the same redress for injury which it gives to its own citizens and neither more nor less; provided the protection which the country gives to its own citizens conforms to the established standard of civilization."

"There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens .... The standard to which the rule appeals is a standard of right, and not necessarily of actual performance..... It is a practical standard and has regard always to the possibilities of government under existing conditions."[1] And this right can be exercised in manifold ways. Thus a State whose subjects

1 23, American Journal of International Law, 1929, Special Supplement, No. 131.

are wronged abroad can diplomatically insist upon the wrongdoers being punished according to the law of that State and upon damages, if necessary, being paid to its injured subjects. The Drafting Committee of the Hague Codification Conference in 1930 set out in the draft Articles 1 & 2 of the "International Responsibility of States" in these terms: "Art. 1: International responsibility is incurred by a State if there is any failure on the part of its organs to carry out the international obligations of the State which causes damage to the person or property of a foreigner on the territory of the State".

"Article 3: The international responsibility of a State imports the duty to make reparation for the damage sustained in so far as it results from failure to comply with its international obligation."[1] Further the, State can resort to retorsion and reprisals in order to compel the other State to remove its grievance but in practice States seldom have recourse to this mode except perhaps as a last resort.

The first essential of an international claim is proof that the claimant is entitled to the protection of the State whose intervention he has invoked. As it is a well recognized principle of international law that the right to protect is confined to nationals of the protecting State, as a general rule it is being held that any break in the national ownership of a claim, as by assignment or change in nationality of the claimant, defeats the claim. Hence, the Preparatory Committee of the 1930 Codification Conference at the Hague has laid down: "A State may not claim a pecuniary indemnity in respect of damage suffered by a private person in the territory of a foreign State, unless the injured person was its national at the moment when the damage was caused and retains its nationality until the claim is decided." In the adjustment of international claims there are two distinct stages:

(a) the diplomatic presentation of the claim by the Government of the injured national as well as the determination of its validity and amount;

1 Hague Codification Conference of 1930, Third Committee, as revised by the Drafting Committee: Orfield, L.B. & Re. E. D: Cases and Materials on International Law, pp. 498-99: Root, Elihu: The Basis of Protection to Citizens Residing Abroad, 4, A.J.I.L. (1910) 517-523.

(b) and the distribution of the award among those entitled to receive it, under the present rules of law. It is probably correct to say that the first of these stages comes within the purview of international law and procedure, while the second stage, that of distribution of awards is a matter of municipal law.

It should be added that right of diplomatic protection is not a personal right of the claimant but exists in favour of one State as against another. It is a privilege which a State may extend or withhold on behalf of its nationals under the rules of international law. The mere fact that a private person declines the protection of its government connot deprive the State of its legal right to extend diplomatic protection on behalf of such person, as a State may present a claim on behalf of its nationals notwithstanding a waiver or other refusal on the part of its national to invoke such diplomatic protection.

The Rule of Local Remedies

The rule that all local remedies must be exhausted in accordance with the municipal law of the tortfeasor before diplomatic interposition is permissible, is from the point of view of procedure, the most important rule in the application of the doctrine of State responsibility. It is normally a condition of an international claim for the redress of an injury suffered by an alien that the alien himself should first have exhausted any remedies available to him under the local law. A State is not required to guarantee that the person or property of an alien will not be injured and the mere facts that such an injury has been suffered does not therefore of itself give his home State a right to demand reparation on his behalf. If the State in which the injury occurs offers him a proper remedy, it is only reasonable that he should be required to avail of it.

An alien is not usually regarded as entitled to the diplomatic interposition of his own government until he has exhausted his legal remedies in the appropriate tribunals of the country against which he makes the claim. There are several reasons for this limitation upon diplomatic protection ; first, the citizen going abroad is presumed to take into account the means furnished by local law for the redress of wrongs ;

secondly, the right of sovereignty and independence warrants the State in demanding from its courts freedom from interference on the assumption that they are capable of doing justice; thirdly, the home Government of the complaining citizen must give the offending Government an opportunity of doing justice to the injured party in its own regular way and thus avoid if possible, all occasion for international discussion; fourthly, if the injury is committed by an individual or minor official, the exhaustion of local remedies is necessary to make certain that the wrongful act of denial of justice is the deliberate act of the State ; and fifthly, if it is a deliberate act of the State, that the State is willing to leave the wrong unrighted. It is a logical principle that where there is a judicial remedy, it must be sought only if sought in vain and a denial of justice established, before diplomatic interposition become proper."

It should be noted, however, that local remedies may serve a double capacity, (1) they are the means by which damages are obtained, and (2) if insufficient, they give rise to State responsibility. Thus, it is apparent, responsibility on the part of a State is contigent not only upon the failure to provide local redress, but upon a sufficiency of such remedies as well.

The exceptions to the principle of the exhaustion of local remedies are self-evident. The rule does not apply if in fact there are no local remedies to exhaust. The second exception to the rule of exhaustion of local remedies applies in cases of delay or denial of justice by the municipal courts of the respondent State. Finally, the third exception to the principle of the exhaustion of local remedies is where it is clear in advance that the attempt to have recourse to local remedies would merely amount to the fulfilment of an empty formality, for example, in a case where it probably does not require proceedings to be taken in the local courts when it is morally even though not formally certain, that they will lead to little redress, for example, it may be clear that the local courts are bound by their own precedents to deny the claim.

It goes without saying that opportunities for local redress for a wrong suffered, differ widely. In countries where the standards of justice are primitive and governments

unstable, local remedies, even if fully utilized, may prove insufficient in terms of accepted standards of civilization. A condition of this nature has often provided a plausible excuse for diplomatic and even military intervention by States to protect their nationals abroad.

Among the States who have suffered most from this inconvenience are those of Latin America. It might be expected, therefore, a number of jurists in that part of the world have searched for legal grounds to prevent intervention on behalf of aliens within their territories. They have sought to limit the right of interposition to those cases where access to the courts is actually denied, thus eliminating the question of a particular standard of justice. On this basis rests the famous Calvo Doctrine, as the principle of local remedies recommends itself on grounds of equity and common sense and is of assistance in the determination of the question, if, and in what circumstances, stipulations on the model of the Calvo Clause are to be upheld.

The Calvo Doctrine

During the latter part of the 19th century, a number of Latin American States adopted a policy of writing into contracts with aliens the so-called Calvo Clause (named after the Argentinian jurist, Calvo). It provided that any disputes under such contracts were to be settled by the local courts and in conformity with local law and that the alien who was party to such a contract should not invoke the diplomatic interposition of his own government.

Thus, the purpose of the clause is to limit or exclude the appeal of a foreigner or a foreign company to their home State in matters which are subject of a contract with another State. Under such a clause the alien renounces the protection or assistance of his government in any matters arising out of the contract. The formulations of the clause range from a stipulation that all disputes or controversies arising out of the contract are to be decided under the municipal law and by the courts of the State granting the concession or other rights under the legal fiction of the foreigner or foreign company being treated as if they were nationals of the State with which they had contracted.

Responsibility of a State for Acts or Omissions of the Legislative, Judicial and Executive Organs of a State

These acts or omissions will involve the State directly in international responsibility. If the legislation of the State adopts acts which are contrary to, or incompatible with, the international obligations of a State or if the legislature fails to adopt or sanction certain measures which are necessary for the purpose of discharging the duties of a State, whatever may be the legality or the validity for such acts or omissions in the eyes of the municipal law of the State concerned, the State under international law will incur international responsibility for any of those acts or omissions which constitute a breach of an international obligation.[1]

Acts or Omissions of the Judiciary

In order to live up to the minimum standards of international law, a State is expected to grant to the judiciary a maximum of independence from the executive. It would therefore be unreasonable to hold a State, which complies with the principle of the independence of courts, responsible for acts of the judiciary within the legitimate scope of their judicial duties. Thus any act of the judiciary which does not amount to a delay or denial of justice cannot constitute an international tort.[2]

Acts or Omissions on the part of the Executive Authorities of the State

If a public official while acting in the performance of his public duties and within the limits of his general competence has violated an international obligation of the State, then responsibility is imputed to that State.

When a public official acting in the performance of his duties exceeds the powers with which he has been invested, his State become responsible for the acts resulting in international delinquencies. This imputability is based on the principle of objective responsibility of the State. For example, in the *Thomasy Youmans Case*[3] between Mexico and the United States of America, it was held that the Mexican Government

1 U.S A. (On behalf of P. W. Shufeldt) V, Guatemala (1930).
2 The Lotus Case (1927).
The Salem Case (1932).
3 Annual Digest, 1925-1926, p, 223.

was responsible for the wrongful acts of the soldiers even though they had acted beyond the scope of their authority.

But if it be ascertained that the State organ or official was not generally competent under municipal law, so that the acts were completely *ultra vires*, no imputation of liability arises. In this case the status of the official as such is immaterial, for an act committed by him in his private capacity does not directly involve the international responsibility of the State.[1] Where an incompetent State agency commits an *intra vires* act, it cannot be said to have acted on behalf of the State.[2] It is appropriate to quote in this context the the Report of the League of Nations' Sub Committee of Committee of Experts for the Progressive Codification of International Law :[3]

"If the act of official is accomplished outside the scope of his competence, that is to say, if he has exceeded his powers, we are then confronted with an act, which judicially speaking, is not an act of State. It may be illegal, but from the point of view of international law, the offence cannot be imputed to the State."

However, even in these circumstances a State may become resposible if through other officials or organs she has not taken measures to prevent the recurrence of the offence. Thus the State may incur an incidental responsibility arising out of the *ultra vires* acts.[4]

Acts or Omissions on the part of Political Subdivisions of a State, or other Dependencies

In the case of acts or omissions on the part of political sub-divisions of the State, the problem of imputability naturally arises in a different manner. In essence, it

1 21, American Journal of Intetnational Law. 1927, pp, 783-789.

2 The Case of Jessie Thomas F. Bayard (1921).
The Case of Peschawha (1921).
The Case of Laura M.B. Janes Claim (1926).
The Case of Margaret Rooper (1927).
The Case of C. P. Messy Case (1927).

3 League of Nations Document : C. 75 M. 69 V. pp, 16-20.

4 Case of William T. Way Claim (1928), decided by the U. S. Mexican Claims Commission.
Eastern Greenland Case: decided by the Permanent Court of International Justice (1933), Series A/B No. 53, 1933, pp. 69-92.

has been said that there are two decisive considerations ; what is the degree of control or authority exercised by the State over the international affairs of its political subdivision or dependency and to what extent is the State responsible for the international relations and representation of the entity concerned ? It is apparent, however, that the mere application of these two tests does not dispose of all the possible cases as is shown by the conflicting decisions arrived at in practice by the divergent opinions held on the subject. Each case has in reality to be examined and dealt with on its own merits. Nevertheless, in a case involving a protectorate or like entity one must determine whether, in addition to enjoying full internal autonomy, the entity in question has a measure of international personality and whether this personality carries with it the capacity to enter directly into international commitments with other States. This legal phenomenon, which is to be observed with increasing frequency in contemporary practice, is of great significance when the issue to be decided is, to whom should responsibility be imputed for the acts or omissions of those semi-sovereign entities ?

Acts or Deeds committed by Private Persons including those occurring during Internal Disturbances, Commotions such as Civil War etc.

In the view of William Edward Hall : "A State must not only itself obey the law, but it must take reasonable care that illegal acts are not done within its domain. Foreign nations have a right to take acts done upon the territory of a State as being *prima facie* in consonance with its will..... Hence it becomes necessary to provide by municipal law, to a reasonable extent, against the commission by private persons of acts which are injurious to the rights of other States, and to use reasonable vigour in the administration of the law so provided."

Where the illegal acts are committed by private individuals and not by an organ or official of the State, grounds for not imputing liability to the State are much stronger, for the doctrine of imputability rests on the assumption that the deliquency has been committed by an agency at least of the State concerned.

This view is based on the principle that the State can only be held answerable for "its own acts". The problem

here is this : Whether the State must be treated as objectively responsible, or whether it is a condition of its responsibility that its conduct with respect to the act of the private individual, must imply a certain deliberate attitude on the part of the State organ concerned. For instance, failure to exercise due deligence to prevent such acts of the private person, or members of a group and failure to impose the prescribed punishment, penalty etc. on those offender or offenders will involve the State in international responsibility. This if the State fails in its duties of repression and punishment of the guilty persons, then the State will become responsible as imputability is determined by this indirect process. It may be easily observed that what is in essence imputed to the State is not really the act or deed which inflicts the injury, but it is the failure to perform a duty, which a State owes towards the other States. In the view of some writers this duty is on occasions very difficult to define and is sometimes quite indefinable also. Damage done by private individuals has many times come before arbitral tribunals, e.g. the *Home Missionary Society Case* that is damages and or injury on the property or persons of aliens in the course of riots involving mob violence. It has been held in those cases the State is responsible for the acts of the rioters only if it is guilty of a breach of good faith or has been negligent in preventing the riots. If the State reasonably affords adequate protection for the life and property of aliens, it has fulfilled its duty at international law towards these persons. The following passage from the Report of the League of Nations Sub-Committee referred to above may be quoted :

> "Damage suffered by foreigners in case of riot, revolution or civil war does not involve international responsibility for the State. In case of riot, however, the State would be responsible if the riot was directed against foreigners, as such, and the State failed to perform its duties of surveillance and repression."

State Practice

All the participating powers of the Committee are of the view that the right of protection by the home State over its nationals abroad may be exercised only in cases of necessity, such as denial of justice. According to Indonesia, Iraq and Japan, this right must be exercised only through the

normal diplomatic channels. Further, India and the U.A.R. are inclined to the view that the injured individual should have exhausted all the available local remedies and that there should have been denial of justice before diplomatic interposition is permissible. According to the participating countries in the Committee, the former home State of a naturalized alien shall have no right of protection over its former nationals in case they have been subjected to ill treatment in the countries of adoption.

Responsibility for Acts of State Organs

Since only the nationals can claim damages from the States in Indonesia, it appears that aliens do not enjoy a comparable right. In the other participating countries, aliens on terms of equality with the nationals are entitled to receive damages from the State for the wrongs or injustice suffered by them.

Burma, Ceylon, India and Indonesia are of the view that a State should not be held liable for the *ultra vires* acts of a government official, when such wrongs are committed on his own initiative and in excess of his authority. In the view of Japan and the U. A. R. the State becomes liable even in such cases. In Iraq the wronged alien enjoys the same remedy as the national. Under the laws of most of the participating States in the Committee, the government official concerned becomes liable for punishment for his *ultra vires* acts which have occasioned injury to aliens.

According to Burma, Iraq and Japan, a State cannot be held liable for the wrongs if they have failed to measure up to certain international standards of the judicial organs and that compensation could not be claimed for the same. Ceylon is in favour of compensation for such lapses. India would leave the matter to be decided by the superior courts of the land. Aliens and nationals in Indonesia have the same remedy against the judicial organ which has injured an alien by its omission to observe certain recognized international standards. In all the participating countries of the Committee the right to make compensation is an acknowledged principle of social justice, and an alien like a national is entitled to the same reparation or compensation whenever he suffers an injury at the hands of the State organs including

government officials. It makes no difference whether the wrong was committed wilfully or inadvertently.

As regards the standard of compensation, in Ceylon, India, Indonesia, Iraq and Japan, aliens are entitled to the standard of national treatment. Compensation in Burma would be fixed in accordance with her laws.

In the U. A. R., compensation is fixed at that amount which would offset damages suffered by the alien in person and property. Compensation will also cover the probable loss of profit incurred by him.

Responsibility of States for Acts of Private Individuals

According to Ceylon and India, a State cannot become liable to pay damages for the injury done to the person or property of an alien by a private individual or by a mob. In the view of Burma, a State becomes responsible in such cases only when no local remedies are available. Indonesia takes the line that if on the one hand, wrong is done by a private individual, the State is not liable to pay any damages but on the other hand, if it is by an official of the State, the latter is liable for the damages. Iraq feels that in such a case the State could pay some compensation to the injured alien by way of an act of grace but not as a legal duty. Japan is of the opinion that a State must not be held liable for purely private acts, and that unless they could be attributed to the State itself no payment becomes payable. The U. A. R. states that a State must not be asked to pay damages for these wrongs unless it could be proved that it failed in its duty to maintain law and order and also to safeguard life and property of aliens in its territory.

Burma, Ceylon and Japan take the view that normally a State should not be held liable for the wrongs committed by private individuals unless they have acted under the instigation of the State organs. Since the complicity of the State in such matters cannot be easily established, India, Indonesia and Iraq are not inclined to express any view in the matter. The U. A. R. states that instigation on the part of the State is not necessary in order to make the State liable, but that it is sufficient if it can be shown that the State has failed in its duty to take the necessary precautionary measures for the protection of foreign nationals against the dangers that could have been apprehended.

According to the participating countries of the Committee a State would not become responsible if an injured alien has been subjected to delay of justice.

Calvo Doctrine

As regards the suitability of the Calvo Doctrine, there was no unanimity among the participating countries of the Committee. Ceylon is inclined to the view that the Calvo Doctrine may be accepted as a principle of international law among the Asian-African countries. But Burma is not in favour of such a view. India takes the line that more careful consideration is necessary before its acceptance. Iraq states that as this doctrine renounces not only the right of the individual concerned but also that of his home State and that as the general practice and opinion are not in favour of this doctrine, it cannot be accepted as a principle of international law in the relation between the Asian-African States. Japan has no comment to offer in the matter. Indonesia and the U.A.R. maintain that in order to safeguard the newly won independence of the Asian-African States and to avoid foreign intervention in the affairs of these countries, the Calvo Doctrine may be acceptable. Further, they add that if this doctrine is adopted the chances of diplomatic intervention on behalf of foreign nationals become very remote. Furthermore, under this doctrine, if an alien seeks his country's diplomatic protection, he will be acting contrary to his own pledge not to do so.

Exhaustion of Local Remedies

The participating countries of the Committee are in favour of the doctrine of exhaustion of local remedies in the practice of the nations. In Burma, Ceylon, India and Japan, an injured alien should exhaust all the local remedies available to an injured party, before he could invoke the aid of his home State to help him to obtain redress for such wrongs. Ceylon states that exhaustion of local remedies becomes very necessary when there is no Calvo Clause in the contract. Indonesia is in favour of special consideration of this very question. Iraq observes that the principle of exhaustion of local remedies might serve as a substitute for the Calvo Clause. According to the U.A.R., the importance for the local Remedies Rules lies in the fact that not only does it

well as foreigners leaving the U. A. R. or Ceylon. As a temporary measure, at the present time, nationals and foreigners must obtain exit visas before leaving the U. A. R.

Burma favours the view that restrictions and prohibitions may be imposed upon the departure of criminals who wish to escape from the country. The Immigration Control Order of Japan does not contain anything concerning the prohibition of the departure of foreign nationals from Japan. However, an alien who has committed a crime may not be permitted to leave the country. Restrictions on the departure of an alien in Ceylon or the U. A. R. are not imposed except when it is necessary to detain him for purposes of investigation in case a crime has been committed and his trial has been pending in the country.

Aliens in Burma, Ceylon, India, Indonesia, Iraq and Japan are permitted to take with them their movable properties out of the country. But Burma does not extend this privilege to her nationals as the latter may not be leaving the country for good.

It may be seen that with reference to the continued denial by the Chinese Communist Government of exit permits to certain American nationals, the United States Department of State stated on May 21, 1951, in these terms :-

> "Arbitrary refusal to permit aliens to depart from a country is of course a violation of the elementary principles of international law and practice."

In the case of *Han-Lee Mao v. Brownel*, the United States Court of Appeals, District of Columbia Circuit, considered in 1953, the right of an alien lawfully present in the United States to leave the State.

In this case an affidavit of the Commissioner of Immigration and Naturalization stated : "...the basis of this order was a finding that if he (Mao) were permitted to go to Communist China whose armies were and are engaged in armed combat with the military forces of the United States in Korea, plaintiff's scientific training and knowledge might be utilized by Communist China and other potential enemies of the United States in seeking to undermine and defeat the military and defensive operations of his nation, and that

prevent hasty and unnecessary disputes among States but also it does help promotion of the goodwill necessary for normal relations among the various nations. Further, it fosters happy relations between a State and a foreign national concerned.

Restriction on Departure of Aliens

Article 14

(1) A State shall have the right, in accordance with its municipal laws and regulations, to impose reasonable restrictions on an alien leaving its territory.

(2) Such restrictions on an alien leaving the State may include *inter alia* insistence on procurement of an exit visa or tax clearance certificate by the alien from the authorities concerned.

(3) An alien who has fulfilled all his local obligations in the State of residence shall not be prevented from departing from the State of residence.

(4) The State of residence shall not prevent an alien, on leaving the state, from taking all his personal effects away with him.

Commentary

Since, normally a State is entitled only to territorial supremacy over the foreign nationals in its territory, it cannot prevent them departing from its domain. But before leaving the territory of a State, the alien must have fulfilled all his obligations in that State to individuals and the State. He should have, for instance, paid the rates, taxes, and private debts, if any, payable by him.

State Practice

The laws of Burma and Indonesia require an alien to obtain a permit before leaving the country, whereas in Ceylon and India, it is not necessary. In Japan too, though it is not necessary, he is required to produce an 'Exit Visa'. In Iraq, such a permit is sometimes required. Normally the U. A. R. does not require an alien or its national to obtain an exit visa before leaving the country. But under exceptional circumstances, exit visas may be necessary from nationals as

his departure at the present time consequently would be prejudicial to the best interests of the United States."[1] Emphasizing the political side of the question the Court said : "Courts ordinarily regard it as beyond their province to interfere with the exercise of what has been aptly called the 'Peculiarly Political' sovereign power of the United States to deal with aliens. In Harisiades v. Shaughnessy, (1952), 342 U. S. 580, 72 S. Ct. 512, 519, 96. L. Ed. 586, the Supreme Court said : "... Any policy towards aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war powers, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of governments as to be largely immune from judicial inquiry or interference."

It may be noted that on May 29, 1954, the United States announced that, since 1951, 434 Chinese students had applied for exit permits which were temporarily refused to the other 120 : "...The Department of State announced of rescission of restraining orders as to 76 further students as from March 31, 1955 : ...An "Agreed Announcement" by the Ambassadors of the United States and of the People's Republic of China made at Geneva on September 10, 1955, stated that the Ambassador of the United States had informed the Ambassador of the People's Republic of China that :

> "The United States recognizes that Chinese in the United States who desire to return to the People's Republic of China are entitled to do so and declares that it has adopted and will further adopt appropriate measures so that they can expeditiously exercise their right to return."

On December 16, 1955, the Department of State declared that no Chinese national had been refused exit from the United States, and referred to protests by the United States against the continued detention of nationals of that country by the People 's Republic of China in violation of the terms of the Agreed Announcement of September 10, 1955.

Generally, a foreigner leaving a State is allowed to take his property away with him on the same conditions as the

1 U.S. Department of State Bulletin, XXIV, No. 623 (June 11, 1951), 947. International Law Reports, 1953, p. 296.

Citizens or subjects of the country. In 1957, the United Kingdom concluded conventions with Sweden, Germany, Israel and Belgium. One of the principles upon which those conventions are based are that persons who go from the territory of one party to the territory of the other, should keep that which they have acquired under the legislation of the former party or enjoy corresponding rights under the legislation of the latter.[1] State practice points to the fact that a tax for leaving the country or a special tax upon the property that are taken away by an alien is not normally levied.

Expulsion or Deportation of Aliens

Article 15

(1) A State shall have the right to order expulsion or deportation of an undesirable alien for reasons of security or public order, in accordance with its laws and regulations in force.

(2) The State of which the alien is a national, shall be entitled to require from the expelling State, through the diplomatic channel, a statement of the reasons for which the expulsion or deportation was ordered.

(3) The State shall, in normal circumstances, allow an alien under an order of expulsion or deportation a reasonable time, on humanitarian grounds, to wind up his affairs especially where the alien has been resident in the country for a long period.

(4) If an alien under an order of expulsion refuses to leave the State voluntarily or returns without obtaining permission after leaving the State, he may be deported by

1 U.S. Treaty Serial No. 46 (1951).
June 9, 1956, Ratified April 30, 1957.
Treaty Series No. 46 (1957), Cmd. 192.
April 29, 1957, Ratifications have not yet been exchanged, Israel No. 1(1957), Cmd. 199.
December 18, 1956. Ratifications have not yet been exchanged, Germany No. 3(1957), Cmd. 78.
May 20, 1957. Ratifications have not yet been exchanged Italy No. 1(1957), Cmd 77.
December 18, 1956, Ratifications have not yet been exchanged. Germany No, 2(1957). Cmd. 11.
Treaty Series No. 13(1957), Cmd. 76.

force, besides being subject to arrest and punishment, under the applicable laws of the State concerned.

(5) A State shall not refuse to receive its nationals expelled from the territory of another State.

Commentary

According to Moore, States generally claim the right to expel aliens regarded as endangering the safety and territorial integrity of the State and there are several examples of such expulsions. International law provides no detailed rules regarding expulsion of aliens. Every thing depends upon the merit of the individual case.

A State may decide for itself whether the continued presence within its territory of a particular alien is so adverse to the national interest that the country needs to rid itself of him. The right to expel foreigners rests upon the same foundation as the right to exclude aliens. In the view of Borchard the right of expulsion could not be limited even by treaties which guarantee to the nationals of the contracting parties the right of residence, travel or of trade, and other rights, as for instance, the existence of the system of capitulations in Turkey did not affect the right of Turkey to expel unwanted aliens.

A State is not forbidden to expel an alien who is domiciled or possessed of a residence within its territory. When such, however, is the case, the reasonable exercise of the privilege of expulsion would appear to demand some respect for the consequences of the connection between the alien and his habitat. Thus the procedure that might not be inequitably applied to a transient visitor, may, on other hand, work grave hardship to one who through a protracted residence within the territory of the expelling State, has dug his roots deep into its commercial or economic life as a participant therein. While this circumstance should not, and does not, deprive the territorial sovereign of its privilege as such, it justifies the challanging of methods that ignore the injury necessarily entailed when a permanent resident is compelled on short notice to depart from the country.

State Practice

The laws of Burma and India dealing with the expulsion or deportation of foreigners have provided their executive

authorities with ample discretion in the matter. Expulsion or deportation from Ceylon is regulated by section 8 and 31 of the laws of Ceylon. Undesirable persons can be deported for any reason from Indonesia. Article 10 of the Residents Act of 1938 sets out the grounds on which aliens could be deported from Iraq. There are provisions in the laws of Japan for the deportation of aliens, but aliens permanently settled in Japan cannot be deported unless a special permission for the purpose has been obtained from the Ministry of Justice. Though, there are no specific grounds which could justify deportation from the U.A.R., yet under certain general principles it is possible, for instance, when aliens endanger the security, public order, and morality of the country and when they are unable to look after themselves, they could be deported. Though in the U.A.R., deportation was originally used only as a punishment, now a foreigner committing crimes against the laws of residence, renders himself liable for deportation.

According to Burma, an alien in transit through a State without the necessary travel documents could be expelled. In such matters Ceylon, India and Indonesia do not make any distinction between aliens or nationals. In Iraq and Japan, foreigners in transit are treated as aliens. In the matter of deportation the laws of the U.A.R. make no distinction between a resident alien and one in transit. Further, the U.A.R. states that as the question of expulsion of aliens in transit does not normally present itself for solution, no view could be expressed in the matter. Theoretically speaking a political refugee could be deported from Burma to a country where he might be persecuted but in practice she refrains from doing so. A political refugee could be deported from Ceylon to a country where he might be exposed to persecution. Such cases in Indonesia will normally receive sympathetic consideration. According to India and Iraq, if the political refugee's conduct deserves or justifies such a course of action, he could be deported to such a country. Japan states that he could be sent to a country of his choice just as in the case of extradition, deportation of political refugees to such a country or countries could not be envisaged in the eyes of the laws of the U.A.R.

According to the general practice of Burma, Ceylon, India and Indonesia, if no State could be found to receive an expelled alien, he would be sent to the State to which he belongs, but if he is a stateless person he could be detained in

the country concerned. In Iraq and Japan, they are liable for detention. Under the laws of the U. A. R. according to the discretion of the Ministry of Justice, such an alien could be put under surveillance and house arrest until he could be deported and the deportation order remains valid until its cancellation by the very authority that issued it.

The laws of Burma contain provisions to deal with the question of unauthorized return of an expelled alien. The Constitution of Ceylon provides for safeguards against such occurrences. Under the laws of India entry of the expelled person will not be permitted. If an expelled alien returns unauthorizedly to Indonesia, he becomes liable for deportation. As no alien could enter Iraq without a valid visa, the expelled alien seeking un-authorized entry will become liable for prosecution. Once an alien is deported from Japan he cannot enter again. In the U. A. R. during the pendency of a deportation order, if that alien returns unauthorizedly, he renders himself liable for punishment and the Minister of Interior may decide upon the re-admission of an expelled alien.

No safeguards are provided for in the Constitution of India against arbitrary, harsh and unjustified expulsion of aliens from India. In Indonesia though there are no explicit safeguards against such expulsion, they could appeal to the Ministry of Justice, and in Iraq they could approach the executive authorities or recourse could be had even to the courts of Iraq in this regard. Aliens subjected to such arbitrary expulsion have the right of appeal to the courts in Japan. A foreigner who is aggrieved by an arbitrary, harsh and unjustified expulsion order may prefer an appeal to the Council of State praying for the nullification of the harsh or illegal order.

Burma, India, Indonesia, Iraq and Japan are of the view that the government of the country must enjoy complete discretion in regard to expulsion or deportation of foreign nationals from its domain. Ceylon takes the line that for reasons of public security, an alien may be expelled from a State. The U. A. R. says that deportation is to be viewed as purely a security measure designed for the public welfare, that it is not meant to be a penalty or a wholesale measure or a screen for the furtherance of private interests. It should normally be used only as an exceptional measure.

Precedents exist, chiefly in the relations between the Great Powers and small and unstable States, showing the exaction by foreign governments of an indemnity for the arbitrary expulsion of their nationals or subjects. Great Britain obtained from Nicaragua in 1895 an indemnity for the expulsion of twelve British subjects, who had been arrested and expelled for alleged participation in the Mosquito rebellion. In the same *Bluefields Case* the United States, relying chiefly upon the Treaty of 1867, demanded that the two American prisoners be informed of the charges against them and of the evidence in support of the charges, admitting however, the right of Nicaragua to expel them if the charges were true.[1] In 1920 the United States deported to Russia, on the ship Buford, a group of anarchists and radical socialists, who had emigrated from that country to the United States and whose activities on behalf of their political principles were considered detrimental to the welfare of the United States.[2] In 1926 the Government of Panama decided to expel one R. O. Marsh and others on account of their subversive activities among the San Blas Indians, and the United States, upon receiving a request for its cooperation, saw no reason why Panama should not "handle the matter independently." A decree of expulsion was accordingly issued.[3]

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(1) Moore, J. B.: Digest of International Law, Vol IV. 551. Ralston: Venezuelan Arbitrations, p. 699.

(2) The deportations were in accordance with an Act of May 10, 1920.

(3) Hackworth: Digest of International Law, Vol. III. 698. C.J.B. de Boeck, "L' Expulsion et les difficutlies internationales qu'en Souleve la pratique," Recueil des Cours, Vol. 18 (1927-III), 447-647.

ASIAN – AFRICAN LEGAL CONSULTATIVE COMMITTEE.

GENERAL PRINCIPLES CONCERNING ADMISSION AND TREATMENT OF ALIENS

(As Provisionally Recommended by the Committee at its Third Session.)

Article 1

Definition of the Term 'Alien'

An alien is a person who is not a citizen or national of the State concerned.

Note : In a Commonwealth country the status of nationals of other Commonwealth countries will be governed by the provisions of its laws, regulations or orders that may be in force.

CONDITION GOVERNING THE ADMISSION OF ALIENS

Article 2

Admission of Aliens in General

(1) Except in cases where there are Treaty provisions to the contrary, the admission of aliens will be at the discretion of the receiving State.

(2) A State admitting aliens into its territory may lay down by law, regulations or executive orders conditions for entry of aliens into its territory.

(3) An alien shall not, except in special circumstances, be admitted unless he is in possession of valid travel documents issued by the State of which he is a national.

(4) A State may whilst admitting aliens into its territory make a distinction between persons on a temporary sojourn and those who wish to be admitted for permanent stay.

(5) A State may restrict or prohibit temporarily the entry of all aliens or certain categories of aliens in times of war or national emergency.

Article 3

The Right of Asylum

(1) In the absence of a Treaty to the contrary, a State shall have the right to offer or provide in its territory asylum to political refugees or to political offenders.

(2) The State shall also have the right to stipulate as a condition of granting asylum to political refugees or political offenders that they shall not carry on political or subversive activities against the State of their origin or against the State from which they have taken refuge, or against the State in which they have been granted asylum or refuge.

Article 4

Discrimination as regards Admission of Aliens

(1) A State shall not, however, refuse entry to an alien on the ground only of his race, religion, sex or colour.

(2) Admission may be refused to an alien if in the opinion of the receiving State the entry or residence of a person in the country is likely to affect prejudicially its national security or public order.

Article 5

Excludable Aliens

(1) Admission may be refused to any alien in a condition of vagabondage, beggary or mendicancy, or to an alien who is of unsound mind or who is mentally defective, or who may be suffering from an incurable or contagious disease of a kind likely to endanger the public health of the country.

(2) Admission may be refused to one who is strongly suspected of serious infractions of law committed abroad against the lives or security of individuals or against public property, or one who has been previously expelled from another State as well as to such aliens as may have been convicted of extraditable criminal offences or one who is the subject of a deportation order.

(3) Admission may also be refused to stowaways, habitual narcotic users, unlawful opium or narcotic traders, prostitutes or procurers or persons living on the earning of prostitution.

(4) Admission may be forbidden to indigent persons and those of advanced age who have no adequate means of supporting themselves unless their support is sufficiently guaranteed at their place of destination.

Article 6

Classification of Aliens

(1) Aliens may be classified into two groups depending on whether they intend to enter the country for a permanent or a temporary stay.

(2) A State may without special restrictions, admit aliens seeking entry for purposes of transit, tourism or study, and such entry may be permitted on the condition that they are forbidden to make their residence in the country permanent, provided that the prohibition shall be notified to the individual concerned in writing.

Note : The Delegation of Iraq reserved its position on clause (2) of this Article.

Article 7

Alien's Right of Residence

Without prejudice to the competence of a State to regulate the right of sojourn and residence which shall include the liberty to compel an alien to comply with its requirements as to registration, an alien shall be entitled to travel freely, sojourn, or reside in the territories of the State in conformity with the laws and regulations in force therein.

(2) In times of national emergency, however, a State shall have the right to impose such restrictions on the right of movement and residence of aliens as it considers necessary in the national interest.

Article 8

Alien's Personal Freedom

(1) Subject to such local laws, regulations and orders as may be in force, aliens shall enjoy the following rights and privileges on a basis of equality with the nationals :—

(a) Freedom from arbitrary arrest.

(b) Freedom to practise their own religion.

(2) Aliens shall enjoy on a basis of equality with nationals protection of the local laws.

(3) Aliens shall be entitled to free and ready access to the courts of law and to the protection of executive and police authorities. They shall enjoy in this respect the same rights and privileges as nationals. They shall on the same conditions enjoy the benefit of legal assistance.

Note : The delegation of Pakistan reserved its position on clauses (2) and (3).

Article 9

A State admitting aliens into its territory shall be free to prohibit or regulate by law or executive orders, professional or business activities or any other employment of the aliens resident therein.

Article 10

(1) An alien shall not enjoy any political rights including the right of suffrage except where it is otherwise provided by local laws, regulations or orders.

(2) A State may by law prohibit political activities on the part of an alien.

Article 11

Right to Property

(1) An alien shall have the right to acquire and hold property subject to local laws, regulations and orders, and a State shall provide protection in respect of such rights.

(2) A State shall, however, have the right to acquire, expropriate or nationalise foreign owned property in the national interest or for a public purpose. Compensation shall be paid for such acquisition, expropriation or nationalisation in accordance with local laws.

Note : The Delegation of Japan was not in agreement with the provisions of clause (2), as in its view full compensation should be paid whenever a State acquires the property of a foreign national irrespective of local laws.

Article 12

Taxation of Aliens and Their Liabilities for Forced Loans etc.

(1) An alien resident in a State shall be liable in the same manner as the nationals of that State to payment of taxes and duties in accordance with its local laws.

(2) A State shall not, however, levy any discriminatory taxes or forced loans on resident aliens.

Note : The Delegation of Indonesia reserved its position on clause (1).

Clause (2) is not acceptable to Indonesia and Pakistan. The provision regarding "forced loan" is not acceptable to Iraq and Ceylon.

Article 13

Alien's Liability for Compulsory Police, Fire Brigade and Military Service

(1) Aliens may in cases of emergency or imminent need be obliged to perform police, fire protection or militia duty for the protection of the place of their residence against natural catastrophies or dangers of a similar character.

(2) Aliens may not be compelled to enlist themselves in the armed forces of the State.

(3) Aliens, however, may if permitted by the State of residence, voluntarily enlist in police or fire-brigade services under the same conditions as nationals.

Note : The Delegation of the United Arab Republic reserved its position on clause (3). The Delegation suggested inclusion of the following provision :

> "Aliens may voluntarily enlist in military services with the express consent of their home States which consent can be withdrawn at any time".

The Delegations of Burma and Ceylon were prepared to include this provision as clause (4). The other Delegations were not in a position to commit themselves on this aspect of the matter.

The Delegation of Indonesia reserved its position on the whole Article.

Article 14

Restrictions on Departure of Aliens

(1) A State shall have the right in accordance with its municipal laws and regulations to impose such restrictions as it may deem necessary on an alien leaving its territory.

(2) Such restrictions on an alien leaving the State may include any exit visa or tax clearance certificate to be procured by the alien from the authorities concerned.

(3) An alien who has fulfilled all his local obligations in the State of residence shall not be prevented from departing from the State of residence.

(4) Subject to the local laws and regulations that may be in force the State of residence shall permit an alien leaving the State to take his personal effects with him.

Note : The Delegation of Pakistan did not accept the provisions of clauses (3) and (4).

Article 15

Expulsion or Deportation of Aliens

(1) A State shall have the right to order expulsion or deportation of an undesirable alien in national or public interest in accordance with its laws and regulations in force.

(2) The State shall, unless the circumstances warrant otherwise, allow an alien under an order of expulsion or deportation a reasonable time to wind up his affairs.

(3) If an alien under an order of expulsion refuses to leave the State voluntarily, or returns without obtaining permission after leaving the State, he may be deported by force, besides being subjected to arrest, detention and punishment, under the relevant laws applicable in the State concerned.

(4) A State shall not refuse to receive its nationals expelled from the territory of another State.

Note : All Delegates except those of Pakistan and the United Arab Republic accept clause (4). Pakistan and United Arab Republic desire the addition of the word "normally".

The Delegation of Japan did not accept the provision of clause (1). It expressed its preference for the original text which reads as follows :

> "A State shall have the right to order expulsion or deportation of an undesirable alien for reasons of security or public order, in accordance with its laws and regulations in force".

Suggestion by the Delegation of Iraq

The provisions of the foregoing Articles shall be subject to the overriding consideration of the national interest and security of the receiving State.

EXTRADITION

CONTENTS

EXTRADITION

Introductory Note

The subject of Extradition was referred to the Committee by the Governments of India and Burma under the provisions of Article 3 (b) of the Statutes of the Committee. During the First Session held in New Delhi the Committee generally discussed the five main topics which had been set out in the Indian Memorandum and adopted an Interim Report on the subject. During the Second Session held in Cairo the views of the Delegations were ascertained on the basis of a questionnaire prepared by the Secretariat and a second Interim Report was drawn up. As there was a fair measure of agreement among the Delegations on the various questions, the Secretariat drew up a Memorandum incorporating certain Draft Articles in which an attempt was made to embody the principles agreed to at the Cairo Session. At the Third Session held in Colombo in January 1960, the subject was further considered by the Committee on the basis of the Draft Articles prepared by the Secretariat and the provisions of a draft Convention presented by the Delegation of the United Arab Republic. The Committee discussed the subject in detail and reached agreement on the basic principles though there were certain dissenting views on some aspects of the subject. One of the important topics which was considered by the Committee related to the principle of non-extradition of political offenders. The majority of the Delegations were of the opinion that extradition should not be granted for political offences and that the requested State should determine whether the offence is political. One Delegation was of the view that this principle should not be applicable to the cases of persons who are not nationals of the State where the political crime is committed since foreign nationals do not enjoy any political rights. An offence would accordingly not be considered as political if it was committed by a person who did not exercise political rights in the aggrieved State. Another Delegation was of the view that in the matter of extradition no distinction should be made between ordinary crimes and crimes which amount to political offences or which are of a political character. All the Delegations were in agreement that extradition may be refused if the person in question is a

national of the requested State and that extradition should not be refused on the ground that the person sought is not a national of the requesting State. Similarly, all the Delegations were in agreement that if a person is abducted from a State by the agents of another State which wishes to prosecute him, the State from which he was abducted should be entitled to demand and obtain his return. The majority of the Delegations were of the opinion that extradition should not be granted for purely military offences, but some Delegations expressed the view that the principle of non-extradition of military offences was not an accepted notion of international law. All the Delegations were in agreement that no legal duty is imposed by customary international law on States to extradite fugitive offenders and that extradition should be granted only if the offence has been committed within the jurisdiction of the requesting State. On the basis of the discussions held at the Colombo Session, the Secretariat has drawn up a report in the form of Draft Articles embodying the principles agreed to at the Colombo Session. The Committee has directed the Secretariat to obtain the views of the Governments of the participating countries regarding their preference between bilateral treaties and multilateral conventions on extradition for the consideration of the Committee at its Fourth Session.

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

MEMORANDUM OF THE GOVERNMENT OF THE UNION OF BURMA

Extradition

On the question of extradition, the follwing basic principles will have to be accepted :-

(i) Each State, as a member of the Family of Nations, has certain responsibilities towards other States.

(ii) One of the responsibilities referred to above is the responsibility of a State, at the request of another State, to apprehend and deliver persons found within the territory of the former State who are alleged to have committed offences within the jurisdiction of the latter State.

(iii) However, unless there is some agreement between the two States concerned, there is no obligation arising out of such responsibility.

(iv) It is therefore usual for States to enter into treaties or make other arrangements on a reciprocal basis for what is technically known as "extradition of offenders".

The Extradition Laws prevailing in Burma conform to these principles and it is only on a requisition for surrender by a foreign State that extradition proceedings are started. The definition of 'Foreign State' in section 2 (b) of the Burma Extradition Act is wide enough to include even persons exercising the powers of Government in lands beyond the limits of Burma. The only check placed is that in the opinion of the judicial officer empowered under the Act, a *prima facie* case against the person sought to be extradited is made out. The list of extradition offences enumerated in the First Schedule of the India Act XV of 1903 is retained almost in its entirety. Offences outside this list are not extradition offences, and thus political offenders enjoy immunity.

Section 18 envisages treaties for the extradition of offenders and provisions not incorporated in the Act may be agreed to, in which case the treaty obligations would be observed.

Extradition in most countries is based either upon specific enactments or upon treaties. These vary in their list of extraditable offences depending upon the relationship existing between the States concerned.

In Asian States which have only recently regained their independence, the Extradition Laws of colonial days have continued and at the present juncture it is necessary to examine the position.

It is most desirable that as between the member States of the Asian-African Legal Consultative Committee, definite arrangements should exist for the extradition of fugitive criminals. Each member State should see that it has adequate statutory laws for this purpose and then enter into relations with the member States either bilaterally or multilaterally.

ASIAN - AFRICAN LEGAL CONSULTATIVE COMMITTEE

MEMORANDUM OF THE GOVERNMENT OF INDIA MINISTRY OF EXTERNAL AFFAIRS

Extradition.

The questions on which the views of the Asian Legal Consultative Committee are solicited in the matter of extradition are :—

(i) Whether and on what principle should a State voluntarily extradite fugitive criminals even in the absence of an extradition treaty ;

(ii) Whether a State should extradite its own nationals and the nationals of States other than the requesting state ;

(iii) What should be the procedure to be followed in the matter of extradition ;

(iv) What offences should properly be regarded as extraditable and whether attempts to commit such offences should also make a person liable to be extradited ;

(v) What principles ought to be followed in determining the question as to whether a crime is of a political nature.

As regards the first question, it is well recognised that no State is under any obligation to surrender fugitive criminals to another State in the absence of a treaty provision requiring it to do so. Although it has been asserted from time to time by reputed authors on international law, and some times by national courts (See Annual Digest on International Law 1919-22, Case No. 182) that even in absence of a treaty the obligation to extradite remained, the doctrine has never become established as a part of the law of nations. (See Dickinson-Extradition (1931) Encyclopaedia of Social Sciences, Volume I, page 41, Harvard Research Draft Convention on Extradition, Moore's Digest on International Law, Volume IV pages 239-424, Oppenheim 7th Edition, Vol. I, pages 634-649, Hyde's International Law, Vol. II, pages 1012-1063 and Hackworth's Digest on International Law, Vol. IV, pages 1-241). However, the municipal laws of certain States

contain provisions for voluntary surrender of fugitive criminals even in the absence of treaties. Such a provision exists in Canada (Revised Statutes, 1952, Vol. V). It contemplates extradition under certain circumstances where no treaties exist. There are also extradition laws in force in France and Germany, made expressly for surrender of fugitive criminals in the absence of treaty arrangement. It is, therefore, for consideration whether a practice should be developed in the countries participating in the Asian-African Legal Consultative Committee about voluntary surrender of fugitive criminals and if so on what principle this could be made.

On the second question it would be observed that if the laws of his home State provide for trial and punishment of offences committed abroad by its nationals. The majority of the States decline to extradite their own nationals and have adopted the principle of punishing them according to laws in force for crimes committed abroad. As regards surrendering their own nationals, Great Britain and United States, regarding criminal jurisdiction as essentially territorial, are prepared on principle to do so ; actually, however, the treaties of the two States contain varying provisions on this point, doubtless on account of the difficulty of securing reciprocity for their policy. The countries which refuse to surrender their own nationals under extradition treaties with the U. K. are :- Denmark, Greece, Guatemala, Hayti, Iceland, Italy, Luxemburg, Nicaragua, Salvador, Spain, Switzerland, and Uruguay, whilst those which allow the option of surrender at discretion of their own nationals are :- Albania, Argentina, Hungary, Iraq, Paraguay, Peru, Belgium, Bolivia, Chile, Columbia, Cuba, Czechoslovakia, Finland, France, Liberia, Mexico, Monaco, Netherlands, Norway, Panama, Poland, Portugal, Romania, San Marino, Thailand and Yugoslavia. Most of the territories between the U. S. A. and foreign countries either disclaim any obligation to surrender citizens of the asylum State or to make their surrender discretionary with that State, although generally speaking, the policy of the United States is to surrender citizens. France, however, like several other European countries, has adopted the principle of punishing its own subjects for grave crimes committed abroad even though this may involve practical difficulties in procuring the necessary oral and documentary evidence. It is, however, not easy to justify on principle

the policy of refusing to extradite nationals. The theory that a State should try its own nationals for crimes wherever committed fails as a suggestion for two reasons : (a) because in many cases it is impracticable to try a crime committed in another country on account of the impossibility of securing the relevant evidence and (b) because the argument cannot have any application to a national who has escaped to his own country after conviction in a foreign country since on general principles of justice such a person may not be tried again for the same offence. It has been suggested that if a national is alleged to have committed an offence abroad and returns home then it is only fair that he would be tried in his own home country according to the laws and procedure with which he is familiar. It has been said that if a foreign national commits an offence in another State and then leaves that State, for his own home State, that State may well be rid of him and the necessity of punishing that offender may not appear to be so great as that of a national of a State. It has also been said that in many countries notions of administration of criminal justice differ widely and he may not receive a fair trial. These considerations, however, do not seem to be sufficient justification for refusal to extradite a State's own national since a person who commits an offence in another State must be expected to take consequences like all other persons in that State according to the laws in force there. Besides in cases of "denial of justice" it is always possible to take up the matter with the foreign States concerned. The practice of the States as evidenced from the various extradition treaties appears to favour extradition of nationals of third State.

On the third question, the practice of States with regard to the evidence of the guilt of the person claimed which is required to support extradition, varies from State to State. This is due to the difference of emphasis which is placed by them, on the one hand, upon the importance of international co-operation in the matter of suppression of crime, and on the other, upon the protection of individual against oppression. The practice followed in the United Kingdom is to require a requesting State to establish a *prima facie* case of an extraditable offence before a magistrate against the person who is wanted on a criminal charge in the requesting State. The same practice has been adopted in India and in the countries of the Commonwealth as it has

been felt that such a procedure provides a safeguard for the individual. But at the same time it may be observed that in a number of bilateral treaties States have expressly done away with the requirement of establishing a *prima facie* case of guilt prior to extradition and persons are generally surrendered upon production of a formal warrant of arrest upon proof of identity of the person claimed, and the extraditable character of the acts alleged to have been committed upon satisfaction that the offence charged is not of a political character. Article 17 of the Harvard Research Draft on Extradition also recognises that the requirement of a *prima facie* case of guilt ought to be eliminated.

As regards the fourth question, it may be observed that although the majority of extraditon treaties include list of extraditable crimes or offences, no general principle can be derived from this. What, however, is insisted upon is that the extraditable offence must be regarded as such under the laws of both the States, although the name by which the crime is described need not necessarily be the same. The usual types of offences which are generally regarded as extraditable appear in Article 3 of United States—Great Britain Treaty on Extradition such as, murder manslaughter, miscarriage, rape, indecent assault, kidnapping, child stealing, abduction, procuration, bigamy, maliciously wounding or inflicting grievous bodily harm, threats with intent to extort money, perjury, arson, burglary or house-breaking, robbery with violence, embezzlement, fraud, obtaining money by false pretences, counterfeiting, forgery, crimes or offences against bankruptcy law, bribery, malicious injury to property, crimes or offences or attempted crimes or offences in connection with the traffic in dangerous drugs. As regards extradition for attempts to commit extraditable offences, so far only attempts to commit murder or attempt to commit offences in connection with the traffic in dangerous drugs are regarded as extraditable offences.

As regards the fifth question, it is to be observed that it is almost universal practice as manifested in treaties and national legislations in various countries, for the States to decline to extradite persons to be tried for political offences. But the question for consideration is as to what test is to be applied in determining whether an offence is or

is not of a political character. In a case decided in the United Kingdom in 1894, it was held that in order to constitute an offence of political character, there must be two or more parties in the State, each seeking to impose the government of their own choice on the other and that if the offence is committed by the one side or the other in pursuance of that object, it is a political offence otherwise not. (Re Menier 1894. 2. Q. B. 415 Per Cave J).

Numerous instances of crimes of political character are mentioned in Hyde's International Law, Vol. II, pages 1019 to 1027, Moore's Digest on International Law, Vol. IV, pages 223 to 254 and Hackworth's Digest on International Law, Vol. IV, pages 45-52. It, however, appears that the question as to whether or not a particular act is a political offence is usually determined on the circumstances of each case. Two instances, however, may specifically be mentioned. In Re Castioni (1891, I.Q.B. 149) it was held that the extradition of Castioni must be denied as the offence with which he was charged was of a political character since the charge of wilful murder preferred against him was in respect of killing a local official during a revolt against the municipal government of Bellinzona in Switzerland. In 1934, the Italian Court of Appeal of Turin declined to extradite to France two persons charged with the assassination of King Alexander of Yugoslavia and the French Minister of Foreign Affairs at Marseilees on October 8, 1934 on the ground that the assassination "having resulted from political motives and having injured the political interest of Yugoslavia, constituted a political offence" under the Italian Penal Code.

The views of the Consultative Committee are, therefore, requested on the question as to whether any principle can be laid down in determining the question as to whether a crime is of a political character or not.

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

MEMORANDUM OF THE GOVERNMENT OF JAPAN

Extradition

The current domestic law in Japan in relating to extradition is the Law of Extradition of July 22, 1953 repealing the Ordinance of Extradition which had been in force since August 10, 1887. This law was enacted from an entirely fresh point of view. The basic policy of Japan towards the problem of extradition is expressed in the provisions of this law. It may be summarised as follows.

First, Japan in principle extradites criminals to countries with which Japan has extradition treaties. Secondly, Article 2 of the said law provides for non-extradition of political criminals, double criminality, and non-extradition of its own nationals. The above law, moreover, stipulates that the restraint of a fugitive should be executed under a warrant issued by a judge, and that the judicial authorities should primarily carry out the examination and render decision as to whether the fugitive should be surrendered or not. The law, however, leaves discretional power to the Minister of Justice by investing him with the right to refuse surrender in spite of the court's decision when it is deemed inappropriate.

Other points such as the content of extradition offences are not stipulated in the law itself, but are left to the treaties.

Let us now examine each of the items of this subject.

Extradition in Absence of Treaty.

The current domestic extradition law of Japan is based on the principle of extradition to countries with which Japan has extradition treaties (Law of Extradition, Article 1). However, it is the recent trend among many countries to extradite, even in the absence of an extradition treaty, under international comity. In 1880, the Institute de Droit International at Oxford adopted a resolution that "nevertheless it is not treaties alone that make extradition an act in conformity with right and it may be effected even in the absence of any contractual tie."

This view is widely supported by scholars and may be considered as an established principle of international law.

Japan too, despite the fact that the repealed Ordinance as well as the present Law of Extradition were based on the principle to extradite only to the countries with which Japan has extradition treaties, has in many cases made requests for extradition, to countries with which Japan has no treaties and has extradited fugitives upon requests from such countries.

Regarding domestic procedure for extradition in the absence of treaty, under international comity the law of extradition is applicable *mutatis mutandis*.

During the time of the Ordinance all the cases of extradition, in the absence of treaty, were dealt with in accordance with the provisions of the Ordinance.

In the case of analogical application of the persent law, however, a problem would arise as to the definition of an"extradition crime" since it is left to each of the treaties. It may be reasonable to limit the analogical application of the law of extradition to offences which are regarded as extradition crimes in actual cases of extradition in most countries.

The Principle of Non-extradition of ones own Nationals

The Japanese Law of Extradition states in Article 2, Item 7 the principle of non-extradition of Japanese nationals. The ground for this is that if a fugitive possessing its nationality is extradited to a foreign country, he would be deprived of sufficient means of self defence because of the language barrier and the difficulty in presenting a favourable witness, and consequently it would result in the failure on the part of the country in discharging its duty to protect its own nationals, pursuant to its own laws.

On the contrary, there is also a strong trend of thought which denies the principle of non-extradition of ones own nationals on the ground that the offence for which the request for extradition was made is a violation of the demanding country's law. Furthermore the most pertinent court to pass judgment on such offences is that of the country in which the crime was committed, especially in view of the convenience of collecting necessary evidence.

France, Germany, and many other civil law countries, taking the former position, accept the principle of non-extradition of its own nationals, while the United States and other common law countries deny such a principle from the latter point of view. Japan takes the former position insofar as the law of extradition is concerned and professes the principle of non-extradition of its own nationals.

It must be noted, however, that this is but a principle and the law admits conclusion of treaties which may not be i n accordance with this principle (Law of Extradition, Article 2, proviso).

In fact, the Treaty of Extradition between Japan and the United States stipulates in Article 7 that either of the contracting party may surrender its own nationals in case the extradition is deemed appropriate. This means that the principle of non-extradition of one's own nationals is not applicable to the case between Japan and the United States, and Japan may surrender its own nationals when a request for extradition is made by the United States and such extradition is deemed appropriate.

The principle of non-extradition of one's own nationals is but one of the two phases, the other being that of punishment of one's own nationals who have committed a crime abroad. Hence, countries which adhere to the principle of non-extradition of its own nationals prescribe many regulations for punishment of crimes committed overseas by its own nationals. From this point of view there are some who maintain that a country which professes the principle of non-extradition of its own nationals, should, so far as it denies surrender of its own nationals on the basis of this principle, incur the obligation to indict the offender for the crime for which the request of extradition was made. Japan, although not liable to such duty by any of the domestic laws, does prescribe most of the offences deemed as "extradition crimes" by many countries as "crimes committed overseas by Japanese nationals" in Article 3 of the Penal Code. It is possible, therefore, for Japan to punish such Japanese nationals provided there is sufficient evidence.

Extradition Procedure

As mentioned before, Japan holds the position that a judicial authority first examines and decides as to whether

the fugitive should be surrendered or not. According to the repealed Ordinance of Extradition, the public procurator first carried out the examination, and after his reporting to the Minister of Justice, the latter was to render a decision (Ordinance, Articles15-18).

According to the present law, however, the Tokyo High Court, upon request of the Procurator of the Tokyo High Public Procurator's Office, examines whether or not the fugitive is to be surrendered, and only in case the High Court rendered a decision in favour of extradition, the Minister of Justice may surrender the fugitive (Law of Extradition, Articles 8-14). Although extradition is primarily an administrative procedure, the above steps have been taken in order to protect basic human rights against possible arbitrary extradition on the part of an administrative authority. The Minister of Justice has the discretionary power in that he bears no restraint even in case the court renders its decision in favour of extradition, and can deny extradition contrary to decision of the court if he finds it inappropriate. (Law of Extradition, Article 14).

In order to dispel possible fear that such participation of a judicial authority in the extradition procedure might cause delay of extradition, due consideration is given to the procedure such as the limitation of time for the examination, etc. (Law of Extradition, Article 9, Paragraph 1).

It is felt, however, that every country should co-operate with each other closely, especially in presenting necessary data in order to accelerate the procedure.

Extradition Crime

An extradition crime is one which subjects the offender to extradition.

The general interpretation of international law seems to be that any country can extradite offenders guilty of any kind of crime insofar as there is no restraint under their domestic law. As to what kind of crime the domestic law should prescribe as an "extradition crime" varies in form as follows :

(a) Domestic laws which leave the definition of extradition crimes to the treaty by merely prescribing them as crimes stipulated in the treaty of extradition, e.g. the Domestic Law of the United States, the treaties in turn vary in the content of extradition crimes according to the contracting parties. Some treaties enumerate the names of offences, while others adopt the term of imprisonment as the criterion. (cf. USCA, Tit, 18, Section 3184).

(b) Domestic laws which enumerate the names of offences. The British Extradition Act falls into this category. It defines extradition crimes as offences which have been committed within the jurisdiction of Great Britain, and which come within the purview of the offences listed in the attached Table 1 (Extradition Act, Section 26).

(c) Domestic laws which prescribe extradition crimes according to the term of imprisonment. There are quite a few countries which take this standpoint. The Extradition Law of France defines extradition crimes as (1) acts punishable by criminal penalty and (2) acts punishable by correctional penalty (*peine correctionnaire*) ; with imprisonment for a period of 2 years or more, or in the case of a convicted person when the penalty pronounced is imprisonment of 2 months or more (Extradition Law of France, Article 4).

Although it is necessary on the one hand to define an extradition crime as accurately as possible, it is on the other hand advisable to admit as many offences as possible in view of the fact that the recent trend among nations is towards increasing the extradition cases. In this sense it may be said that the system adopting the term of imprisonment as the criterion is more appropriate than that of enumerating the offences. Article 2 of the Draft Convention on Extradition drawn up by the Harvard Research in International Law and published in 1935 provides for extradition of criminals who have committed crimes punishable with imprisonment of 2 years or more.

The present Japanese Law of Extradition, following the example of the repealed Ordinance (Article 1, Paragraph 2), leaves the content of extradition crime to the respective treaties according to Article 1, Paragraph 2. Consequently

the contents of extradition crimes vary according to the demanding country. The Treaty of Extradition between Japan and the United States which is still in force enumerates the extraditable crimes, whereas the Treaty of Extradition between Japan and Russia (repealed) stipulated that the criminal shall be surrendered in case the offence in question is punishable with imprisonment for 1 year or more under the laws of both contracting parties.

The crimes listed as extraditable crimes in Article 2 of the Treaty of Extradition between Japan and the United States were 14 at first, but later they were increased to 15 according to the amendment (Imperial Ordinance, Sept. 25, 1886) and the Supplementary Agreement (Imperial Ordinance, Sept. 26, 1906). Thus, the above-mentioned 15 crimes are to be understood between Japan and the United States as the "extradition crimes" stipulated in Article 1, Paragraph 2 of the Law of Extradition. Japan, in consequence, is not liable to meet the requests by the United States for extradition when the offence in question is one other than the 15 listed crimes.

Since Article 2 of the said treaty is confined to "burglary criminal assault, or arson," it leaves a question as to whether attempts to commit, or instigation of these crimes constitute an extradition crime between Japan and the United States. However, since item 1 of the same Article explicitly provides for an attempt to murder, and item 8 for instigation of perjury, attempt or instigation of other crimes may be understood as being not included unless there is specific reference to it. We have already referred as to how an extradition crime should be treated in the absence of a treaty.

Political Crime

As stated before, the Japanese Law of Extradition has adopted the principle of non-extradition of political criminals. There is, however, a wide variation in the interpretation of the term "political criminal". They can be roughly classified into two groups according to the two theories they follow; namely the Objective Theory and the Subjective Theory.

(a) **Objective Theory**

This view maintains that a political crime is to be determined by the type of crime, regardless of the aim of the offender.

(b) **Subjective Theory**

This view maintains that a political crime is to be determined by the aim or motive of the offender, regardless of the type of crime.

Most treaties and laws of various countries do not define political crimes, but rather tend to avoid possible controversy in the interpretation of the term by excluding certain kinds of offences from the concept of political crimes.

(1) Law based on the Objective Theory :

This is represented by the German Law of Extradition of 1929. Article 3 of that law gives a positive definition by prescribing the acts not extraditable as those which are associated with a certain political act either in preparing for or securing, or conceiving, or preventing, that political act. A political act, in turn, is defined as a punishable act of infringement directly inflicted, upon the existence and safety of the State, the sovereign and the constituent members of the State, the legislative organ, sufferage and franchise of the people, or against the friendly relations with foreign countries.

(2) Law based on the Subjective Theory :

Although not being a law, the Draft Convention on Extradition drawn up by the Harvard Research in International Law provides in Article 5 (B):

"That term political offence includes treason, sedition and espionage whether committed by one or more persons ; it includes any offence connected with the activities of an organized group directed against the security or governmental system of the requesting State; and it does not exclude other offences having a political objective."

(3) Laws which have other criteria :

Among many domestic laws and treaties belonging to this category, the following two are the most typical;

(i) Views represented in the Swiss Law. According to this view, even a crime which has

been committed with a political objective will not constitute a political crime if the factors of an ordinary crime are preponderant. The Swiss "Federal Law on Extradition to Foreign States" stipulated in Article 10 that a criminal shall be extradited in case the crime be committed was primarily a common crime regardless of whether or not it was committed with a political objective.

(ii) Views represented in the Belgian Law. According to this view, homicide and other crimes which inflict injury upon the Chief of the State and his family are excluded from category of political crimes (Article 6 of the Belgian "Law Concerning Extradition" of 1856; see also Article 7, Paragraph 2 of the Swedish "Law Regarding Extradition of Criminals" of 1913).

In Japan, no definition of a political crime is given in either the Ordinance or the Law of Extradition. Also the Treaty of Extradition between Japan and United States has no provisions concerning interpretation. On the other hand it is an accepted theory in international law that the decision as to whether or not the crime in question is a political crime, lies with the country to which the request for extradition is made, unless it is stipulated otherwise in the treaty. Thus, in case there is a request for extradition by a foreign country, the decision is left to Japan to determine whether the fugitive is a political criminal or not. There is no doubt that a crime like insurrection constitutes a political crime. If Japan receives a request from a foreign country for extradition, regarding any of the above crimes, say treason, she could of course refuse. If a crime related to a political affair, but also included factors of an ordinary crime such as homicide and arson, it is extremely difficult to decide whether it is a political crime or not. In such cases one should decide by taking all the circumstances into account. In this connection, it seems advisable to take the position of the afore-mentioned Swiss Extradition Law and surrender the fugitive by taking the crime he committed as a non-political crime when the characteristics on a common crime preponderate over that of a political crime.

ASIAN - AFRICAN LEGAL CONSULTATIVE COMMITTEE
FIRST SESSION

INTERIM REPORT OF THE COMMITTEE
ON
PRINCIPLES OF EXTRADITION OF OFFENDERS

The Committee at its sixth and seventh meetings held on Tuesday the 23rd and Wednesday the 24th April, 1957, took up for consideration item 2 of Part III of the Agenda- Principles for extradition of offenders taking refuge in the territory of another including question relating to desirability of conclusion of extradition treaties and simplification in the procedure for extradition—which had been referred by the Governments of Burma and India.

The Committee considered three Memorandum on the subject presented by the Governments of Burma, India and Japan and discussed the five questions which have been set out in the Indian Memorandum, namely :

(i) whether and on what principle should a State voluntarily extradite fugitive criminals even in the absence of an extradition treaty ;

(ii) whether a State should extradite its own nationals and the nationals of States other than the requesting State ;

(iii) what should be the procedure to be followed in the matter of extradition ;

(iv) what offences should properly be regarded as extraditable and whether attempts to commit such offences should also make person liable to be extradited ;

(v) what principles ought to be followed in determining the question as to whether a crime is of a political nature.

The Committee took note of the statements made by the Members for Burma and India and the views of the Delegations of Burma, Ceylon, India, Indonesia and Japan.

The views expressed by the various delegations may be summarised as follows :

(1) On the first question, the Burmese Delegation considered that since States owe a duty to each other, adoption of measures in regard to extradition of offenders was necessary. In its view this could be done either by enactment of similar legislation by all the participating countries or by conclusion of bilateral treaties between them. On the second question, the Delegation did not favour the suggestion of surrender by a country of its own nationals since this was frought with complications. It was also not in favour of surrender of the nationals of the third States direct to the requesting State but was of the view that the requesting State should approach the State of origin of the offender for his extradition from the State where he had taken refuge. The Delegation's view on the third question was that the existing practice of establishment of a *prima facie* case against an accused person, though cumbrous in procedure, had worked satisfactorily and ought to be retained. The determination of the fourth question, in its view, should be left to the States themselves which could be agreed upon by means of provisions in bilateral treaties. On the fifth question the Delegation was of the view that no general formula could be evolved for determining as to whether a crime was of a political nature.

(2) The view expressed by the Indian Delegation on the first question was that there could be no objection to voluntary extradition of offenders even in the absence of treaty arrangements. As regards the second question, the Delegation could not see sufficient justification for refusal on the part of a State to extradite its own nationals or the nationals of a third State. On the third point, it considered the retention of the existing safeguard of establishing a *prima facie* case against the accused person to be necessary. On the fourth question the Delegation favoured the proposal that the extraditable offences should be determined by the States themselves by means of extradition treaties and that the extraditable crimes should be the same in both the countries. On the fifth question,

having regard to the varied practice followed from time to time, the Delegation felt that it was not possible to lay down any general test to determine as to whether a crime is of political nature or not.

(3) The Delegation of Ceylon did not favour the idea of voluntary surrender of fugitive offenders and considered the conclusion of treaties to be essential in this regard. On the second question it was of the view that in cases where extradition treaties existed, the basis for extradition of its own nationals ought to be on reciprocity, but reciprocity need not be insisted upon always and in all cases. It saw no objection to the surrender of the nationals of a third State direct to the requesting State. As regards the third question, the Delegation agreed with the views that it was necessary to establish a *prima facie* case before a fugitive offender could be extradited. On the fourth question, its views were the same as those of the Delegations of Burma and India, but it did not favour the inclusion of attempts to commit crimes in the list of extraditable offences. As regards the fifth question, the Delegation was of the view that no general formula could be evolved to determine the political nature of a crime.

(4) The Indonesian Delegation favoured the proposal of voluntary extradition even in the absence of treaties, but felt that this matter should be left to the discretion of the Governments concerned and ought to be limited to crimes of a serious character. On the second question, the Delegation felt that in principle no distinction could be made in this regard between its own nationals and the nationals of third States. It favoured the idea of extradition of its own nationals only when they are charged with crimes of a serious character subject to the discretion of the requested State. On the third question, the Delegation agreed with the view that the establishment of a *prima facie* case was necessary before a fugitive offender could be surrendered. As regards the fourth question, the Delegation was of the view that though there was not much difference in the

list of extraditable offences which are attached to the treaties concluded between various States, it desired that whilst drawing up such lists, the local conditions in the countries concerned should be kept in view. The Delegation also felt that the extraditable offences should be determined by the States themselves in bilateral treaties. It was of the view that attempt to commit offences should be made extraditable only if such an attempt is regarded as a crime in both the countries. On the fifth question, it agreed with the views of other Delegations that no specific test could be laid down for determining the political nature of an offence.

(5) The Delegation of Japan stated that although in principle offenders are to be surrendered only on the basis of a treaty, in practice such surrenders are made voluntarily even in the absence of a treaty with the requesing State. On the second question, the Delegation did not favour the proposal of surrender of its own nationals. On the third, fourth and fifth questions, it was in agreement with the views expressed by other Delegations.

(6) The Delegation of Syria expressly reserved its position.

The conclusions which could be drawn from the discussions of the Committee appear to be as follows ;

(1) There was agreement in principle among the Delegations of Burma, Ceylon, India, Indonesia and Japan that the conclusion of extradition treaties between the various States was desirable so that fugitive criminals could be surrendered to the State in whose territory the crime had been committed. The Indian and the Japanese Delegations were of the opinion that there was no objection to the voluntary surrender of criminals even in the absence of a treaty. The Indonesian Delegation considered such voluntary surrender to be desirable only in respect of crimes of a serious character. The Delegations of Burma and Ceylon were not in favour of such voluntary surrender.

(2) On the question of extradition by a State of its own nationals, whilst the Indian Delegation was of the view that there was no sufficient justification in refusing to extradite its own nationals and the Indonesian Delegation favoured surrender of one's own nationals in respect of crimes of a serious character, the Delegations of Burma and Japan were opposed to such surrender of its own nationals by a State. The position taken by the Delegation of Ceylon was that surrender of its own nationals ought to be on a reciprocal basis between the States, but such reciprocity need not be insisted upon in all cases. On the question of surrender of nationals of a third State, the Burmese Delegation was of the view that such extradition ought to be through the State of origin of the offender which should be approached by the requesting State. The other Delegations saw no objection to direct surrender of offenders to the requesting State in such cases.

(3) Tne Delegations of Burma, Ceylon, India, Indonesia and Japan were agreed that a *prima facie* case of guilt in respect of an extraditable offence ought to be established before a fugitive offender could be handed over to the requesting State.

(4) The Delegations of Burma, Ceylon, India, Indonesia and Japan were agreed that extraditable offences should be determined by the States themselves by means of extradition treaties on the question ; as to whether attempts to commit extraditable offences should themselves be extraditable, the Delegations expressed varying opinions.

(5) The Delegations of Burma, Ceylon, India, Indonesia and Japan were agreed that no particular test or formula could be evolved to determine the question as to whether a particular crime could be regarded as one of a political nature.

The Committee having considered the statements and views noted above, put forward by various Delegations represented at this Session, is of the opinion that it would be necessary for the Committee to collect further material and

make a study of the question relating to voluntary surrender of fugitive criminals and the question of extradition of its own nationals and those of third States before it would be in a position to make its recommendations to the Governments of the participating countries.

The views of the Committee in respect of the three questions on which there was agreement between the five Delegations (the Delegations of Syria and Iraq having reserved their position) are as follows :—

(1) The Committee favours the view that before a State surrenders a fugitive criminal to a requesting State, a *prima facie* case of guilt ought to be established to show :

(i) that an extraditable offence was committed;

(ii) that the offence was committed in the territory of the requesting State ;

(iii) that the crime was committed by the person who is sought to be extradited; and

(iv) that the crime is not of a political nature.

(2) The Committee is of the view that no specific procedure need be laid down in respect of establishment of such a *prima facie* case and this should be governed in accordance with the rules of criminal procedure as prevailing in the country where the offender has taken refuge.

(3) The Committee is of the view that extradition treaties ought to be concluded between the participating countries and that the list of extraditable offences should be set out in such treaties.

(4) The Committee is of the opinion that it is not feasible to formulate any specific test to determine the question as to whether a crime is of a political character or not and has to be judged in the facts and circumstances of each case.

8. The Memoranda submitted by the Governments of Burma, India and Japan would form part of this report.

ASIAN - AFRICAN LEGAL CONSULTATIVE COMMITTEE

CAIRO SESSION

Interim Report of the Sub-committee on Extradition

In the first Session, the question of extradition of fugitive offenders was generally considered by the Committee though the delegations of Iraq and Syria had reserved their position. In an interim report drawn up by the Committee at that Session the views expressed by the delegations were summarised. At this Session, the delegation of the U. A. R. submitted a written memorandum on the subject. A general statement was made by the delegation of the U. A. R. while the delegation of Indonesia made a statement dealing with the question of offences of a political character.

The basis of discussion at the Session was the detailed questionnaire prepared by the Secretariat on the various aspects of extradition. The views of the delegations were ascertained in the form of answers to the questions. The views may be summed up subject-wise as follows :

I. Legal Duty of Extradition

It was agreed that no legal duty is imposed by customary international law on States to extradite fugitive offenders. The majority of the delegations were, however, of the view that extradition may, in the absence of a treaty, be effected by way of international cooperation in suppression of crimes on a reciprocal basis. Some delegations, however, thought that extradition could be effected only in pursuance of a treaty.

II. Extraditable Offences

A. The Nature of Extraditable Offences

Until recently the practice among the participating countries was to enumerate the offences which were to be made extraditable in treaties and in the municipal legislations relating to extradition. The latest extradition convention among the member States of the Arab League on the other hand has adopted the method of describing extradition offences as being those which are punishable with imprisonment for a certain minimum period. It might be possible to

combine both these methods in extradition laws and in extradition treaties.

Regarding attempts to commit offences, some of those who adopt the enumerative method would make attempts to commit only the more serious offences extraditable provided such attempts amount to punishable offences.

B. **Conditions of Extradition**

The laws and/or the treaties of most of the participating countries have generally provided for some or all of the following conditions for extradition, namely :

(1) ***Non bis in idem***, i.e. the rule providing against double jeopardy for the same act.

(2) Double criminality ; i.e. the act should be punishable as an offence in both the requesting and the requested States.

(3) Specially ; i.e. a person may not be tried in the requesting State except for the offences for which extradition was obtained. The U.A.R. delegation pointed out certain exceptions to this rule namely :

(a) Where the person extradited accepts in a formal statement to be tried for other offences.

(b) If, after being given the opportunity of returning within a reasonable period to the requested State, he waives it, and

(c) If the requested country agrees to the prosecution of such a person in the requesting State for other offences.

(4) The requested State in its discretion may decline extradition on the ground of lapse of time, i.e. the request for extradition was made unreasonably late.

(5) Extradition may not be granted for offences of political character. The delegation of Ceylon, however, stated that although this principle has been accepted in Ceylon at present, in future legislations she would reserve the right to extradite persons who commit serious types of mixed crimes such as crimes which are of both political and

ordinary nature. No comprehensive definition of what is an offence of a political character was however, available.

The delegation of Indonesia urged consideration by the member States of the principle that no offence should be considered as being of a political character by the member States if it was committed in any of these States by a foreigner.

III. **Extradition of Nationals and those of third States**

The participating countries, with the exception of Burma, Japan and the U.A.R., considered that a State should extradite even its own nationals for crimes committed abroad on reciprocal basis as they were of the opinion that the difficulty of securing relevant evidence in the trial of a person in his home State for a crime committed abroad was a good ground for extraditing him to the State where the crime was committed. Regarding the extradition of nationals of third States, all the delegations agreed that this could not be refused though the delegations of Burma, Indonesia and the U.A.R. stressed the desirability of such a request for extradition being routed through the home State of the person whom extradition had been asked for.

IV. **Procedure for Extradition**

In almost all the participating countries the procedure for extradition is substantially similar. A *prima facie* case is to be made out against a fugitive offender in all the countries. While in the majority of the member States, it is a court of law which considers whether a *prima facie* case exists, in the southern region of the U.A.R. this is done by the Executive. In all the States the fugitive offender would be discharged if a *prima facie* case is not made out against him and no question of his extradition would then arise. Even if a *prima facie* case is made out, however, the final decision to extradite is still in the discretion of the executive in all the member States.

The person against whom a *prima facie* case has been found to exist, would perhaps be able to obtain a writ of *Habeas Corpus* in Burma, Ceylon and India.

In the event of requests for extradition of the same person being received from more than one State, the requested State would have to decide to which of the requesting States,

the person should be handed over. In most of the countries such an occasion has not arisen. Should it arise, however, it is generally felt that the priority of the claim, the gravity of the crime, or the penalty to be imposed should be taken into account, subject to the discretion of the requested State.

In the Extradition Agreement of 1952 among the Arab League States, the priority of extradition for the same offences is to be given first to the State whose interests have been affected most by the offence, next to the State in whose territory the offence was committed, and subsequently to the State of whom the person is a national. However, if the claims are for different offences, the person in question is to be handed over to the State which made the first request for his extradition. When the fugitive has been abducted from a foreign country by agents of the State which wishes to prosecute him, it has generally been felt that the State from whose territory the abduction took place was entitled to demand the return of the abducted person. If such an abduction amounts to an extraditable offence, such a State may even demand the extradition of the abductors. Where the surrender of a fugitive from a State is effected by its own citizens or by persons under its control, it was generally felt that the State from which the surrender has been effected may not be able to demand the return of the fugitive.

As there appears to be a fair measure of agreement among the delegations of the participating countries on most of the questions discussed in this Session, it is for consideration whether an attempt should be made to embody the agreed principles into a draft convention at a later stage.

ASIAN - AFRICAN LEGAL CONSULTATIVE COMMITTEE

DRAFT ARTICLES & COMMENTARIES ON EXTRADITION

(Prepared by the Secretariat of the Committee)

Introductory

This subject was referred to the Committee for consideration by the Governments of India and Burma. The Governments of India, Burma, Japan and United Arab Republic have submitted memoranda on the subject. During the First Session, the Committee discussed the five main topics which had been set out in the Indian Memorandum and adopted an Interim Report on the subject. During the Second Session, the views of the Delegations were ascertained on the basis of a questionnaire prepared by the Secretariat and a second Interim Report was drawn up by the Committee. This report states that "as there appears to be a fair measure of agreement on most of the questions discussed in this Session, it is for consideration whether an attempt should be made to embody the agreed principles into a Draft Convention at a later stage". The Secretariat has accordingly studied the subject and drawn up the Draft Articles on Extradition, in which an attempt has been made to embody the principles agreed to at the Cairo Session. The Draft Articles and the Commentaries have been prepared by the Secretariat with a view to assisting the Committee in its final discussions on this subject at the Third Session.

Numerous bilateral treaties on extradition have been concluded between States but most attempts to regulate extradition by means of multilateral conventions have failed. The earliest attempts at codification in this field were made by the Latin American States. In the late nineteenth and early twentieth centuries, three multilateral conventions were concluded by Latin American States, namely, the Convention of 1889 between Argentina, Bolivia, Paraguay, Peru and Uruguay and the Conventions of 1907 and 1911 which included Costa Rica, Columbia, Eucador, Guatemala, Honduras, Nicaragua, San Salvador and Venezuela among the signatories. These early agreements in the Central American region were succeeded by the Bustamante Code of 1928 and the Central

American Convention of 1934. The practical results of these agreements were, however, negligible. The elaborate provisions made for reservations by signatory Powers had the effect of nullifying the very purpose of the conventions, namely, the object of arriving at uniformity in State practice. The time was not yet ripe for the conclusion of multilateral conventions on extradition and it is not surprising to find that the Committee of Experts for the Progressive Codification of International Law, appointed by the League of Nations in 1926, came to the conclusion that there were very few questions suitable for inclusion in an extradition convention. The Committee of Experts were of the opinion that only a very few minor non-controversial questions were 'susceptible' of being dealt with in an international convention on extradition.

Over thirty years have elapsed since this opinion was expressed and it is for consideration whether the time is now ripe for the conclusion of a multilateral convention on extradition. The establishment of regional inter-governmental bodies, such as the Organization of American States, the Council of Europe, the League of Arab States and this Committee, has provided an active stimulus to the development and codification of international law in their respective regions, by the creation of machinery whereby the procedure for holding regional conferences has been facilitated and whereby continuity in the organisation of research and the distribution of information has been secured. It may indeed be said that these regional organisations, concerned as they are with the technical aspects of international co-operation, have achieved a greater success in the promotion of multilateral conventions than had been possible under the old system of proceeding only through the Foreign Offices of the States concerned. Standing Committees of legal experts, such as the Inter-American Juridical Committee and this Committee, have stimulated international juridical activity by fostering the initiative necessary for the promotion of conventions on particular subjects falling within their terms of reference. In the field of extradition, draft conventions have recently been drawn up by the League of Arab States, the Inter-American Juridical Committee and the Committee of Experts of the Council of Europe. Although the subject of extradition was originally selected by the International Law Commission for codification,

the Commission has not yet taken up the subject for consideration. The Extradition Agreement of the League of Arab States was discussed in detail at the Cairo Session of this Committee and it is not necessary to dwell on it here. The Inter-American Draft Convention on Extradition was drawn up by the Juridical Committee and submitted to the Council of Jurists. The discussions on the draft at the Third Meeting of the Inter-American Council of Jurists revealed a considerable difference of opinion in respect of the practical application of the principles of the draft to concrete situations. The chief differences of opinion arose in connection with the conditions under which extradition should not be granted and in connection with the extradition of nationals. Many provisions of the draft convention reopened traditional differences of opinion among the Member countries. The final draft, as revised, was approved by the Council of Jurists and transmitted to Council of the Organisation of American States.

Perhaps the most interesting draft, from the point of view of this Committee, is the European Draft Convention on Extradition which has been prepared "with a view to the punishment of those committing crimes on the territory of one of the Members of the Council of Europe, and taking refuge on the territory of another Member". The Committee of Ministers of the Council of Europe, after obtaining the views of the Member Governments, set up a Committee of Experts which prepared a Draft Convention which was adopted by the Legal and Administrative Committee of the Council of Europe. A careful study of this draft reveals that there does not appear to have been much agreement among the Member countries on the fundamental principles governing the law of extradition. This conclusion is inescapable as numerous reservations have been included in the Draft Convention and many of its Articles have been very loosely worded in order to secure general acceptance. The draft as a whole has been based on the well-known Harvard Research Draft on Extradition. In view of the fact that there was not, as yet, general agreement among the Member countries on the most important principles relating to extradition, the draft does not contain much originality and does not appear to mark any advance on the majority of existing bilateral treaties between Member States of the Council of Europe.

At the Cairo Session of this Committee, however, there appeared to be a fair measure of agreement among the delegations of the Member countries on the general principles relating to extradition of fugitive criminals. It was agreed that no legal duty is imposed by customary international law on States to extradite fugitive offenders and that extradition should not be granted for political offences. It was agreed, further, that any draft prepared by this Committee should contain provisions providing against 'double jeopardy' and 'double criminality' and that the rules of 'speciality' and 'prescription' should also be included in such a draft. In all the Member countries the procedure for extradition is substantially similar and it was agreed that a ***prima facie*** case should be established before the fugitive is extradited. The principles agreed to at the Cairo Session have been embodied in the Draft Articles prepared by the Secretariat. It must be emphasised, however, that only the principles agreed to have been included in the draft. The draft has been prepared with a view to securing general assent and where there was disagreement, either no provision has been included or a discretionary clause has been inserted. The draftsman has refrained from including in the draft, for instance, a definition of such controversial terms as political and fiscal offences. The Committee took the view that no formula could be evolved to determine the question of a 'political crime' and the question of fiscal offences was not considered by the Committee. In view of the absence of unanimity, it has not been possible to deal satisfactorily with the question of attempts to commit offences and it has not been possible to reconcile the conflicting views of countries which extradite and those which refuse to extradite their own nationals; nor has it been found possible to draft precise provisions relating to the question of concurrent requests for extradition of the same person or the question of transit of extradited persons, as the Committee has not discussed those problems adequately. At the Third Session, the Committee might direct its attention to these questions and also to the other questions relating to extradition which have not been discussed and have therefore not been included in the Draft Articles, but have merely been referred to in the Commentaries.

DRAFT ARTICLES
ON
EXTRADITION

(Embodying the principles agreed to at the Cairo Session).

Article 1

The Contracting Parties undertake to surrender to each other, in the circumstances and under the conditions stipulated in the present Treaty/Convention, persons who are in the territory of one Party and are being prosecuted or have been convicted by the judicial authorities of the other Party.

Commentary

At the Cairo Session there was agreement in principle among the delegations that the conclusion of an extradition convention between the participating countries was desirable. A convention of this kind, if it is to command the general assent of the participating countries in the Committee, would seem to require the general acceptance by Member States of certain basic principles. At the Cairo Session there appeared to be a fair measure of agreement among the delegations of the Member countries on the general principles relating to the extradition of fugitive criminals, although some differences of opinion were expressed on certain aspects. It was agreed that "no legal duty is imposed by customary international law on States to extradite fugitive offenders". The majority of the delegations were, however, of the opinion that "extradition may, in the absence of a treaty, be effected by way of international co-operation in suppression of crimes on a reciprocal basis". India was of the opinion that "international law imposes no obligation in extraditing criminals, but States do recognise it even in the absence of treaties." The U.A.R. expressed the view that "extradition is a moral obligation based on the principles of solidarity and cooperation between nations" and Japan stated that although international law imposes no obligation, "extradition is made even in the absence of treaties."

Some delegations, however, thought that extradition could be effected only in pursuance of a treaty. Ceylon stated that her law recognized extradition but only with countries with which she had a treaty and Sudan expressed the view that "there should be a treaty regarding extradition because otherwise things would be fluctuating".

Although it has been asserted by some writers on international law that there is a legal duty to extradite even in the absence of a treaty, this doctrine has not become an established rule of international law and there was agreement in principle among the delegations to the Cairo Session that there is no legal duty of extradition under customary international law. The present Draft accordingly commences with an Article which states that the contracting parties undertake to surrender fugitive offenders only "in the circumstances and under the conditions stipulated in the present Convention."

Article 2

Extradition shall not be granted unless the offence, for which the person sought is being prosecuted or has been convicted, is punishable by at least one year's imprisonment, under the laws of both the requested and requesting States.

Commentary

Every draft convention on extradition has to choose between two methods of qualifying extraditable offences, namely, the enumerative method and the eliminative method. The enumerative method, which specifies each offence for which extradition may be granted, has been adopted by most extradition treaties in the nineteenth and early twentieth centuries. This system has also been adopted in municipal legislation by the United Kingdom (Extradition Acts 1870, 1873, 1906 & 1932), Belgium (Law of 1933), and countries such as India, who have based their Extradition Acts on the British model. Until recently the practice among the Member Countries of this Committee has been to enumerate the offences which are to be extraditable in treaties as also in the municipal legislations relating to extradition. The modern trend, in both extradition treaties and municipal legislation, is to adopt the eliminative method, which defines extraditable offences by reference to the maximum or minimum penalty which may be imposed. Modern bilateral treaties, such as the Extradition Treaty of 12 June, 1942 between Germany and Italy, and the Treaty of 29th November, 1951 between France and the Federal Republic of Germany, have adopted the eliminative in preferance to the enumerative method. The recent treaty between Iraq and Turkey provides that the offence must be punishable in both countries with at least one year's imprisonment. The eliminative method has also been adopted in municipal legislation by countries such as France (Law of 1927) and Germany (Law of 1929). Recently concluded multilateral conventions, such as the Extradition Agreement of 14th September 1952 between the Member States of the League of Arab States and the Extradition Convention of 5 May, 1954 adopted by the Legal Committee of the Council of Europe, have adopted the eliminative method. The eliminative method has also been adopted by the well known Harvard Research Draft on Extradition and by the Draft Convention on Extradition adopted by the Inter-American Council of Jurists at its Third Session at Mexico City in February 1956. The present Draft accordingly adopts the eliminative method and provides that an offence, in order to be extraditable, must be punishable with at least one year's imprisonment in both countries.

The laws and treaties of most of the Member countries of this Committee have adopted the principle of double criminality, namely, that an act should be punishable as an offence in both the requesting and requested States. The present Draft accordingly adopts this provision. All the delegations at the Cairo Conference appeared to be in agreement on this question. With regard to attempt to commit an extraditable offence, there did not appear to be unanimity among the delegations as to whether such offences should themselves be regarded as extraditable. Ceylon, Iraq and the U.A.R. appeared to favour the view that attempts to commit serious offences should also be extraditable, but Japan expressed the opinion that an attempt to commit an offence should not be extraditable. As there was no unanimity on this question, a separate provision relating to attempts to commit an offence has not been included in the present Draft as the Draft has been prepared with a view to securing general assent.

Article 3

Extradition shall not be granted for political offences. The requested State shall determine whether the offence is political.

Commentary

All the delegations at the Cairo Session were of the opinion that extradition should not be granted for political offences. The delegation of Ceylon, however, observed that

"although this principle has been accepted in Ceylon at present, in future legislations she would reserve the right to extradite persons who commit serious types of mixed crimes, such as crimes which are both of a political and ordinary nature". The delegation of Indonesia urged consideration by the Member States of the principle that "no offence should be considered as being of a political character by the Member States if it was committed in any of these States by a foreigner". In the view of Indonesia, a political crime can only be committed by persons exercising political rights in the States in which the crime has been committed; in other words, it can be committed only by a citizen of that State within the boundaries of the State concerned. Thus, in the view of Indonesia, a political crime can only be committed against one's own State within its boundaries and a foreigner cannot be regarded as having committed a political crime against a State other than his own. As the Committee has not as yet expressed an opinion on this new approach to the problem of political crimes, a provision to this effect has not been included in the present Draft.

Extradition treaties do not usually contain a definition of the term "political offence". A similar situation prevails in most systems of municipal law. Although the Japanese Law of Extradition has adopted the principle of non-extradition of political criminals, no definition of a political crime is given in either the Ordinance or the Law of Extradition. With regard to the United Arab Republic, neither the Syrian Penal Code nor the laws of the Egyptian Region contain a definition of political offences for the purpose of extradition. A similar position prevails in the municipal legislations of the other Member countries. This is true of almost all systems of municipal law. A singular exception is the German Extradition Law of 23 December 1929, which defines political offences as "punishable attacks directed immediately against the existence or the security of the State, against the Head or a member of such of the government of the State, against a constitutional body, against the rights and duties of citizens in the course of elections and plebiscites, or against good relations with foreign countries". The inadequacy of this definition is apparent to anyone who is acquainted with the political history of Germany under the Nazi regime. The difficulty of defining a political crime is no less reflected in

the writings of text-book writers among whom there is much controversy. Some writers consider a crime 'political' if committed from a political motive, whereas others call 'political' any crime committed for a political purpose, again others recognise such a crime only as 'political' as was committed both from a political motive and at the same time for a political purpose; and finally, some writers confine the term 'political crime' to certain offences against the State only, such as high treason.

In view of the paucity of legislative precedents and the failure of text-book writers to formulate a satisfactory definition of the term, a definition of the term 'political offence' has not been attempted in the present Draft. The feasibility of defining political crime has always been doubted; and in most countries the question is left to discretion of the authorities exercising jurisdiction in the matter. English law, for instance, merely refers to 'offence of a political character' and does not attempt a precise definition. A similar position prevails in French law, with the exception that in France an offence committed during an insurrection or civil war is always regarded as a political offence. Belgian law recognises the so called *'fait connexe a un crime ou delit politique'* and Swiss law the *'systeme de la predominance.'* At the Cairo Session, the delegations unanimously agreed that no particular test or formula could be evolved to determine what is a political offence. The present Draft accordingly provides that the decision as to whether an offence is political or not, shall be left to the discretion of the requested States. Such a provision is in accordance with State practice in the Member countries. A similar provision has been adopted by the League of Arab States in its Extradition Agreement of 1952, and by the Inter-American Council of Jurists in its Extradition Convention of 1956.

Article 4

Each Contracting Party reserves the right to grant or refuse extradition of its own nationals.

Commentary

The municipal laws of most countries provide that nationals shall not be extradited, but there are some countries which are prepared to do so on a basis of reciprocity. Belgium,

Denmark, France, Germany, Greece, Italy, Spain, Switzerland and almost all the other continental European States contain provisions in their laws and Constitutions that nationals may not be extradited. On the other hand, the United Kingdom and the United States do not make any distinction in their extradition law between their own nationals and foreign citizens; presumably the United Kingdom and the United States are prepared on principle to surrender their own nationals, but in practice this policy is not always followed on account of the difficulty of securing reciprocity. Most of the treaties between the United States and foreign countries either disclaim any obligation to surrender citizens of the asylum State or make their surrender discretionary with that State. Similarly, it is not unusual for the United Kingdom when concluding extradition treaties with countries which prohibit the extradition of their own nationals to insert a clause which leaves it to the discretion of the United Kingdom to grant or to refuse the extradition of United Kingdom nationals.

It is difficult to reconcile, by means of a draft convention, the fundamentally different approach of States which prohibit and those which permit the extradition of their own nationals. At the Cairo Session, India, Ceylon, Iraq, Sudan and Indonesia appeared to be in favour of the extradition of their own nationals on a reciprocal basis. Burma, Japan and the U. A. R. expressed a contrary view. Indonesia stated that she had no objection to extraditing nationals provided that they had committed crimes of "a serious nature". The U. A. R. on the other hand stated quite clearly that the principle of extraditing a national was not acceptable to the U. A. R. Sudan observed that she had no objection to the extradition of her nationals but Burma stated that she was reluctant to hand over nationals. Ceylon appeared to be in favour of the extradition of nationals but Japan stated that her "own nationals should not be extradited". In view of the fact that there was no unanimity among the delegations on this question, the present Draft leaves it to the discretion of the Contracting Party whether to grant or refuse extradition of its own nationals.

Article 5

Extradition shall not be refused on the grounds that the person sought is not a national of the requesting State.

Commentary

The practice of States as evidenced in various extradition treaties appears to favour the extradition of persons who are not nationals of requesting State. All the delegations at the Cairo Session agreed that extradition of nationals of third States could not be refused. Japan observed that although it was a delicate question, she had no objection to the extradition of a person who was not a national of the requesting State. Indonesia and Ceylon stated quite clearly that they had no objection, and India observed that she had "no objection if a treaty exists". Although the U.A.R. urged that in such a situation it was advisable for the requested State to give notice to the State of the person in question, and Burma stressed the desirability of such a request for extradition being routed through the home State of the person concerned.

Article 6

Extradition shall not be granted for purely military offences.

Commentary

Most extradition treaties exclude military offences but the exemption is intended to be granted only for offences of an exclusively military character. The agreement between Egypt and Iraq of 1931, for instance, expressly prohibits extradition for 'purely military offences' and the Franco-German Treaty of 1951 provides that extradition shall not be granted if the offence 'consists exclusively of a violation of military duties'. The Inter-American Draft Convention of 1956 similarly excludes 'essentially military crimes'. The exemption is for offences of an exclusively military character and not for those which are also offences under general criminal law. Although the delegates at the Cairo Session appeared to be in agreement with this principle, no attempt was made to define what was meant by a military offence. Japan, Indonesia, India and Ceylon stated that there were no provisions in their extradition laws relating to military offences. Iraq stated that under her law there was an express provision excluding military offences from extradition and the U. A. R. said that the "Egyptian Military Code defines military offences as being offences committed by any member in the rank and file of the Armed Forces in violation of military duties and disciplines imposed

on him by his military status such as desertion, disobedience of orders, attempt at suicide etc."

Extradition treaties have, in the past, often excluded fiscal offences, including violations of revenue, customs and excise laws as well as exchange control laws, from the purview of extradition. The Treaty of 3rd September, 1930, between Germany and Turkey, (as revived by an Agreement of 1 February 1952, between the Federal Republic of Germany and Turkey), expressly excludes extradition for fiscal offences. So does the Treaty between Germany and Italy, of 12 June 1942, (as revived by an Agreement of 1st March, 1953, between the Federal Republic of Germany and the Italian Republic). Perhaps the reason for the exclusion is that there is a danger that fiscal offences when made the basis of requests for extradition may, in fact, disguise attempts to enforce confiscatory legislation. The modern tendency is, however, not to exclude fiscal offences from the purview of extradition. The Franco-German Treaty of 1951, for instance, permits extradition for fiscal offences, including violations of exchange control laws. Similarly, the Draft Convention adopted by the Council of Europe (Legal Committee) in 1954 accepts the principle of granting extradition for fiscal offences. As the modern view is that there is no reason, in principle, to exempt fiscal offences from the purview of the law of extradition, a provision excluding fiscal offences has not been included in the present Draft. The Committee has not expressed an opinion on this question.

Article 7

Extradition shall be granted only if the offence, for which the person sought is being prosecuted or has been convicted, has been committed within the jurisdiction of the requesting State.

Commentary

Most extradition treaties provide that extradition shall be granted only if the offence was committed within the jurisdiction of the requesting State. The Anglo-American Extradition Treaty of 1931, for instance, provides that extradition shall be granted only if the crime was "committed within the jurisdiction of one party" and the person sought is "found within the territory of the other party". The Extradition Treaty between Japan and the United States contains a similar

provisions in Article 1. The Inter-American Draft Convention of 1956 also provides that the offence "must have been committed within the jurisdiction of the requesting State". At the Delhi and Cairo Sessions of this Committee there was agreement in principle among the delegations that the conclusion of an extradition treaty was desirable so that fugitive criminals could be surrendered to "the State in whose territory the crime had been committed.

Article 8

The requesting State shall not, without the consent of the requested State, prosecute or punish the person extradited for any offence committed before his extradition other than that for which he was extradited.

Commentary

The rule of speciality is usually embodied in extradition treaties but there is no universally recognised rule of customary international law in this matter and it is not surprising to find that State practice is widely divergent. The extradition laws of some countries such as the United Kingdom do not permit the trial of the person extradited "on facts other than those on which the surrender is based". Section 19 of the 1870 Extradition Act of the United Kingdom provides that a person "shall not.....be tried for any offence committed prior to the surrender..... other than such of said crimes (described in the First Schedule) as may be proved by the facts on which the surrender is grounded". German law, on the other hand, permits the consideration at the trial of "new facts" which have subsequently been revealed, provided that these "new facts" leave unaffected the general factual situation underlying the offence when viewed as a whole. Belgian law permits the prosecution of the person extradited for all offences committed prior to extradition, provided such offences fall within the category of extraditable crimes under the treaty in question. At the Cairo Session, India, Burma, Ceylon, Indonesia, Japan and Iraq were of the opinion that a person may be tried only for the offence in respect of which extradition was granted. Burma observed that "international custom seems to be that when extradition is requested by the requesting State for a particular offence, then the person can be tried only for that offence and cannot

be tried for an offence other than that mentioned in the extradition report unless there was an elapse of time and permission was obtained from the requested State". Indonesia and Iraq stated that their extradition laws contained no provisions relating to this matter and Japan observed that "theoretically the person must tried for the offence in respect of which extradition was granted."

The U.A.R. agreed that "treaties and custom usually prevent trial for any offence other than that for which extradition was granted", but raised the question of certain exceptions to this rule of speciality. In this context it may be asked whether the rule of speciality is an absolute one. Are there any limitations in the rule of speciality ? If so, may the rule be waived and by whom ? Here again there is a considerable divergence in law and practice in different countries. The extradition laws of a few countries provide that the limitation can be waived only by the surrendered person himself. This exception was mentioned by the U.A.R. Most treaties, on the other hand, provide that the rule may be waived with the consent of the requested State. This exception was also mentioned by the U.A.R. The Franco-German Extradition Treaty of 29th November, 1951 is recent example of a treaty which contains such a limitation. This treaty provides, in Article 16, that the rule shall not apply "if the State which has extradited (the person concerned) consents to an extension of the extradition". The wording is not a very precise one. The present Draft does not go as far as the Franco-German Extradition Treaty. It provides in accordance with the view of the U.A.R. that the requesting State shall not, without the consent of the requested State, prosecute or punish the person extradited for any offence committed before his extradition other than that for which he was extradited. Such a provision has been included in most of the recently concluded conventions on extradition such as the European Draft Convention of 1956 and it also forms part of the well-known Harvard Research Draft Convention on Extradition.

Article 9

Extradition shall be refused if the person claimed has already been tried and discharged or punished, or is still under trial in the requested State, for the offence for which extradition is demanded.

Commentary

The laws and/or treaties of most of the Member countries contain provisions providing against double jeopardy for the same act. There is, for instance, a provision in the Criminal Procedure Code of Iraq prohibiting double jeopardy and treaties concluded by Iraq with other countries, such as the Iraqi-Egyptian Treaty of 1931, contain provision to this effect. The principle of '*Non Bis In Idem*' is also observed by the U.A.R. and the agreement signed by Egypt and Iraq in 1931 stipulates that the requested person may not be surrendered if he has been previously tried for the offence for which his surrender is requested, so that punishment may not be repeated for the same offence. The extradition agreement concluded between the Arab League States contains a stipulation to this effect. The principle of '*Non Bis In Idem*' is also recognised by Japan and Indonesia. All the delegations at the Cairo Session agreed that a person shall not be extradited if he has already been tried and discharged or punished or is still under trial for the offence for which his extradition is demanded.

Article 10

Extradition may be refused when the person claimed has become immune, by reason of lapse of time, from prosecution or punishment according to the laws of either the requesting or requested State.

Commentary

Although all extradition treaties contain a provision to the effect that extradition may be refused on the ground of lapse of time, some treaties provide that the request may be refused if the offence is time-barred under the law of the requested State, while others provide that the request may be refused only if the offence is time-barred under the laws of both the requested and the requesting States. Although all the delegations at the Cairo Session agreed that extradition may be refused on the ground of lapse of time, the Committee does not appear to have expressed an opinion on this latter question. Most treaties have in the past regarded the law of the requested State as decisive, but the modern tendency, as exemplified in the Franco-German Treaty of 1951, the

European Draft Convention of 1954 and the Inter-American Draft Convention of 1956, appears to favour the refusal of extradition when the offence has become time-barred under the laws of either the requested or the requesting State. As the extradition laws of the Member countries appear to be silent on this matter, the present Draft follows the modern tendency and provides that extradition may be refused when the trial or punishment of the offence has become barred by lapse of time according to the laws of either party.

Article 11

1. The requisition for extradition shall be made in writing and shall be communicated by a diplomatic or consular officer of the requesting State to the constituted authority of the requested State.

2. The requisition shall be accompanied by the original or a certified copy of the sentence or of the warrant of arrest or other document having the same validity, issued by a competent judicial authority.

3. The nature of the offence for which the requisition for extradition is made, the time and place of its commission, its legal classification or descriptian, and the legal provisions applicable to it, should be specified as precisely as possible.

4. The requisition shall also be accompanied by a copy of the criminal provisions that are applicable to the case, together with a description of the person claimed and any other particulars which may serve to establish his identity and nationality.

5. In the case of a person accused of an offence, the requisition shall be accompanied in addition by the original or certified copy of the statements of witnesses and declarations of experts, made on oath or otherwise to a competent judicial authority.

6. The extradition shall take place only if, according to the authorities of the State applied to, the existing evidence would be sufficient to justify committal for trial if the offence had been committed in the territory of that State.

Commentary

In all the Member countries, the procedure for extradition is substantially similar and the delegates at the Cairo Session said that their countries followed international practice in this matter. The first five paragraphs of Article 11 have accordingly been drafted with a view to conforming with international practice; similar provisions are found in all extradition treaties. With regard to paragraph six, all the delegates at the Cairo Session stated that their laws require a *prima facie* case to be established before surrendering a fugitive criminal. While in the majority of the Member States, it is a court of law which considers whether a *prima facie* case exists; in the South Region of the U.A.R., this is done by the executive. The U.A.R. delegate stated that in Egypt the surrender of criminals is entrusted to the executive authorities. In the Northern Region, however, the Syrian Penal Code provides that the Courts are the proper authority to examine extradition demands. On this matter, Oppenheim's International Law (Vol. I) states that "it is not within the province of the courts of the requested State to try the case on its merits, but merely to ascertain whether the evidence submitted justifies *prima facie* judicial proceedings against the accused". In view of the difference in the procedure adopted in the Southern Region of the U.A.R., the present Draft states that the matter shall be decided by "the authorities of the State applied to" and does not specify whether this authority is a court of law or the executive. It must be noted, however, that the doctrine of the *prima facie* case has nothing to do with proof of identity of the person claimed, of the extraditable character of the acts alleged to have been committed, of the place of committal of the acts alleged, of the political or military character of the offence charged, or of the acquisition of immunity by lapse of time. It has to do only with the requirement or non-requirement by the requested State of evidence, beyond the formal warrant of arrest, that the person claimed did the act charged in the warrant of arrest, for which act it is desired to put him on trial in the requesting State through the cooperation of the requested State in extraditing him.

Article 12

1. All measures to carry out extradition shall be taken in accordance with the provisions of the laws of the requested State, and the person sought shall have the right to utilize all resources available to him according to the laws of the requested State.

2. If, according to the laws of the requested State, the evidence is not sufficient to justify the committal of the person for trial, the

person shall be discharged by the authorities of the requested State and extradition shall not take place.

Commentary

In all the Member States the fugitive offender would be discharged if *prima facie* case is not made out against him and no question of his extradition would then arise. This question would, of course, be decided according to the laws of the requested State and the final decision would be left to the discretion of the executive. The person sought would, however, have the right to utilize all resources available to him according to the laws of the requested State. The person sought would have the right, for instance, to obtain a writ of *Habeas Corpus* in countries such as India, Ceylon and Burma.

Article 13

If requests for extradition are made concurrently by several States in respect of the same person, the requested State shall freely decide thereon, taking into consideration all the circumstances of the case and, in particular, the priority of the request, the gravity of the offence and the penalty to be imposed thereof.

Commentary

Concurrent requests for the extradition of the same person may arise in instances where the person sought has committed the same offence in different States or different offences in different States. Most extradition conventions, however, such as the European Draft Convention, treat the two cases as posing the same basic problem. The Inter-American Draft Covention, for instance, merely states that" when several States request the extradition of a person, preference shall be given to the first formal request." The European Draft Convention adopts, as additional factors to be taken into account, the possibility of subsequent extradition taking place as between the requesting States, the severity of the offence, the place where the offence has been committed and the nationality of the person whose extradition is sought. At the Cairo Session it was agreed that in the event of conflicting requests, the requested State shall decide to which of the requesting States the person shall be surrendered. This principle forms a part of most extradition treaties. The

delegations, however, appeared to be in agreement that if such a situation did arise, the requested State should exercise its discretion taking into consideration "the priority of the claim, the gravity of the crime, or the penalty to be imposed". The present Draft accordingly provides that the requested State shall freely decide thereon, taking particularly these three factors into consideration. The date of the requests is undoubtedly the most important factor where the same offence has been committed in two different States but where different offences have been committed in different States, the obvious criterion would be the relative gravity of the two offences and the more serious of the two offences would logically be the one in respect of which the more severe penalty is imposed.

Article 14

1. The requested State shall inform the requesting State in writing and through the diplomatic channel of its decision on the requisition for extradition. In case of total or partial rejection the reasons shall be stated.

2. If extradition is granted, the person claimed shall be conducted by the authorities of the extraditing State to the frontier or port of embarkation indicated by the diplomatic or consular agent of the State making the requisition.

Commentary

These provisions relating to the performance of extradition are in conformity with existing international practice and are contained in most extradition treaties and conventions.

Article 15

If a fugitive is abducted from a State by the agents of another State which wishes to prosecute him, the State from which he was abducted shall be entitled to demand the return of the abducted person.

Commentary

The final question on which the Committee expressed an opinion at the Cairo Session was the problem of the regular recovery of fugitives; if a fugitive has been abducted from a foreign country by the agents of the State which wishes to prosecute him, could the State whose territory has been invaded demand the return of the individual ? In reply to this

question, Burma said that if a national got back to his own country by any such method, it was unlikely that he would be returned to the place where he committed his crime. Japan observed that this was merely a theoretical question but Iraq agreed with the Burmese view. The U.A.R. said that according to international precedents, a State which delivered a fugitive accused to a country that requested his extradition had no right to call for his return if it realized that he had been wrongfully surrendered. If, however, the surrender had been effected through a fault of the requesting country, the latter should return the person surrendered to it. With regard to the question whether a fugitive offender is entitled to release from custody merely by reason of the irregular process by which he was brought into the State of prosecution, all the delegates agreed that it did not matter how the prisoner had been brought. As it was finally agreed that the State from whose territory the abduction took place should be entitled to demand the return of the abducted person, a provision to this effect had been included in the present Draft, although the question is highly controversial.

Article 16

Each Contracting Party shall grant facilities for the transit of a person requested or extradited by another Contracting Party for an offence which is extraditable under this Treaty/Convention.

Commentary

Although this question was not considered by the Committee at its Cairo Session, it has been thought fit to include a provision relating to transit in the course of extradition as this problem is of special significance to Member States of the Asian-African Legal Consultative Committee whose territories are separated from one another by numerous frontiers. The draft merely provides that the Contracting Parties shall grant transit facilities but if due consideration is given to this question by the Committee a more adequate provision could be drafted. The primary question to be determined in this context is whether a request for transit facilities is to be treated like a request for extradition. If it is, then there is no obligation to grant transit facilities where under the municipal law of the transit country extradition is not permissible, for instance, as in the case of a national of the

transit country where the municipal law prohibits the extradition of nationals. It is submitted that a request for transit facilities by one Member State to another cannot be regarded as request for extradition. If both States are parties to the same Convention, the duty to allow transit should be regarded as absolute and not subject to conditions other than those stipulated in the Convention. Difficulties would, however, arise in the event of a request for transit facilities by a Member State to a Non-Member State or by a Non-Member State to a Member State. In such a case, the State might be justified in regarding such a request as a request for extradition. Any provisions in the present Draft would bind only Member States and the problem of transit across Non-Member States still remains. Such problems are of special significance to members of this Committee, whose territories are separated from one another by other States. In numerous multipartite conventions embracing that emanating from the Seventh International Conference of American States at Montevideo in 1933, the obligation of a third State to permit transit through its territory is acknowledged. In the absence of such agreements, any convention on extradition would be very restricted in its field of application.

ASIAN - AFRICAN LEGAL CONSULTATIVE COMMITTEE

DRAFT AGREEMENT
ON
EXTRADITION

Presented by the United Arab Republic Delegation to the Third Session.

Article 1

Each contracting State, signatory of this agreement, shall undertake to surrender the offenders whose extradition is requested by any other contracting State, in accordance with the provisions stipulated in the following articles.

Article 2

Extradition requests may be granted if the person whose extradition is requested, is accused as a principal or an accessory, of committing or attempting to commit an offence, within the jurisdiction of the requesting State, punishable by at least one year's imprisonment under the laws of both the requesting and the requested States.

If this person has been already convicted for such an offence, he should not be extradited unless he was condemned for at least two months' imprisonment.

Article 3

Extradition may be refused, if the person in question is a national of the requested State.

Article 4

Extradition shall not be refused on the grounds that the person in question is not a national of the requesting State.

Article 5

Extradition is not admissible in political offences. It will be left to the requested State to decide whether an offence is political or not. This State has the right to demand from the requesting State any clarifications and information necessary in this respect.

In case the person whose surrender is requested, submits sound evidence that his offence is political, the burden of proving the opposite lies on the requesting State.

Article 6

Extradition shall not be granted for purely military offences.

Article 7

Extradition is inadmissible if the person in question has already been tried for the offence for which his extradition is requested, and was acquitted or convicted and the penalty inflicted has been fully executed, or if he is still under investigation or trial in the requested State for the same offence for which extradition is requested.

Article 8

Extradition shall not be granted if the person in question has become immune by reason of lapse of time from prosecution or punishment according to the law of either the requesting or requested State.

Article 9

If the person in question is under investigation or trial in the requested State for an offence other than that for which his extradition is requested, his extradition shall be postponed until his trial is terminated and the penalty has been fully executed.

Article 10

The requesting State shall not, without the consent of the requested State, try or punish the person extradited except for the offence for which he was extradited, offences connected with it and the offence he might have committed after his extradition.

Yet he may be tried for other offences in the following cases :

1. If the person himself accepts such trial in an official statement issued by a competent judicial authority and signed by him and his lawyer, if any, provided an official copy of

the said statement is sent to the State which surrendered the person.

2. If he was given the opportunity to leave the territory of the State to which he was surrendered and did not make use of it during a period of thirty days. If that State wishes to try him for these other offences before the expiration of the said period, it must permit him to return to the State which surrendered him and take new proceedings for re-extraditing him.

Article 11

If the requested State receives several requests from various States concerning the extradition of one person for the same offence, the priority of extradition goes to the State whose interests have been more affected by the offence, then to the State on whose territory the offence was committed and then to the State of which he is a national.

If two or more States are in similiar circumstances concerning the offence for which extradition is requested, or if the said requests concern different offences, the priority in extradition goes to the State which was first in presenting its request.

Article 12

The requisition for extradition shall be made in writing and shall be submitted through diplomatic channels to the constituted authority of the requested State.

Article 13

The laws of each State shall determine the proceedings of extradition, the authority competent to receive the requisition for extradition and decide upon it, and the proceedings to be followed in this respect.

Article 14

All measures to carry out extradition shall be taken in accordance with the provisions of the laws of the requested State. The person in question shall have the right to utilise all resources available to him according to these provisions.

Article 15

If the person whose extradition is requested is not a national of the requesting State, the requested State shall notify the State, of whose that person is a national, of the request as soon as it is received, in order to enable the said State to defend him if necessary.

Article 16

The person in question may be provisionally arrested and kept under supervision until the question of extradition is decided upon.

Article 17

If, according to the laws of the requested State, the evidence is not sufficient to justify the committal of the person in question for trial, extradition shall not be granted and this person shall be discharged by the authorities of the requested State.

Article 18

The requisition for extradition shall be accompanied by the following documents :

(A) **If the claim concerns a person under investigation :**

1. a copy of the warrant issued by the competent authority for the arrest of the person in question. This warrant shall include the nature of the offence, the time and place of its commission and the legal provisions applicable to it.
2. a copy of the criminal law provisions applicable to the case.
3. a copy of the statements of witnesses and declarations of experts made under oath or otherwise to a competent judicial authority.
4. a short summary of the evidence incriminating the person whose surrender is requested.

(B) **If the claim concerns a person convicted in contumacium :**

1. a copy of the judgment in contumacium and a copy of the summons.

2. a copy of the statements of witnesses and declarations of experts made under oath or otherwise to a competent judicial authority.

(C) **If the claim concerns a person convicted in his presence :**

1. a copy of the judgment.

2. a certificate from the competent judicial authority stating that the judgment is final and executory.

3. a copy of the order of the execution of the judgment.

(D) **If the claim concerns a person who has escaped from the prison where the sentence was being executed upon him :**

1. a copy of the judgment.

2. a copy of the execution order stating the date of his imprisonment.

3. a certificate from the warden of the prison, or any other competent authority, stating that the person in question has escaped from prison.

In all cases the claim must be supported by a detailed account of the personality of the accused or convicted person, his description, his photograph if possible, and the documents proving his nationality if he is a national of the requesting State.

All said documents shall be duly certified by the competent authorities in the requesting State.

Article 19

Exceptionally, requests for extradition may be made by post, telegram or telephone, provided such requests include a short account of the offence, a notification that a warrant of arrest has been issued by the competent authority, and that extradition shall be requested through diplomatic channels. In this case, the requested State shall take the necessary precautions to keep the person in question under supervision until it receives the written extradition request. The requested State may, if necessary, arrest and detain the said person

for a period not exceeding thirty days, after which he shall be released if the written request accompanied by the necessary documents, or a request for the renewal of his detention for a period of thirty days at the most, have not been received. At the expiration of the renewed period, the person in question is immediately released if the written request accompanied by the necessary documents has not been received.

The period of detention shall be deducted from the period of imprisonment to which he is sentenced in the requesting State.

If the request is made by post, telegram or telephone the competent authorities in the requested State may, if necessary, communicate with the competent authorities in the requesting State, to ascertain the request.

Article 20

All articles seized which were in the possession of the person being extradited at the time of his arrest and anything which may be sent as proof of the offence shall be delivered to the requesting State when extradition takes place and that insofar as the laws of the extraditing State permits.

Article 21

The requested State shall inform the requesting State in writing and through diplomatic channels of its decision on the requisition for extradition. If it is rejected, the reasons shall be stated.

Article 22

The competent authorities of the extraditing State shall take the necessary steps to enable the agents of the requesting State, to deport the extradited person.

Article 23

The requesting State shall bear all expenses incurred in the execution of the request ; and if the extradited person is acquitted, the said State shall also bear the expenses necessary for his return to the State from which he was extradited.

Article 24

The State which granted extradition may release the person in question if the requesting State does not deport him

within a period of two months from the date of notification of the order of extradition.

Article 25

If extradition took place as a result of fraud or any similar fault on the part of the requesting State, the State which extradited the person may demand his return.

Also, if a person is abducted from a State by the agents of another State which wishes to prosecute him, the State from which he was abducted shall be entitled to demand his return.

Article 26

The States bound to this agreement shall upon presentation of a copy of the extradition order, grant facilities for the transit through their territories, of persons surrendered by one of them to the other, and ensure their safe custody.

Article 27

If the provisions of this agreement are in conflict with those of any bilateral agreement between two signatory States, these two States shall apply the provisions most suitable for facilitating extradition.

ASIAN - AFRICAN LEGAL CONSULTATIVE COMMITTEE

DRAFT ARTICLES ON EXTRADITION

(As provisionally recommended by the Committee at the Third Session)

Article 1

The Contracting Parties undertake to surrender to each other, in the circumstances and under the conditions stipulated in the present Treaty/Convention, persons who are in the territory of one party and are being prosecuted or have been convicted by the judicial authorities of the other party.

Article 2

Alternative "A"

Extradition shall not be granted unless the act constituting the offence for which the person sought is being prosecuted or has been convicted is punishable by at least three years imprisonment under the laws of both the requested and requesting States.

Alternative "B"

Extradition may be granted if the person whose extradition is requested, is accused as a principal or an accessory, of committing or attempting to commit an offence, within the jurisdiction of the requesting State, punishable by at least one year's imprisonment under the laws of both the requesting and the requested States.

(2) If this person has been already convicted for such an offence, he should not be extradited unless he was condemned for at least two month's imprisonment.

Note :

The Delegations of Ceylon, India and Japan accepted Alternative "A" of the Draft though the Delegations of Ceylon and India were of the opinion that the "enumerative" method should be preferred in determining the extraditable offences. The Delegations of Burma and Pakistan accepted Alternative "A" with the amendment that the period of punishment should be one year instead of three.

The Delegations of Iraq and the United Arab Republic accepted Alternative "B". The Delegation of Indonesia

accepted clause (i) of Alternative "B" of the Draft though it was not in a position to accept clause (2) thereof. Indonesia was of the view that the period of punishment should be two years in place of one year in the Draft.

Article 3

Extradition shall not be granted for political offences. The requested State shall determine whether the offence is political.

Note : The Delegations of Burma, India, Iraq, Japan, Pakistan and the United Arab Republic accepted the provisions of the Draft Article.

The Delegation of Ceylon was of the view that in the matter of Extradition no distinction should be made between ordinary crimes and crimes which amount to political offences or which are of a political nature, and as such they were not in a position to accept the provisions of this Article.

The Delegation of Indonesia stated that the Draft Article went much beyond the hitherto accepted notions in the matter of non-extradition of political offenders. The Delegation was of the view that the principles behind this article should not be applicable to the cases of persons who are not the nationals of the State where the political crime is committed since foreign nationals do not enjoy any political rights. The Draft suggested by the Delegation was in the following terms :

"(a) Unless otherwise provided by a treaty, extradition shall not be granted for political offences".

(b) An offence shall not be considered as political if it is committed by a person who does not exercise political rights in the aggrieved State.

(c) An offence shall not be considered as of a political nature if there is a a preponderence of the features of a common crime over the political motives or objectives of the offender.

Article 4

Extradition may be refused, if the person in question is a national of the requested State.

Article 5

Extradition shall not be refused on the ground that the person sought to be extradited is not a national of the requesting State.

Note : The Delegation of Pakistan reserved their position on this Article as the Government of Pakistan did not have an opportunity of considering this matter fully.

Article 6

Extradition shall not be granted for purely military offences.

Explanation : The expression "purely military offences" means acts or omissions which are punishable only under the military laws of a State and do not fall within the scope of ordinary penal laws of the State. This article will have no application to offences i. e. acts or omissions which are punishable both under the military laws and ordinary penal laws of a State.

Note : The Delegation of Indonesia expressed the view that this Article should be omitted altogether as in their view the principle of non-extradition of military offences is not an accepted notion of international law. The Delegation of Japan agreed with the views of the Delegation of Indonesia. The Delegation of Pakistan also did not accept the provisions of this article, as in their opinion the provisions were much too wide.

Article 7

The requested State has the right to seek information and clarification from the requesting State as to the nature of the offence for which extradition has been requested in order to determine whether the offence is of a political character or not.

(2) In cases where person sought to be extradited submits *prima facie* evidence that his offence is of a political character the burden of proving the opposite lies on the requesting State.

Note : This article was not acceptable to the Delegation of Ceylon having regard to their basic objection to the principle of non-extradition of political offenders.

The Delegation of Indonesia suggested the following alternative draft to clause (2) of the Article.

" The burden of proof that the offence is of a political nature or that the request for his extradition is made in fact with a view to try or punish the fugitive offender for an offence of a poltical nature lies with him. "

Article 8

Extradition shall be granted only if the offence for which the person sought is being prosecuted or has been convicted, has been committed within the jurisdiction of the requesting State.

Article 9

The requesting State shall not, without the consent of the requested State, try or punish the person extradited except for the offence for which he was extradited, offences directly connected with it and committed for the same purpose and the offences he might have committed after his extradition.

Note : The Delegation of Pakistan reserved its position with regard to this article as the Government of Pakistan had not formulated its view on this article.

Article 10

A person who has been extradited may be tried for an offence or offences other than the offence or offences for which his extradition was granted in the following circumstances :

(a) where the person himself accepts such trial in a statement made before a competent judicial authority, which is signed by him and his lawyer if he is represented by one, and a certified copy of such statement is officially forwarded to the State which had surrendered the person,

(b) where the person after being given the opportunity of leaving the territory of the State to which he had been surrendered fails to do so within a period of thirty days,

Note : The Delegations of Ceylon and Japan did not accept the provisions of this article. The Delegation of Pakistan reserved its position on this article.

Article 11

Alternative "A"

Extradition may be refused if the person sought to be extradited has already been tried and discharged or punished, or is still under trial in the requested State, for the offence for which extradition is demanded.

Alternative "B"

Extradition shall be refused if the person in question has already been tried for the offence for which his extradition is requested and was acquitted or discharged or convicted and the penalty inflicted has been fully executed or he has been pardoned or if he is still under investigation or trial in the requested State for the same offence for which extradition is requested.

Note : The Delegations of Ceylon and the United Arab Republic preferred Alternative "B" of the Draft Article. The remaining delegations accepted Alternative "A".

Artilce 12

Extradition shall not be granted if the person in question has become immune by reason of lapse of time from prosecution or punishment according to the laws of either the requesting or the requested State.

Article 13

The requisition for extradition shall be made in writing and shall be submitted normally through diplomatic channels to the constituted authority of the requested State.

Article 14

Alternative "A"

The requisition for extradition shall be accompanied by the original or a certified copy of the sentence or of the warrant of arrest or other document having the same validity issued by a competent judicial authority.

2. The nature of the offence for which the requisition for extradition is made, the time and place of its commission, its legal classification or description, and the legal provisions applicable to it, should be specified as precisely as possible.

3. The requisition shall also be accompanied by a copy of the criminal law provisions that are applicable to the case, together with a description of the person claimed and any other particulars which may serve to establish his identity and nationality.

4. In the case of a person accused of an offence, the requisition shall be accompanied in addition by the original or certified copy of the statements of witnesses and declarations of experts made on oath or otherwise to a competent judicial authority.

Alternative "B"

The requisition for extradition shall be accompanied by the following documents :

(a) **If the claim concerns a person under investigation :**

(i) A copy of the warrant issued by the competent authority for the arrest of the person in question. This warrant shall include the nature of the offence, the time and place of its commission and the legal provisions applicable to it.

(ii) A copy of the criminal law provisions applicable to the case.

(iii) A copy of the statements of witnesses and declarations of experts made under oath or otherwise to a competent judicial authority.

(iv) A short summary of the evidence incriminating the person whose surrender is requested.

(b) **If the claim concerns a person convicted in contumacium :**

(i) A copy of the judgment in contumacium and a copy of the summons.

(ii) A copy of the statements of witnesses and declarations of experts made under oath or otherwise to a competent judicial authority.

(c) **If the claim concerns a person convicted in his presence :**

(i) A copy of the judgment.

(ii) A certificate from the competent judicial authority stating that the judgment is final and executory.

(iii) A copy of the order of the execution of the judgment.

(d) **If the claim concerns a person who has escaped from the prison where the sentence was being executed upon him.**

(i) A copy of judgment.

(ii) A copy of the execution order stating the date of his imprisonment.

(iii) A certificate from the warden of the prison, or any other competent authority, stating that the person in question has escaped from prison.

In all cases the claim must be supported by a detailed account of the personality of the accused or convicted person, his description, his photograph if possible, and the documents proving his nationality, if he is a national of the requesting State.

All said documents shall be duly certified by the competent authorities in the requesting State.

Note : The Delegations of Burma, India, Iraq, Pakistan preferred Alternative "A" whereas the Delegations of Ceylon, Indonesia and the U. A. R. expressed preference for Alternative "B". Japan had no particular preference.

Article 15

The extradition shall take place only if, according to the authorities of the State applied to, the existing evidence would be sufficient to justify committal for trial if the offence had been committed within the jurisdiction of that State.

Article 16

All measures to carry out extradition shall be taken in accordance with the provisions of the laws of the requested State, and the person sought shall have the right to utilize all remedies and relief available to him according to the laws of the requested State.

Article 17

If requests for extradition are made concurrently by several States, in respect of the same person, the requested State shall have the discretion to decide thereon, taking into consideration all the circumstances of the case and, in particular, the priority of the request, the gravity of the offence and the penalty to be imposed therefor.

Note ; The Delegations of Iraq and U.A.R. wished the inclusion of the following additional clause in this article :

> "If two or more States are in similar circumstances concerning the offence for which extradition is requested, or if the said requests concern different offences, the priority in extradition goes to the State which was first in presenting its requests".

Article 18

The requested State shall inform the requesting State in writing and through diplomatic channels of its decision on the requisition for extradition. If the request for extradition is rejected, the reasons shall be stated.

Explanation : Wherever Diplomatic relations between the States concerned have not been opened the requests for extradition may be made directly by one Government to another or through consular channels if available.

Article 19

The competent authorities of extraditing State shall take the necessary steps to enable the agents of the requesting State to take away the extradited person.

Article 20

If a person is abducted from a State by the agents of another State which wishes to prosecute him, the State from which he was abducted shall be entitled to demand and obtain his return.

Note : The Delegation of Pakistan was of the view that the words "and obtain" in the last line of the Article were not necessary.

Article 21

If the offence, in respect of which extradition is sought, is under investigation or the person in question is on trial in the requested State for an offence other than that for which his extradition is requested, his extradition shall be postponed until his trial is terminated and the penalty has been undergone.

Article 22

If the person whose extradition is requested is not a national of the requesting State, the requested State shall notify the State of which that person is a national, of that request as soon as it is received in order to enable the said State to defend him if necessary.

Note : The Delegation for Pakistan reserved its position on this Article.

Article 23

The person whose extradition is sought may be provisionally arrested and kept under supervision until the question of extradition is decided upon.

Note : The Delegations of Burma, Ceylon, India and Pakistan did not accept the provisions of this article.

Article 24

In exceptional cases requests for extradition may be made by post, telegram or telephone, provided such requests include a short account of the offence, a notification that a warrant of arrest has been issued by the competent authority and that extradition shall be requested through diplomatic channels. In such cases the requested State shall take the necessary precautions to keep the person in question under supervision until it receives the written extradition request. The requested State may, if necessary, arrest and detain the said person for a period not exceeding thirty days, after which he shall be released if the written request accompanied by the necessary documents, or a request for the renewal of his detention for a period of thirty days at the most, has been received. At the expiration of the renewed period, the person in question is immediately released if the written

request accompanied by the necessary documents has not been received.

2. The period of detention shall be deducted from the period of imprisonment to which he is sentenced in the requesting State.

3. If the request is made by post, telegram or telephone, the competent authorities in the requested State may, if necessary, communicate with the competent authorities in the requesting State, to ascertain the request.

Note : The delegations of Burma, Ceylon, India and Pakistan did not accept the provisions of this article.

Article 25

All articles seized which were in the possession of the person being extradited, at the time of his arrest, and anything which may be used as proof of the offence shall be delivered to the requesting State when extradition takes place, and that insofar as the laws of the extraditing State permit.

Note : The delegations of Indonesia, Iraq, Japan and the United Arab Republic accepted the provisions of this article. The delegations of Burma and Ceylon could not accept the provisions of this article. The delegations of India and Pakistan reserved their position.

Article 26

The requesting State shall bear all expenses incurred in the execution of the request, and if the extradited person is discharged or acquitted, the said State, shall also bear the expenses necessary for his return to the State from which he was extradited.

Article 27

The State which granted extradition may release the person in question, if the requesting State does not take him away within a period of two months from the date of its notification of the order of extradition.

Note : The delegation of Pakistan reserved its position on this article.

Article 28

If extradition takes place as a result of fraud, deceit or misrepresentation or any similar fault on the part of the requesting State or its agents, the State which extradited the person may demand and obtain his return.

Note : The delegations of India and Pakistan reserved their position.

Article 29

Each contracting Party shall upon presentation of a copy of the extradition order, grant facilities for the transit through their territories, of persons surrendered by one of them to the other and ensure their safe custody.

Note : The delegation of India reserved its position on this article since in its view consideration of this article will arise only after a decision is taken on the basic question as to whether the matter of extradition should be governed by Bilateral Treaties or a Multilateral Convention.

Article 30.

If the provisions of this agreement are in conflict with those of any bilateral agreement between two signatory States, those two States shall apply the provisions most suitable for facilitating extradition.

Note : The delegations of Ceylon, Iraq and the United Arab Republic accepted this provision. The delegations of Burma, India, and Pakistan did not accept the provision. The delegations of Indonesia and Japan reserved their position.

ARBITRAL PROCEDURE

CONTENTS

ARBITRAL PROCEDURE

Introductory Note

At the Second Session held at Cairo, the Committee decided to take up for consideration the subject of Arbitral Procedure as a matter arising out of the work done by the International Law Commission. The International Law Commission at its Tenth Session had finalised its recommendations on the subject and had drawn up Model Rules on Arbitral Procedure. The Committee directed its Secretariat to prepare a questionnaire on the subject to serve as a basis of discussion. At the Third Session held at Colombo, the Committee generally discussed the subject on the basis of the questionnaire prepared by the Secretariat and appointed a Sub-Committee to prepare a preliminary report. Since all the Governments had not furnished their replies to the questionnaire, the Committee was not in a position to discuss the subject fully during the Third Session. The Committee accordingly decided that the preliminary report prepared by the Sub-Committee and the written answers that have been or will be received from the Governments should be placed before the Committee for further consideration at its Fourth Session.

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

THIRD SESSION

REPORT OF THE SUB-COMMITTEE ON ARBITRAL PROCEDURE

Present : Mr. Justice T. S. Fernando (Ceylon)
Mr. V.S. Deshpande (India)
Mr. Hafiz Ganem (United Arab Republic)

Arbitral Procedure

Before entering on the discussion of the questionnaire the Delegates for India and Indonesia expressed the view that the model rules made by the International Law Commission go far beyond the established concepts of arbitration and approach that of a process of Court. As the Delegates, however, felt that the consideration of this basic question was involved in the Sections I, II and III in the questionnaire, the Committee proceeded to consider each question in the questionnaire and ascertain the view of the Delegations on the questions in the questionnaire.

Section I — General Principles

There was general agreement among the Delegates, the Delegate of Japan excepted, that the consent of parties underlies the formation of the Arbitration Agreement as also its enforcement. There was general opposition to the acceptance of the concept of a judicial arbitration. If there is any disagreement between the parties, for instance, regarding the existence of a dispute or its arbitrability, such a dispute has to be settled by the consent of parties and not by empowering any tribunal like the International Court of Justice to decide it.

The Delegate of Japan while answering question No. 1 of this Section in the affirmative also answered questions 2 and 3 in the affirmative. It would appear that questions 2 and 3 are antithetical and therefore the answers to both of them could not be the same. The Delegation of Japan may perhaps like to clarify this apparent inconsistency in the answers.

The Delegation of Burma and Iraq were not in favour of offering any comments on the detailed questionnaire.

Section II — The Undertaking to Arbitrate

There was further unanimity among the Delegates that :

(a) the undertaking to arbitrate must be carried out in good faith ;

(b) such undertaking should result from a written instrument ; and

(c) such an agreement should be *ad hoc*, that is to say, the agreement should be made after the dispute has arisen.

As the Delegates of Burma, Iraq and Pakistan abstained from further comments on the detailed questionnaire, this report does not contain their views on the questionnaire.

Section III — Arbitrability

It was further agreed that if the parties to an undertaking to arbitrate disagree as to the existence of a dispute or as to its arbitrability, this question should not be brought up before the International Court of Justice or the Permanent Court of Arbitration. The Delegate of Japan, however, seemed to be of a different view. He was in favour of the omission only of the Permanent Court of Arbitration from the tribunals before which the questions of arbitrability could be taken up.

The Delegates of India and Ceylon were of the view that such a dispute should not be referred to the Arbitral Tribunal even if it has been already constituted, but the Delegates of Japan and the United Arab Republic were of the view that it should be referred to the Arbitral Tribunal if it has already been constituted.

Section IV — The Constitution of the Arbitral Tribunal

The Delegates of Ceylon and United Arab Republic were agreed that an Arbitral Tribunal could be constituted not merely at the request of one of the parties but after the parties agree that an arbitrable dispute has arisen.

All the Delegates, with the exception of Japan, appeared to be of the view that in the absence of agreement the

International Court of Justice should not be brought in to make appointments of arbitrators. Japan saw no objection to the appointment of an arbitrator by the President of the International Court of Justice in the absence of agreement between the parties.

Section V — The Immutability of the Tribunal

Regarding the first three questions the Delegates of the United Arab Republic and Japan stated that a party may replace an arbitrator appointed by it until the tribunal has begun its proceedings. But the arbitrator should not be replaced during the proceedings before the tribunal except by mutual agreement. The Indian view appeared to be the same though clarification of this may be sought from the Indian Delegation.

Ceylon, however, put forward the view that either party to an agreement should have the right to change the arbitrator appointed by it at any stage of the proceedings. As to the fourth question, the Delegates of India and United Arab Republic were of the view that arbitrators may be changed on account of a disqualification at the instance of any party at any stage of the proceedings but not by any decision of the International Court of Justice.

Section VI — The Compromis

The Delegates of Ceylon, India and United Arab Republic were agreed that the parties having recourse to arbitration should conclude a *compromis* which would include such provisions as are deemed desirable by the parties. The Delegate of the United Arab Republic was further of the view that if the parties fail to reach agreement on the contents of the *compromis* or fail to conclude a *compromis*, the Arbitral Tribunal after it is constituted should draw up the *compromis*. The Delegates of Ceylon and India, however, adhered to their earlier view that if the parties fail to agree such a dispute cannot be referred for decision even to the Arbitral Tribunal. All three Delegates were of the view that no such dispute can be referred to the International Court of Justice. The Delegate of Japan said that he would submit written answers to the questions in this section and the remaining sections at a later stage.

Section VII — Powers of the Tribunal and Procedure

The Delegate of the United Arab Republic was of the view that the Arbitral Tribunal is the judge of its own competence and possesses the widest powers to interpret the *compromis*. He also answered the rest of the questions of this sections in the affirmative with the reservation in answering question No. 9 that the counter claim or additional or incidental claims could be decided by the tribunal only if they are directly connected with the subject matter of the *compromis*.

On the assumption that the jurisdiction of the arbitrator has not been disputed by any party, the views of the Delegate of Ceylon were similar with the exception that he was of the view that the Arbitral Tribunal was not free to decide on counter claims or additional or incidental claims arising out of the subject matter. The Delegate of India on the other hand assumed in regard to question No. 1 that the agreement of parties to the exercise of the jurisdiction of the Arbitral Tribunal was lacking and therefore his answer to it was in the negative. He also answered question No. 9 in the negative for the same reason. In regard to question No. 10 he was opposed to any Arbitral Tribunal deciding a case *ex parte*. His answer to question No. 14 was in the affirmative.

Section VIII — The Award

Regarding the first question, while the United Arab Republic Delegate was of the view that the time to give the award could be extended not only by the agreement of the parties but also by the Court when it deems such extension necessary to reach a just decision, the Delegates of Ceylon and India thought that the time could not be extended except by agreement of parties.

Section IX — Interpretation of the Award

Question No. 1 was answered in the affirmative by the United Arab Republic Delegate and in the negative by the Ceylon Delegate. The Delegate of India stated that the interpretation of the award should be done by the Arbitral Tribunal only if the parties agree to that being done. All the three Delegates agreed that a dispute regarding the interpretation of the award could not be referred to the International Court of Justice without the agreement of parties.

Section X — Validity & Annulment of the Award

On the assumption that the annulment of the award would be made by the International Court of Justice, the United Arab Republic Delegate was prepared to recognise the legal right of the parties to ask for such annulment on important grounds but the Delegates of Ceylon and India were averse to referring such a matter to the International Court of Justice. The Delegates of Ceylon and United Arab Republic answered question No. 2 in the affirmative while the Delegate of India answered it in the negative. All the Delegates were agreed that such a dispute could not be referred to the International Court of Justice except by consent of parties.

Section XI — Revision of the Award

In answer to question No. 1 the Delegate of the United Arab Republic thought that the parties should have the right to ask for the revision of the award in case of discovery of new material facts while the Delegates of Ceylon and India thought that this could be done only with the agreement of parties. All three Delegates were agreed that an application, if it could be made, for such a revision should be made to the Arbitral Tribunal but not to the International Court of Justice except by consent of parties.

OTHER DECISIONS

CONTENTS

OTHER DECISIONS

Report Of the International Law Commission Eleventh Session

The International Law Commission had during its Eleventh Session considered the subjects of the Law of Treaties, Consular Immunities and Privileges, and State Responsibility. The Report of the Commission was placed before the Committee in accordance with Article 3 (a) of its Statutes. The Committee decided that since the Commission had not finalised its report on any of the three subjects which it had considered, it was premature for the Committee to go into these subjects. It, however, directed the Secretariat to collect basic materials on these subjects and to prepare background papers and to place the same before the Committee together with the report of the Commission when it is finalised.

Dual Nationality

The subject of Dual Nationality was referred to the Committee by the Government of the Union of Burma under the provisions of Article 3 (b) of the Statutes of the Committee. The Governments of Burma, Japan and the United Arab Republic submitted memoranda on the subject and the United Arab Republic also presented a draft agreement for the consideration of the Committee.

During the First Session held in New Delhi, the Delegations of Burma, Indonesia and Japan made brief statements on the problem of dual nationality but the Committee decided to postpone further consideration of the subject as the Delegations of India, Ceylon, Iraq and Syria had reserved their position on this subject.

During the Second Session held in Cairo, the views of the Delegations were ascertained on the basis of a Questionnaire prepared by the Secretariat. The main topics which were discussed during the Second Session were; (1) the acquisition of dual nationality; (2) the position of a resident citizen who is simultaneously a citizen of another State and the rights of such a citizen; (3) the position of non-resident citizen possessing dual nationality; and (4) the position of an alien possessing dual nationality. The Delegations were of the opinion that it would be desirable to reduce the number of cases of persons possessing dual nationality by means of

enacting domestic legislation or concluding international conventions. It was, however, felt that unless there was uniformity in nationality laws and unanimity on the fundamental principles of nationality, it would be very difficult to achieve the desired objective by means of a multilateral convention. The Committee decided that the Secretariat should prepare a report on the subject on the basis of the discussions held during the Session and that this report together with the draft agreement submitted by the United Arab Republic should be taken up for consideration during the Third Session.

At the Third Session held in Colombo, the Committee had a general discussion on the subject and the unanimous view of the Delegations was that some preparatory work should be done by the governments of the participating countries on the basis of the report of the Secretariat before the Committee could finally make its recommendations on the subject. The Committee therefore decided to request the governments of the participating countries to study the report of the Secretariat and the draft of the agreement presented by the U.A.R. Delegation and to communicate their views to the Secretariat in written memoranda indicating the particular problems which have arisen in this regard and suggesting specific points which they desire the Committee to take up for particular study and consideration.

Recognition of Foreign Decrees in Matrimonial Matters

The subject of Recognition of Foreign Decrees in Matrimonial Matters was referred to the Committee by the Government of Ceylon under the provisions of Article 3(c) of the Statutes of the Committee as being a matter on which exchange of views and information between the participating countries was desirable. At the First Session held in New Delhi, the Committee appointed the Member for Ceylon as Rapporteur to prepare and present a report on the subject. At the Second Session held in Cairo, the Rapporteur presented his report on the subject but the delegations present at the Session were of the opinion that the report needed further consideration before the Committee would be in a position to discuss the subject fully. At the Third Session held in Colombo in January 1960, the Committee did not have adequate time to consider the subject in detail and it was decided that

the subject should be placed on the Agenda of the Fourth Session. The Committee decided to request the governments of the participating countries to express their views on the provisions of the Draft Convention as suggested by the Rapporteur in his report and the Draft Convention presented by the Delegation of the United Arab Republic.

Legal Aid

The subject of Free Legal Aid was referred to the Committee by the Government of Ceylon under the provisions of Article 3(c) of the Statutes of the Committee as being a matter of common concern on which exchange of views and information was desirable between the participating countries. At the First Session held in New Delhi, the Committee appointed the Member for Ceylon as Rapporteur on the subject. At the Second Session held in Cairo, the Committee decided that the Delegation of Ceylon should continue to act as Rapporteur on the subject and requested all other Delegations to furnish the Rapporteur with statements of the laws and practice prevalent in their respective countries on the subject. The Governments of Burma, India, Japan, Pakistan, Indonesia and the United Arab Republic submitted memoranda on the subject and at the Third Session held in Colombo the Rapporteur presented his report on Free Legal Aid. The Committee considered the Rapporteur's Report and directed the Secretariat to circulate the same amongst the governments of the participating countries. The Committee decided that any specific question which may be raised by the governments of the participating countries on this Report should be placed before the Committee for consideration at its Fourth Session.

Law of the Sea

The Committee decided to postpone consideration of this subject in view of the United Nations Conference of Plenipotentiaries which was convened to meet in Geneva in March, 1960.

Future Work of the Committee

The Committee decided to take up for consideration at its next Session the question of Legality of Nuclear Tests under Article 3 (c) of its Statutes as being a matter of common concern

between the participating countries. It also decided to undertake a study of the conflicts in the laws of the participating countries regarding International Sales and Purchases and Relief in respect of Double Taxation as a part of its programme of activities for 1960-61.

Co-operation with other Organisations

The Committee recommended that the Legal Counsel of the United Nations be invited to attend its Fourth Session and that the Committee's Secretariat should maintain contact with the United Nations and other international or regional organisations.

Appendix "A"

ASIAN - AFRICAN LEGAL CONSULTATIVE COMMITTEE

STATUTES

Article 1

The Asian - African Legal Consultative Committee shall consist of seven original members nominated by the Governments of Burma, Ceylon, India, Indonesia, Iraq, Japan and the United Arab Republic. The Committee may from time to time admit to membership persons nominated by the Governments of other Asian African countries.

Article 2

The government of each of the participating countries shall nominate a legal expert to serve on the Committee as Member. An alternate member may also be nominated if considered necessary.

Article 3

The Committee shall function for an initial period of five years and its purpose shall be as follows :

(a) to examine questions that are under consideration by the International Law Commission and to arrange for the views of the Committee to be placed before the said Commission;

(b) to consider legal problems that may be referred to the Committee by any of the participating countries and to make such recommendations to governments as may be thought fit ;

(c) to exchange views and information on legal matters of common concern ; and

(d) to communicate with the consent of the governments of the participating countries, the points of view of the Committee on international legal problems referred to it, to the United Nations, other institutions and international organisations.

Article 4

The members of the Committee may exchange views by correspondence either directly or through the Secretariat on

matters that are under consideration. The Committee shall normally meet once every year and such meetings shall be held in the participating countries by rotation.

Article 5

The Committee shall have a permanent Secretariat at such place as may be determined by the Committee for facilitating mutual consultations between the members and for achieving the purposes of the Committee generally. The Committee shall appoint a qualified person as its Secretary who may be authorized to act on its behalf on such matters as the Committee may determine and until the Secretary is appointed by the Committee, the Secretary to the International Legal Conference at New Delhi shall perform the functions of the Secretary to the Committee with a temporary Secretariat at New Delhi.

Article 6

The expenses incurred in connection with the meetings of the Committee other than the cost of travel of the members for the purpose of attending the meeting shall normally be met by the participating country in which the meeting is held ; the expenditure incurred on the Secretariat shall be borne by the participating countries in such proportions as may be agreed and the amount shall be paid annually in advance in the account to be maintained in the name of the Committee.

Article 7

The Committee may enter into arrangements for consultations with such international organizations, authorities and bodies as may be considered desirable.

Article 8

The Committee may from time to time frame such rules as may be considered necessary for carrying into effect the purposes of the Committee.

Appendix "B"

ASIAN - AFRICAN LEGAL CONSULTATIVE COMMITTEE

STATUTORY RULES

1. Short Title

These rules shall be called the Asian-African Legal Consultative Committee Statutory Rules.

2. Interpretation

In these Rules unless the context otherwise requires :—

(a) "Committee" means the Asian-African Legal Consultative Committee.

(b) "Liaison Officer" means a person appointed by the government of a participating country under the provisions of these rules.

(c) "Member" means a person who is so nominated by the government of a participating country under the provisions of Article 2 of the Statutes and includes an Alternate Member.

(d) "Original Member" means a Member nominated by the government of any of the countries enumerated in Article 1 of the Statutes.

(e) "Participating country" means a country the government of which has accepted the Statutes and whose nominee has been admitted to the membership of the Committee.

(f) "President" means the person who has been elected as such under the provisions of these rules and includes any other person temporarily performing the functions of the President.

(g) "Secretariat" means collectively the staff appointed by the Committee.

(h) "Secretary" means the person so appointed by the Committee and includes any person temporarily performing the functions of the Secretary.

3. Election and Functions of President

(1) The Committee shall at each Annual Session elect a member in his representative capacity as the President of the Committee and the person so elected shall hold office until the election of another President.

(2) The President shall perform such functions as are specified in these rules.

(3) The Committee shall also elect a member in his representative capacity to be the Vice-President of the Committee and the Vice-President shall perform all the functions of the President if the latter for any reason is unable to perform them.

4. Admission of Members

The Committee may by a decision supported by a two third majority inclusive of two third of the original members admit to membership a person nominated by the Government of an Asian or African country, if such a Government by a written communication addressed to the Secretary of the Committee intimates its desire to participate in the Committee and its acceptance of the Statutes and the Rules framed thereunder. Such decision may be taken either by circulation or by means of a resolution adopted in any of its Sessions.

5. Nomination of Members

(1) Each of the participating countries shall nominate a legal expert to serve on the Committee as a Member and may at its discretion also nominate an Alternate Member. Intimation of such nomination shall be given forthwith to the Secretary of the Committee.

(2) A person nominated as Member or Alternate Member shall hold office until his nomination is revoked by his Government and intimation to that effect is received by the Secretary of the Committee.

6. Functions of the Committee

(1) The Government of a participating country by communication addressed to the Secretary may refer for the

opinion of the Committee any legal problem together with a memorandum setting out the questions on which the views of the Committee are sought.

(2) The legal problems so referred under clause (1) shall be placed by the Secretary on the provisional agenda of the next Session of the Committee and the Committee shall, subject to the question of priority to be attached to the subject, consider the problem and shall make such recommendations as the Committee may determine.

(3) Notwithstanding anything contained in clause (2) if a legal problem referred for consideration of the Committee under clause (1) in the opinion of the Government referring the problem is of an urgent nature, the Secretary shall at the request of the Government concerned after informing the President obtain by correspondence the individual opinions of the members on the problem so referred. He shall then transmit the views so obtained to the President, the Government concerned, and the Governments of all the participating countries.

(4) The Committee may at the request of the Government of any of the participating countries or on the motion of any of the members take up for consideration any legal matter of common concern and may express such views or make such recommendations as may be thought fit.

(5) (a) At each Annual Session of the Committee the Secretary shall place before it a report containing the work done by the International Law Commission of the United Nations at its Session immediately preceding the Session of the Committee together with any memoranda that may be received by the Secretary on this subject from the Governments of the participating countries.

(b) The Secretary may, at each Annual Session of the Committee, submit reports on the work done in the year immediately preceding the Session of the Committee by other institutions and international organisations with whom consultative arrangements have been concluded.

(6) The Committee shall consider the report submitted to it and may make such recommendations or send their

views to the Governments of the participating countries as the Committee may determine.

(7) The Committee may at any of its Session finally dispose of a subject placed on the Agenda or may reserve it for further consideration, or may postpone its consideration.

(8) The Committee may in respect of a subject reserved for further consideration adopt an interim report setting forth its provisional views or interim recommendations on the subject, and may appoint a member as Rapporteur on the subject. The Rapporteur so appointed shall at the subsequent meeting of the Committee place before it his provisional or final report on the Subject. The Rapporteur may seek the views of the other members of the Committee and consult them in the preparation of his report.

9. The members of the Committee may by correspondence consult one another on any matter that is under consideration of the Committee.

7. Sessions of the Committee

(1) The Committee shall normally meet once annually in the participating countries by rotation.

(2) The date and place of such Sessions shall either be determined by the Committee at its previous Session or be left to the Secretary after consulting the Governments of the participating countries.

(3) At each Session of the Committee the Government of a participating country may at its discretion in addition to its member and alternate member send such number of advisers as it thinks fit.

(4) The Committee may at its discretion admit to its Sessions observers from non-participating countries and from such inter-Governmental or non-Governmental organisations with whom consultative arrangements have been made by the Committee under Article 7. Such observers shall not address the meeting or take part in the discussions unless invited to do so by the Committee. The Committee may, however, declare any of its meetings during a Session to be a closed meeting to which observers shall not be admitted.

(5) The Committee may also at its discretion invite a recognised expert to attend any of its meetings and assist in its deliberations. The expert so invited shall act in his individual capacity.

(6) The Committee may, if it thinks fit, appoint sub-committees for detailed consideration of the subjects.

(7) All the meetings of the Committee shall be presided over by the President and in his absence by the Vice-President.

(8) All decisions or recommendations of the Committee shall be by a simple majority except in cases specified under the rules. The dissenting views expressed by any member or members shall also be recorded. An alternate member shall not vote on the resolutions if the member is present.

(9) The proceedings of all the meetings of the Committee together with resolutions and dissenting opinions shall be furnished forthwith to the Governments of the participating countries.

8. Secretariat

(1) The Committee shall have a permanent Secretariat at such place as may from time to time be determined by the Committee.

(2) The Committee shall, as soon as may be, appoint as its Secretary a national of any of the participating countries who is a legal expert with administrative experience.

(3) The Committee may, if for financial or any other reason considers it expedient so to do, keep the post of the Secretary in abeyance, and appoint a person qualified to be the Secretary under the preceding clause to perform the functions of the office. A person so appointed shall be known as the Acting Secretary.

(4) The Secretary or the Acting Secretary shall receive such salaries, travelling and other allowances and such other emoluments as may be determined by the Committee.

(5) The Committee may authorise the Secretary to appoint such technical and other staff as may be necessary on

such remuneration as may be determined from time to time by the Committee.

(6) The Secretary shall be responsible to the Committee in respect of the work of the Secretariat.

(7) The Secretary shall have the right to address the meetings of the Committee on all administrative and organisational matters and he may make statements and furnish information during deliberations of the Committee or of a Sub-committee if called upon to do so. The Secretary may be represented by a member of the Secretariat for this purpose.

(8) The Secretary shall be authorised to act on behalf of the Committee in all correspondence, to take decisions on all administrative matters and to perform such other functions as are specified in these rules.

(9) The Secretary shall, however, in the performance of his duties act in consultation with the Liaison Officers appointed under Rule 9 except in routine and administrative matters. The Secretary shall report to the Liaison Officers at their meetings any action taken by him in this regard.

9. Liaison Officer

(1) Each of the participating countries shall appoint an officer to act as Liaison Officer.

(2) The Liaison Officer shall act as the channel of communication between the Secretariat of the Committee and the Governments of the participating countries.

(3) The Liaison Officers shall meet as often as necessary and all decisions of Liaison Officers shall be taken at meetings by a simple majority of the total number of Liaison Officers.

10. Finance and Expenditure

(1) The participating country in which the Session of the Committee is held shall be responsible for all expenses in connection with the organisation of the Session including the cost of board and lodging of the members and alternate members during the Session of the Committee.

(2) The cost of travel of the member, alternate member and advisers shall be the concern of each participating country.

(3) The expenditure incurred on the Secretariat shall be met by the participating countries in such proportions as may be agreed on the recommendation of the Committee subject to a minimum contribution of Rs. 5000/- per year Indian Rupees or equivalent thereof. Such contribution shall be paid in advance annually.

(4) The cost of travel and other expenses incurred by the Secretary or the staff of the Secretariat shall be met out of the funds placed at the disposal of the Committee for the purposes of the Secretariat under clause (3).

(5) The Committee shall maintain an account in a recognised bank in its name at the place where the Secretariat is situated and the contributions of each of the participating countries under clause (3) shall be deposited in this account. The account so maintained shall be operated by the Secretary or such other person as may be authorised by him in consultation with the Liaison Officers.

(6) The Secretary shall be authorised to incur such expenditure on the Secretariat and for other purposes of the Committee as may be necessary provided that any item of expenditure over one thousand Indian Rupees or equivalent thereof shall require to be sanctioned at a meeting of the Liaison Officers.

(7) The account of the Committee shall be audited once annually by an Auditor appointed by the Liaison Officers and the accounts so audited shall require to be passed at a meeting of the Liaison Officers.

11. Consultations with other Organisations

(1) The Committee may from time to time direct the Secretary to communicate with such international, regional, inter-Governmental or non-Governmental organisations or committees engaged in legal work with a view to enter into suitable arrangements for consultations.

(2) (a) The Committee may nominate as observer any of its members or the Secretary or a member of the Secretariat

as the case may be to attend the meetings of such organisations or committees with whom arrangements for consultations may have been entered into.

(b) When the Committee is not in session such nomination may be made by the Liaison Officers.

(c) The Committee or the Liaison Officers may in the event of non-availability of a person specified in sub-clause (a) nominate a member of the mission of any of the participating countries to attend such meetings.

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

THIRD SESSION.

Resolution No. III (1)

CONSIDERING THAT under the provisions of Clause (1) of Rule 3 of the Statutory Rules the Committee is required to elect at each Annual Session a member in his representative capacity as the President of the Committee;

AND CONSIDERING that the Delegation of Burma has moved for the election of the Member and Leader of the Delegation of Ceylon in his representative capacity as the President of the Committee, which motion has been duly seconded by the Delegation of India;

THE COMMITTEE UNANIMOUSLY decides to elect the Member and Leader of the Delegation of Ceylon to be the President of the Committee.

(Passed Unanimously 20.1.1960)

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

THIRD SESSION.

Resolution No. III (2)

CONSIDERING THAT under the provisions of Clause (3) of Rule 3 of the Statutory Rules the Committee is required to elect at each Annual Session a member in his representative capacity as the Vice-President of the Committee;

AND CONSIDERING that the Delegation of Japan has moved for the election of the Member and Leader of the Delegation of Pakistan in his representative capacity as the Vice-President of the Committee, which motion has been duly seconded by the Delegation of the United Arab Republic;

THE COMMITTEE UNANIMOUSLY DECIDES to elect the Member and Leader of the Delegation of Pakistan to be Vice-President of the Committee.

(Passed unanimously 20.1.1960)

AFRICAN LEGAL CONSULTATIVE COMMITTEE

THIRD SESSION.

Resolution No.III (3).

CONSIDERING that the Committee at its Second Session held in Cairo in October 1958 had prepared the draft. Articles on Immunities and Privileges of the Committee which had been submitted for consideration of the Governments of the participating countries;

AND CONSIDERING that the Delegations of Burma, India, Iraq, Japan and Pakistan had expressed a desire for a further period of time to enable their Governments to consider the matter fully;

AND NOTING that the Government of Ceylon had accepted in principle the draft Articles and that the Articles were generally acceptable to the Governments of Indonesia and the United Arab Republic subject to certain minor amendments;

THE COMMITTEE DECIDES that the final consideration of the draft Articles on Immunities and Privileges of the Committee be postponed until the Fourth Session of the Committee.

(Passed on 21.1.1960)

ASIAN AFRICAN LEGAL CONSULTATIVE COMMITTEE

THIRD SESSION.

Resolution No.III (4).

CONSIDERING that a report on the work done by the International Law Commission at its Eleventh Session had been placed before the Committee under Clause 5(a) of Rule 6 of the statutory rules;

AND CONSIDERING that the International Law Commission had not finalized its report on any of the three subjects which had been considered by the Commission at its Eleventh Session, namely, the Law of Treaties Consular Immunities and Privileges and State Responsibility for submission to the Governments;

THE COMMITTEE DECIDES that the Secretariat be directed to collect basic materials on these subjects And to prepare the background papers after the International Law Commission finalizes its reported to place the same before the Committee at its Fourth Session for consideration.

(Passed on 22.1.1960)

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

THIRD SESSION

Resolution No.III (5)

CONSIDERING that under the provisions of Clause (4) of Rule 7 of the statutory rules the Committee is empowered to admit to its Sessions Observers from non-participating countries;

AND CONSIDERING that the Government of Iran had by a written communication addressed to the Secretary expressed its desire to be represented by an Observer at this Session of the Committee;

THE COMMITTEE DECIDES to admit the Observer representing the Government of Iran to the Third Session of the Committee.

(Passed on 22.1.1960)

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

THIRD SESSION.

Resolution No. 111 (7).

CONSIDERING that the questions relating to dual nationality were referred to this Committee by the Government of the Union of Burma;

CONSIDERING that the subject was discussed during the Second Session of the Committee on the basis of a questionnaire prepared by the secretariat of the Committee and the Delegation of the United Arab Republic had presented a draft of an Agreement for elimination and reduction of dual nationality;

CONSIDERING that at the Second Session it was decided to direct the Secretariat to prepare a report on the subject on the basis of the discussions held during that Session and to place that report along with the Draft Agreement presented by the Delegation of the United Arab Republic for consideration during the Third Session of the Committee;

CONSIDERING that the Secretariat had presented its report as directed before this Session of the Committee;

AND CONSIDERING that the unanimous view of the Delegations present at this Session has been that some preparatory work should be done by the Governments of the participating countries on the basis of the Report of the Secretariat before the Committee could finally make its recommendations on the subject;

THE COMMITTEE DECIDES to request the Governments of the participating countries to study the Report of the Secretariat together with the draft of an Agreement presented by the Delegation of the United Arab Republic and to communicate their views to the Secretariat in written memoranda indicating the particular problems which have arisen in this regard and suggesting specific points which they desire the Committee to take up for particular study and consideration.

THE COMMITTEE FURTHER DECIDES to direct the Secretariat to prepare the draft of a model bilateral treaty on the subject for consideration of the Committee at its Fourth Session together with an explanatory memorandum.

THE COMMITTEE FURTHER DECIDES to direct the Secretariat to prepare draft Articles containing the principles regarding elimination or reduction of dual nationality as also the question of treatment of dual nationals.

(Passed on 25.1.1960)

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

THIRD SESSION

Resolution No.III (8)

CONSIDERING that the law relating to the Regime of the High Seas was referred by the Governments of Ceylon and India and the Regime of Territorial Sea had been referred by the Government of Ceylon for consideration by the Committee;

CONSIDERING that the Government of the Republic of Indonesia had requested the Committee to consider the Law of the Seas with particular reference to the Special Regime of Territorial Waters of Archipelagoes,

CONSIDERING that the Secretariat had prepared and presented a report on the work done in the Conference of Plenipotentiaries on the Law of the Seas held in Geneva in 1958;

AND CONSIDERING that the Delegation of Japan had mov8d for postponement of consideration of these subjects relating to the Law of the Seas by the Committee at this Session in view of the forth coming Conference of Plenipotentiaries convened by the United Nations to meet in Geneva in March 1960, which suggestion has been accepted by all the Delegations;

THE COMMITTEE DECIDES to postpone consideration of the subjects relating to the Law of the Seas;

THE COMMITTEE FURTHER DECIDES that the question of placing these subjects on the Agenda of the Committee for its Fourth Session should be decided at the time of drawing up of the Provisional Agenda for that Session by the Secretary in consultation with the Liaison Officers.

(Passed on 26.1.1960
replaced on27.1.1960

ANNEXURE 'A'

The Committee noted that the Government of the United Arab Republic are of the opinion -

(a) That a foreign state should not enjoy immunity, except in public transactions undertaken by it in its capacity as an international entity, excluding any legal transactions similar to the usual civil activities undertaken by individuals and private entities.

(b) That neither a commercial representative of a foreign government, nor any state trading organization belonging to it, which have an independent juridical entity, may enjoy immunity in commercial transactions.

(c) That all questions of immunity of a foreign state, its representatives or the state trading organization belonging to it, should be left to the decision of courts, sufficiently considering certificates issued by ministries for Foreign Affairs in compliance with the courts demand.

(d) That foreign judgments should not be enforced on the states public property, in an absolute manner. Nevertheless, the state trading organizations belonging to the state, and having an independent juridical entity are not immune, and law suits against them and their representatives may be brought to the courts of/a foreign state, concerning their transactions and activities, of the last mentioned state,

(e) that although the plea of immunity should be left to the decisions of national courts alone, *yet,* litigations relating to commercial transactions of the state, may be referred to arbitration.

(f) That a multi-lateral convention on enforcement of judgments against a foreign state is premature.

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

THIRD SESSION

Resolution No.III (9).

CONSIDERING that the Government of India had referred to the Committee for its opinion the question of Immunity of states in respect of Commercial Transactions under the provisions of Article 3 (b) of the Statutes;

CONSIDERING that the committee had adopted a report on the subject and presented the same to the Governments of the participating countries for their comments;

CONSIDERING that the Governments of the participating countries through their Delegations present at this Session have made their comments on the Committee's recommendations which have been taken note of and fully discussed at this Session of the Committee;

AND CONSIDERING that the views of the Delegation of Indonesia to the effect that immunity should be granted to all activities of foreign States irrespective of their nature which are carried on by the Government itself had already been taken note of in paragraphs 4 and 11 of the Report;

THE COMMITTEE DECIDES that its recommendations contained in paragraph 9 of its report should be retained in their present form and a paragraph be added to the said report containing the views of the Government of the United Arab republic as presented in a memorandum at this Session and setout in Ann0xure "A" to this resolution;

THE COMMITTEE FURTHER DECIDES that its report as adopted at the Cairo Session together with the amendment as aforesaid be submitted to the Governments of the participating countries as the Final Report of the Committee;

THE COMMITTEE DIRECTS the Secretariat to make available copies of the Final Report to the United Nations under the provisions of Article 3 (d) of the Statutes of the Committee for information of that body;

THE COMMITTEE DECIDES that the subject of immunity of States in respect of Commercial Transactions be removed from the Agenda of future Sessions unless the Government of any participating country wishes the Committee to consider any further questions on this subject.

Minute by the Delegation of Pakistan

The Government of Pakistan did not have sufficient time to consider the Report of the Committee on the subject adopted at the Cairo Session and accordingly the Delegate for Pakistan could not express the views of his Government on the Report.

(Passed on 27.1.1960)

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

THIRD SESSION

Resolution No.III (10).

CONSIDERING that the question of planning of the future work of the Committee, the question of printing and publication of the proceedings to be undertaken by the Committee's Secretariat and. the administrative questions relating to the staff structure of the Secretariat and the conditions of service of staff members were placed before the present Session of the Committee, being items Nos.6, 8 and 9 of the Agenda;

CONSIDERING that the Committee at its First Meeting held on the 20th January, 1960, appointed a Sub-Committee to deal with these questions and to make its recommendations thereon;

AND CONSIDERING that the Sub-Committee has submitted its report containing its recommendations on the aforesaid questions;

THE COMMITTEE APPROVES of the recommendations of the Sub-Committee and decides -

(a) that the Secretariat of the Committee be directed to prepare a compilation of the laws of the participating countries and of countries in other regions of the world regarding international sales and purchases and also the laws, treaties and conventions with regard to relief against Double Taxation to serve as a basis for exchange of information between the Governments of the participating countries on these matters,

(b) to request the Governments of the participating countries to furnish the Secretariat the information relating to their laws and the provisions of their Treaties and Conventions relating to the, subjects mentioned in sub-clause (a) herein;

THE COMMITTEE DECIDES to direct the Secretariat to place the subject of "Legality of Nuclear Tests" on the Agenda of the Fourth Session of the Committee and to collect background material and information on the subject including scientific data as may be available;

THE COMMITTEE DECIDES to direct the Secretariat to publish a summary of the proceedings of the Third Session of the Committee together with the relevant background material contained in the Brief of Documents for general distribution;

THE COMMITTEE DECIDES to direct the Secretary to extend an invitation to the Legal Counsel of the United Nations to attend the Fourth Session of the Committee and to maintain close contact with the Secretariat of the United Nations and other international organizations including the International Law Commission;

THE COMMITTEE DECIDES to recommend to the Governments of the participating countries that other countries in the Asian-African Continent, which are not participating in the Committee at present should be encouraged by such appropriate means as may be considered proper by the Governments of the participating countries to join the Committee in order to make it a truly representative organization of the Asian-African States and also with a view to enable the Committee to increase its activities in its future programme of work;

THE COMMITTEE FURTHER DECIDES to recommend to the Governments of the participating countries to set up a national unit or nominate a particular official as may be considered appropriate by the Governments concerned to deal with the work of this Committee;

THE COMMITTEE DECIDES to approve of the staff structure of the Secretariat, salary scales of staff members, secretariat Entertainment Fund and conditions of service of staff members as recommended by the sub-Committee in paragraphs 10 to 13 of its report.

(Passed on 1.2.1960)

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

THIRD SESSION

Resolution No. III (11).

CONSIDERING that the Government of Japan had requested the Committee to examine the subject of status of Aliens with particular emphasis on the topics enumerated in the Reference of the Government of Japan;

CONSIDERING that the subject was generally discussed on the basis of a questionnaire at the Cairo Session of the Committee and that the Secretariat was directed to prepare a report on this subject on the basis of discussions held in Cairo;

CONSIDERING that the Secretariat has presented its report in the form of Draft Articles together with commentaries setting out the relevant State practice and judicial decisions,

AND CONSIDERING that the Committee had discussed the subject in detail during the present Session except the question of Responsibility of States for Treatment of Aliens and Diplomatic Protection of persons by their home States;

THE COMMITTEE decides to direct the Secretariat to draw up a report containing the Draft Articles as approved by the Committee at this Session together with relevant commentaries and to submit the same to the Governments of the participating countries for their comments;

THE COMMITTEE FURTHER DIRECTS that the subject be placed on the Agenda of its Fourth Session for consideration of the comments of the Governments of participating countries on the Draft Articles drawn up during the Present Session;

THE COMMITTEE DIRECTS the Secretariat to collect further data and materials on the subject of Responsibility of states for Treatment of Aliens and Diplomatic Protection of persons by their home states for consideration of the Committee at its next Session.

(Passed 2.2.1960)

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

THIRD SESSION

Resolution No. III (12).

CONSIDERING that the International Law Commission at its 1958 Session had finalized its recommendations on Arbitral Procedure und had drawn up model rules on the subject;

CONSIDERING that the subject was placed for discussion before this Session of the Committee on the basis of a questionnaire prepared by the Secretariat pursuant to Resolution No.II (14) adopted at the Cairo Session;

CONSIDERING that the question was generally discussed though the Delegations of Indonesia and Pakistan were not in a position to give answers to the questions or formulated as their Governments did not have the time to consider this subject;

AND CONSIDERING that a Sub-Committee was appointed to prepare a preliminary report on the basis of the discussions held during the present Session;

THE COMMITTEE DECIDES that the preliminary report as prepared by the Sub Committee be placed before the next Session of the Committee together with the written answers that have been or nay be received from the Governments of the participating countries on the questionnaire prepared by the Secretariat for further consideration of the Committee at its next Session.

THE COMMITTEE FURTHER DECIDES to request the Governments of the participating countries to furnish their views on the subject on the basis of the questionnaire prepared by the. Secretariat.

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

THIRD SESSION.

Resolution No. III (13).

CONSIDERING that the questions relating to extradition of fugitive offenders were referred to the Committee for consideration by the Governments of Burma and India;

CONSIDERING that the subject had been discussed at the Second Session of the Committee on the basis of a questionnaire prepared by the Secretariat end that the Delegations at that Session desired the matter to be further considered at this Session before making the final recommendations on the subject;

CONSIDERING that the Secretariat had drawn up certain draft Articles on the subject embodying the principles agreed to by the Delegations at the Cairo Session;

CONSIDERING that the Delegation of the United Arab Republic has prepared and presented the draft of a Convention for consideration of the Committee;

AND CONSIDERING that the subject had been further discussed at this Session on the basis of the draft Articles prepared by the Secretariat and the provisions of the draft Convention presented by the Delegation of the United Arab Republic;

THE COMMITTEE DIRECTS the Secretariat to draw up draft Articles on the basis of the discussions held and decisions taken at the present Session and to present the same before the next Session of the Committee for further consideration.

THE COMMITTEE FURTHER DIRECTS the Secretariat to obtain the views of the Governments of the participating countries regarding their preference between bilateral Treaties and multilateral Convention for consideration of the Committee at its next Session.

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

THIRD SESSION.

Resolution No. III (14).

CONSIDERING that the questions relating to free legal aid were referred to this Committee by the Government of Ceylon under Article 3(c) of its Statutes a8 being a matter of common concern on which exchange of views and information was desirable between the participating countries;

CONSIDERING that the Committee at its First Session had appointed a Rapporteur on the subject to prepare and present a report;

AND CONSIDERING that the Rapporteur has prepared and presented his report on the subject at this Session of the Committee;

THE COMMITTEE DECIDES to take note of the report and to direct the Secretariat to circulate the same amongst the Governments of the participating countries.

THE COMMITTEE FURTHER DECIDES that any specific questions which may be raised by the Governments of the participating countries on this report should be placed before the Committee at its next Session for consideration.

(Passed on 3.2.1960)

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

THIRD SESSION.

Resolution No. III (15).

CONSIDERING that the questions relating to recognition of foreign decrees in matrimonial matters were referred to this Committee by the Government of Ceylon under the provisions of Article 3(c) of its Statutes as being a matter on which exchange of views and information between the participating countries was desirable;

CONSIDERING that the Committee at its First Session had appointed a Rapporteur to prepare and present a report on the subject;

CONSIDERING that the Rapporteur had prepared and presented his report at the Cairo Session of the Committee;

CONSIDERING that the Delegations present at the Cairo Session were of the opinion that the report needed further consideration of the Delegations before the Committee would be in a position to discuss this subject fully;

AND CONSIDERING that the Committee at this Session did not have adequate time to consider the subject in detail;

THE COMMITTEE DECIDES to direct the Secretariat to place the subject on the Agenda of the Fourth Session of the Committee.

THE COMMITTEE FURTHER DECIDES to request the Governments of the participating countries to express their views on the provisions of the draft Convention as suggested by the Rapporteur in his report and the draft Convention presented by the Delegation of the _____.

(Passed on 3.2.1960)

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

THIRD SESSION.

Resolution No.III (16).

CONSIDERING that under the Statutes of the Committee its Sessions have to be held normally once a year by rotation in the participating countries;

AND CONSIDERING that the Delegation of Japan has offered to hold the next Session in Tokyo during the month of March 1961;

THE COMMITTEE DECIDES to accept with thanks the offer of the Government of Japan to act as host and to hold the Session in Tokyo during the month of March, 1961.