ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

REPORT OF THE ELEVENTH SESSION
HELD IN ACCRA (Ghana)
From 19th to 29th January, 1970

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

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A C C R A (Ghana)

1970

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ACCRA 1970

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I. INTRODUCTORY

Establishment and functions of the Committee

The Asian Legal Consultative Committee, as it was originally called, was constituted in November 1956 by the Governments of *Burma*, *Ceylon*, *India*, *Indonesia*, *Iraq*, *Japan* and *Syria* to serve as an advisory body of legal experts and to facilitate and foster exchange of views and information on legal matters of common concern among the Member Governments. In response to a suggestion made by the then Prime Minister of India, the late Mr. Jawaharlal Nehru, which was accepted by all the then participating countries, the Committee's name was changed to that of *Asian-African Legal Consultative Committee* as from the year 1958, so as to include participation of countries in the African continent. The present membership of the Committee is as follows : *Burma*, *Ceylon*, *Ghana*, *India*, *Indonesia*, *Iran*, *Iraq*, *Japan*, *Jordan*, *Kuwait*, *Malaysia*, *Nigeria*, *Pakistan*, *Sierra Leone*, *Syria*, *Thailand* and *the United Arab Republic*, as *Full Members*, and the Republic of Philippines and the Republic of Korea as *Associate Members*.

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

(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 ; to examine the reports of the Commission and to make recommendations thereon to the Governments of the participating countries ;

(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 to make recommendations thereon, if deemed necessary ; 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.

The Committee normally meets once annually by rotation in the countries participating in the Committee. Its first session was held in New Delhi (1957), second in Cairo (1958), third in Colombo (1960), fourth in Tokyo (1961), fifth in Rangoon (1962), sixth in Cairo (1964), seventh in Baghdad (1965), eighth in Bangkok (1966), ninth in New Delhi (1967), tenth in Karachi (1969) and the eleventh session in Accra (Ghana) from 19th to 29th January, 1970. The twelfth session of the Committee is scheduled to be held in Colombo during January 1971.

Office-bearers of the Committee and its Secretariat

During the Eleventh Session held in Accra, the Committee elected Hon. N.Y.B. Adade, Attorney-General and Minister of Justice of Ghana and Mr. B.A. Shitta-Bay, Acting Principal State Counsel in the Federal Ministry of Justice of Nigeria, respectively as the President and Vice-President of the Committee for the year 1970-71.

The Committee maintains its permanent Secretariat in New Delhi (India) for day-to-day work and for implementation of the decisions taken by the Committee at its sessions. The Committee functions in all its matters through its Secretary who acts in consultation with the Liaison Officers appointed by each of the participating countries.

The Committee decided at its first, second, fourth, sixth, seventh, ninth and eleventh sessions that Mr. B. Sen, Senior

Advocate of the Supreme Court of India, should perform the functions of the Secretary to the Committee.

Cooperation with other organisations

The Committee maintains close relations with and receives published documentation from the United Nations, the International Law Commission, the International Court of Justice, the U.N. High Commissioner for Refugees, the United Nations Conference on Trade and Development, the United Nations Commission on International Trade Law, the Organisation of African Unity, the League of Arab States, the International Institute for the Unification of Private Law and the Hague Conference on Private International Law. The Committee has taken steps to cooperate with the United Nations in its Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law, and as part of that programme it has decided to sponsor a training scheme which may be availed of by nationals of Asian and African countries.

The Committee is empowered under its Statutory Rules to have at its sessions Observers from international and regional inter-governmental organisations. The International Law Commission is usually represented at the Committee's sessions by its President or one of the members of the Commission.

The Secretary-General of the United Nations has also been represented at various sessions of the Committee.

The Committee sends Observers to the sessions of the International Law Commission in response to a standing invitation extended to it by the Commission. The last session of the Commission was attended by the Committee's President, Hon. N.Y.B. Adade, Minister of Justice of Ghana. The United Nations also invites the Committee to be represented at all Conferences convoked by it for consideration of legal matters. The Committee was represented at the U.N. Conferences of Plenipotentiaries on Diplomatic Relations as also on

the Law of Treaties. The Committee participated in the Second United Nations Conference on Trade and Development held in New Delhi in 1968. The Committee is also invited to be represented in various meetings of the UNCTAD, the UNCITRAL and various inter-Governmental Organisations concerned in the field of law.

Immunities and Privileges

The Committee, the representatives of the Member States participating in its sessions, the Secretary of the Committee and the members of the Secretariat are accorded certain immunities and privileges in accordance with the provisions of the Committee's Articles on Privileges and Immunities.

Membership and Procedure

The membership of this Committee is open to Asian and African governments who accept the Statutes and Statutory Rules of the Committee. The procedure for membership as indicated in the Statutory Rules is for a Government to address a note to the Secretary of the Committee, stating its acceptance of the Statutes and Statutory Rules. There is also provision for Associate Membership under conditions set out in the Statutory Rules.

Each Member Government contributes towards the expenses of the Secretariat, whilst the expenses for the holding of the sessions are borne by the country in which the session is held. The contributions towards the expenses of the Secretariat of each Member Country at present vary between £900 and £2,500 per annum depending upon the size and national income of the country. Associate Members, however, pay a fixed fee of approximately £450.

Resume of work done by the Committee

During the past thirteen years of its existence the Committee had to concern itself with all the three types of activities referred to in clauses (a), (b) and (c) of its Statutes,

namely examination of questions that are under consideration by the U.N. International Law Commission ; consideration of legal problems referred by Member Governments and consideration of legal matters of common concern. The subjects on which the Committee has been able to make its final reports (recommendations) so far include "Diplomatic Immunities and Privileges", "State Immunity in respect of Commercial Transactions", "Principles of Extradition", "Status and treatment of Aliens", "Dual or Multiple Nationality", "Legality of Nuclear Tests", "Arbitral Procedure", "Recognition and Enforcement of Foreign Judgments in Matrimonial Matters", "Reciprocal Enforcement of Foreign Judgments, Service of Process and Recording of Evidence both in Civil and Criminal Cases", "Free Legal Aid", "Relief against Double Taxation", certain questions relating to the 1966 Judgment of the International Court of Justice in the *South West Africa Cases*, and the Law of Treaties.

The Committee had also finalised its recommendations on the subject of "Rights of Refugees" at its Eighth Session held in Bangkok (1966), but at the request of one of its Member Governments it has decided to reconsider its recommendations in the light of new developments in the field of international refugee law. The subject was accordingly given consideration by the Committee again at its Tenth and Eleventh Sessions.

The topics on which the Committee has made some progress are "the Law relating to International Rivers", "International Sale of Goods" and "International Legislation on Shipping".

Some of the other topics which are pending consideration of the Committee include "Diplomatic Protection and State Responsibility", "the Law of Outer Space", "Revision of the U.N. Charter from Asian-African Viewpoint", "Codification of the Principles of Peaceful Co-existence", "Relations between States and Inter-Governmental Organisations", "State Succession" and "the Law of the Sea" with particular reference to peaceful

uses of the sea-bed and the ocean-floor beyond the limits of national jurisdiction. The Law of the Sea will be the priority item before the Twelfth Session of the Committee.

Studies in Economic Laws

The topics at present under consideration of the Committee in relation to International Trade and Economics are as follows :—

(*1*) *Rules of Private International Law or Conflict of Laws relating to Sales and Purchases in Commercial Transactions between States or their Nationals :*

This subject was considered by a Sub-Committee appointed by the Committee at its Fourth Session (1961). Thereafter it was not possible to take up this subject until the Eleventh Session of the Committee on account of its preoccupation with other pressing matters. The subject was taken up at the Eleventh Session following upon a request by the United Nations Commission on International Trade Law to study the subject and acquaint it with its views. The Sub-Committee appointed at that Session presented an Interim Report wherein it suggested for the establishment of a Standing Sub-Committee with view to making a report at the Twelfth Session of the Committee. This suggsetion was accepted by the Committee.

(*2*) *International Transport Law* :

This topic has been included in the programme of work of this Committee under Article 3(c) of its Statutes on the suggestion of the International Institute for the Unification of Private Law. "International Legislation on Shipping" which forms a part of this subject was included in the agenda of the Eleventh Session of the Committee, following upon a request from the United Nations Commission on International Trade Law and the United Nations Conference on Trade and Development to assist them in their work on this subject. The subject was considered by a Sub-Committee appointed at that

Session which recommended that the first topic to be considered by the Committee under International Legislation on Shipping should be the question of Bills of Lading. The Committee accepted the recommendation of the Sub-Committee.

(*3*) *Laws and Regulations relating to Commerce and Industry* :

This Committee, at its Third Session held in 1960, had decided on the suggestion of the Government of India that it would proceed to prepare a Study including a compilation of the Laws and Regulations on "Commerce and Industry and connected Labour Problems" in the Asian and African countries. To begin with, the Study was confined to Member Countries of the Committee on the following three topics :

(1) Foreign Investment Laws and Regulations ;

(2) Laws and Regulations relating to Control of Industry ;

(3) Laws and Regulations relating to Control of Import and Export Trade.

The Secretariat of the Committee has already published in mimeographed form its studies on the first and third topics. The Secretariat has now expanded the scope of these studies by including the laws and regulations of all Asian and African countries on these topics.

Publications of the Committee

The full reports, including the verbatim record of discussions together with the recommendations of the Committee are made available only to the Governments of the Member States of the Committee. The Committee, however, brings out regularly shorter reports on its sessions for general circulation and sale. So far it has published reports on its first to

tenth sessions. The Committee has also published five special reports entitled as under :

(1) *The Legality of Nuclear Tests—Report of the Committee and Background Materials.*

(2) *Reciprocal Enforcement of Foreign Judgments, Service of Process and Recording of Evidence both in Civil and Criminal Cases—Report of the Committee and Background Materials.*

(3) *The Rights of Refugees—Report of the Committee and Background Materials.*

(4) *Relief against Double Taxation and Fiscal Evasion—Report of the Committee and Background Materials.*

(5) *South West Africa Cases—Report of the Committee and Background Materials.*

The Secretariat of the Committee has also prepared and published a compilation of the Constitutions of Asian countries. Its compilation of the Constitutions of African countries is to be published shortly. The Secretariat has made considerable progress on the preparation of a Digest of important decisions of the municipal courts of Asian and African countries on international legal questions as also a Digest of Treaties and Conventions registered with the United Nations Secretariat to which an Asian or African State is a party.

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II. DELEGATES OF PARTICIPATING COUNTRIES AND OBSERVERS ATTENDING THE ELEVENTH SESSION

A. Delegations of Member States :

CEYLON

Member and Leader of Delegation	Hon. L.B.T. Premaratne, Q.C., Attorney-General.
Alternate Member	Mr. C. Mahendran, Acting High Commissioner for Ceylon in Ghana.
Adviser	Mr. R.C.A. Vandergert, Assistant Secretary (Legal), Ministry of Defence & External Affairs.

GHANA

Member and Leader of Delegation	Hon. N.Y.B. Adade, Attorney-General and Minister of Justice.
Alternate Member	Dr. S.K.B. Asante, Solicitor-General.
Adviser	Mr. W.W.K. Vanderpuye, Director, Legal and Consular Divisions, Ministry of External Affairs.

Adviser	Mr. Justice A.N.E. Amissah, Professor and Dean of the Faculty of Law, University of Ghana.
Adviser	Mr. Joe Reindorf, Barrister-at-Law.
Adviser	Mr. T.E.K. Kwaku, Barrister-at-Law and formerly Chairman of the Black Star Line.
Adviser	Mr. G.K.A. Ofosu-Amaah, Senior Lecturer at the Faculty of Law, University of Ghana.
Adviser	Dr. E.K. Nantwi, Solicitor & Secretary, Ghana National Trading Corporation.
Adviser	Mr. D.M. Mills, Senior State Attorney.
Adviser	Mr. M.A.F. Ribeiro, State Attorney.
Adviser	Mr. Y.K. Quartey, Shipping Commissioner, Ministry of Communications.
Adviser	Dr. S.K. Date Bah, Professor, Faculty of Law, University of Ghana.

INDIA

Member and Leader of Delegation	Dr. Nagendra Singh, Secretary to the President of India and Member of the International Law Commission.

Alternate Member	Dr. S.P. Jagota, Director, Legal & Treaties Division, Ministry of External Affairs.
Adviser	Mr. V.N. Nagaraja, Joint Commissioner, Ministry of Irrigation and Power.
Adviser	Mr. A.S. Mani, First Secretary, High Commission of India in Ghana.
Adviser	Dr. R.K. Dixit, Assistant Legal Adviser, Legal and Treaties Division, Ministry of External Affairs.
Adviser	Mr. K.L. Sarma, Law Officer, Legal and Treaties Division, Ministry of External Affairs.

INDONESIA

Member and Leader of Delegation	Mr. Zahar Arifin, Minister-Counsellor, Indonesian Embassy, Cairo.
Alternate Member	Mr. S.A.M. Alaydrus, First Secretary, Indonesian Embassy, Lagos.

IRAQ

Member and Leader of Delegation	H.E. Dr. Hassan Al-Rawi, Ambassador, Director-General of Legal and Treaties Department, Ministry of Foreign Affairs.
Alternate Member	Mr. Haqi Al-Mufti, Charge d'Affaires, Embassy of Iraq, Accra.
Adviser/Secretary to the Delegation	Mr. Asif Al-Omari, Third Secretary, Embassy of Iraq, Accra.

JAPAN

Member and Leader of Delegation	Dr. Kumao Nishimura.
Alternate Member	Mr. Seiichi Omori, Counsellor, Embassy of Japan, New Delhi.
Adviser	Mr. Kiyoaki Suehiro, Official, Legal Affairs Division, Treaties Bureau, Ministry of Foreign Affairs.

JORDAN

Member and Leader of Delegation	Hon. Shukri Al Muhtadi, Legal Adviser to the Prime Minister.

NIGERIA

Member and Leader of Delegation	Mr. B.A. Shitta-Bay, Acting Principal State Counsel, Federal Ministry of Justice.

PAKISTAN

Member and Leader of Delegation	Hon. Syed Sharifuddin Pirzada, Attorney-General.
Alternate Member	Mr. M.A. Samad, Legal Adviser, Ministry of Foreign Affairs.
Adviser	Mr. Mirza Gholam Hafiz, Senior Advocate.

UNITED ARAB REPUBLIC

Member and Leader of Delegation	Hon. Mr. Justice Hassan Fahmy El Badawi, Chief Justice of the U.A.R.
Alternate Member	Hon. Mr. Justice Salah Eldin Habeeb, Director of Legislation Department, Ministry of Law.
Adviser	Hon. Mr. Justice Omar Shareef, Member, Conseil d'etat.

SECRETARY TO THE COMMITTEE	Mr. B. Sen, Secretary, Asian-African Legal Consultative Committee.

B. Delegations of Associate Member States

REPUBLIC OF PHILIPPINES

Associate Member	Mr. Wilfrido I. Enverga, Adviser, Philippino Delegation to the United Nations at Geneva.

REPUBLIC OF KOREA	
Associate Member	H.E. Dr. Woonsang Choi, Ambassador, Consul-General of the Republic of Korea in New Delhi.
Adviser	Mr. Kwang Je Cho, Chief, Treaty Section, Ministry of Foreign Affairs.
Adviser	Mr. Sai Taik Kim, Treaty Section, Ministry of Foreign Affairs.

C. Representatives of Non-Member States attending as Observers :

ALGERIA	Mr. M. Abdellaziz Bouchouk.
CAMBODIA	H.E. Mr. Chan Youran, Ambassador of Combodia to Senegal.
CONGO (KINSHASA)	Mr. H. Kaseba.
KENYA	Mr. D.W. Kaniaru, Assistant Secretary, Ministry of External Affairs.
LEBANON	H.E. Mr. Said Hibri, Ambassador of Lebanon in Ghana.
	Mr. Moustafa Kanj, Embassy of Lebanon in Ghana.
LIBERIA	Mr. Herbert Brewer, Counsellor, Department of State.

MALAYSIA	Hon. Dato' Mohd. Salleh bin Abas, Solicitor-General.
	Mr. L.C. Vohrah, Senior Federal Counsel.
MALI	Mr. Garba Asse.
MOROCCO	Mr. M.A. El Alaoui, Charge d'Affaires, Embassy of Morocco in Ghana.
NIGER	H.E. the Ambassador of Niger in Ghana.
TANZANIA	Mr. J.S. Warioba, State Attorney.
TURKEY	Mr. Imal Patu, Charge d'Affaires, Embassy of Turkey in Ghana.

D. Representatives of United Nations and U.N. Agencies attending as Observers :

INTERNATIONAL LAW COMMISSION	Prof. Nikolai Ushakov, Chairman of the International Law Commission.
UNITED NATIONS	Mr. John Honnold, Chief of the International Trade Law Branch.
	Mr. A.M. Akiwumi, Regional Adviser on Economic Co-operation, Economic Commission for Africa.
U.N. HIGH COMMISSIONER FOR REFUGEES	Dr. Ebehard Jahn, Deputy Director, Legal Division.

E. Representatives of Inter-Governmental Organisations attending as Observers :

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW	Mr. M.H. van Hoogstraaten, Secretary-General.
LEAGUE OF ARAB STATES	Mr. Mohamed Alie el Din Mohamed Ibrahim, Member of the Legal Department.
ORGANISATION OF AFRICAN UNITY	Mr. R.J. Hayfron Benjamin, Vice-President, Commission of Arbitration & Conciliation.

F. Representatives of Non-Governmental Organisations attending as Observers :

AMERICAN SOCIETY OF INTERNATIONAL LAW	Prof. Fletcher Baldwin.
INTERNATIONAL LAW ASSOCIATION (GERMAN SECTION)	Dr. G. Jaenicke.
INTERNATIONAL LAW ASSOCIATION OF U.S.S.R.	Mr. V.J. Shilin.

LIAISON OFFICERS OF THE PARTICIPATING COUNTRIES ON THE COMMITTEE

1. BURMA	U Tha Tun, Second Secretary, Embassy of Burma, New Delhi.
2. CEYLON	Mr. B.P. Tilakaratna, Deputy High Commissioner, Ceylon High Commission, New Delhi.
3. GHANA	Mr. W. Asare-Brown, Counsellor, High Commission for Ghana, New Delhi.
4. INDIA	Dr. S.P. Jagota, Director (L & T), Ministry of External Affairs, Government of India, New Delhi.
5. INDONESIA	Mr. Sos Wisudha, Minister Counsellor, Embassy of Indonesia, New Delhi.
6. IRAN	Mr. A. Makki, Second Secretary, Embassy of Iran, New Delhi.
7. IRAQ	Mr. Amir S. Araim, Third Secretary, Embassy of Iraq. New Delhi.

8. JAPAN	Mr. K. Uchida, Second Secretary, Embassy of Japan, New Delhi.
9. JORDAN	Dr. Khaled Rsheidat, Counsellor, Embassy of Jordan, New Delhi.
10. KUWAIT	Mr. Abdul-Razzaq Al-Kanderi, Second Secretary, Embassy of the State of Kuwait, New Delhi.
11. MALAYSIA	Mr. Abdul Halim Bin Ali, Second Secretary, High Commission for Malaysia, New Delhi.
12. NIGERIA	Mr. Bayo Akinyemi, First Secretary, High Commission for Nigeria, New Delhi.
13. PAKISTAN	Mr. K.M. Shehabuddin, Second Secretary, Pakistan High Commission, New Delhi.
14. SIERRA LEONE	Mr. W. Asare-Brown, Counsellor, Ghana High Commission, New Delhi.
15. SYRIA	Mr. Kassem Mardam, Counsellor, Embassy of Syrian Arab Republic, New Delhi.

16. THAILAND	Mr. Thawee Manaschuang, First Secretary, Embassy of Thailand, New Delhi.
17. UNITED ARAB REPUBLIC	

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2. *Law of International Rivers* : (Referred by the Governments of Iraq and Pakistan.)

IV. Matters taken up by the Committee under Article 3(c) of the Statutes :

*1. International Sale of Goods (Taken up by the Committee at the suggestion of the Government of India.)
2. International Legislation on Shipping (For preliminary discussion only.)

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*Priority item.

IV. THE RIGHTS OF REFUGEES

I. INTRODUCTORY NOTE

The subject "The Rights of Refugees" had originally been referred to the Asian-African Legal Consultative Committee for its consideration by the Government of the United Arab Republic in 1964. The Committee, after due consideration, had made its recommendations in the form of Draft Principles at its Bangkok Session held in 1966. However, following upon a request from the Government of Pakistan to reconsider some of the aspects of the Committee's Report on this subject a decision was taken at the Karachi (Tenth) Session to reopen discussion on this topic.

At the Karachi Session discussion on the subject primarily centred around the proposals made by the Delegations of Pakistan and Jordan regarding amendments to the definition of the term 'refugee' as adopted by the Committee in the Bangkok Principles. The Committee also generally discussed questions relating of asylum, travel documents, the standard of treatment for refugees, the right to return, the right to compensation and the question of possible establishment of tribunals which would decide on the right of return and the right to compensation in cases of dispute. The Committee also took note of certain new developments in the sphere of international refugee law by reason of the adoption of the O.A.U. Convention, the U.N. Declaration on Territorial Asylum and the entering into force of the 1967 Protocol on the 1951 U.N. Refugee Convention. Further, a great deal of discussion took place on the question of Palestinian Arab Refugees and the possibility of including such persons within the legal definition of refugees. The representative of the U.N.H.C.R. in this connection pointed out that it might not be possible to deal with the cases of various categories of "refugees" within one set of principles. Similar views were also expressed by some of the

Delegates. At the end of the discussions, two resolutions were adopted : Resolution No. X (7) which dealt specifically with the question of Palestinian Arab Refugees was transmitted to the Secretary-General of the United Nations and the Committee was informed that the matter was being brought to the notice of the Security Council ; Resolution X (8) was concerned with giving of directions to the Secretariat of the Committee for further collection of material on the subject so that it could be discussed more fully at the Eleventh Session of the Committee.

In pursuance of the directions contained in Resolution No. X (8) the Secretariat of the Committee collected further material and analysed the various instruments and resolutions which had been brought to the Committee's notice at the Tenth Session. The U.N.H.C.R. also in response to the Committee's request prepared notes dealing with these instruments and resolutions. All these materials were placed before the Eleventh Session of the Committee.

The two basic issues which were before the Committee at its Eleventh Session held in Ghana in January 1970, consisted of : (a) a review of the principles concerning treatment of refugees as adopted by the Committee at its Eighth Session in Bangkok in the light of the developments in the field since the Bangkok Session ; and (b) the question of giving appropriate expression to the general principles governing the right of return, the restoration of property and compensation to Palestinian Arab Refugees and other displaced persons and to formulate the same as a set of principles. There were prolonged discussions on both these issues. The Committee decided, as regards the first question, to postpone its consideration to a subsequent Session, and on the second question, it adopted an 'Addendum' to the Principles concerning Treatment of Refugees formulating therein a set of principles pertaining to the status and rights of displaced persons.

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CHAPTER I

INTRODUCTORY NOTE

The subject of "the Rights of Refugees" came up for consideration before the Asian-African Legal Consultative Committee on a reference made under Article 3(b) of its Statutes by the Government of the United Arab Republic in 1963. The Committee discussed the subject in detail at its Sixth, Seventh and Eighth Sessions held in Cairo, Baghdad and Bangkok in 1964, 1965 and 1966 respectively. At its Bangkok Session, the Committee adopted its Final Report containing certain principles concerning treatment of refugees (hereinafter, in the present study, referred to as the "Bangkok Principles").

Immediately after the Bangkok Session, the aforesaid report was submitted to the Member Governments of the Committee. The Government of Pakistan suggested that, before the final adoption of the report together with the Bangkok Principles, the Committee, should review them in the light of certain comments made thereon by the said government.[1]

1. The comments made by the Government of Pakistan on the Bangkok Principles were :—

"(i) The term 'refugee' in Article I should be enlarged by adding a new clause viz. "(c) Leaves or being outside is unable or unwilling to return to his homeland, the sovereignty over which or the international status of which is disputed by two or more States and hostilities have taken place" in Article 1 after clause (b).

(ii) Article II should have consequential amendment in the light of the amendment of the definition of refugee in Article I.

(iii) In Article IV a provision for the constitution of a tribunal for determining any controversy on the right of return of refugees, should be made.

(iv) In Article V a provision for payment of compensation to refugees who are desirous of returning to their country should be made, and

The office of the United Nations High Commissioner for Refugees also made inquiry as regards the possibility of the subject coming up for a reconsideration by the Committee in the light of developments which had taken place in the field of international refugee law since the adoption of the Committee's report and the Principles. They also pointed out some problems which might be examined by the Committee in the course of such review.[2]

Pursuant to these suggestions, which were accepted by all the Member Governments of the Committee, the subject was

the refugees should be accorded the standard of treatment of the nationals of the country of asylum. However, certain reservations should be made, namely, until the refugees are given full citizenship they (i) cannot enter into Government service, (ii) cannot become member of the Parliament or hold political office in the country, (iii) cannot vote as a citizen in the elections of the country and (iv) their movements can be restricted in the interests of public order and security of the State".

2. *Extract from UNHCR's letter dated 26.3.68*:

"I have also given some further thought to the question whether it would be useful if your Committee were once again to place the question of refugees on its agenda and wonder whether the best approach might not be for the Committee to review the recommendations adopted by the African Conference on Refugees in Addis Ababa in October last year. This would automatically include the question of the new Protocol relating to the Status of Refugees of January 1967 and the Declaration on Territorial Asylum adopted by the United Nations General Assembly in November 1967. This would also make it possible to resume the discussions on item 5 of the list of problems submitted to the Committee by the Government of the United Arab Republic. I do not know whether your Committee would think it suitable to deal with all the problems listed under that item, but there is certainly one question with regard to which the Committee could certainly play a useful role, i.e. item 5A (travel documents and visas). When dealing with cases of individual refugees in Asia this office is frequently faced with the problem caused by the absence of an internationally recognised travel document for such persons. I could also imagine that the Committee might usefully have a more detailed discussion on the question of repatriation. The suggestion made by the Pakistan High Commission in New Delhi are quite interesting in this respect. The "Addis Ababa Recommendations" on this matter also contain some rather useful suggestions."

placed before the Committee once again at its Tenth Session held at Karachi in January 1969.

The Committee, after a general discussion of the subject, adopted two resolutions, No. X(7) and X(8) at its Karachi Session. In the operative part of the resolution No. X(7), the Committee decided to recommend to Member Governments to make every effort to secure both the right of return to their homeland of the Palestine Arab Refugees and other displaced Arabs and their right to restoration of properties. In its resolution No. X(8), the Committee requested the Secretariat to put the item concerning "Rights of Refugees" on the agenda of its Eleventh Session including all the proposals made at the Tenth Session by the Delegations of Pakistan and Jordan and in the meantime, in order to facilitate the work of the Committee, to prepare, in cooperation with the United Nations High Commissioner's Office for Refugees, a detailed analysis of the above mentioned instruments and recommendations[3]. The proposals referred to in the said resolutions and other suggestions made at the Karachi Session can be broadly classified under the following heads :

(i) The definition of "refugee", including the question of enlarging the definition so as to cover thereunder, or else to provide separately for, the situations of people expelled from their homeland by an alien occupying power and other types of uprooted people;

(ii) Right to territorial asylum;

(iii) Travel documents and visas;

(iv) Right of return or repatriation, including the question of constitution of a tribunal for determining controversies relating to the right of return;

3. The instruments referred to in the resolution include the 1951 Refugee Convention, the Protocol relating to the Status of Refugees of 31 January 1967, the U.N. Declaration on Territorial Asylum of 14 December 1967; the Recomendations made by the Addis Ababa Refugee Conference of October 1967 and the O.A.U. instrument concerning refugees.

(v) Right to compensation, including the question of constituting a compensation tribunal;

(vi) Standard of treatment of refugees; and

(vii) Duties of a refugee.

The above classification also forms the basis of the scheme of treatment of the subject, adopted in the present study. In regard to each of these matters which are examined in separate chapters, the present Study proceeds to analyse the relevant article or articles of the Bangkok Principles; the proposals for amendment of such article or articles; relevant provisions of international conventions, treaties, declarations, draft conventions; views expressed by the Delegations and Observers attending the Eighth (Bangkok, 1966) and Tenth (Karachi, 1966) Sessions of the Committee; proceedings and conclusions of international conferences, wherever relevant; and the views expressed by jurists in legal articles or other writings on the matter concerned.

CHAPTER II

HISTORICAL BACKGROUND

The refugee problem is as old as human history. However, the first international step towards assistance to refugees was taken only in 1921, when the League of Nations created the office of the League of Nations High Commissioner for Russian Refugees. The said office was made responsible for helping about one million Russian refugees, who left their country during the Bolshevik revolution, in matters of their resettlement and other necessary relief. Dr. Fridtjof Nansen, a Norwegian, was appointed to the High Commissioner's post. Later, other refugees, including Bulgarian, Greek and Armenian refugees displaced during and after the First World War, as also those created as a result of the Greco-Turkish War of 1922 and the Spanish Civil War, were also placed under his care.

Since most of the above-mentioned refugees had lost their former nationality and found themselves without valid travel documents, they experienced difficulties in travelling to, and finding a shelter in, another country. This problem was sought to be solved by a number of Arrangements adopted as a result of efforts within the League. The first of these Arrangements, which was concluded on 5 July 1922, provided for issuance of Certificates of Identity to Russian refugees. It was adopted by 53 States. This was followed by the Arrangement of 31 May 1924 for the issue of Certificates of Identity to Armenian refugees. Both of the aforesaid Arrangements were supplemented and amended by the Arrangement of 12 May 1926 for the issue of Certificates to Russian and Armenian refugees, which, by the Arrangement of 30 June 1928 was extended to Turkish, Assyrian, Assyro-Chaldean and assimilated refugees. These certificates, which came to be known as "Nansen passports", were in the

form of an identity document, issued by the country of residence, on a simple piece of paper, on which entry and transit visas could be affixed by other countries.

Since the position of refugees, who had lost their national protection, became an anomaly in international law, it was felt that their legal status should be defined. A number of Arrangements to this effect were concluded on Dr. Nansen's initiative. The first among these was the Arrangement of 30 June 1928 relating to the legal status of Russian and Armenian refugees. It contained provisions dealing, *inter alia*, with expulsion, personal status, exemption from reciprocity and the right to work. This was followed by the Convention relating to the International Status of Refugees signed at Geneva on 28 October 1933. The Convention was applicable to Russian, Armenian and assimilated refugees, the so-called "Nansen refugees". The task of legal and political protection of the refugees was the responsibility of the League of Nations High Commissioner for Refugees, which task, after Dr. Nansen's death in 1930, was undertaken by the League's Secretariat. The relief and assistance functions were discharged by the International Labour Office between 1924 and 1929, and thereafter were entrusted to the newly created Nansen International Office.

The rise of Nazism in Germany created the problem of German refugees, whose responsibility was entrusted, in 1933, to the newly formed High Commissioner's Office for German Refugees. The said office became a part of the League of Nations in 1936, after withdrawal of Germany from the League. The German refugee problem also led to signing of the provisional Arrangement concerning the Status of Refugees coming from Germany on 4 July 1936,[1] and the Convention concerning the Status of Refugees coming from Germany on 10 February 1938. Also in 1938, the functions of both the Nansen International Office and the High Commissioner for German Refugees were assumed by the office of High Commissioner for

1. Extended in 1939 to refugees coming from Austria.

Refugees created under the auspices of the League of Nations. Further in 1938, an Inter-Governmental Committee for Refugees was created at an international conference held at Evian, to deal principally with the resettlement of German refugees. During the Second World War, the co-ordination between the League of Nations High Commissioner's Office and the Inter-Governmental Committee came about in the person of Sir Herbert Emersen, who assumed functions of Heads of both of these organizations. The competence of the Inter-Governmental Committee was extended to cover other Europeans, who became refugees as a result of political and military situations during the War.

After the War, the responsibility for the care of refugees, mainly with a view to their repatriation, was taken over by the United Nations Relief and Rehabilitation Administration (UNRRA). In 1947, the United Nations Commission for Human Rights adopted a resolution expressing the wish that "early consideration be given by the United Nations to the legal status of persons who do not enjoy the protection of any Government, in particular the acquisition of nationality, as regards their legal and social protection and their documentation". The United Nations also created a specialized agency, which existed, first as a Preparatory Commission, and later between 1947 and 1952, as the International Refugees Organization (IRO), entrusted with the tasks of the UNRRA in the field of care, maintenance, repatriation and resettlement, and those of the Inter-Governmental Committee and the League of Nations High Commissioner in the field of legal and political protection of refugees. Although only 18 Governments of the 54 member States of the United Nations participated in the establishment of the IRO, they contributed more than 400 million dollars over a period of four and half years. An important policy of the IRO was that emigration of refugees was not compulsory. The task of the organization was "facilitation".

Even before the IRO was liquidated in 1952, certain Governments had decided to continue work in the interest of organized migration of nationals as well as of refugees. This organization—Intergovernmental Committee for European Migration (ICEM)—while international in scope, was established, outside the framework of the United Nations, at Brussels in November 1951, at a conference convened by the Belgian Government. The organization effects the movement of refugees to countries offering resettlement opportunities, aids European countries in solving population problems, and seeks to aid the development of overseas countries lacking essential man-power. As of 1966, the organization was comprised of 30 member governments with 8 observer governments.

The legal work of the United Nations concerning the problem of refugees emanates from the 1947 resolution of the United Nations Commission for Human Rights, quoted above. The UN Secretary-General, pursuant to a recommendation of the Economic and Social Council, prepared a study of the existing situations regarding the protection of refugees and stateless persons and of national legislations and international agreements and conventions relating to the subject. He also recommended to the Council the conclusion of international conventions concerning the legal status of refugees and stateless persons, whether *de jure* or *de facto*, and the creation of an international organ for their protection. This led to : (i) the creation by the U.N. General Assembly, by Resolution 428(V) of 14 December 1950, of the Office of the United Nations High Commissioner for Refugees; (ii) the adoption in Geneva by a U.N. Conference of Plenipotentiaries of a Convention relating to the Status of Refugees on 28 July 1951; and (iii) the adoption in New York of a Convention relating to the Status of Stateless Persons on 24 September 1954.

"The Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR), adopted by the

United Nations General Assembly on 14 December 1950 states that the High Commissioner shall assume the function of providing international protection to refugees falling under the competence of his Office and of seeking permanent solutions to their problems by facilitating their voluntary repatriation or resettlement. He may also engage in such additional activities as the General Assembly may determine, within the limits of the resources placed at his disposal. He is authorized to provide international protection and to co-ordinate international action on behalf of refugees. Under the Statute, he is required to carry out his functions with the co-operation of governments and the voluntary organizations recognized by them. His functions include :

(i) Promoting the conclusion and ratification of, or accession to, international conventions and agreements concerning the legal position of refugees ;

(ii) supervising the application of these international instruments, and proposing amendments thereto ;

(iii) encouraging national legislation and administrative measures benefiting refugees, and

(iv) in co-operation with governments concerned to watch over the application of these measures of international protection.

The UNHCR also provides legal assistance to refugees in individual cases where they require advice or representation in court, and can neither pay for such services nor obtain them free of charge. In general, the UNHCR seeks to help refugees to obtain a final solution to their problems, i.e. either the return to the home country or a treatment as close as possible to that accorded to nationals of the country of asylum and eventually their complete integration in the country of asylum through naturalisation."

The 1951 Convention relating to the Status of Refugees[2] defines the term "refugee" for purposes of the Convention[3] and provides that a refugee has duties to the country in which he finds himself, in particular, that he conforms to its laws as well as to measures taken for the maintenance of public order.[4] The provisions of the Convention are to be applied without discrimination.[5] Under the heading "Exemption from reciprocity", it is provided that, except where the Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.[6] Provisional measures may be taken against a refugee in time of war or other grave and exceptional circumstances, where essential to national security.[7] Other provisions treat of the juridical status of a refugee, including his personal status, rights with respect to property including artistic and industrial property, right of association, and access to courts.[8]

Another group of articles treats of rights with respect to gainful employment.[9] Other articles deal with rationing systems, housing, public education, public relief, labour legislation and social security.[10] Still others provide in regard to administrative assistance, freedom of movement, identity papers, travel documents, fiscal charges, transfer of assets, illegal entry, expulsion, and naturalization.[11] As of 1st

2. 189 UNTS, Page 130. The Convention has been ratified or acceded to by 56 States as of 1st September 1969.
3. Article 2.
4. Article 2.
5. Article 3.
6. Article 7.
7. Article 9.
8. Articles 12 to 16.
9. Articles 17 to 19.
10. Articles 20 to 24.
11. Articles 25 to 34.

September 1969, the Convention had been ratified by 56 States. The UNHCR has been given the task of supervising the application of the Convention. In the view of Mr. Kwasi Gyeke-Dako, "the provisions of the 1951 Convention were designed to suit the refugee situations as they then existed in Europe".[12]

The situation created in Palestine in 1948 and in subsequent years resulted in large number of people being rendered homeless. The special problem of Palestinian Arab 'Refugees' has been the subject matter of several resolutions adopted both by the General Assembly and the Security Council. The General Assembly Resolution No. 194 (XI) of 1948 recognized the right of return of Palestine Arab Refugees and called upon the parties concerned to respect this right and to facilitate the return to their homes. By Resolution No. 302 (IV) of 1949 the United Nations Relief and Works Agency (UNRWA) was created for the purpose of assisting Arab 'Refugees' from Palestine. The United Nations Conciliation Commission for Palestine has also been concerned with this problem. Several resolutions including in particular Resolution No. 237 (1967) and Resolution No. 2452 (1968) have been passed by the Security Council reiterating the right of the Palestinian Arab 'Refugees' to return to their homes.

The Asian-African Legal Consultative Committee considered the question of the "Rights of Refugees" at its Sixth, Seventh, Eighth and Tenth Sessions, held in Cairo, Baghdad, Bangkok and Karachi in 1964, 1965, 1966 and 1969 respectively. At its Bangkok Session, held in 1966, the Committee adopted a report containing the "Principles concerning the Treatment of Refugees". These Principles, known as the "Bangkok Principles", provide for (i) minimum standard of treatment which a refugee should enjoy in the country which

12. In his article on "Some Legal and Social Aspects of African Refugee Problem"—See AALCC Brief on "Rights of Refugees" for the 10th Session, P. 321.

has granted him asylum; (ii) the principle of *non-refoulement* of asylum seekers; (iii) the principle of provisional asylum; (iv) the principle of respect by other States of the grant of asylum; (v) the right of return; (vi) the right of compensation; and (vii) the prohibition of subversive activities.[13] At its Karachi Session, the Committee considered the question of reconsideration of the Bangkok Principles, with a view to enlarging the definition of "refugee" to cover the situations faced by the Palestinian refugees and other uprooted people, and in the light of developments in the field which have taken place since the adoption of these Principles.

In Africa, almost the entire continent has been plagued with the refugee problem. The Council of Ministers of the Organization of African Unity (O.A.U.) by its resolution CM 19(11) of January 1964 of its Second Ordinary Session, established a Commission on the Problems of Refugees for examining the refugee problem in Africa and the question of ways and means of maintaining refugees in their country of asylum. By its resolution CM 36(111) of July 1964, the Council invited "the Commission to draw up a draft convention covering all aspects of the problem of refugees in Africa". The draft convention prepared by the Commission was submitted for examination by a Committee of Legal Experts appointed by the Council of Ministers. The said Committee prepared a revised draft Convention, which was circulated among the Member States of the O.A.U. for their comments and observations thereon. On receipt of comments from the Governments of Ethiopia, Cameroons and Sierra Leone, the O.A.U. Secretariat prepared a revised draft of the Convention containing provisions which were complementary to the 1951 U.N. Convention on Refugees. The O.A.U. Refugees Commission, at its meeting in Addis Ababa in June 1968, adopted the said draft, after making necessary modifications the rein,in the form of the O.A.U. Convention Govern-

13. The Bangkok Principles have been dealt with in detail in the present Study.

ing the Specific Aspects of the Problem of Refugees in Africa. The aforesaid Convention was adopted by the OAU Assembly and Heads of State and Government on 8 September 1969.

Efforts of the African countries outside the OAU towards a solution of the refugee problem include (i) the Agreement concluded between the Congo (Kinshasa) and Sudan on the repatriation of the Congolese and Sudanese refugees to their country of origin, at Kinshasa on 7 February 1967; (ii) the joint communique issued by the Delegations of Burundi and Rwanda on refugee situation dated 2 February 1967; and (iii) the Declaration made at Goma on 20 March 1967 by the Heads of State of the Congo, Burundi and Rwanda. These agreements provide for mutual exchange of information concerning the names, lists and location of refugees. Some of them provide for (i) measures to be taken in order to prevent refugees from engaging in terrorist activities, and (ii) indemnity clauses in regard to assurance of safety to the refugees returning to their home country. Further, a conference jointly organized by the Economic Commission for Africa, the OAU, the U.N. High Commissioner for Refugees and the Dag Hammarskjold Foundation, at Addis Ababa in October 1967, adopted recommendations, not only on problems of material assistance and education for refugees, but also on legal questions such as the definition of "refugees", the right of asylum, the social rights of refugees, issuance of travel documents to refugees and their voluntary repatriation.

On 31 January 1967, the United Nations General Assembly adopted the Protocol relating to the Status of Refugees in order to remove the limitation *ratione personne* in the 1951 U.N. Convention, so as to make its provisions applicable to new refugee situations as well. By September 1969, 33 States had become parties to the Protocol. Certain other States have completed legislative or administrative measures

necessary under their domestic laws for accession but have not as yet deposited the instruments of accession. On 14 December 1967 the General Assembly unanimously adopted the U.N. Declaration on Territorial Asylum.

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CHAPTER III

TOWARDS AN UNDERSTANDING OF THE PROBLEM OF REFUGEES AND OTHER UPROOTED PEOPLE

The problem of 'refugees' is essentially a social and humanitarian problem by its nature. In the words of the Delegate of India to the Eighth (Bangkok, 1966) Session of the Asian-African Legal Consultative Committee: "The treatment of refugees is basically a humanitarian question. The attempts to give the refugees a legal status is only to ensure that a person who is a victim of unfortunate circumstances arising from persecution or reasonable apprehension thereof has a definite protection not only in the asylum State but also in other countries which have accepted their legal obligations in respect of refugees."[1] The Delegate of Jordan to the Tenth (Karachi, 1969) Session of the Committee was of the view that "We can hardly lose sight of the fact that this is predominantly and basically and fundamentally a human problem. There may be undercurrents of political and legal questions, but I submit to you that this is basically a human problem."[2] The Delegate of Japan to the Tenth (Karachi, 1969) Session of the Committee stated that "in view of the importance of the problem of refugees, not only for humanitarian reasons but also political reasons of world peace, this problem should be tackled with patience and persistence so as to alleviate the tragic plight of those people. Being a Consul-

1. See "Verbatim Record of Discussions held at the Eighth (Bangkok, 1966) Session on the subject of Refugees", at pp. 17, 18.
2. See "Verbatim Record of Discussions held at the Tenth (Karachi, 1969) Session on the subject of Refugees", for the Meeting of 23 January 1969, at p. 25.

tative Committee of a legal character, we think we must concentrate on finding out and working out the improvement of our Bangkok Report as a legal matter. But in doing so we must take always into consideration, as I have said, the problems which are involved. The legal aspect is one small aspect only of this important problem of refugees".[3] The Delegate of Pakistan expressed the opinion that legal and technical objections must not stand in the way of settlement of such a grave problem in which the right of human beings to life, liberty and security as described in Article 3 of the Universal Declaration of Human Rights was involved.[4]

The humanitarian character of the refugee problem has also been recognized in the U.N. Convention relating to the Status of Refugees, 1951;[5] the U.N. Declaration on Territorial Asylum, 1967[6]; and the O.A.U. Convention relating to the Status of Refugees in Africa.[7]

The term "refugee" as defined in international instruments does not attempt to cover all categories of uprooted people. At the Tenth (Karachi, 1969) Session of the Committee, the Delegate of Ghana brought out the distinction between the popular concept of refugees and the international concept.[8] The Delegate of Japan thought it necessary to distinguish refugees from the displaced persons, and suggested that a new clause dealing with the case of displaced persons be formulated.[9] The observer for the office of the United Nations

3. *Ibid.*, p. 14.
4. *Ibid.*, for the Meeting held on 25 January 1969.
5. In the fifth Preambular paragraph.
6. In the first paragraph of the Declaration, adopted by the U.N. General Assembly by Resolution No. 2312 (XXII) of 14 December 1967.
7. In the second Preambular paragraph.
8. See Verbatim Record of Discussions on the subject, held at the Tenth Session.
9. *Ibid.*, at the Meeting held on 28 January 1969.

High Commissioner for Refugees referred to the various refugee situations which exist, which are very different from each other and which make it difficult to establish common principles covering all of them.[10] He dealt with the following refugee situations : (i) Exchanges of populations, where persons have been fleeing or have been expelled to a country with which they have close ethnic, cultural or religious links and where refugees are given the full rights of citizens. In such situations, there exist problems of economic integration and legal problems are of lesser importance ; (ii) Refugees fleeing from one country to another for fear of persecution by reasons of their belonging to political, religious or ethnic minorities in their country of origin. Their stay in the country of asylum is not necessarily of long duration. The problem in regard to those refugees is that of their economic integration in the country of asylum and that of their legal status until such time as a refugee can safely return home or when he becomes completely integrated in the country of asylum by acquisition of its nationality ; (iii) Refugees from countries under colonial domination or under a minority regime. Since these refugees usually desire to return to their country after its liberation, the problem with regard to them is to find temporary solutions which enable them to live in dignity and to prepare them for the time when their country is liberated, so that they may actively participate in the political, economic and cultural reconstruction of their country ; (iv) People expelled from their home country by an occupying power and now awaiting the return to their homes. With regard to this group, the problem is primarily one of ensuring implementation of the right of return and that of compensation.[11]

A methodical treatment of the question of definition of "refugee" makes it necessary to examine the possibility of having different sets of principles for different situations which

10. *Ibid.*, at the Meeting held on 28 January 1969.

11. *Ibid.*, at the Meeting held on 23 January 1969.

bring about uprooting of people from their homeland. These persons can be broadly classified in three categories :

Firstly, those who are refugees in the strict sense of the term, i. e., as defined in the U.N. Convention on Refugees of 1951 as modified by the Protocol of 1967. Those in this category should enjoy their rights and be subject to their obligations as refugees only for such a duration of time as their peculiar circumstances make it necessary.

Secondly, people expelled from their homeland by an occupying power. This would cover the case of Palestinian refugees and people similarly situated. The set of principles governing these people would have to be based on the distinction as to whether these persons, as a result of an illegal occupation of their homeland by an alien power, flee to another country, or they, on an illegal foreign occupation of a part of their country where their homeland is situated, flee to the other part of the same country remaining unoccupied. In the latter case the principles should provide for their right of return to their homeland and their right to compensation enforceable against the occupying power.

Thirdly, other types of uprooted people, such as victims of civil war, refugee seamen and others not covered in any of the aforesaid categories. Different sets of principles have to be formulated for the different types of these persons considering the circumstances peculiar to each of these types.

Refugees in the first categeory can be distinguished from uprooted persons in the second category in regard to (a) the difference in the situation leading to their uprooting whereas, in the case of refugees in the first category the circumstances leading to their uprooting are those pointed out in points (i), (ii) and (iii) in the above mentioned statement of the Observer for the Office of the UNHCR, the circumstances leading to uprooting of people in the second category are those pointed out in point (iv) of his statement ;

(b) The primary factor, which in the case of refugees in the first category, is that of the fear of persecution, and which in the case of uprooted persons in the second category is merely the fact of illegal occupation of their homeland by a foreign power ; and

(c) The meaning of "homeland", which in case of the first category, invariably refers to their country of origin, and which, in the case of the second category, refers either to the whole, or to a part, of their country of origin, depending upon (i) whether the whole or only a part of their country of origin, where their homeland is situated, falls under the illegal occupation of the alien power, and (ii) whether the persons in the said category move to another country, or only flee from the occcupied part, to the unoccupied part of their country of origin.

CHAPTER IV

DEFINITION OF "REFUGEE"

1. The definition as contained in the Bangkok Principles

In the "Principles concerning Treatment of Refugees" adopted by the Asian-African Legal Consultative Committee, the term "refugee" has been defined as folows :

Article 1

Definition of the term "Refugee"

A refugee is a person who, owing to persecution or well founded fear of persecution for reasons of race, colour, religion, political belief or membership of a particular social group :

a) leaves the State of which he is a national, or the country of his nationality, or if he has no nationality, the State or country of which he is a habitual resident ; or

b) being outside such State or country, is unable or unwilling to return to it or to avail himself of its protection.

Exceptions

(1) A person having more than one nationality shall not be a refugee if he is in a position to avail himself of the protection of any State or country of which he is a national.

(2) A person who prior to his admission into the country of refuge, has committed a crime against peace, a war crime, or a crime against humanity or a serious

non-political crime or has committed acts contrary to the purposes and principles of the United Nations shall not be a refugee.

Explanation : The dependants of a refugee shall be deemed to be refugees.

Explanation : The expression "leaves" includes voluntary as well as involuntary leaving.

Article II

1. Loss of Status as Refugee

1. A refugee shall lose his status as refugee if—

i) he voluntarily returns permanently to the State of which he was a national or the country of his nationality, or if he has no nationality to the State or the country of which he was a habitual resident ; or

ii) he has voluntarily re-availed himself of the protection of the State or country of his nationality ; or

iii) he voluntarily acquires the nationality of another State or country and is entitled to the protection of that State or country.

2. A refugee shall lose his status as a refugee if he does not return to the State of which he is a national, or to the country of his nationality, or if he has no nationality, to the State or country of which he was a habitual resident, or if he fails to avail himself of the protection of such State or country after the circumstances in which he became a refugee have ceased to exist.[1]

1. See Proceedings of the Eighth Session of the Asian-African Legal Consultative Committee, held at Bangkok in 1966.

2. Proposals for amendment of the said definition

(i) The Delegates of Iraq, Pakistan and the United Arab Republic had expressed the view even at the Bangkok Session that, in their opinion, the definition of the term "refugee" should include a person who is obliged to leave the State of which he is a national under the pressure of an illegal act or as a result of invasion of such State, wholly or partially, by an alien with a view to occupying the State. The expression "illegal act" in the said proposal, according to the Delegation of Iraq, meant "aggressive act by another State or another people from outside the State."[2]

(ii) The Government of Pakistan, in their letter of 5 January 1968 addressed to the Secretary of the Asian-African Legal Consultative Committee, suggested that the term "refugee" should be enlarged by adding the following new clause (c) after clause (b) in Article I :

"(c) Leaves or being outside is unable or unwilling to return to his homeland, the sovereignty over which or the international status of which is disputed by two or more States and hostilities have taken place."

Consequential amendment of Article II, in the light of the amendment of the definition of refugee in Article I, was also suggested.[3]

At the Tenth (Karachi, 1969) Session of the Committee, the Government of Pakistan in response to the views expressed by certain other Member Governments, agreed to substitute the words "in dispute" for the words "disputed by two or more States and hostilities have taken place" in the said proposal.

2. See Proceedings of the Eighth (Bangkok, 1966) Session.

3. See Brief of Documents on "Rights of Refugees", prepared by the Secretariat of the Committee for its Tenth (Karachi, 1969) Session at p. 29.

Certain consequential amendments of Articles IV and V of the Bangkok Principles were also proposed by the said Government. Explaining his proposal, the Delegate of Pakistan stated that, in the particular case, the persons concerned do not seek refuge in any place outside their country of origin or nationality, but merely flee to another part of the same country.[4]

Commenting upon the above proposal, the Delegates of Japan and Iraq expressed the view that, in order to cover the said category of persons, it may be necessary to have a proviso or a new clause concerning "displaced persons", as distinguished from "refugees" in proper sense of the term. The Delegate of Japan felt that it may be necessary to have a separate set of rights and obligations in respect of these persons.[5]

The Observer for the Office of the UNHCR stated that, in regard to these persons, the problem was primarily one of ensuring the implementation of the right of return and that of compensation.[6]

3. A comparison between the definitions of "refugee" as contained in the Bangkok Principles (1966) adopted by the Committee, the U.N. Refugee Convention of 1951 as extended by the Protocol of 1967, and the OAU Convention concerning Refugees (September 1969)

The definition of "refugee" as contained in Article 1 of the U. N. Convention on Refugees of 1951[7] is as follows :

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who :

4. See Verbatim Record of Discussions on the subject at the Tenth (Karachi, 1969) Session of the Committee.
5. *Ibid.*
6. *Ibid.*
7. 189 UNTS, p. 150 at p. 152.

(1) Has been considered a refugee under the Arrangement of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being presecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

B. (1) For the purposes of this Convention the words "events occurring before 1 January 1951" in Article 1, section A, shall be understood to mean either :

(a) "events occurring in Europe before 1 January 1951"; or

(b) "events occurring in Europe or elsewhere before 1 January 1951";

and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

(2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a ratification addressed to the Secretary-General of the United Nations.

C. This Convention shall cease to apply to any person falling under the terms of section A if :

(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or

(2) Having lost his nationality, he has voluntarily reacquired it; or

(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality ; or

(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that :

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to purposes and principles of the United Nations.

The Convention has been signed, ratified or acceded to, as of 1 September 1969 by 56 States.[8] Under paragraph B of the above definition, such State becoming a party to the Convention must declare whether it accepts the Convention on the understanding that "events occurring before 1 January 1951" means events occurring before that date in Europe or events occurring before that date in Europe and elsewhere.[9] The refugees covered by the said definition are only those whose fear of persecution is a result of events occurring before 1 January 1951. The Convention, therefore, did not apply to the refugees involved in new refugee situations arising after this dateline, even though they satisfied all other requirements of the said definition. This was sought to be remedied by the 1967 Protocol relating to the Status of Refugees, adopted by the U.N. General Assembly,[10] making the provisions of the Convention applicable to all refugees fulfilling its definition, irrespective of the dateline. The Protocol also provides that it shall be applied without any geographical limitation, save that existing limitations made by States already parties to the Convention shall, unless withdrawn, also apply under the Protocol. It has been acceded to by 33 States,[11] and several other States are in the process of taking steps for accession.

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8. The Asian and African States out of these 56 States, are 26 viz., Algeria, Botswana, Burundi, Cameroon, Central African Republic, Republic of the Congo (Brazzaville), Democratic Republic of Congo, Cyprus, Dahomey, Gabon, The Gambia, Ghana, Guinea, Ivory Coast, Kenya, Liberia, Madagascar, Morocco, Niger, Nigeria, Senegal, Swaziland, United Republic of Tanzania, Togo, Tunisia and Israel.
9. Out of the Asian and African States parties to the Convention only Madagascar made a declaration to the effect that the said phrase be understood to mean "events occurring in Europe".
10. And opened for accession by means of a resolution dated 31 January 1967.
11. The Asian and African States, out of these 33 States, are 10, viz., Botswana, Cameroon, Cyprus, The Gambia, Guinea, Nigeria, Senegal, Swaziland, United Republic of Tanzania and Israel.

The definition of "refugee" as contained in Article I of the OAU Convention governing the Specific Aspects of the Problem of Refugees in Africa adopted by the OAU Assembly and Heads of State and Government on 8 September 1969, is as follows :

1. For the purpose of this Convention the term 'refugee' shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.
2. The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.
3. In the case of a person who has several nationalities, the term "a country of which he is a national" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of which he is a national if without any valid reason based on well-founded fear he has not availed himself of the protection of one of the countries of which he is a national.
4. This Convention shall cease to apply to any refugee if :
   (a) he has voluntarily re-availed himself of the protection of the country of his nationality; or

(b) having lost his nationality, he has voluntarily re-acquired it; or

(c) he has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(d) he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution;

(e) he can no longer, because the circumstances in connection with which he was recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

(f) he has committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee;

(g) he has seriously infringed the purpopes and objectives of this Convention.

5. The provisions of this Convention shall not apply to any person with respect to whom the country of asylum has serious reasons for considering that :

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the organization of African Unity ;

(d) he has been guilty of acts contrary to the purposes and principles of the United Nations.

6. In the sense of the present Convention, it is the contracting State of asylum which determines the quality of refugee.

The definition contained in the OAU Convention was adopted persuant to Recommendation II of the Conference on the Legal, Economic and Social Aspects of the Refugee Problem in Africa.[12]

A comparison of the aforesaid definitions brings to light the following conclusions :

(A) The essential concept of refugee embodied in all the three definitions is that of a person who, owing to well-founded or genuine fear of persecution, by reasons of race, colour, religion or political belief or membership of a social group, leaves, or stays out of, his country of origin, which may be the country of his nationality, or his place of habitual residence, and is unable or unwilling to return by reason of the same genuine well-founded fear.

(B) The definition of refugee in the OAU Convention is broader than the other two definitions in that, in paragraph 2, it covers within its scope any person who owing to external aggression, occupation, foreign domination, or internal disorder affecting either part or the whole of his country of origin or nationality has to leave the same. This is an

12. Cf. AFR/REF/CONF. 1967/No. 2. In the said Recommendation : 'The Conference

Having considered the definition of the term "refugee"

Recalling the resolution on refugees adopted by the Assembly of the Heads of the State and Government of the Organization of African Unity in Kinshasa in Setpember 1967 that all Member States should accede to the 1951 United Nations Convention relating to the Status of Refugees and to the United Nations Protocol of 1967 on the same subject.

Recommends that, in addition to the definition contained in the 1951 United Nations Convention relating to the Status of Refugees, as extended by the United Nations Protocol of 1967, African States should take into account the specific aspects of African refugee situations with regard to the definition of an African refugee.

interesting innovation in regard to the definition, which the Committee may wish to consider.

(C) Apart from the distinction pointed out in (B) above, the definition contained in the OAU Convention substantially appears to be similar to the one contained in the Bangkok Principles.

(D) Whereas the definition contained in the Bangkok Principles inculdes the phrase "persecution or well-founded fear of persecution", the phrase included in other two definitions is only "well-founded fear of persecution". According to the Delegates of Ceylon and Japan to the Eighth (Bangkok 1966) Session of the Committee, the expression "persecution" means something more than discrimination or unfair treatment but includes such conduct as shocks the conscience of civilized nations. The Committee may consider, whether as an alternative to the said concept, it would be advisable to use the test of making a person refugee in the circumstances where there is no expectation that minimum guarantees of human rights would be available to him in the country of origin. It would be interesting to note, in this connection, that Article 10 of the Constitution of Italy of 1947[13] provides : "A foreigner to whom the practical exercise in his own country of democratic freedoms, guaranteed by the Italian Constitution, is precluded, is entitled to the right of asylum within the territory of the Republic, under conditions laid down by law".

(E) Mr. Kwasi Gyeke-Dako[14] has pointed out that "the continent of Africa has the characteristic of containing different races, e.g. : Black Africans, Arabs and Whites" and the word "race" in Africa embraces tribes, ethnic groups, etc." He suggests that an explanatory note be added to

13. Of December 27, 1947, as amended on March 11, 1953 and February 9, 1963.

14. In his paper on "Some Legal and Social Aspects of African Refugee Problem" : See Brief on Rights of Refugees prepared for the Tenth Session of the Committee, at p. 356,

explain the meaning of the word "race" to include tribe and ethnic group. This does not occur in any of the definitions considered above, and in the context of Africa, deserves consideration by the Committee in regard to improvement of the definition contained in the Bangkok Principles.

(F) Whereas the expression used in the definition contained in the 1951 U.N. Refugee Convention and the OAU Convention is only "country", the definition contained in the Bangkok Principles refers to both the terms "State" and "Country" as well as the phrase "State or Country".

(G) Exception (1) of Article I of the Bangkok Principles, as well as paragraph 3 of Article I of the OAU Convention correspond to the exclusion clause in Article 1A(2) of the U.N. Refugee Convention.

(H) Neither does the U.N. Refugee Convention nor does the OAU Convention contain a provision corresponding to the *Explanation* to Article I of the Bangkok Principles. Mr. Kwasi Gyeke-Dako has emphasized the need to define "refugee" in the OAU Convention, so as to include the "dependants of the refugee"[15].

(I) Clause (ii) of paragraph 1 of Article II of the Bangkok Principles and clause (a) of paragraph 4 of Article I of the OAU Convention appear to be based on clause (I) of paragraph C of Article I of the U.N. Refugee Convention of 1951.

4. Discussions on the proposals for amendment of definition of a 'refugee' made at the Karachi Session

The first proposal made by the Delegate of Pakistan regarding amendment of Bangkok Principles was a follows :—

Article I

A new paragraph (C) may be added to read as follows :

"(C) leaves or being outside is unable or unwilling to

15. *Ibid.*

return to his homeland, the sovereignty over which or the international status of which is in dispute."

Article IV

(1) The following words "or to the territory from which he was displaced" may be added after the word "nationality" and before the word "and".

(2) For the word "or country to receive him" in the end a comma and the following words may be substituted :

", country or occupying power to receive him".

Article V

(1) Para 1, the following words may be added : "or the occupying power in control of the territory" after the word "country" and before the word "which".

(2) Para 2, after the word "country" and before the comma and word "public" the following words : "or the occupying power" may be added.

The Delegate of India expressed the view that the addition of the words "return to his homeland, the sovereignty over which or the international status of which is in dispute" might appear to refer to specific questions of bilateral interest and it may be prudent for this Committee to avoid going from the general principles to specific controversies or bilateral issues.[16]

The second proposal was submitted in a resolution moved jointly by the Delegations of Jordan ann Pakistan, the operative part of which read as follows :

"*The Committee Decides* that the definition of the term 'refugee' as adopted in the Committee's Report on the

16. *Ibid.*, at the Meeting of 23 January 1969.

principles concerning the treatment of refugees at the Eighth Session of the Committee at Bangkok be amended by adding a new sub-paragraph in Article I as follows :

" (c) leaves or being outside is unable or unwilling to return to his homeland—the State, country or occupied territory from which he, his parents, or grand parents had been displaced."

The Committee Further Decides to adopt the following consequential amendments in Articles IV and V as a result of the amendment of the definition of the term 'refugee' :

Article IV

(i) the following words "or the territory from which he was displaced" shall be added after the word "nationality" and before the word "and" ; and

(ii) for the words "or country to receive him" in the end a comma and the following words shall be substituted : " , country or occupying power to receive him".

Article V

Para 1 :

The following words :

"or the occupying power in control of the territory" shall be added after the word "country" and before the word "which".

Para 2 :

After the word "country" and before the comma and word "public", the following words :

"or the occupying power" shall be added."

In the course of discussions on this proposal, the Delegate of Ghana wanted to know the meaning of the word

'homeland'. He asked : "Does it mean his village ? Does it mean his town ? Does it mean his city or is it intended to cover the normal cases known to refugee law ? His country of origin is the country of nationality or his place of habitual residence."[17]

The Delegate of Sierra Leone pointed out : "The amendment contains the word 'homeland'. It contains the words 'territory' and 'State'. If one means an amendment in the text, one would see that one becomes refugee if he leaves or being outside is unable or unwilling to return to his homeland ...etc. Then, in Article IV, the amendment seeks to say "or the territory from which he was displaced".....How do we interpret the word 'homeland' in Article I as against the word 'territory' in Article IV ? It seems to me that, for reasons of consistency, it would have been better to retain the word 'homeland' in Article IV, and one might merely say 'homeland', depending on how you define 'homeland'." He suggested a similar change in the last line of the amendment to Article IV. "It would not be 'homeland' but it would be 'power occupying the homeland' from which he was displaced to receive him."[18]

In this regard, the Delegate of Jordan stated : " 'Homeland' is one of the three things as far as a refugee is concerned. It can either be a State and, in the question of Palestine, as you know, it would not be a State or a country; therefore we had to bring in the notion of country or 'occupied territory'."[19]

The Delegate of Ghana also referred to the word 'displaced' in the said proposal and said : "Are we now to accept that mere displacement of a person should render him a refugee, because the implications will be that a man

17. *Ibid.*
18. *Ibid.*
19. *Ibid.*

may be displaced from his village to the next village, and he can become a refugee, or several persons, by reason of all these norms known to the law of refugee, can go from one village to another, one city in the same country to another". He expressed the view that "the situation facing us regarding the Jordanian nationals, if my understanding is correct, is that they have moved from one part of their own country which is now under the foreign domination to another part of the same country which is still under Jordanian sovereignty".[20]

The Delegate of Jordan also referred to the objection raised by the Delegate of India in regard to the first proposal discussed above and asked as to how the said proposal could have any untoward consequences. He stated: "I cannot conceive of one single reason why a person—assuming that the part of the country he has left is under temporary military occupation—I cannot see why, the Geneva Convention would tell you that he ought not to be displaced, to start with. If he is ready to go back, every facility should be given to him to go back."[21]

The Delegate of Sierra Leone thought that a consequential amendment of Article II of the Bangkok Principles would also be necessary. He said: "It seems to me that a person, who has been displaced from one part of his country, should, if situation improves or if he changes his mind, decides to go back to that part of the country where he has been habitually resident, ceases to enjoy the status of a refugee."[22]

The third proposal was submitted by the Delegation of Jordan, which read as follows:

"ADDENDUM TO THE PRINCIPLES CONCERNING TREATMENT OF REFUGEES

WHEREAS it appears to the Committee on further consideration that the principles adopted at its Session held in

20. *Ibid.*
21. *Ibid.*
22. *Ibid.*

Bangkok in 1966 mainly contemplate the status of what may be called political refugees who have been deprived of the protection of their own Government and do not provide adequately for the case of other refugees or displaced persons.

AND WHEREAS the Committee considers that such other refugees or displaced persons should enjoy the benefit of protection of the nature afforded by Articles IV and V of those principles.

NOW THEREFORE, the Committee at its Tenth Session held in Karachi between 21st to 30th January, 1969 resolves as follows:

1. Any person who because of foreign domination, external aggression or occupation has left his habitual place of residence, or being outside such place, desires to go back thereto but is prevented from so doing by the Government or military authorities in control of such a place of residence shall be entitled to return to the place of his habitual residence from which he was displaced.

2. It shall accordingly be the duty of the Government or military authorities in control of such place of habitual residence to facilitate by all means at their disposal, the return of all such persons as are referred to in the foregoing paragraph, and the restitution of their property to them.

3. This natural right of return shall also be enjoyed and facilitated to the same extent as stated above in respect of the dependants of all such persons as are referred to in paragraph 1 above."

The Delegate of Jordan pointed out that the above proposal had been formulated after taking into consideration the views expressed in the matter by the various Delegates.

23. *Ibid.*, at the Meeting of 28 January 1969.

The Delegates of Iraq, Pakistan, the United Arab Republic, and Sierra Leone supported the proposal. The Delegate of Ceylon, while supporting the proposal, thought that certain amendments in regard to the title and the form might be necessary. He also said that "in the first paragraph of the draft resolution it would be preferable to omit reference to 'foreign domination and external aggression' and instead, to have reference only to 'occupation by the armed forces of another State'."[24] The Delegate of Thailand was prepared to support the proposal subject to the following amendments suggested by him. He regarded it proper to include another situation, that of internal armed conflict. He also thought that the "reference to the Government or military authorities in control of such a place, that has intention to prevent the refugee to return, might not serve the intention of the proposer of this draft Resolution, because the Government or the military authorities concerned may say it openly that it accepts the refugees. So I would humbly request that these words may be replaced with reference to events referred to above that will cover all situations".[25]

The Delegate of Ghana suggested that sufficient time be given to the Member Governments to examine the proposal.[26] In regard to the first proposal of Pakistan it may be stated that the legal objection to the concept involved in the proposal is that a person cannot be regarded to be a refugee in the State or country of his nationality and that he cannot have any "international rights" against his own State. Whatever legal rights he has against his own State are regulated by the constitutional and municipal laws of that State, and not by international law, which only recognizes the principle of internal sovereignty of a State. As such, an international legal right of asylum or an international legal right of minimum standard of treatment against one's own

24. *Ibid.*
25. *Ibid.*
26. *Ibid.*

State is meaningless. At the Tenth (Karachi, 1969) Session of the Committee, the Delegate of Ceylon expressed the fear that the proposal might be "in opposition to the principle of internal sovereignty in so far as people may leave one part of their country for another part of their country when both parts are in the same territory".[27] The Delegate of Ghana said that "even if we expand our definition to cover these exceptional cases facing us, the rest of the world may find it difficult in accepting such a definition".[28] The Delegate of Indonesia pointed out : "If we were a political or social body, my Delegation would have no difficulty in accepting either the old formulation or a new amendment that our distinguished Delegate from Pakistan has submitted. Unfortunately, we are a juridical body. That is why we have to formulate something which is justified from a juridical point of view. Moreover, in formulating a wider definition of refugee, it should be borne in mind that it may help in solving the problem that we face".[29]

5. The special problem concerning Palestinian Arab Refugees

With regard to the people from Palestine, the Observer for the Arab League to the Eighth (Bangkok, 1966) Session of the Committee stated that "many interpretations and connotations which are associated with the term "refugee" do not apply to the Palestinian Arabs who have been forcibly made to leave their country. He emphasized the element of their forcible expulsion and stated: "They have been evicted from their country forcibly without they themselves consciously seeking 'refuge'."[30] In the case of people

27. *Ibid.*

28. *Ibid.*

29. *Ibid.*

30. See the Proceedings of the Eighth (Bangkok, 1966) Session of the Committee.

expelled from their homeland by an alien occupying power, the main element is that of their "forcible expulsion". The Delegate of Japan to the Tenth (Karachi, 1969) Session of the Committee referred to the notion of persecution in the case of these persons.[31] However, even if there is some "persecution or well-founded fear of persecution" in their case, such notion occupies only a subsidiary place, the fundamental element being their "forcible expulsion" from their homeland.

The Delegate of Iraq to the Karachi Session regarded the plight of the aforesaid category of persons as "a new problem or rather a new dimension of the existing problem of refugees which has doubled in the area since 1948. The events of June 1967 added a new dimension and has aggravated the problem" of these persons.[32] The Delegate of the United Arab Republic also emphasized that the problem under consideration "has been aggravated and thousands have become homeless and without any sort of protection. The pragmatic solution to the situation..... here is an international and conscientious solution of their problems".[33] The Delegate of India was of the view that "the Committee should try to do all it can to see that the problem is handled on humanitarian basis, and if legal considerations come in any way as a handicap or an impediment, that handicap or impediment must be removed".[34] The Delegate of Jordan stated : "If I read correctly the spirit and the letter of the United Nations Charter and the Universal Declaration for Human Rights, I think the narrowing of the definition, the non-enlargement of the definition would go contrary to the general modern trends of international law."[35] He also expressed the "view that when

31. See Verbatim Record of Discussions on the subject at the Tenth Session of the Committee for the Meeting of 23 January 1969.

32. *Ibid.*, at the Meeting of 25 January 1969.

33. *Ibid.*, at the Meeting of 23 January 1969.

34. *Ibid.*, at the Meeting of 25 January 1969.

35. *Ibid.*

we are tackling a humun problem, as we do, we would rather err on an overstatement rather than an understatement."[36] The Delegate of Sierra Leone was of the view that "we should not indulge in legality or technicality. However, since we are in fact concerned with the juridical issue as well as a humanitarian problem, my Delegation takes the view that we must of necessity, consider the juridical issues involved".[37] The question has been posed as to how best one could cover the cases of Palestinian Arab "Refugees" within a legal framework so that they could enjoy certain rights as recognised by International Refugee Law. The Palestinian Arabs and others could perhaps be brought under the category of a "refugee" if the definition given in paragraph 2 of Article 1 of the O.A.U. Convention on Refugees is adopted. The proposal made by the Delegates of Iraq, Pakistan and the U.A.R. at the Bangkok Session regarding definition of a "refugee" would appear to be on similar lines.

In so far as the Arab "refugees", who move from one part of the country to another due to external aggression and alien occupation, are concerned, they would not be covered within any hitherto accepted connotation of the term "refugee" in the legal sense. They are to be regarded as uprooted people or displaced persons and their rights and obligations would need to be considered separately as suggested by the Delegate of Japan. It may be pointed out that in the event of the Committee deciding to amend the definition of "refugee" in the Bangkok Principles by addition of a clause similar to para 2 of Article 1 of the 1969 O.A.U. Convention, certain amendments in regard to the right of return under Article IV of Bangkok Principles and the right to compensation under Article V of the said Principles would be necessary, so as to enable the aforesaid category of refugees to avail of these rights : (a) in the case of external aggression or foreign

36. *Ibid.*, at the Meeting of 23 January 1969.

37. *Ibid.*, at the Meeting of 25 January 1969.

domination, against the alien power in control of his place of habitual residence; (b) in the case of occupation, against the alien power occupying his place of habitual residence; and (c) in the case of internal disorder, against the power in control of the place of his habitual residence.

In considering the case of the second category of Arab refugees, namely, those who have moved from one part of the country to another on account of Israeli occupation, the Committee could well rely upon certain principles which are already accepted in international law or proceed by way of extension of those principles. For example, international law relating to belligerent occupation recognizes certain obligations of the occupying power towards the inhabitants of the occupied territory. A "belligerent is under a duty to respect the life and liberty of private enemy individuals, which he can carry out only on the condition that they abstain from hostilities against him."[38] Further, the occupant "is himself under an obligation to give a measure of protection to the inhabitants of the occupied territory."[39] Also modern international law recognizes the concept of "Postliminium", according to which "territory, individuals, and property, after having come in time of war under the authority of the enemy, return, either during the war or at its end, under the sway of their original sovereign."[40] The occupying power is forbidden from acquiring or disposing of public property in the occupied territory. As regards private property in such territory, it "must not be taken or interfered with, unless it is of use for local military purposes. . . . . mere plunder is prohibited."[41] The occupying power is also under a duty to allow the inhabitants to continue their lawful occupations and religious customs and not to

38. Oppenheim's *International Law* (7th Edition), Vol. II, p. 206.

39. *Ibid.*, at p. 259.

40. *Ibid.*, at p. 617.

41. J.G. Starke, *An Introduction to International Law* (6th Ed.), at p. 435.

deport them. Further, the occupying power is expected to conform to the rules set out in Section III of the Hague Rules of 1907 and Articles 47 to 78 in Part III, Section III of the Geneva Convention for the Protection of Civilian Persons in Time of War. Under the said Convention, the occupant power is under obligation "(a) not to take hostages, or impose collective penalties against the population for breaches of security or interference with the occupying forces by individual inhabitants; (b) not to transfer by force inhabitants, individually or *en masse*, to other territory or to deport them; (c) not to compel the inhabitants to engage in military operations or in works connected with such operations, other than for the needs of the occupying army so as to impinge upon the ordinary requirements of the civilian populations. The Convention also imposes, subject to the same qualifications, a specific obligation to maintain the former Courts and status of Judges, and the former penal laws, a d not to use coercion against public officials".[42] Under Article 32 of the Convention, the Judges or inhabitants are not to be subjected to any measures causing physical suffering or extermination, whether by murder, torture, corporeal punishment, mutilation or medical and scientific experiment not necessary to medical treatment, or by any other measure of brutality of civilian and military agents. Article 49 forbids all individual or mass forcible transfers from the territory, regardless of motive, subject only to cases where the security of the population or military necessity requires them.

As such, a legal basis for the rights of people expelled from their homeland by an occupying power against the latter, and the obligation of such power towards the said people, is already in existence in customary as well as conventional international law. Thus, for the limited purpose of providing for the international rights of these people to return and to restoration of their property and other conditions of their living,

42. *Ibid.*, at pp. 450 and 451.

and the obligation of the occupant power in regard to payment of compensation in the event of breach by it of its corresponding obligations, certain principles can undoubtedly be formulated. The problem remains only in regard to the content of these rights and obligations and the manner of providing for them. Furthermore, the rights of the Palestinian Arab refugees to return to their homes have been recognised and emphasised in about 25 resolutions passed by the United Nations since 1948. This can undoubtedly form a legal basis for formulation of a set of principles on the subject. The Committee's Resolution No. X (7) is in accord with this position.

6. *Other cases of uprooted persons* :

These would include (a) refugee sea-men, (b) victims of civil war or internal armed conflict, and (c) persons who leave their country because of denial of adequate means of employment or education by reason of their belonging to a repressed minority group.

(a) In regard to refugee seamen, the 1951 U.N. Refugee Convention provides in Article II :

> "In the case of refugees regularly serving as crew members on board a ship flying the flag of a Contracting State, that State shall give sympathetic consideration to their establishment on its territory and the issue of travel documents to them or their temporary admission to its territory particularly with a view to facilitating their establishment in another country."

Article 12 of the draft of the OAU Convention relating to the Status of Refugees in Africa, prepared by the Committee of Legal Experts, also contained a similar provision.

The Asian-African Legal Consultative Committee may consider whether it is advisable and necessary to include a

similar provision in the "Bangkok Principles". In this connection the Committee may also examine the provisions of the 1957 Agreement on Refugee Seamen.

(b) In regard to persons who are victims of civil war or internal armed conflict, the Delegate of Thailand to the Tenth (Karachi, 1969) Session of the Committee suggested that it might be proper to include a provision concerning them.[43] These persons can be divided into two categories : (i) those who leave their country or State of nationality or habitual residence and seek refuge in another country or State; and (ii) those who leave their homeland in one part of their country or State of nationality or habitual residence, which part is under the control of one of the parties to the civil war or internal armed conflict, and move to, and seek protection in, the other part of the same country or State, which other part is under the control of the other party to the civil war or internal armed conflict.

The case of category No. (i) of these persons would be covered by the provision of paragraph 2 of Article I of the OAU Refugee Convention. This is accepted by the Committee.

The case of category No. (ii) of the aforesaid persons is similar to that of displaced persons who are expelled from their homeland by an alien occupying power, and who move to, and seek protection in, the other part of their own country. Since the case of these victims of civil war or internal armed conflict would involve prescribing certain international duties of a Government during domestic conflict within its own territory, it may be argued that doing this might constitute a derogation from the principle of internal sovereignty. However, the Geneva Convention relating to the Protection of Civilian Persons in Time of War of 1949 has guaranteed certain minimal protection to all persons not

43. See Verbatim Record of Discussions on the subject at the Tenth (Karachi, 1969) Session of the Committee, for the Meeting of 28 January 1969.

participating in the hostilities during an armed conflict not of an international character within the territory of a contracting party. Article 3 of the said Convention requires that these persons must be treated humanely in all circumstances, without any adverse distinction founded on race, colour, religion, sex, birth or wealth. The said Article also prohibits at any place or time (a) violence to life and person, in particular murder, mutilation, cruel treatment and torture; (b) taking hostages; (c) outrages upon personal dignity; and (d) sentences or executions without previous judgment by a regular court affording the judicial guarantees insisted on by civilized peoples. It also requires the wounded and sick to be collected and cared for.

The Committee may consider whether it would include the case of aforesaid victims of civil war or internal armed conflict within the category of displaced persons.

(c) As regards persons who leave their country because of denial of adequate means of employment or education in their own country, by reason of their belonging to a repressed minority group, the Committee may consider providing for them in the "Principles concerning Treatment of Refugees". However, this would involve extending the concept of "persecution" to cover these cases.

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CHAPTER V

RIGHT TO TERRITORIAL ASYLUM

1. Provision relating to "Asylum" in the Bangkok Principles

Article III of the "Principles concerning Treatment of Refugees", adopted at its Bangkok (Eighth, 1966) Session by the Committee, provides as follows:

"*Asylum to a Refugee*

1. A State has the sovereign right to grant or refuse asylum in its territory to a refugee.
2. The exercise of the right to grant such asylum to a refugee shall be respected by all other States and shall not be regarded as an unfriendly act.
3. No one seeking asylum in accordance with these principles should, except for overriding reasons of national security or safeguarding the populations, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory.
4. In cases where a State decides to apply any of the above mentioned measures to a person seeking asylum, it should grant provisional asylum under such conditions as it may deem appropriate, to enable the person thus endangered to seek asylum in another country."

2. Meaning of the term "asylum"

Dr. P. Weis points out that the "Greek word 'asylum' means a place which may not be violated i. e., a sanctuary,

originally a religious institution under which persons fleeing from prosecution or persecution could find shelter in a sacred place considered inviolable. The term was later received into secular law and thereafter into international law".[1]

"Asylum is the protection which a State grants on its territory or in some other place under the control of certain of its organs, to a person who comes to seek it."[2] Grant of asylum is primarily a humanitarian act. According to Dr. C. A. Dunshee de Abranches of Brazil, "Asylum is a specific form of the international protection of human rights. This protection is one of the basic purposes of the United Nations."[3] Asylum can be of three types: territorial, diplomatic and in a warship. The latter two types are also known as extra-territorial asylum. In the present chapter, we are concerned only with the territorial asylum.

In regard to territorial asylum, the Delegate of Thailand to the Eighth (Bangkok, 1966) Session of the Committee, expressed the view that the "person who finds himself in the territory of another State is not given asylum until the State has exercised the right to grant asylum. Asylum is not a fact, it is the exercise of a right by the State."[4]

Dr. P. Weis points out: "In traditional international law the right of asylum is considered as the right of the State to grant asylum in the exercise of its territorial supremacy. In the context of human rights, the term has normally been used from the aspect of the individual, i.e., as the right of the individual

1. In his article on "Recent Development in the Law of Territorial Asylum." *Revue des Droits de l'Homme* (Human Rights Journal), Vol. 1-3, 1968.
2. *L'Anunaire* (1950), p. 67, Art. 1.
3. Before the International Law Association during discussion on "Legal Aspects of the Problem of Asylum". See *Report of the 51st Conference*, held at Tokyo in 1964, at p. 234.
4. Record of Discussions on the subject at the Eighth Session of the Committee, held at Bangkok in 1966.

to asylum."[5] This aspect of the matter has been discussed below in detail in this chapter.

3. General Comments

At the Tenth (Karachi, 1969) Session of the Committee, the Delegate of Ghana stressed the need for efforts being made to improve the lot of refugees so as "to make them either less stranger or no stranger at all in the land in which they find themselves."[6] The problems confronting a person seeking territorial asylum appear to be twofold. Firstly, the question of his admittance to the territory of the State in which he seeks asylum. Secondly, the question of his status, in case he is granted admittance. According to Dr. Frank E. Krenz, the "problem of asylum is therefore to be broken into three separate issues. First, the asylum seeker is to gain physical presence inside the territory of the State of refuge. The duty of States not to repeal refugees at their frontiers has been termed the 'principle of *non-refoulement*'. Secondly, the admittance of an asylum seeker consists in the legitimation of his stay and constitutes in a sense the actual recognition of his refugee quality. Only at this point comes the third element, that of the refugee's status in the country of asylum. There can, in fact, be no question of status without admission, nor can admission take place without the physical presence of the applicant.[7]

Whereas traditional international law relating to asylum had been based on a distinction between political offenders and ordinary criminals, and evolved out of the principle of

5. In his article on "Recent Developments in the Law of Territorial Asylum": *Revue Des Droits de l'Homme* (Human Rights Journal), Vol. 1-3, 1968.

6. Varbatim Record of Discussions on the subject at the Tenth (Karachi, 1969) Session of the Committee, for the meeting of 23 January 1969.

7. In his article on "The Refugee as a Subject of International Law." *International and Comparative Law Quarterly*, p. 103, (1966).

non-extradition of political offenders, recent trend has been to consider the position and status of the person seeking asylum, rather than the nature of the crime he is accused of. The concept of persecution has also found its way in the recent treaties, conventions and declarations by the United Nations.

Article 14 of the Universal Declaration of Human Rights provides :

1. Everyone has the right to seek and enjoy in other countries asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."

Article 27 of the American Declaration of the Rights and Duties of Man of 1948 states that "every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and international agreements".

The 1951 U.N. Convention on Refugees does not include a provision concerning admittance of refugees. Article 31 (1) of the Convention merely prohibits imposition of penalties on refugees because of their illegal entry or presence in the territories of the contracting States. The Preamble to the Convention recognizes that "the grant of asylum may place unduly heavy burdens on certain countries" and calls for international co-operation to deal with the problem. Article 33 of the Convention forbids the contracting States from expelling or returning (*refouler*) a refugee to any territory "where his life would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion", save for reasons of security.

The U.N. Declaration on Territorial Asylum adopted by the U.N. General Assembly in 1967 confirms the right to

asylum of those referred to in Article 14 of the Universal Declaration on Human Rights as also of those struggling against colonial domination, with the State of refugee being given the authority to evaluate the grounds for the grant of asylum. It also provides for *non-refoulement* and for grant of provisional asylum; calls for a spirit of international solidarity in lightening the burden of the State of refuge; and prohibits activities by asylees contrary to the purposes and principles of the United Nations. The Human Rights Commission of the U.N. Economic and Social Council, which adopted the draft of the Declaration, was 'divided into two groups: the first (consisting mainly of representatives of Afro-Asian countries) pleaded for the maintenance of the State's sovereignty and its right to be free in granting or refusing asylum for reasons of its own security and welfare, while the other group (mostly European States) stressed the humanitarian duties of the State which should oblige them to deviate only in exceptional cases from the principle of *non-refoulement*.[8]

The OAU Convention, in Article II, calls for the best endeavours by Member States to receive all refugees and secure their settlement; provides that grant of asylum is not to be regarded as an unfriendly act by any State; provides for the principle of *non-refoulement*; calls for international cooperation in lightening the burden of a State granting refuge; provides for temporary asylum; and requires settlement of refugees at a reasonable distance from the frontier of the country of origin.

The International Law Commission is expected to consider the problem of the right of asylum sometime in the near future.

For refugees, the right to asylum is the most important right. The Observer for the Office of the UNHCR has pointed

8. *Bulletin of the International Commission of Jurists*, No. 11, Dec. 1960, p. 53.

out that "the enjoyment of all the basic rights by refugees is conditional upon their being granted refuge in a particular country and, in particular, their being protected against measures of expulsion or return to a country where they may face persecution. Various efforts have been and continue to be made on the international level to give the so-called "right of asylum" more concrete expression".[9]

Mr. Frank E. Krenz has stated, "While the principle of not returning refugees to their country of origin can be held as an established axiom of the civilized world, governments have shrunk from accepting the obligation to grant quasi-permanent admission to refugees into their territory. Fears still remain that an influx of asylum-seekers may not only bring political handicaps, but also impose unforeseen burdens on the national population and endanger its homogeneity and welfare. On the other hand, the experience gained after the two World Wars has proved, in human as well as in factual terms, that these fears are unfounded. Allowing for certain periods of crisis, the proportion and distribution of refugees have been such as to allow for comparatively easy and rapid absorption".[10]

4. Proposals for improvement of provision relating to "asylum" in the Bangkok Principles

(i) In a note prepared by the Office of the UNHCR, at the request of the Secretariat of the Asian-African Legal Consultative Committee regarding recent developments,[11] it has been pointed out that *Article 1, paragraph 3, of the UN Declaration on Territorial Asylum provides that "it shall rest with the State*

9. Before the Eighth Session of the Committee held at Bangkok in 1966.

10. In this article on "The Refugee as a subject of International Law". *15 International and Comparative Law Quarterly*, pp. 115 and 116 (1966).

11. See Brief of Documents prepared by the Committee's Secretariat for the Tenth (Karachi, 1969) Session, p. 59.

granting asylum to evaluate the grounds for the grant of asylum". It has been suggested that a clause in Article III of the Bangkok Principles along those lines might be useful.[12]

(ii) It has also been pointed out in the said note that the Bangkok Principles do not contain a provision comparable to *Article 2 of the UN Declaration which provides that "the situation of persons seeking asylum is of concern to the international community" and that, therefore, "States should consider, in the spirit of international solidarity, appropriate measures individually or jointly or through United Nations, to lighten the burden of a State which finds difficulty in granting or continuing to grant asylum". The note suggests inclusion of a similar clause under Article III of the Bangkok Principles.*[13]

(iii) It has been further pointed out in the said note that the Bangkok Principles do not contain a provision similar to *Article 4 of the UN Declaration, which provides that "States granting asylum shall not permit persons who have received asylum to engage in activities contrary to the purposes and principles of the United Nations".*

The said note mentions that Article VII of the Bangkok Principles does provide for an obligation of the refugee not to engage in subversive activities. *The note goes on to say; "It may be useful, however, to clarify that it is also an obligation of States not to permit any subversive activities of the kind described in Article IV of the United Nations Declaration, because compliance by States with that obligation will help ensure that the grant*

12. *Ibid.*, at p. 69.

13. *Ibid.*, at p. 70.

of asylum will be respected by other States and not be regarded as an unfriendly act."[14]

(iv) The note also refers to *paragraph 5 of Article II of the OAU Convention which provides that where a refugee "has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his final resettlement". The note suggests inclusion of a similar provision in Article III of the Bangkok Principles.* It states: "Such a clause may be of very practical importance for the solution of cases of individual refugees who, for one reason or another, have not succeeded in finding a country of asylum. According to the experience gained by the UNHCR, however, endeavours to promote the settlement of such cases frequently have little chance of success unless there is a country willing to give temporary shelter and to provide the refugees with a travel document once a country of resettlement has been found."[15]

5. Grant of asylum, whether the State's or the individual's right

Commenting upon the provision relating to "asylum" in the Bangkok Principles, the Delegate of India to the Tenth (Karachi, 1969) Session of the Committee states: "Although the sovereign right of a State to grant or refuse asylum was recognized, it has also been provided that a State would not reject a refugee at the frontier but grant him provisional asylum and should not return or expel a refugee to a territory where his life or liberty may be in danger. The only exception was overriding reasons of national security."[16] In regard to the right to asylum, the Delegate of Ghana to the Eighth

14. *Ibid.*, at p. 70.

15. *Ibid.*, at pp. 70 and 71.

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

(Bangkok, 1967) Session of the Committee said: "It is not actually a right bestowed on the refugee. It is a right which has been conferred on the receiving State..."[17]

The Baghdad draft of Article III had merely provided that "A State has the sovereign right to grant or refuse asylum to a refugee in its territory". The Delegate of Ghana at the Eighth Session had moved certain amendments seeking to circumscribe the aforesaid right of a State by (i) the principle of *non-refoulement*; and (ii) duty to grant provisional asylum. Certain Delegates were in favour of an unfettered discretion of a State in the matter, excepting that the refugee should be afforded an opportunity to seek asylum elsewhere, if he is refused admittance.[18] However, the aforesaid amendments of the Delegate of Ghana were adopted by the Committee, and incorporated in Article III of the Bangkok Principles as paragraphs 3 and 4 respectively.

Traditional international law recognizes only "the right of the State to grant asylum in the exercise of its territorial sovereignty"[19], and not the right of a refugee to be granted asylum. The practice of most of the States also implies that the States enjoy complete discretion whether to afford territorial asylum or not. These include Australia, the U.K., the U.S.A., Japan, Belgium, Czechoslovakia, Peru and India.[20]

Mr. Frank E. Krenz says that "with the spectre of an uncontrolled influx of refugees, unknown both in their quality and number, looming high before the guardians of public

17. Record of Discussions on the subject at the Eighth (Bangkok, 1966) Session of the Committee.
18. *Ibid.*
19. P. Weis in his article on "Recent Developments in the Law of Territorial Asylum". *Revue Des Droits de l'Homme* (Human Rights Journal), Vol. 1-3, 1968.
20. See discussion on "Legal Aspects of the Problem of Asylum" in the *Report of the 51st Conference of the International Law Association*, held at Tokyo in 1964.

policy and order, governments have barricaded themselves, so it seems, behind a distinction between extradition and non-admission, or between asylum seekers, "admitted" and those "not-admitted". On this principle, refugees not admitted are not granted the benefit of the protection which asylum affords and no rights may be derived from mere physical presence... The recognition of refugee status has, therefore, been considered as being a declaratory, rather than a constitutive, act".[21] However, the Delegate of Thailand to the Eighth (Bangkok, 1966) Session of the Committee expressed the view that "if we say that a State has the sovereign right to grant or refuse asylum to a refugee in its territory, it means that the refugee is already in its territory, and then the asylum is granted later. Now, that does not correspond with international law at all. It fact, international law allows a State to grant asylum which is territorial asylum the moment the refugee enters its territory, and not after the refugee is in its territory".[22]

The Observer for the Office of the UNHCR referred to the growing tendency for the inclusion, for humanitarian reasons, of the principle of *non-refoulement* in the instruments recognizing the right of asylum to be the sovereign right of a State to grant asylum at its discretion.[23] The 1939 Montevideo Convention on Political Asylum and Refugees provides that "the State which grants asylum does not thereby incur an obligation to admit the refugees in its territory, except in cases where they are not given admission by other States".[24] The principle of *non-refoulement* has been provided for in Article 33 of the 1951 U.N. Refugee Convention. The State practice and the national constitutions of a considerable number of

21. In his article on "Refugee as a subject of International Law", *International & Comparative Law Quarterly*, p. 105 (1966).
22. See Record of Discussions on the subject held at the Eighth (Bangkok, 1966) Session of the Committee.
23. *Ibid.*
24. Hudson, *International Legislation*, Vol. 8, p. 405.

States recognize "the non-extradition of political offenders and/or...the grant of asylum to persons who fear persecution in their country of origin".[25]

Can it be said that the aforesaid category of persons have come to acquire a right to territorial asylum under international law? Dr. P. Weis is of the view that "while in this field (the existence of a right of asylum) international law would seem to be in the process of development, it is, of course, difficult at any given stage to affirm either that a rule of customary law has been modified or that a new rule has come into existence".[26] It is only in the context of human rights that such a right has not become universally enforceable as against States so far. According to Dr. C. A. Dunshee de Abranches of Brazil, the "right of asylum constitutes the only possibility of international protection of the citizen against the abuse of States in the case of political and religious persecution. Freedom of opinion, thought and religion vanishes if the grant of asylum remains as an exclusive right of sovereign States".[27] Article 14, paragraph 1 of the Universal Declaration of Human Rights (1948) provides : "Everyone has the right to seek and to enjoy in other countries asylum from persecution." Professor Lauterpacht has regarded this phraseology to be "artificial to the point of flippancy" as it recognizes a right to seek, but not a right to be granted asylum.[28] According to him, "there was no intention to assume even a moral obligation to grant asylum".[29] Moreover, the UN Covenant on Civil and Political Rights, which includes the right of asylum, has been ratified, or acceded to, by a very few States. The U.N. Refugee Convention of 1951 does not provide for any obli-

25. See *Report of the International Law Association, for the 51st Conference* held at Tokyo in 1964, at p. 288.
26. *Ibid.*, at p. 267.
27. *Ibid.*, at p. 234.
28. H. Lauterpacht, "The Universal Declaration of Human Rights". 25 *British Yearbook of International Law* (1948), p. 374.
29. H. Lauterpacht, *International Law and Human Rights* (1950), 421-423.

gation upon the contracting States to grant asylum, but merely provides for the treatment to be enjoyed by refugees once asylum has been granted. However, the Convention, in Article 33 provides : "No contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of particular social group or political opinion" save for reasons of national security.

Article 1, paragraph 1 of the UN Declaration on Territorial Asylum of 1967 provides : "Asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke Article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism, shall be respected by all other States." Paragraph (iii) of the said Article provides : "It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum." Paragraph (i) of Article 3 of the Declaration provides : "No person, referred to in Article 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, explusion or compulsory return to any State where he may be subjected to persecution." Paragraph (iii) of Article 3 merely requires a State to "consider the possibility of granting to the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State".

Dr. P. Weis has expressed the view that an "individual right to asylum is recognized under the municipal laws of a considerable number of countries ; but rules of municipal law which show a certain degree of uniformity do not yet create international law".[30] References in this connection may be made to Article 129 of the Constitution of the USSR, Article

30. In his article on "Recent Developments in the Law of Territorial Asylum" : *Revue des Droits de l'Homme* (Human Rights Journal), Vol. 1-3, 1968.

10 of the Constitution of Italy, Preamble of the French Constitution and Article 31 of the Yugoslav Constitution.

Mr. Frank E. Krenz points out that in some quarters, it has been postulated not only that the traditional right of States to grant asylum to political persecutees has changed into a legal duty, but also that refugees have themselves a right to be granted this protection.[31] Article 1 of the Draft Convention on Territorial Asylum considered by the Committee on the Legal Aspects of the Problem of Asylum, at the 53rd (Buenos Aires) Conference of the International Law Association provides for a legal obligation on the part of the contracting parties to grant asylum to refugees. It states that "the High Contracting Parties undertake to grant asylum in their territory to persons who are persecuted for political reasons or offences, or for mixed offences for which extradition shall not be granted or on grounds of race, religion, nationality, membership of a particular social (or economic) group or political opinion". According to Mr. Krenz, the "law on asylum is in the process of achieving a transformation. While originally constituting no more than a right of States to grant or refuse extradition, this institution has more than tended to invest the individual asylum seeker with certain rights enforceable against the State of refuge. Although a general State usage to grant asylum may now undoubtedly be established, a necessary element in the formation of a customary legal norm, i. e., the so-called *opinio juris* on the part of States, appears to many as still lacking. It would seem, therefore, that the realization of an individual right to asylum is still lacking. It would seem, therefore, that the realisation of an individual right to asylum is still to await some kind of general recognition".[32]

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31. In his article on "The Refugee as a Subject of International Law", *15 International & Comparative Law Quarterly*, p. 92 (1966).

32. *Ibid.*, at p. 115.

6. Evaluation of the grounds for asylum

Paragraph 3 of Article 1 of the UN Declaration on Territorial Asylum of 1967 provides: "It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum". As stated in proposal number (i), set out under item 4 of this Chapter, the Office of the UNHCR has suggested inclusion of a similar provision in Article III of the Bangkok Principles. It may be stated in this regard that paragraph 1 of the said Article provides for the sovereign right of a State to grant or refuse asylum, and, as such, a provision along the lines of paragraph 3 of Article 1 of the UN Declaration may be superfluous.

It is for consideration whether it would be desirable to provide for certain criteria to which a State, deciding upon the question of asylum may be required to conform. The first of these criteria is the principle of non-discrimination in matters relating to grant of asylum. Article 3 of the 1951 UN Refugee Convention provides that the "contracting Parties shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin". Article IV of the draft of the OAU Refugee Convention, as revised by the OAU General Secretariat, also made a similar provision. The Preamble of the UN Declaration on Territorial Asylum of 1967 refers to the need for "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion".

The second criterion in this regard may be a provision similar to clause 1 of the Resolution on "Asylum to Persons in Danger of Persecution" of the Council of Europe, which provides: "They should act in a particularly liberal and humanitarian spirit in relation to persons who seek asylum on their territory." In its preamble, the Resolution refers to "the liberal practices based on humanitarian considerations already

followed in regard to asylum by the governments of the member States".[33]

7. Cases in which asylum cannot be granted

Paragraph 2 of Article 1 of the UN Declaration on Territorial Asylum provides :

> "The right to seek and to enjoy asylum may not be invoked by any person with regard to whom there are serious reasons for considering that he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes."

Paragraph 2 of Article 14 of the Universal Declaration of Human Rights provides that the "right may not be invoked in the case of persecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."

Article 1 of the Convention on Political Asylum concluded at the Seventh International Conference of American States in 1933 provides that "It shall not be lawful for the States to grant asylum in legations, warships, military camps or airships 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 and sea forces".

The Committee may consider the question of desirability of including a provision concerning the above-mentioned cases in which asylum should not be granted, in Article III of the Bangkok Principles, and in case it deems it desirable to do so, it may also consider the contents of such a provision.

33. Resolution (67) 14, of 29 June 1967, adopted by the Committee of Ministers of the Council of Europe.

8. The principle of 'non-refoulement'

As stated above, under item 5 of the present chapter, the principle of *non-refoulement* was incorporated as paragraph 3 in Article III of the Bangkok Principles, on the proposal of the Delegate of Ghana. The word used in the said paragraph is "should", and it was stated by the Delegate of India, "that what is sought in the proposal of the Distinguished Representative of Ghana is a moral obligation and not a legal obligation, but a moral obligation or a moral complusion will affect certainly the legal right set out in Article III. It will mean that a State must always grant asylum to any refugee seeking asylum except for overriding reasons of national security or safeguarding the population".[34] However, the fact that there is ambiguity in regard to interpretations of the word "should" cannot be denied. It may be interesting to note that in the corresponding provisions contained in Article 33 of the 1951 UN Refugee Convention, Article 3 of the UN Declaration on Territorial Asylum of 1967, paragraph 3 of Article II of the OAU Convention on Refugees, or paragraph 2 of the 1967 Resolution on Asylum to Persons in Danger of Persecution of the Council of Europe, the word used is "shall" which is unambiguously mandatory.

The Committee may consider the question of making the provisions of paragraph 3 of Article III of the Bangkok Principles mandatory for the States, by substituting the word "shall" for the word "should".

9. Provisional asylum

Paragraph 4 of Article III of the Bangkok Principles provides :

> "In cases where a State decides to apply any of the above-mentioned measures (such as rejection at the frontier,

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

return or expulsion) to a person seeking asylum, it should grant provisional asylum under such conditions as it may deem appropriate, to enable the person thus endangered to seek asylum in another country."

This paragraph was included in Article III on the proposal submitted by the Delegates of Ceylon and Ghana. It provides for grant of provisional asylum in cases where a State decides to apply any of the measures such as rejection at the frontier, return or expulsion.

Further, the use of the word "should" in paragraph 4 of Article III discloses that the provision is merely recommendatory, and not mandatory. The Delegate of Thailand stated that "it is a moral obligation, that is to say, a State should consider the possibility of the grant of provisional or, as some Delegates have observed, temporary asylum".[35]

Paragraph 3 of Article 3 of the UN Declaration on Territorial Asylum provides :

"Should a State decide in any case that exception (only for overriding reasons of national security or in order to safeguard the populations, as in case of mass influx of persons, as stated in paragraph 2) to the principle (of *non-refoulement*) stated in paragraph 1 of this article would be justified, *it shall consider the possibility of* granting to the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State."

Dr. E. Jahn is of the view that the provision concerning "temporary asylum" in the Bangkok Principles is "formulated even more strongly than that in the UN Declaration".[36]

35. *Ibid.*

36. In his article on "The work of the Asian-African Legal Consultative Committee on the Legal Status of Refugees", published in *Zeitschrift fur Auslandisches Offentliches Recht und Volkerrecht*, Vol. 27, Nos. 1-2, July 1967.

It may be interesting to note in this connection the provision of paragraph 5 of Article II of the OAU Convention on Refugees, which reads :

"Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph."

As stated in proposal number 4, set out under item 4 of the present chapter, the Office of the UNHCR has suggested inclusion in Article III of the Bangkok Principles a provision along the lines of the aforesaid provision of the OAU Convention. It has been stated that "such a clause may be of very practical importance for the solution of cases of individual refugees who, for one reason or another, have not succeeded in finding a country of asylum. According to the experience of the UNHCR, however, endeavours to promote the settlement of such cases frequently have little chance of success unless there is a country willing to give temporary shelter and to provide the refugee with a travel document once a country of resettlement has been found".[37] Mr. P. Weis has also stressed the "duty of admitting refugees for such period, however temporary, as may be necessary for their protection".[38] Mr. Whiteman has expressed the view that temporary asylum "may be granted in cases where, for example, the continued presence of a political refugee would adversely affect relations between the host State and the State from which the refugee has fled, or where the host State feels

37. In the "Note prepared by the United Nations High Commissioner for Refugees at the request of the Secretariat regarding recent developments in the field" : See Brief of Documents on the subject prepared for the Tenth Session of the Committee, at pp. 70 and 71.

38. In his article on "Recent Developments in the Law of Territorial Asylum"; *Revue des Droits de l'Homme*, Vol. 1-3, 1968.

unable to control the activities of the political refugee. Temporary asylum includes, of course, asylum that is temporary in character for whatever reason".[39]

The Committee may also consider inclusion of a provision along the lines of Article 31 of the 1951 UN Refugee Convention which provides :

"1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country."

The former draft of the OAU Convention on Refugees also contained similar provisions.[40]

10. Grant of asylum, to be respected, and not to be regarded as an unfriendly act, by other States

This is provided for in paragraph 2 of Article III of the Bangkok Principles, which was included on the proposal of the Delegate of Thailand. The UN Declaration on Territorial

39. In *Digest of International Law* (1967), Vol. 8, at p. 676.
40. See Article 22 of the draft prepared by the Committee of Legal Experts; and Article XIII of the draft as revised by the OAU General Secretariat.

Asylum of 1967, in its preamble, recognizes that the grant of asylum by a State "cannot be regarded as unfriendly by any other State". In paragraph 1 of Article 1, it provides that asylum granted by a State shall be respected by all other States. The OAU Convention on Refugees provides, in paragraph 2 of Article II that the "grant of asylum to refugee is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State". Article I of the Convention on Territorial Asylum, signed at Caracas on 28 March 1954 provides : "Every State has the right, in the exercise of its sovereignty, to admit into its territory such persons as it deems advisable, without, through the exercise of this right, giving rise to complaint by any other State."

11. Where the grant of asylum may place undue burden on the State of refuge

At the Tenth (Karachi, 1969) Session of the Committee the Observer for Cambodia stated that "all the burdens are on the back of the country which is giving them asylum. Our resources are not unlimited".[41] At the Eighth (Bangkok, 1966) Session of the Committee, the Observer for the Office of the UNHCR pointed out that in "Africa, as a result of decolonisation or of ethnic strife the number of refugees of concern to our Office has risen to over 650,000...this...alone shows the vast scale of refugee problems in that area imposing a serious strain on the resources of countries which have just become independent".[42]

As stated in proposal number (ii) set out under item 4 of the present Chapter, the Office of the UNHCR has suggested inclusion of a provision, in Article III of the Bangkok

41. Verbatim Record of Discussions on the subject held at the Tenth (Karachi, 1969) Session of the Committee.
42. See Record of Discussions on the subject held at the Eighth (Bangkok, 1966) Session of the Committee.

Principles, comparable to Article 2 of the UN Declaration on Territorial Asylum of 1967, which provides :

> "1. The situation of persons referred to in Article 1, paragraph 1, is, without prejudice to the sovereignty of States and the purposes and principles of the United Nations, of concern to the international community.
>
> 2. Where a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State."

In its Preamble, the 1951 U.N. Refugee Convention recognizes that the grant of asylum may place unduly heavy burden on certain countries and that a satisfactory solution of the problem cannot be achieved without international cooperation.

Paragraph 4 Article II of the OAU Convention also contains a provision to this effect, which reads as follows :

> Where a member State finds difficulty in continuing to grant asylum to refugees, such member State may appeal directly to other member States and through the OAU, and such other member States shall in a spirit of African Unity and international cooperation take appropriate measures to lighten the burden of the member State granting asylum.

The 1967 Resolution on "Asylum to Persons in Danger of Persecution" of the Council of Europe, in paragraph 4, provides that "where difficulties arise for a member State in consequence of its action in accordance with the above recomendations, governments of other member States should, in a spirit of European solidarity and of common personality in this field consider individually or in cooperation, particularly in the framework of the Council of Europe, appropriate measures in order to overcome such difficulties".[43]

The Committee may consider inclusion of a provision in Article III of the Bangkok Principles, along the lines of Article 2 of the UN Declaration on Territorial Asylum of 1967, or paragrarh 4 of Article II of the OAU Convention on Refugees.

12. Where to settle the refugees

Paragraph 6 of Article II of the OAU Convention on Refugees provides :

> "For reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin."

This seems to be a useful provision designed to reduce the chances of subversive activities by the refugees against their country of origin. *The Committee may consider including a similar provision in Article III of the Bangkok Principles.*

13. Duty to prevent refugees from engaging in subversive activities

As stated in proposal number (iii), set out under item 4 of the present chapter, the Office of the UNHCR has suggested inclusion of a provision in Article III of the Bangkok Principles along the lines of Article 4 of the UN Declaration on Territorial Asylum of 1967 which provides :

> "States granting asylum shall not permit persons who have received asylum to engage in activities contrary to the purposes and principles of the United Nations."

The Office of the UNHCR has observed that Article VII of the Bangkok Principles does provide for a corresponding obligation of the refugee himself in this regard. It, however,

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43. Resolution (67) 14 of 29 June 1967 of the Committee of Ministers of the Council of Europe.

suggests that "it may be useful to clarify that it is also an obligation of States not to permit any subversive activities of the kind described in Article IV of the United Nations Declaration because compliance by States with that obligation will help ensure that the grant of asylum will be respected by other States and will not be regarded as an unfriendly act".[44]

Article VII of the Bangkok Principles provides :

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

The said article was included in the Bangkok Principles on the proposal of the Delegate of Ghana, as modified at the suggestion of the Delegates of Thailand and Japan. The Delegate of Iraq suggested that "the provision should cover also the national security of the country of origin".[45] According to the Delegate of Thailand, the provision did not prohibit genuine activities towards liberation of a dependent country.[46]

The Chairman of the International Law Commission stressed also the need of "not endangering the security or not acting against other countries".[47]

Article III of the OAU Convention provides, in paragraph 2, that "Signatory States shall undertake to prohibit refugees residing in their respective territories from attacking any Member State of the Organisation of African Unity especially through arms, press and radio, which may cause tension between member States".

44. See Brief of Documents prepared by the Committee's Secretariat for the Tenth (Karachi, 1969) Session at p. 70.
45. See Record of Discussions on the subject held at the Eighth (Bangkok, 1966) Session of the Committee.
46. *Ibid.*
47. *Ibid.*

Paragraph 3 of the Resolution on "Asylum to Persons in Danger of Persecution" of the Council of Europe also refers to the need to "safeguard national security or protect the community from serious danger".[48] Article IX of the Convention on Territorial Asylum signed at Caracas on 28 March 1954 provides :

> "At the request of the interested State, the State that has granted refuge or asylum shall take steps to keep watch over, or to intern at a reasonable distance from its border, those political refugees or asylees who are notorious leaders of a subversive movement, as well as those against whom there is evidence that they are disposed to join it."[49]

Article 11 of the Treaty on Political Asylum and Refugees, signed on 4 August 1939 at Montevideo, provides that "it is the duty of the State to prevent the refugees from committing within its territory, acts which may endanger the public peace of the State from which they come".[50]

The Committee may consider including in Article III of the Bangkok Principles, an appropriate provision providing for the duty of the State of refuge in regard to matters mentioned above. If the Committee favours inclusion of such a provision in Article III, then Article VII may have to be deleted.

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48. Resolution (67) 14, of 29 June 1967 of the Committee of Ministers of the Council of Europe.
49. Tenth Inter-American Conference, Caracas, Venezuela, March 1 to 28, 1954.
50. Hudson, *International Legislation*, Vol. VIII, pp. 404 and 409 to 410.

CHAPTER VI

TRAVEL DOCUMENTS AND VISAS

1. Bangkok Principles

"The Principles concerning Treatment of Refugees" adopted by the Committee at its Eighth (Bangkok, 1966) Session do not make provision concerning travel documents and visas for refugees.

2. General comments

An old Russian proverb says that "a man without a passport is a man without a soul". Dr. P. Weis points out that, after the Bolshevist revolution, the Russian refugees, who "were deprived of their nationality . . . . found themselves without passports or valid documents, which impeded their freedom of movement and their possibility of finding a country of settlement".[1] The problem of issuance of travel documents to these refugees was the matter of first concern to the League of Nations. The result of the efforts of the League in this direction was the Arrangement of 5 July 1922 concerning the Issuance of Certificates of Identity to Russian refugees, adopted by 53 States. Under the arrangement, an identity document issued by the country of refuge on a simple piece of paper, on which other countries could issue entry and transit visas, popularly known as "Nansen passport" was created. This document and the "London travel document" issued under the London Agreement of 15 October 1946, have now been superseded by the travel document provided for in the 1951

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

U.N. Refugee Convention, the latter being universally recognized.

In a note concerning recent developments in the field, prepared by the Office of the UNHCR at the request of the Committee, it has been pointed out that "endeavours to promote the settlement of (refugees) frequently have little chance of success unless there is a country willing to give temporary shelter and to provide the refugee with a travel document once a country of resettlement has been found".[2] The Conference on the Legal, Economic and Social Aspects of African Refugee Problem held at Addis Ababa in 1967 recognized "that the provision of travel documents is of importance to refugees enabling them to visit other countries for purposes of study, temporary employment or resettlement and may thus relieve the burden on countries of first asylum".[3] The Conference also stressed "the need for providing refugees with suitable documentation so that their problems may be solved, in a spirit of international solidarity, on a regional level, thereby alleviating the burden on certain countries of asylum in Africa. Negotiations—either bilateral or multilateral—between African States would be required in order that countries more favourably placed geographically may share the burden, for instance, by offering permanent residence to a certain number of refugees in respect of whom they would not request the faculty of return to the country of first asylum, or would limit this option to a very short period".

In another note on "Travel Documents for Refugees", prepared by the Office of the UNHCR at the request of the Committee,[4] it has been pointed out that in "Africa, while the majority of the refugees have been placed in rural settle-

2. See Brief of Documents on the subject prepared by the Committee's Secretariat for the Tenth (Karachi, 1969) Session.
3. In its Recommendation V. CF. AFR/REF/CONF-1967/No. 5.
4. Included in the Notes prepared by the Office of the UNHCR.

ment, there is a considerable number for whom placement on land does not provide a solution, and for whom a second country of asylum must be sought or who need to travel to another country in order to further their education. For these persons a travel document is of the greatest importance. A similar need arises in Asia, where the laws of many States do not normally make special provision for the issuance of travel documents to aliens who cannot obtain passports from their country of origin—which is of course the case for refugees. The UNHCR frequently receives requests for assistance from refugees in Asian countries where difficulties have arisen because of the lack of a travel document".

3. Proposals for provisions in regard to travel documents and visas

The note regarding recent developments in the field, prepared by the Office of the UNHCR at the request of the Committee, points out that "When the item on the Rights of Refugees was placed on the agenda of the Committee in 1964 the memorandum of the Government of the United Arab Republic suggested that the question of travel documents should be dealt with. The need for a solution of this problem has become increasingly apparent and the Committee therefore may wish to include in the "Principles" a special article dealing with the subject".[5]

At the Conference on the Legal, Economic and Social Aspects of African Refugee Problem, apart from the suggestions concerning (a) the 1951 U.N. Refugee Convention Travel Documents, (b) competence for issuing travel documents, (c) extra-territorial effects of issue of travel document, and (d) the return clause, the following proposals were made

5. See Brief of Documents on the subject prepared by the Committee's Secretariat for the Tenth (Karachi, 1969) Session of the Committee at p. 73.

in regard to ways and means of relieving the burden on the countries of first asylum.

(i) That when a refugee leaves a country of first asylum permanent resettlement in a second country which is prepared to admit him, that second country should waive the requirement of a return clause in his travel document. The responsibility for issuing a new document for subsequent travel would then be transferred immediately to the second country;

(ii) That refugees should be provided with identity documents by the country of first asylum, which should in the circumstances be recognized by another State as sufficient for the admission of the holders. Such a solution would be more appropriate for group movements and would of course depend on arrangements made by the two countries concerned. It does not appear suitable for individual travel, or where countries of transit are involved. Moreover, the question of the right of return would still have to be decided; and

(iii) That a country of asylum, willing to accept a specific refugee, should issue him, through its diplomatic or consular representative in the country of first asylum, a travel document enabling him to leave that country and take up his residence in the issuing State. This is normally the procedure adopted in the cases of granting of diplomatic asylum. An extension of this idea concerns refugees who are going to a third country for the purpose of study; the country which will ultimately receive them as residents will issue them with a travel document while they are in the country of first asylum A—enabling them to travel to country B where they will pursue their studies, and finally travel to the country C which issued the documents for permanent residence.

4. Identity papers and international travel documents

As stated above, under item 2 of the present Chapter a travel document issued to a refugee is a substitute for a national passport. It enables the refugee to travel outside the country in which he finds himself. It is normally the country of his first asylum, which issues him a travel document. "Most governments have administrative arrangements whereby stateless persons or aliens, unable to obtain a national passport, may be issued with a travel document. Such documents (aliens passports, *laisesez—passer*, *feuilles de route*), in which it is usually specified that the bearer is not a national of the issuing country, vary in form from a sheet of paper to a bound booklet and in most cases they do not carry an automatic right of return to the country of issue. Sometimes such documents are recognized by the authorities of other countries as an appropriate document on which a visa may be affixed, but sometimes they are not so recognised".[6]

In regard to the identity papers and travel documents to be issued to a refugee, the 1951 U.N. Refugee Convention provides :

Article 27 (Identity Papers)

"The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document."

Travel 28 (Travel Documents)

"1. The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the schedule to this Convention shall apply with respect to such

6. Note on "Travel Documents for Refugees" prepared by the Office of the UNHCR at the request of the Committee's Secretariat.

documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.

2. Travel documents issued to refugees under previous international agreements by parties thereto shall be recognized and treated by the contracting States in the same way as if they had been issued pursuant to this article".

Article 29 (Fiscal Charges)

"1. The Contracting States shall not impose upon refugees duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations.

2. Nothing in the above paragraph shall prevent the application to refugees of the laws and regulations concerning charges in respect of the issue to aliens of administrative documents including identity papers."

The Schedule to the Convention provides that "Children may be including in the travel documents of a parent or, in exceptional circumstances, of another adult refugee";[7] the "document shall be valid for the largest possible number of countries";[8] the "document shall be valid for either one or two years, at the discretion of the issuing authority";[9] the "fees charged for the issue of the document shall not exceed the lowest scale of charges for national passports";[10] the

7. Paragraph 2 of the Schedule.
8. Paragraph 4 of the Schedule.
9. Paragraph 5 of the Schedule.
10. Paragraph 3 of the Schedule.

status of the refugee in regard to his nationality is neither determined nor affected by the document or the entries made thereon so that a refugee is neither under, nor entitled to, diplomatic protection of the country of issue;[11] and the renewal or extension of the validity of the document is under discretion of the issuing country, who, in appropriate cases, may exercise the same through their diplomatic or consular authorities. However, the issuing country has been required to give sympathetic consideration to application for renewal or extension.[12]

A specimen of the travel document is annexed to the Convention. The Office of the UNHCR, "in consultation with governments, has aimed at achieving uniformity of appearance for this document wherever it is issued and has produced a model document for this purpose in booklet form —with stiff blue covers—resembling a national passport. Most of the States issuing the document have adopted this model, with the result that the blue Convention Travel Document has become universally known".[13]

In addition, the UNHCR has made available to a number of governments a small supply of blank travel documents, in conformity with the 1951 Convention, printed in English and French, which the authorities complete with the name of the issuing country, and deliver to refugees in their territory. The UNHCR is prepared to consider extending this service to any State party to the 1951 Convention or 1967 Protocol which, because of the small number of refugees in its country, or for other administrative reasons, does not itself wish to undertake the printing of a special travel document for refugees.

Dr. P. Weis points out that refugees "are entitled to identity documents and refugees lawfully staying in the country

11. Paragraphs 15 and 16 of the Schedule.

12. Paragraph 6 of the Schedule.

13. UNHCR's Note on "Travel Documents for Refugees".

are entitled to special passport-type travel documents enabling them after travel abroad to return to the issuing country".[14] At any time a refugee wants to visit another country temporarily, the latter country, before issuing him an entry visa, would insist on his possessing a document giving him the right to return to his country of asylum beyond the intended date of his stay. Even in case of his intended settlement in the other country, his possession of the aforesaid right of return is generally insisted upon. In regard to the said right, paragraph 13 of the Schedule to the 1951 UN Refugee Convention requires the Contracting States to allow re-admission to refugees holding a travel document, during the period of its validity, on their compliance with formalities prescribed in that regard. As such, the holder of a travel document would be entitled to return without the need of obtaining a re-entry visa. The duration of the document's validity is normally one or two years, except in exceptional cases, where the right of return may be restricted to a shorter period, which is not less than 3 months. Thus, a refugee travel document resembles a national passport in regard to many advantages it confers on the holders.

The possession of the aforesaid document is evidence of the facts that the holder is a refugee and that he resides in the issuing country and has the right to return there after his travel abroad. Paragraph 7 of the Schedule of the 1951 Refugee Convention requires the Contracting States to recognize the validity of the aforesaid travel document. It may be interesting to note that the said document is "internationally recognized, even by certain States not signatories to the Convenition".[15] Practically all the countries, to which refugees have

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

15. According to Mr. Frank E Kreuz, in his article on "The Refugee as a subject of International Law"; 15, *International and Comparative Law Quarterly* (1966).

wished to travel, have so far accepted the said document for visa purposes. However, visa is, almost without exception, issued only to a refugee holding a travel document giving him a right of return to the issuing country. Paragraph 8 of the Schedule to the Convention provides for affixation of a visa to a refugee travel document, in case the country, which the refugee intends to visit, is "prepared to admit him and if a visa is required". Paragraph 9 provides for transit visas to "refugees who have obtained visas for a territory of final destination". Paragraph 10 provides for fees to be charged for issuance of visas, which are not to "exceed the lowest scale of charges for visas on foreign passports". Certain governments have authorised their diplomatic and consular representatives abroad to issue visas on Convention travel documents without consultation with the Central authorities. Furthermore, certain bilateral and regional international agreements have been concluded between States whose nationals enjoy visa-free travel, whereby refugees holding Convention travel documents issued by these States are authorized to travel to such other States for temporary visits without the necessity of a visa, thus assimilating refugees to nationals to a limited extent".[16]

The OAU Convention on Refugees provides for travel documents in terms of provisions of the 1951 U.N. Refugee Convention in that regard. In paragraph 1 of Article VI, the Convention states :

> "Subject to Article III, Member States shall issue to refugees lawfully staying in their territories travel documents in accordance with the United Nations Convention relating to the Status of Refugees and the Schedule and Annex thereto, for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require. Member States may issue such travel documents to any other refugee in their territory."

16. See Brief of Documents on the subject, prepared by the Committee's Secretariat for the Tenth (Karachi, 1969) Session of the Committee at p. 123.

The Committee may consider including a provision in the Bangkok Principles along the lines of paragraph 1 of Article VI of the O.A.U. Convention. This will take care of the proposals number (a), (b), (c) and (d) set out under item 3 of the present Chapter.

5. Travel documents in case of second asylum of a refugee

As pointed out under item 11 of Chapter V of the present Study, the 1951 U.N. Refugee Convention in its Preamble has recognized "that the grant of asylum may place heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international cooperation". It was also pointed out that Article 2 of the U.N. Declaration on Territorial Asylum of 1967 provides that the situation of refugees is "of concern to the international community" and that "where a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider, in a sprit of international solidarity, appropriate measures to lighten the burden of that State".

The requirement in regard to return clause in a travel document under the 1951 U.N. Refugee Convention has led many countries of first asylum to fear that the refugees to whom the travel documents are issued would become their permanent liability. However, experience has shown that the great majority of refugees who were admitted for resettlement to a second country of asylum remained there permanently. The return clause incorporated in the Convention Travel Documents—of great value in encouraging other countries to admit refugees—has only rarely been made use of where migration for settlement was concerned.[17]

17. *Ibid.*, at p. 124.

It has been pointed out above that primary responsibility for issuing travel documents rests with the country of first asylum. The necessity of sharing the burden of the country of first asylum has also been recognized. Certain provisions of the Schedule to the 1951 U.N. Refugee Convention are directed towards lightening the burden of the country of first asylum. These are :

Paragraph 11

"When a refugee has lawfully taken up residence in the territory of another contracting State, the responsibility for the issue of a new document under the terms and conditions of article 28, shall be that of the competent authority of that territory, to which the refugee shall be entitled to apply".

Paragraph 12

"The authorities issuing a new document shall withdraw the old document and shall return it to the country of issue if it is stated in the document that it should be so returned; otherwise it shall withdraw and cancel the document".

The OAU Convention on Refugees, in paragraph 2 of Article VI, provides that "where an African country of second asylum accepts a refugee from a country of first asylum the country of first asylum may be dispensed from issuing a document with a return clause". The said provision has been regarded by the Office of the UNHCR as an innovation. It has been stated by the said Office that this "provision is meant to facilitate the resettlement of groups of refugees from countries of first asylum which, due to their geographic situation, have to bear a heavy burden because of the influx of refugees".[18] *The Committee may consider including in the Bangkok Principles a provision along the lines of paragraph 2 of Article VI of the OAU Convention on Refugees.*

18. In a note on "Recent Developments in the Field" prepared at the request of the Committee's Secretariat, *Ibid.*, at p. 66.

It has been suggested (as noted earlier) that refugees should be provided with identity documents, which should in certain circumstances be recognized by another State as sufficent for the admission of the holders. Such a solution would be more appropriate for group movements and would of course depend on arrangements made by the two countries concerned. It does not appear to be suitable for individual travel, or where countries of transit are involved. Moreover, the question of the right of return would still have to be decided. The Committee may consider the advisability of providing for the cases of group movements of refugees from the country of first asylum to the country of second asylum along the lines mentioned above.

6. Recognition of travel documents issued under previous agreements

The OAU Convention on refugees in paragraph 3 of Article VI provides:

"Travel documents issued to refugees under previous international agreements by parties thereto shall be recognized and treated by Member States in the same way as if they had been issued pursuant to this Article".

The agreements referred above include the Arrangement of 5 July 1922 concerning Issue of Certificates of Identity to Russian refugees, the Arrangement of 31 May 1924 relating to Issue of Certificates of Identity to Armenian refugees, the Arrangement of 12 May 1926 for the Issue of Certificates of Identity to Russian and Armenian refugees, the Arrangement of 30 June 1928 for Issue of Certificates of Identity to these and other refugees, the Geneva Convention relating to the International Status of Refugees of 28 October 1933, the Provisional Arrangement concerning the Status of Refugees coming from Germany of 4 July 1936, the Convention concerning the Status of Refugees coming from Germany of 10 February 1938, and the London

Agreement of 15 October 1946 on the Adoption of a Travel Document for Refugees.

The Committee may consider including in the Bangkok Principles a provision along the lines of paragraph 3 of Article VI of the OAU Convention on Refugees.

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CHAPTER VII

RIGHT OF RETURN OR REPATRIATION

1. Provision relating to the right of return or repatriation in the Bangkok Principles

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

> "A refugee shall have the right to return if he so chooses to the State of which he is a national or to the country of his nationality and in this event it shall be the duty of such State or country to receive him".

2. Comments on the aforesaid provision

Reference to the word "country" in the above provision was added to the Baghdad draft of Article IV, at the Eighth (Bangkok, 1966) Session of Committee at the suggestion of the Delegate of Iraq. The purpose of amendment, according to him, was "to enable the refugee to have the right to return to his country of origin without recognising the political entity in the country of origin". He pointed out "that there are some countries which are not States recognised by international law". He stated: "For example, a refugee from Rhodesia has been received in the neighbouring countries, he wants to return to Rhodesia. So it is not possible to accept the term 'State' only.....In Africa, for example, we have Angola; the Angolans are under the mandate; the Portuguese recognize the authority of the State of Angola as a Portuguese State". He also regarded the amendment to be necessary in view of similar amendments accepted in regard

to Articles I and II of the Bangkok Principles.[1] The Delegates of Ceylon, India and Japan agreed with this view. The amendment was accepted by the Committee.

Regarding the expression "if he so chooses" in Article IV of Bangkok Principles, the Delegate of Ceylon stated that the same emphasizes the "principle that no refugee should be repatriated against his own will" and that the said words "sufficiently bring out the idea of voluntariness".[2] The Delegate of Japan expressed a similar view. The Delegate of Thailand was of the view "that a State has no right, or at any rate the right is not recognized under international law, to expel its own nationals. There is only the right to expel aliens and, therefore, there is no right not to accept the return of its own nationals provided they remain nationals of that State.[3]

At the Bangkok Session, the Committee also considered the question as to whether any provision should be made for implementation of the right of a refugee to return to the State or country of his nationality. The Delegate of Ceylon expressed the view that it was neither possible nor necessary to make any provision for implementation of the right. The Delegate of Japan was of the view that the circumstances were not ripe for making any recommendation on this question. The Delegate of Pakistan was of the opinion that it was not practicable at the said session, to make any provision in this regard. The Delegates of Ghana, India, Indonesia and Thailand were of the view that this question should be kept pending and might be examined by the Committee at a suitable time.

3. General comments on the right of return or repatriation

At the Tenth (Karachi, 1969) Session of the Committee, the Delegate of Jordan called the right of a refugee to return or

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

repatriation "as a fundmental human right under the Charter".[4] Paragraph 2 of Article 13 of the Universal Declaration of Human Rights provides: "Everyone has the right to leave any country, including his own and return to his country".

After the Second World War, responsibility for the care of refugees with a view mainly to their repatriation was undertaken by the United Nations Relief and Rehabilitation Administration (UNRRA), and between 1947 and 1952, by the International Refugee Organization (IRO). After the creation of the Office of the UNHCR, responsibility for these functions was assumed by the said Office. Insofar as the Palestine Arab 'Refugees' are concerned, similar functions were conferred on the United Nations Relief and Works Agency (UNRWA).

At the Tenth (Karachi, 1969) Session, the Observer for the Office of the UNHCR pointed out that "it has been emphasized on many occasions in the United Nations General Assembly (that) voluntary repatriation is one of the basic solutions of the refugee problem. In fact, the integration of refugees in countries of asylum is only a solution for situations in which voluntary repatriation is not feasible. The refugees' choice between repatriation and provisional or final settlement in another country must be truly free, but all possible ways and means should be exhausted to promote the repatriation of refugees who want to return home".[5] The 1967 Conference on the Legal, Economic and Social Aspects of African Refugee Problem expressed the opinion that the best solution to the problem lay in encouraging voluntary repatriation. It noted "that voluntary repatriation is the best solution to refugee problem".[6]

4. See Verbatim Record of Discussions on the subject at Tenth (Karachi, 1969) Session of the Committee for the Meeting of 23 January 1969.
5. *Ibid.*
6. In Recommendation IV. 6 F. AFR/REF/CONF. 1967/No. 4 and 7.

4. Proposals for amendment of Article IV of Bangkok Principles

(i) As already pointed out the question of implementation of the right of return was discussed at the Eighth (Bangkok, 1966) Session of the Committee. Some doubt was expressed as to the practical effect of a provision in that regard, and for that reason the Committee, at the said Session, did not accept any specific provision for safeguarding the implementation of the right of return or repatriation. Later, in their letter of 5 January 1968, addressed to the Committee's Secretary, the Government of Pakistan suggested that a provision for the constitution of a tribunal for determining any controversy on the right of return of refugees, should be made in Article IV. The Office of the UNHCR regarded the suggestion to be quite interesting.[7]

(ii) The office of the UNHCR expressed the view "that the Committee might usefully have a more detailed discussion on the question of repatriation.....The "Addis Ababa Recommendations" on this matter also contain some rather useful suggestions".[8]

5. Cases in which return or repatriation is possible

At the Eighth (Bangkok, 1966) Session of the Committee, the Delegate of India expressed the view that "If refugees are not to be equated with other aliens inasmuch as they do not enjoy the effective protection of the State of their nationality, the ultimate realistic objective should be to facilitate their return to their State of origin, to the extent this is practicable". He further stated : "We agree that his return to the State of origin must be voluntary, but if he does not voluntarily return to where he came from, after the circumstances which led to his becoming a refugee have

7. UNHCR letter dated 26 March 1968.

8. *Ibid.*

ceased to exist, he should also lose the special treatment he would otherwise be entitled to in the State of asylum. We think that this is a reasonable limitation on a general principle".[9] This matter is covered by paragraph 2 of Article II of the Bangkok Principles.

At the Tenth (Karachi, 1966) Session, the Delegate of Jordan expressed the opinion that "Our first concern and effort should be concentrated on repatriation". In his view, "just saying that 'wherever repatriation is not possible, we should take recourse to integration', makes it very easy and convenient for people who have wilfully and by premeditation created the problem of refugees".[10] In this regard, it may be stated that in the matter of return or repatriation of a refugee, we cannot afford to ignore or avoid the principle of "voluntary repatriation".

Cases in which return or repatriation of refugees is possible have necessarily to be only the cases of voluntary repatriation. However, voluntary return or repatriation of refugees can be encouraged through providing them with all the necessary facilities and creating favourable environments for their return. These involve (a) appeal for return, (b) proper arrangements for return, (c) international co-operation in the matter, (d) proper resettlement in their country of origin on their return, and (e) prohibition of penalization on their return. These matters have been discussed below in this Chapter.

6. Prohibition of return or repatriation of refugees against their will

The OAU Convention on Refugees, in paragraph 1 of Article V provides :

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

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

"The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will."

Article IV of the Bangkok Principles embodies the principle of voluntary return or repatriation to the extent it refers to a choice by the refugee concerned, whether or not to exercise the right of return. It does not expressly provide for the specific duty of the State of asylum to repatriate him against his will.

7. Appeal by the country of origin for return of refugees

The OAU Convention on Refugees, in paragraph 4 of Article V, provides :

".....Whenever necessary, an appeal shall be made through national information media and through the Administrative Secretary-General of the OAU, inviting refugees to return home and giving assurance that the new circumstances prevailing in their country of origin will enable them to return without risk and to take up a normal and peaceful life without fear of being disturbed or punished, and that the text of such appeal should be given to refugees and properly explained to them by their country of asylum."

Such a provision would cover certain activities of the country of origin with the object of inducing the refugees to return. A White House press release, dated 24 May 1956 points out that the "Soviet Government and its satellites in Eastern Europe have shown unusual interest in inducing the return of refugees from these countries, particularly those resident in Western Europe and more recently those in the United States. The formation of repatriation committees, proclamations by the various governments of amnesties for citizens who have escaped, and personal contact on the part of official Soviet bloc representatives abroad are manifestations

of this concern". [11] These activities may be distinguished from prohibited activities of the country of origin designed to bring undue pressure on refugees to return. The latter includes blackmail, e.g. the threat to reveal to the Immigration Department of the country of asylum information leading to deportation of the refugees, or death sentences on the refugees refusing to return or imposition of savage and inhumane penalties on any relative of the refugees remaining in the country of origin. These would be clearly repugnant to the principle of voluntary repatriation of refugees, and would not be covered by persuasive methods, such as appeal, to induce the refugees to return.

8. International co-operation in regard to return of refugees

At the Tenth (Karachi, 1969) Session of the Committee, the Delegate for Thailand stated that the "refugee problem should not be left to countries involved in the same, but the international community should assume more active role in a satisfactory solution thereof, providing assistance for their repatriation and providing facilities in the State of asylum". [12]

The OAU Convention on Refugees, in paragraph 5 of Article V, provides :

"Refugees who freely decide to return to their homeland, as a result of such assurances or on their own initiative, shall be given every necessary assistance by the country of asylum, the country of origin, and by voluntary agencies, the international and intergovernmental organisations to facilitate their return."

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11. XXXIV Department of State Bulletin No. 884, 4 June 1965, p. 939.

12. Verbatim Record of Discussions on the subject for the Tenth (Karachi, 1969) Session of the Committee, for the meeting of 23 January 1969.

The 1967 African Conference on Legal, Economic and Social Aspects of African Refugee Problem, in its Recommendation IV, recalled "the efforts and bilateral or multilateral agreements concluded between various African States to facilitate the voluntary repatriation of refugees". The Conference also recommended "that inter-governmental Committees for aid to returning refugees should be set up, consisting of representatives of countries of origin and of countries of asylum and also representatives of refugees and of international organisations, with the approval of the governments concerned". [13]

9. Arrangements for return of refugees

The OAU Convention on Refugees, in paragraph 2 of Article V, provides :

> "The country of asylum, in collaboration with the country of origin, shall make adequate arrangements for the safe return of the refugees requesting repatriation".

The 1967 Conference on Legal, Economic and Social Aspects of African Refugee Problem recommended that "an Inter-African Committee for African Refugee migration should be set up to deal with the transport of refugees from one country to another".[14]

10. Resettlement of refugees, by their country of origin, on their return

The OAU Convention on Refugees, in paragraph 3 of Article V provides :

> "The country of origin, on receiving back refugees shall facilititate their resettlement and grant them the

13. Cf. AFR/REF/CONF. 1967/No. 4 and 7.

14. *Ibid.*

> full rights and privileges of nationals of the country, and subject them to the same obligations".

The aforesaid obligation of the country of origin would include its obligation in regard to economic reestablishment of the aforesaid persons. The 1967 African Conference on Legal, Economic, and Social Aspects of African Refugee Problem recommended that "every possible step should be taken to eliminate the causes, whatever they may be, which have forced refugees to leave their country". It also recommended that "the country of origin should help returning nationals to resettle and take up a normal and peaceful life, with the help of international organisations where necessary, and that all the planning and executive facilities contemplated for the integration of refugees in their country of asylum should, wherever possible, be made equally available to them when they return to their homes. Further, the Conference recommended that "the United Nations General Assembly should adopt a resolution broadening the terms of reference of the UNHCR to enable it to assist governments in their endeavour to aid former refugees who have returned to their homeland.[15]

At the Eighth (Bangkok, 1966) Session of the Committee, the Observer for the Arab League expressed the view that "the right to return to their country of origin implies also that there has not been a complete qualitative transformation in the area which is called the country of origin, because the right to return to the country of origin means to a large extent the right to return to the conditions preceding their eviction..... the right to return to the framework which obtained at the time of eviction.....might not be the right to identical framework, but it does mean the broad character of the framework". [16]

15. *Ibid.*

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

11. Prohibition of penalization of former refugees on their return

The OAU Convention on Refugees, in paragraph 4 of Article V, provides :

> "Refugees who voluntarily return to their country shall in no way be penalized for having left it for any of the reasons giving rise to refugee situations. . . . "

12. Cases in which repatriation is not possible

In cases where repatriation is not possible, the only possibility is that of integration. At the Tenth (Karachi, 1969) Session of the Committee, the Observer for the Office of the UNHCR expressed the view that "the integration of refugees in countries of asylum is only a solution for situations in which voluntary repatriation is not feasible. The refugees' choice between repatriation and provisional or final settlement in another country must be truly free, but all possible ways and means should be exhausted to promote the repatriation of refugees who want to return home".[17]

Article 34 of the 1951 U.N. Refugee Convention requires the Contracting States to "facilitate the assimilation and naturalization of refugees" as far as possible. The 1967 Conference on Legal, Economic and Social Aspects of the African Refugee Problem recommended "that every African Government should agree to take a certain number of refugees so as to relieve the few countries of first asylum which appear to be overloaded and faced with all kinds of difficulties".[18]

At the Eighth (Bangkok, 1966) Session of the Committee, Dr. E. Jahn of the Office of the UNHCR pointed out that

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

18. CF. AFR/REF/CONF., 1967/No. 17.

"in most of the situations which our Office has had to deal, more recently political circumstances have so far directly prevented repatriation or have made the individual refugee hesitant to choose to return to his home country. In fact, although our Office is engaged in assisting individual repatriation movements throughout the world, the number affected is very limited". He further stated : "Whenever a solution of refugee problems by means of repatriation is not feasible, efforts are made to ensure otherwise that refugees do not remain a perpetual burden to the countries where they have found shelter and to the international community which cannot remain indifferent to the sacrifices of countries of first asylum. History has shown the dangers that may result from the stagnation of refugee situations. Unless action is taken promptly, they may become a source of friction, of economic, social and political instability, which ultimately will prove far more costly and difficult to resolve than if speedy and effective action is taken at the outset".[19]

In regard to the practicability of the repatriation of refugees, the Delegate of India was of the view that "this is essentially a political question, because the return of a refugee to his State of origin could be facilitated only by a change of the political situation in that State. If that is not possible, a solution will have to be found, as the statement of the UNHCR made it clear yesterday, either by means of integration in the asylum State or by resettlement in other States".[20]

13. Question of implementation of the right of return or repatriation

As stated in proposal number (i), discussed under item 4 of the present Chapter, the Government of Pakistan, in their letter of 5 January 1968, addressed to the Secretary of the Committee, suggested inclusion in Article IV of the

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

20. *Ibid.*

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

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

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

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

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

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

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

23. *Ibid.*
24. *Ibid.*
25. *Ibid.*
26. *Ibid.*

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

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

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

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CHAPTER VIII

RIGHT TO COMPENSATION

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

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

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

2. Comments on the said provision

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

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

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

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

(i) The Delegates of India and Japan to the Eighth (Bangkok, 1966) Session of the Committee expressed the view that the words "deprivation of personal liberty in denial of human rights" should be omitted from paragraph 2.[3]

(ii) The Delegates of Ceylon, Japan and Thailand at the Bangkok Session suggested that the words "in the circumstances in which the State should incur State responsibility for such treatment to aliens under international law" should be added at the end of paragraph 2.[4]

(iii) The Delegates of Ceylon, Japan, Pakistan and Thailand represented the view that compensation should be payable also in respect of the denial of the refugee's right to return to the State of which he is a national.

(iv) The Delegate of Ghana, at the Eighth (Bangkok, 1966) Session of the Committee, felt that the provisions of paragraph 2 were not clear. He was of the view that there should be some connection between the instances mentioned in the paragraph and the event that led to a person becoming a refugee.[5] Similar views were referred by the Delegates of Ceylon, India and Indonesia and a note to this effect was recorded.

(v) The Government of Pakistan, in their letter dated 5 January 1968 addressed to the Secretary of the Committee, suggested inclusion, in Article V of the

3. *Ibid.*
4. *Ibid.*
5. *Ibid.*

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

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

4. The legal basis for payment of compensation

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

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

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

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

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

5. From whom to claim compensation

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

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

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

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

6. Grounds for claim of compensation

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

9. *Ibid.*
10. *Ibid.*

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

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

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

7. The question of providing for a compensation tribunal

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

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

11. *Ibid.*
12. *Ibid.*

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

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

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

13. *Ibid.*
14. *Ibid.*
15. *Ibid.*
16. *Ibid.*
17. *Ibid.*

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

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

I. Bilateral treaties, setting up international tribunals, which act primarily as channels of negotiations between the States concerned in matters relating to compensation;

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

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

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

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

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

VI. Bilateral treaties providing for compensation, but establishing no machinery for settlement of compensation claims.

I. Bilateral treaties setting up international tribunals, which act primarily as channels of negotiations between the States concerned in matters relating to compensation:

(i) & Conventions between the U.S.A. and Panama, signed
(ii) 28 July 1926 and 17 December 1932, establishing the American-Panamian General Claims Commissions.

(iii) Agreement between Yugoslavia and Czechoslovakia, of 4 September 1947,[19] reviving an existing mixed Commission. Article 4 of the Agreement provided that the representatives of the two Governments concerned might establish a special mixed body to be responsible for determining the amount payable and the method of payment.

(iv) The 1948 agreements on compensation for nationalized British property between the U.K. and Poland,[20] establishing a Mixed Commission, with functions to discuss general questions of compensation to British claimants, to formulate proposals for standard rules and formulae for the assessment of compensation and to discuss the method of payment and questions of transfer of compensation to British claimants.

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

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

(v) The Agreement of 5 May 1949[21] between Denmark and Poland setting up the Danish-Polish Commission to "achieve a solution in each individual case" (in terms of Article 10 of the Agreement).

(vi) The Agreement of 23 May 1949[22] between Italy and Yugoslavia, setting up the Italian-Yugoslav Commission to determine the value of nationalized Italian property.

(vii) Agreement between Turkey and Yugoslavia of 5 January 1950, setting up a joint commission, which was to settle the procedure to be applied for the determination of compensation, and then to fix the amount of compensation according to the 'real value' of the property, rights and interests.

(viii) Agreement of 12 June 1952, between the U.S.A. and Japan establishing the U.S.—Japan Property Commission.[23]

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

Treaty of Peace between the U.S.A. and Italy of 10 February 1947[24]—Article 83 of the Treaty established the U.S.-Italian Conciliation Commission.

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

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

21. *U.N.T.S.*, Vol. 87, p.79.
22. *U.N.T.S.*, Vol. 150, p.179.
23. *U.N.T.S.*, Vol. 138, p.183.
24. *U.N.T.S.*, Vol. 29, p.126.

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

(ii) Arbitration Agreement Treaty made by Portugal with France, Britain and Spain, providing for an arbitration tribunal within the framework of the Permanent Court of Arbitration.

(iii) Agreement of 28 February 1947 between Sweden and Poland, setting up a Mixed Commission, with the task of interpreting the Agreement. The Commission could act in individual cases only if negotiations between the Polish authorities and the Swedish claims break down.

(iv to vii) France concluded compensation agreements with four States following the nationalisation of gas and electricity undertakings in April 1946. These are (a) with Belgium on 18 February 1949,[25] (b) Switzerland on 21 November 1949, (c) U.K., on 11 April 1951,[26] and (d) Canada on 26 January 1951.[27] All these follow a common pattern. Compensation under the first agreement was to be calculated according to Articles 10, 11, 12 and 14 of the French Law of 8 April 1946 as amended. The agreements contained an arbitration clause regarding any difficulties which might arise in connection with interpretation or application and which were not settled by direct negotiation. The parties agreed that the decision of the abritration tribunal would be final and binding upon them.

25. *U.N.T.S.*, Vol. 31, p.173.
26. *U.N.T.S.*, Vol. 106, p.3.
27. *U.N.T.S.*, Vol. 233, p.65.

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

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

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

(i) Treaty of 1850 between U.S.A. and Switzerland, under which nationals of one of the two countries residing or established in the other were to be placed on an equal footing with nationals of the country of residence in matters of compensation.

(ii to iv) Treaties concluded by the U.S.A. with Nicaragua in 1867, Salvador in 1870 and Orange Free State in 1871, providing for national treatment in the matter of compensation.

(v) Convention of Commerce, Navigation and Establishment between France and Greece of 1929, providing for most-favoured-nation treatment.

(vi & vii) Under two protocols between Switzerland and Czechoslovakia concluded in 1946 and 1947, Swiss interested persons were given the right of direct access to the appropriate Czech authorities "so as to be able to take all the necessary steps to protect their rights and submit a claim for compensation or make any other proposals for an accepted settlement".

(viii) Agreement of 19 March 1947 between Belgium and Czechoslovakia.[28]

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

(ix) 1947 Commercial Treaty between Poland and Czechoslovakia providing for national treatment on reciprocal basis.[29]

(x) Agreement of 4 November 1949 between Czechoslovakia and the Netherlands.

(xi) Treaty of Commerce between India and Afghanistan of 4 April 1950, providing for real and just compensation.[30]

(xii) Agreement between Czechoslovakia and France of 1950.

(xiii) Treaty of Amity and Economic Relations of 1951 between the U.S.A. and Ethiopia, providing for fair and equitable treatment.[31]

(xiv) Treaty between the U.S.A. and Japan of 1951,[32] providing that compensation was to be in an effectively realisable form and should represent the full equivalent of the property taken, and, finally that 'adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof'.

(xv) Treaty of Commerce, Establishment and Navigation between the U.K. and Iran of 2 March 1959, providing for equitable treatment to nationals and companies of the other party in the matter of expropriation and to make prompt and adequate compensation, and containing a most-favoured-nation clause.

29. *U.N.T.S.*, Vol. 85, p. 212.
30. *U.N.T.S.*, Vol. 167, p. 105.
31. *U.N.T.S.*, Vol. 206, p. 41.
32. *U.N.T.S.*, Vol. 206. p. 143.

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

(i) The 1930 Convention on Establishment between Turkey and Switzerland providing for fair compensation payable in advance.

(ii) Agreement between France and Poland of 19 March 1958, under which the compensation paid by the Polish Government was in the form of bituminous coal in respect of French interests affected by the Polish Nationalisation Law of 3 January 1946.

(iii) A similar Agreement between Poland and Belgium was concluded in February 1948, under which Poland undertook to deliver 4,600,000 tonnes of coal to Belgium.

(iv) The U.S.-Yugoslav Agreement of 19 July 1948, under which the Yugoslav Government transferred the sum of 17 million dollars to the U.S. Government in full settlement of all claims of the U.S. nationals respecting property and rights and interests in property which had been nationalised or subject to other taking by the Yugoslav Government between 1 Septemeber 1939 and the date of the Agreement.[33]

(v) Agreement of 17 September 1948 between Switzerland and Yugoslavia, providing for payment of lump-sum compensation.

(vi to x) Five agreements which the U.K. concluded with Yugoslavia (1948),[34] Czechoslovakia (1949),[35] Poland (1954),[36] Bulgaria (1955),[37] and Hungary (1956),[38]

33. *U.N.T.S.*, Vol. 34, p. 195.
34. *U.N.T.S.*, Vol. 81, p. 133.
35. *U.N.T.S.*, Vol. 263, p. 405.
36. *U.N.T.S.*, Vol. 204, p. 137.
37. *U.N.T.S.*, Vol. 222, p. 349.
38. *U.N.T.S.*, Vol. 249, p. 19.

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

(xi) Agreement of 25 June 1949 between Switzerland and Poland, providing for lump-sum compensation.

(xii) Agreement of 22 December 1949 between Switzerland and Czechoslovakia, providing for lump-sum compensation.

(xiii) Protocol of 12 May 1949 between Denmark and Poland providing for lump-sum compensation.[39]

(xiv to xvi) Agreement concluded by Switzerland with Yugoslavia and Poland of 16 November 1949, and Hungary of 31 March 1951, providing for lump-sum compensation.

(xvii) An agreement for compensation in kind was concluded privately in 1950 between Swiss shareholders in one of the principal Hungarian electricity enterprises and the Hungarian Government.

(xviii) Lump-sum compensation Agreement of 2 June 1950 between France and Czechoslovakia.

(xix) Franco-Hungarian Agreement of 12 June 1950, providing for lump-sum compensation.

(xx) Under an agreement with Rumania signed on 3 August 1951, Switzerland accepted a lump-sum of 42,500,000 francs.

(xxi) Agreement of 14 April 1951 between France and Yugoslavia, providing for lump-sum compensation.

(xxii) Agreement of 30 September 1952 between Belgium and Czechoslovakia, providing for lump-sum compensation.

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

(xxiii) Agreement of 23 December 1955 between Norway and Poland, providing for lump-sum compensation.

(xxiv) Agreement of 2 December 1955 between Norway and Bulgaria, under which lump-sum compensation was to be paid in instalments.

(xxv) Agreement of 1 February 1955 between Luxembourg and Czechoslovakia, providing for lump-sum compensation.

(xxvi) Agreement between Sweden and Czechoslovakia of 22 December 1956, providing for lump-sum compensation.

(xxvii) Agreement of 30 March 1960 between the U.S.A. and Rumania, providing for lump-sum compensation.

(xxviii) Agreement of 16 July 1960 between the U.S.A. and Poland, providing for lump-sum compensation.

An examination of the above treaties leads us to the following conclusions:

(i) Nearly all the claims for compensation arising out of nationalization have been dealt with or provided for in *bilateral treaties between the Governments concerned.*

(ii) Out of 60 bilateral treaties dealt with in the aforesaid survey, none, except one,[40] of the treaties provides for adjudication by the International Court of Justice, primarily because the Court is not regarded as a suitable forum for the settlement of the large number of related individual cases which have arisen from the operation of the nationalisation measures.

40. U. S.-China Treaty of 1949. See Part IV of the survey given above.

(iii) Only 7 treaties provide for arbitration for settlement of disputes relating to compensation.[41] One of the treaties in this group sets up an arbitration tribunal within the framework of Permanent Court of Arbitration.[42]

(iv) Eight of the treaties examined in this chapter provide for international tribunals which act primarily as channels of negotiations between the States concerned in matters relating to compensation,[43] and only one treaty provides for an international tribunal to act as a conciliation commission between the States concerned.[44]

Several of classical writers on international law have drawn a distinction between arbitral commissions and diplomatic mixed commissions. *Fauchille*, for instance, maintained that the former judged according to law and equity following legal formulae, whereas the latter based their decisions on the common interests of parties following diplomatic formulae, and that they partook of the nature of direct negotiations.

(v) Out of 60 bilateral treaties dealt with in this survey, 15 treaties provide for municipal remedies or establish municipal tribunals for disposing of compensation matters.[45] Some of the treaties in this group provide for national treatment in matters of grant of compensation, while the others provide for a most-favoured-nation treatment.

41. See Part III of the Survey.

42. Arbitration Agreement Treaty made by Portugal with Britain and Spain.

43. See Part I of the Survey.

44. See Part II of the Survey.

45. See Part V of the Survey.

(vi) Twenty-eight treaties referred to in this chapter make no provision in regard to a machinery to dispose of claims for compensation.[46] These treaties invariably incorporate the settlement arrived at between the States concerned in regard to such claims. A large majority of treaties in this group provide for payment of a specified amount of money as lump-sum compensation in settlement of the specified categories of claims, payable either in one lot or instalments over a number of years. Other treaties in this group provide for payment of compensation in kind.

The British Government established a quasi-judicial municipal tribunal to deal with claims for compensation in regard to unjustified expulsion of foreign nationals from the territories in South Africa occupied by the British forces during the Boer Wars. The function of the Commission was to investigate "the claims to compensation which have been made by various foreigners, subjects of friendly Powers, in consequence of their expulsion by the British military authorities from the Transvaal and the Orange River Colony"; to inquire "carfully into the grounds for such expulsion", and to report its findings to the British Government.[47]

The International Law Association, in 1958, considered certain proposals in regard to establishment of a special international tribunal to deal with nationalisation disputes, in particular with the questions of compensation.[48] Some of these proposals were:

46. See Part VI of the Survey.

47. *British Digest of International Law*, Vol. 6, pp. 209 to 230.

48. See *Report of the 48th Conference of the International Law Association*, held at New York in 1958.

(a) Setting up of 'economic tribunals' to hear appeals concerning settlements negotiated by the States concerned.

(b) Establishment of Mixed Claims Commissions to settle differences on the legitimation of claims to compensation, and on the amount and method of this payment.

(c) Setting up an International Arbitral Tribunal to hear and settle nationalization claims *ex aequo et bono*.

(d) Establishing an International Tribunal, which would apply the general principles of law recognized by civilized nations and have jurisdiction over all manners of disputes between States and aliens.

Under the proposals (b), (c) and (d) given above, the access to the tribunals was to be extended to individual claimants.

8. The question of enforceability of the award of the tribunal determining compensation

After having given a final decision, an international tribunal becomes functus office. Thereafter it has no power to supervise the process of execution of its decision, unless specifically required to do so in its terms of reference. Some of the treaties dealing with the matters of execution of the award are:

(a) Article 13 of the Covenant of the League of Nations which required the League Members "to carry out in good faith any award that may be rendered....." and this obligation extended to the awards of any international tribunal, and not solely to the judgments of the Permanent Court of International Justice.

(b) Articie 94(1) of the U.N. Charter requires the Members to expressly undertake "to comply with the decisions of the International Court of Justice in any case to which it is a party". There is, however, no express provision in the Charter, similar to that contained in the Covenant, requiring Members of the U.N. to execute the awards of other international tribunals. Under Article 94(2), recourse may be had to the Security Council to secure compliance with the judgment of the International Court of Justice.

In this regard it may be useful to examine some of the treaties and conventions providing for enforceability of the award of the tribunal determining compensation.

The following treaties and conventions provide for execution of the awards of arbitral tribunals ;

(i) The American-Netherlands Agreement of 1925 relating to the *Island of Palmas Case*, providing that all disputes connected with the execution of the award should be submitted to the arbitrator.

(ii) Convention between Great Britain and Costa Rica in the Augwlar-Amory and Royal Bank of Canada Claims case of 12 January 1922.

(iii) Article IX of United States-Mexican General Claims Commission Convention.

(iv) Article IX of Franco-Mexican Mixed Claims Commission Convention.

(v) Guatemala and Honduras Treaty, Washington, 16 July 1930.

(iv) Bolivia and Paraguay Treaty of Peace, Buenos Aires, 21 July 1938.

(vii) Arbitration Agreement between U.K. and Saudi Arabia, Article XIV.

(viii) Article 7 of the Protocol between Colombia and Peru of 24 May 1934.

(ix) Article 11 of the Charter of the Arbitration Tribunal, Annex B to the Convention of Relations between the Three Powers and the Federal Republic of Germany, 26 May 1952.

In connection with the question of enforceability of the decision of an international tribunal, it may be stated that States, in general, carry out or abide by such decisions. Many of these decisions are self-executing and require "no positive action by any party. In the vast majority of instances in which positive action has been required, execution has followed as a matter of course. Even in cases in which the losing party has been greatly dissatisfied, it has frequently been willing to comply with the decision in order to uphold the respect due to the process of adjudication".[49] However, in a few cases States have refused to execute the decisions of international tribunals. Even while doing so, the "State refusing to abide by a decision usually adduces arguments to justify its course, *exces de pouvoir* being the stock excuse, and in some cases the argument may be sound. In most cases, the refusal does not preclude a later settlement of the dispute through the channels of diplomatic negotiations".[50] It may also be noted in this connection that resort to force by any of the parties to the dispute to secure compliance by the other party with the decision of an international tribunal is not warranted by international law. Only in regard to a judgment of the International Court of Justice, a party may, under Article 94(2) of the U.N. Charter, "have recourse to

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49. Hudson, in his book on *International Tribunals* (1944), at p. 129.

50. *Ibid.*, at p. 130.

the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment".

9. To whom compensation should be payable

Article V of the Bangkok Principles provides for the right of a refugee to receive compensation. However, the survey made under the previous item (item 7) of the present chapter discloses that in many cases, compensation has been paid in a lump-sum to the State concerned and not to the individual claimants. In such a situation, the task of disbursement of compensation to the individual claimants falls on the said State.

In regard to the question, to whom compensation is payable, solution may differ from case to case. In the case of a person who leaves individually due to fear of political persecution, compensation may have to be paid to the person concerned. The case in point is that of individual refugees escaping from East Germany to Western Europe. However, where there is a mass movement of refugees, as in the case of movements of refugees due to events in the Middle East, or in Czechoslovakia, it is advisable that the payment may have to be made to the authority charged with resettlement of the refugees.

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CHAPTER IX

STANDARD OF TREATMENT

1. Provision relating to minimum standard of treatment of refugees in Bangkok Principles

Article VI of the "Principles concerning Treatment of Refugees", adopted by the Committee at its Eighth (Bangkok, 1966) Session, provides :

"1. A State shall accord to refugees treatment in no way less favourable than that generally accorded to aliens in similar circumstances.

2. The standard of treatment referred to in the preceding clause shall include the rights relating to aliens contained in the Final Report of the Committee on the Status of Aliens, appended to these principles, to the extent that they are applicable to refugees.

3. A refugee shall not be denied any rights on the ground that he does not fulfil requirements which by their nature a refugee is incapable of fulfilling.

4. A refugee shall not be denied any rights on the ground that there is no reciprocity in regard to the grant of such rights between the receiving State and the State or country of nationality of the refugee or, if he is stateless, the State or country of his former habitual residence."[1]

1. For "Principles concerning Admission and Treatment of Aliens" adopted by the Committee at its Fourth Session, appended to Bangkok Principles, See *The Rights of Refugees : Report of the Committee and Background Materials* (New Delhi ; 1967) at p. 220-227.

2. Comments on the aforesaid provision

Article VI of the Bangkok Principles was based on a draft prepared by the Delegates of Ceylon, Ghana and India at the Bangkok Session. The said draft replaced earlier Draft Articles VI, VII and VIII as provisionally adopted at the Baghdad (Seventh) Session. Those articles in the Baghdad draft incorporated the provisions of the Committee's Principles on the Treatment of Aliens, with the consequence that the rights stipulated therein were subject to local laws, regulations and orders, and some of them subject also to the conditions imposed at the time of granting asylum. The Observer for the UNHCR asked the Committee to consider whether it was logical to grant a right so broadly defined that the exception may nullify the right itself. He stated : "There are, after all, certain principles which it would seem are of somewhat higher order, and should not be made subject to specific laws... They seem important for the refugees who, as distinct from other aliens, just cannot return to the home country if they do not like the conditions in their country of residence, as is the case with a normal alien, and who generally also have no choice between various countries of asylum. Furthermore, I wonder if it is at all useful to pick out certain rights, certain individual rights, and to leave out others which are at least of equal importance". [2]

There was a great deal of discussion on the matter raised by the Observer for the Office of the UNHCR. Majority of the Delegates were of the view that the standard of treatment for the refugees should be such treatment that is generally accorded to aliens in similar circumstances. According to the Delegate of India, the "better course to adopt would probably be for us to state the general proposition that the treatment of a refugee in a State of asylum will generally be in conformity

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

with the treatment of an alien in similar circumstances. But at the same time we could elaborate some of these principles of the treatment of refugees in the State of asylum". He further stated that "if we just say that he will be treated like an alien, it will be reducing his position. So the best way perhaps would be to say that his status will not be less than that of an alien. It may be more depending upon the policies that are followed by the State of asylum, and in this matter I suggest that it might be desirable to mention a few of more important rights".[3] The Delegate of Japan said that he was "quite prepared to accept the proposal to retain only the general proposition and delete Articles VI, VII and VIII"[4] of the Baghdad Draft. The Delegate of Ghana wanted the Committee to be careful about ensuring that a refugee "does not get treatment less favourable than the alien, at least the minimum standard for the refugee is to be the treatment of an alien.....And when we come to Article XI, it may well stand as it is giving a higher standard to a refugee, if the State so desires, and by so doing a refugee will not be in a worse position than an alien in the country".[5]

The Delegates of Pakistan and Iraq, however, expressed the view that the standard of treatment for a refugee should be similar to that of a national of the country as the refugee stood in a position different from other aliens. The Observer for the Office of the UNHCR stated that if a refugee were to be given the same standard of treatment as an alien, there may be difficulties as laws relating to aliens in many countries provide for conditions of reciprocity, and there may be cases where a refugee will not be in a position to fulfil various conditions prescribed in the laws relating to aliens. He asked "Would it be proper to say, yes, we give the refugee in our country the right to work provided that in the country of his origin our national is given the same right. In this context,

3. *Ibid.*
4. *Ibid.*
5. *Ibid.*

the refugee is somewhat in a special position and the condition of reciprocity should not apply".[6] The Delegate of India wanted the Committee to provide for "the principle of exemption from the application of reciprocity and the prohibition on taking of exceptional measures in relation to refugees because of humanitarian considerations".[7]

The Observer for the Office of the UNHCR also wanted the general proposition in regard to minimum standard of treatment of a refugee, to "be supplemented by a reference to the (UN) Refugee Convention, that may well lead to a clear and satisfactory solution".[8] However, the Delegate of India stated that, at that time, "we don't wish to express any view whether or not reference should be made in our Principles to the 1951 Convention, because our intention was that after we have adopted these principles, we may go over to the Convention, if necessary, to see whether they accord well with the provisions of the Convention".[9]

According to Dr. E. Jahn, in Article VI "the Committee decided to establish a 'minimum standard of treatment of refugees' and to leave it to the participating States to regulate the status of refugees in a more detailed manner, be it by multilateral or bilateral arrangements or by their own municipal laws". He further stated, "While the African participants were in favour of a mere reference to the 1951 Refugee Convention, there was considerable reluctance on the part of the Asian participants to undertake explicit obligations in this matter". [10]

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6. *Ibid.*
7. *Ibid.*
8. *Ibid.*
9. *Ibid.*
10. In his article on "The Work of the Asian-African Legal Consultative Committee on the Legal Status of Refugees", published in *Zeitschrift fur Auslandisches Offentliches Recht and Volkerrecht*, Vol. 27, Nos. 1-2, July 1967.

The Committee also adopted Article IX, which provides:

> "Nothing in these articles shall be deemed to impair any higher rights and benefits granted or which may hereafter be granted by a State to refugees."

The aforesaid "article makes it quite clear that the Principles should not result in a dimunition of the rights of refugees and is in line with the general policy of the Committee that it would be up to the Government of each participating State to decide how it would give effect to the Committee's recommendations". [11]

3. Proposal for amendment of Article VI of Bangkok Principles

In their letter of 5 January 1968 addressed to the Secretary of the Committee, the Government of Pakistan suggested that "the refugees should be accorded the standard of treatment of the nationals of the country of asylum. However, certain reservations should be made, namely, until the refugees are given full citizenship they (i) cannot enter into Government service, (ii) cannot become members of the Parliament or hold political office in the country, (iii) cannot vote as a citizen in the elections of the country, and (iv) their movements can be restricted in the interests of public order and security of State".

4. Views regarding standard of treatment

Mr. Frank E. Krenz states that according "to customary international law, the asylum seeker's status is chiefly governed by the fact that he now falls under the territorial jurisdiction of the receiving State. Generally speaking, he occupies the position of any normal alien, with the proviso that he may not be expelled to his home-country unless there are grave reasons for doing so .....As an alien, the

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11. According to Dr. E. Jahn, *Ibid.*

refugee is entitled to treatment in accordance with the rule of law, as well as to the benefits of the "minimum treatment" rule. He may not be treated as an outlaw nor confined in disregard of the law. However, the refugee cannot claim rights not otherwise granted by legislation to foreigners, such as permission to work, assistance under public or social schemes, free education and the like. In addition he has to submit to the rules pertaining to alien administration".[12]

It is submitted that while determining the standard of treatment of refugees, considerations that should be kept in view are (i) human rights aspects, and (ii) integration aspects. The fact that refugees cannot return to their country of origin due to peculiar circumstances in which they are placed has to be borne in mind. At the Eighth (Bangkok, 1966) Session of the Committee, the Observer for the Office of the UNHCR pointed out that "experience has shown that integration of refugees is often hampered by legal obstacles resulting from the application to them of the "treatment of aliens" concept and in particular of regulations designed to protect national labour. The legal problems of refugees are thus seen in the context of a group of ordinary foreigners temporarily tolerated in a given country until the time when they can be returned. Today we know how unsatisfactory and dangerous it may be to apply this concept to refugees and how easily it may lead to human suffering, to economic burdens for the State concerned and for the international community, to social and economic problems, or even to political tension. The fact can no longer be overlooked that the refugee differs from the ordinary alien. We now know that legal instruments dealing with the status of refugees should be seen not only in the context of a somewhat modified aliens law but also against the background of possible permanent solutions. These should

12. In his article on "The Refugee as a subject of International Law"; (1966) *International & Comparative Law Quarterly*, at p. 109.

help to ensure that refugees may become useful members of their new communities and that international action for the solution of refugee situations may become effective".[13]

The Observer for the Arab League stated that in the case of "the Arab States hosting the Arab refugees from Palestine, the question of integration does not arise and the question of continuous integration does not arise. Their integration ultimately means the dissolution of their entity and of their right to return".[14]

The 1967 Conference on the Legal, Economic and Social Aspects of African Refugee Problem recommended that "wherever possible refugees should enjoy the same rights and privileges as nationals of the country of asylum so as to promote the integration and assimilation of refugees". As regards the social rights of refugees, the Conference recalled "that the Universal Declaration of Human Rights and the 1951 United Nations Refugee Convention contain the essential basic provisions in this matter". The Conference also recognized "that the granting of social rights, more particularly as regards gainful employment and education, may help to ensure that refugees do not become a burden to their country of asylum and may enable them to countribute to its economic and social well-being". Dr. P. Weis has also expressed the view that assimilation and integration of refugees should as far as possible be facilitated.[15]

In regard to the problem of standard of treatment, Mr. Frank E. Krenz points out "that unless the country of

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

14. *Ibid.*

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

asylum, in the exercise of its rights to afford refuge, adopts special provisions regulating his status and legal capacity, the refugee may find himself in difficult circumstances. The law is indeed particularly vague on this point, and all depends on the arrangements made by the individual States".[16]

Standard of treatment, in case of refugees, has necessarily to vary from case to case, depending on (i) particular classification to which a refugee belongs, (ii) the duration of his stay in the country of asylum, and (iii) the possibilities of a refugee's return to his country of origin, or of his final resettlement in a second country of asylum in the near future. Where a person is a "refugee", in the accepted sense of the term and has resided sufficiently long in the country of asylum, and where there are no possibilities in the near future of his return to his country of origin or of his final resettlement in another country of asylum, the case of his assimilation and integration in the country of asylum may be considered strong and he might be given rights similar to those of nationals of the country of asylum. On the other hand, where a person is not a "refugee", in the proper sense or where he belongs to a group or has resided in the country of asylum only for a short period, or else is likely to return to his country of origin or to find his final resettlement in another country of asylum, he may have to be treated on a different footing.

As already stated the Government of Pakistan, in their letter of 5 January 1968, have suggested that "the refugees should be accorded the standard of treatment of the nationals of the country of asylum". However, the Government of Pakistan itself has suggested that certain reservations should be made, namely: until the refugees are given full citizenship, they (i) cannot enter into government service, (ii) cannot become members of Parliament or hold political office in the

16. In his article on "The Refugee as a subject of International Law", *International & Comparative Law Quarterly* (1966), p. 110.

country, (iii) cannot vote as a citizen in the elections of the country, (iv) their movements can be restricted in the interests of public order and security of State. At the Eighth (Bangkok, 1966) Session of the Committee also, the Delegates of Pakistan and Iraq expressed the view that the standard of treatment for the refugee should be similar to that of a national of the country of asylum, as the refugee stood in a position different from other aliens. The Delegate of Pakistan stated that the provisions of Article VI, as adopted by the Committee, were not acceptable to him, as in his view a refugee should be accorded the standard of treatment applicable to a national of the country of asylum. He said: "It has been my personal experience that after becoming a refugee subject to local laws that were made for the treatment of the refugees, all the rights and liabilities that the refugees in fact obtained were absolutely the same as that of nationals in that country. So why keep him in suspense, still comparable to an alien and still the fear of his being turned back as an alien. Why don't we try to have him absorbed in the normal life of the country of his refuge by according him all the rights and responsibilities that would be available to a national in the country of his selection.[17] The Delegate of Iraq pointed out that in his country, under the existing laws, a refugee was accorded the national standard of treatment subject to a few exceptions.[18]

In a note prepared at the request of the Committee's Secretariat, the UNHCR has commented upon the proposal of the Pakistan Government, contained in their letter of 5 January 1968. It has been pointed out that the proposal "corresponds to the views already put forward by the Delegations of Iraq and Pakistan at the Bangkok Session. The proposal is also in line with the recommendations adopted at the "African Conference on the Legal, Economic and Social Aspects of African

17. See Record of Discussions on the subject at the Eighth (Bangkok, 1966) Session of the Committee.
18. *Ibid.*

Refugee Problem" and, in particular, with the view expressed that the granting to refugees of the same rights and privileges as nationals of the country of asylum is the best means to promote the integration and final settlement of refugees. As stated in Recommendation VI of the Addis Ababa Conference, the granting of social rights, in particular, may help to ensure that refugees do not become a burden to the country of asylum and may enable them to contribute to its economic and social well-being".[19]

The Delegate of Japan to the Tenth (Karachi, 1969) Session dealt with the problems involved in according national standard of treatment to refugees. He agreed that his Government was not giving the standard of national treatment. He said : "To assure to refugees the same treatment which our nationals have in the fields of labour, employment, social security, education etc., will entail too heavy financial and other responsibilities upon our Government, and, in one sense, the refugee will have more favourable treatment than the ordinary foreign residents in my country. These points make us very reluctant to accede to the suggestion of the United Nations High Commissioner for Refugees".[20]

In the note prepared by the Office of the UNHCR, it was stated that while "the granting to refugees the same rights and privileges as nationals of the country of asylum would, from the humanitarian point of view, be the most welcome solution, it should at least be recognized that the standard of treatment, for which the United Nations Refugee Convention provides, constitutes the basic minimum. The acceptance of these principles is reflected by the relatively high number of

19. See Brief of Documents prepared by the Committee's Secretariat for the Tenth (Karachi, 1969) Session, at p. 71.

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

accessions to the Refugee Convention (54 countries)[21] and it is interesting to note that nearly half the number of parties to the Convention are independent African countries.....The Committee might, however, wish to take a position with regard to the principles enunciated in the 1951 Convention and the 1967 Protocol, which have now been widely accepted as representing the minimum standard of treatment of refugees".[22] At the Eighth (Bangkok, 1966) Session of the Committee, the Observer for the Office of the UNHCR stated : "I am sure that the distinguished members of this Committee will agree that the minimum standards adopted in the Convention are still valid today and that we should not now apply to new refugees standards inferior to those adopted more than 15 years ago. The application of such lower standards in new refugee situations would, in fact, mean discrimination against new refugees as compared with old refugees."[23] In this regard Mr. Kwasi Gyeke-Dako has expressed the view that the "adoption of a less favourable instrument will impair the value of the universal international instrument with the consequent reduction of the scope and application of international law in this humanitarian field....."[24]

Commenting upon the provisions of the 1951 U. N. Refugee Convention in this regard, the Observer for the Office of the UNHCR stated at the Tenth (Karachi, 1969) Session of the Committee that the "Convention does not provide for national treatment, but for a standard which is somewhat between that of an alien and a national. I also would like to stress that governments which find it difficult to implement one

21. 56 countries as of 1 September 1969.

22. See Brief of Documents on the subject prepared by the Committee's Secretariat for the Tenth (Karachi, 1969) Session of the Committee at pp. 71 and 72.

23. *Ibid.*, at pp. 149 and 150.

24. In his article on "Some Legal and Social Aspects of African Refugee Problems", *Ibid.*, at p. 348.

or the other provisions of the Convention may make reservations to it".[25]

5. A comparison between the standard of treatment provided in the 1951 U. N. Refugee Convention and standard of treatment under Article VI of the Bangkok Principles

(i) Under the 1951 U. N. Refugee Convention, refugees are to be *treated on an equal footing with the nationals of the State of asylum* as regards freedom to practise their religion and the religious education of their children;[26] as regards wage-earning employment, in the case of refugees who have completed three years' residence in the contracting State concerned or who have a spouse whom they have not abandoned or two or more children possessing the nationality of that country,[27] as regards rationing,[28] elementary education,[29] public relief and assistance,[30] labour legislation and social security,[31] fiscal charges and taxation;[32] and with respect to protection of industrial property, such as inventions, trade marks and trade names, and rights in literary and scientific works;[33] and access to courts of law, including legal assistance and exemption from security for costs.[34]

25. Verbatim Record of Discussions on the subject at the Tenth (Karachi, 1969) Session of the Committee, for the Meeting held on 23 January 1969.
26. Article 4.
27. Article 17 (2).
28. Article 20.
29. Article 22 (1).
30. Article 23.
31. Article 24.
32. Article 29.
33. Article 14.
34. Article 16.

Under the provisions of Article VI of the Bangkok Principles, the refugees are accorded aliens' treatment in regard to freedom to profess and practise their own religion;[35] access to the courts of law and legal assistance;[36] wage-earning employment;[37] and taxation and duties.[38]

At the Tenth (Karachi, 1969) Session of the Committee, the Observer for the Office of the UNHCR stated : "How can the problem of these individual refugees, mostly qualified workers and intellectuals, be solved if they are not given the right to participate in the economic life of the country of asylum or, wherever applicable, in its educational facilities ?"[39] The Observer for the Democratic Republic of Congo pointed out that "since the very beginning, the Angolan refugees in the Congo, ever since their arrival, enjoy exactly the same rights as the Congolese citizens despite the fact that the problems of employment and education are difficult to solve even for the Congolese themselves. No discrimination whatever is made against the Angolans in this matter".[40] The Observer pointed out that his Government "houses these people. It provides them with work, furnished living quarters, land to build on with funds for the purpose, and fields to cultivate. The illetrate Angolan children and adults attend school under the same conditions as the citizens of the Congo. They have access to the hospitals and enjoy other direct substantial and cash contributions which the Government of the Congo gives them. In brief, the refugees from Angola have the same

35. Paragraph (ii) of Article 8 of the "Principles concerning Treatment of Aliens" adopted by the Committee.
36. *Ibid.*, paragraphs (iv) and (v) of Article 8.
37. *Ibid.*, Article 9.
38. *Ibid.*, Article 13.
39. Verbatim Record of Discussions on the subject at the Tenth (Karachi, 1969) Session of the Committee, for the Meeting held on 23 January 1969.
40. *Ibid.*, for the Meeting held on 28 January 1969.

status as the Congolese citizens except for the national civil service (in which they can nevertheless be employed as technicians if they show sufficient capacity and competence) and for purely political rights reserved for nationals alone".[41]

(ii) Under the 1951 U. N. Refugee Convention, *most favoured-nation treatment* is provided for in regard to their right to form and join non-political and non-profit making associations and trade unions;[42] and the right to engage in wage-earning employment in case of refugees not fulfilling the conditions for national treatment.[43]

Under the provisions of Article VI of the Bangkok Principles, a refugee is entitled only to aliens' treatment in regard to wage-earning employment.[44]

(iii) Under the 1951 U. N. Refugee Convention, refugees are entitled to *treatment as favourable as possible and in any event not less favourable than that accorded to aliens generally* in regard to acquisition of movable and immovable property, property rights and interests;[45] the right to engage on their own account in agriculture, industry, handicrafts and commerce, and to establish commercial and industrial companies;[46] to practise the liberal professions;[47] to obtain housing;[48] and to benefit from higher education,

41. *Ibid.*
42. Article 15.
43. Article 17 (1).
44. Article 9 of the "Principles concerning Treatment of Aliens", adopted by the Committee.
45. Article 13.
46. Article 18.
47. Article 19.
48. Article 21.

remission of fees and charges and the award of scholarships.[49]

Out of these matters, in regard to the right to acquire, hold and dispose of property;[50] and professional or business activities,[51] the Bangkok Principles also, under the provisions of Article VI, allow aliens' treatment to refugees.

At the Eighth (Bangkok, 1969) Session of the Committee, the Observer for the Office of the UNHCR expressed the view that "it is not possible to integrate refugees if they are not given the right to work. It is not feasible to foresee projects for agricultural development if refugees are not allowed to acquire property".[52]

(iv) Under the 1951 U. N. Refugee Convention, refugees are entitled to aliens' treatment in regard to administrative assistance[53] and freedom of movement.[54]

Under the provisions of Article VI of the Bangkok Principles also, refugees are entitled to alien treatment in regard to freedom of movement.[55]

(v) Under the 1951 U. N. Refugee Convention, refugees, on certain conditions, are exempt from the requirement of reciprocity, especially legislative reciprocity.[56]

49. Article 22 (2).
50. Articles 11 and 12 of "Principles concerning Treatment of Aliens", adopted by the Committee.
51. *Ibid.*, Article 9.
52. See Record of Discussions on the subject at the Eighth (Bangkok, 1966) Session of the Committee.
53. Article 25.
54. Article 26.
55. See Article of "Principles concerning Treatment of Aliens", adopted by the Committee.
56. Article 7.

This is provided for also in the Bangkok Principles, in paragraph 4 of Article VI.

(vi) Under the 1951 U. N. Refugee Convention, the refugees are exempt from exceptional measures imposed on aliens, solely on the ground of their nationality.[57] There is no corresponding provision in the Bangkok Principles.

(vii) Under the 1951 U. N. Refugee Convention, personal status of a refugee is to be governed by the law of his country of domicile or residence.[58] There is no similar provision in the Bangkok Principles.

(viii) Under the 1951 U. N. Refugee Convention, refugees once admitted to legal residence are protected against expulsion, subject to the considerations of national security and public order.[59] In this regard, Article VIII of the Bangkok Principles provides :

"1. Save in the national or public interest or on the ground of violation of the conditions of asylum, the State shall not expel a refugee.

2. Before expelling a refugee, the State shall allow him a reasonable period within which to seek admission into another State. The State shall, however, have the right to apply during the period such internal measures as it may deem necessary.

3. A refugee shall not be deported or returned to a State or country where his life or liberty would be threatened for reasons of race, colour,

57. Article 8.

58. Article 12.

59. Article 32.

religion, political belief or membership of a particular social group".

Article 16 of the "Principles concerning Treatment of Aliens", adopted by the Committee at its Fourth Session, provides for explusion and deportation of aliens. However, these shall be subject to the provision of Article VIII of the Bangkok Principles, in so far as they are applicable to refugees.

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CHAPTER X

DUTIES OF A REFUGEE

1. Provision in regard to duties of a refugee in the Bangkok Principles

Article VII of the "Principles concerning Treatment of Refugees", adopted by the Committee at its Eighth (Bangkok, 1966) Session, provides—

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

2. Comments on the aforesaid provision

In regard to the above provision, Dr. E. Jahn has pointed out that "Article VII corresponds to the clause in the U.N. Declaration on Territorial Asylum concerning prohibition of activities contrary to the purposes and principles of the United Nations", but mentions in addition "activities endangering the national security of the country of refuge. This article was particularly supported by the African delegations which felt that specific mention should be made of these activities".[1]

3. Prohibition of subversive activities against any country

It may be noted that Article III of the OAU Convention provides that every refugee shall "abstain from any subversive

1. In his article on "The Work of the Asian-African Legal Consultative Committee on the Legal Status of Refugees", published in *Zeitschrift fur Auslandisches Offerdliches Recht and Volkerrecht*, Vol. 27, Nos. 1-2, July, 1967.

activities against any Member State of the OAU". The African Conference on Legal, Economic and Social Aspects of African Refugee Problem of 1967, has recommended that every refugee shall "abstain from any subversive activities against any African country, except for countries under colonial or racist minority domination".[2]

Dr. Kwasi Gyeke-Dako has pointed out that since "the major cause of refugee situations in Africa stems from political unrest, most of the refugees, at least the politically-conscious ones, may be tempted to seek ways and means of ousting the regimes from which they had fled. These regimes may include independent African States".[3]

4. Prohibition of activities inconsistent with or against the principles and purposes of the United Nations

It may be noted that the U.N. Declaration on Territorial Asylum of 1967, in Article 4, provides for the obligation of the State of asylum, and not that of the refugee. It provides—

> "States granting asylum shall not permit persons who have received asylum to engage in activities contrary to the purposes and principles of the United Nations."

The OAU Convention and the 1951 U.N. Refugee Convention do not contain any provision in this regard, in reference to duties of a refugee.

5. Duty to conform to the laws and regulations of the State of asylum

Article 2 of the 1951 U.N. Refugee Convention provides—

> "Every refugee has duties to the country in which he finds himself, which require in particular that he conform

2. In Recommendation III, CF. AFR/REF/CONF--1967/NO. 3.

3. In his article on "Some Legal and Social Aspects of African Refugee Problems". See Brief of Documents on the subject prepared by the Committee's Secretariat for the Tenth (Karachi, 1969) Session at pp. 352 and 353.

to it laws and regulations as well as measures taken for the maintenance of public order."[4]

Article III of the OAU Convention on Refugees also makes a similar provision. The African Conference on Legal, Economic and Social Aspects of African Refugee Problem of 1967 also recommended that every "refugee owes a duty to the country of asylum, which requires in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order".[4]

The Committee may consider including in Article III of Bangkok Principles a provision along the lines of Article 2 of the 1951 U.N. Refugee Convention.

4. In Recommendation III, CF. AFR/REF/CONF. 1967/No. 3.

III. SUMMARY RECORD OF DISCUSSIONS HELD AT THE ELEVENTH SESSION, ACCRA

The subject "Right of Refugees" was discussed by the Committee at its Eleventh Session in Accra (Ghana) during the second, fifth, sixth and seventh meetings of that Session held on the 20th, 23rd, 26th and 27th of January, 1970.

The basic issues which were before the Committee at this Session were : (i) a reappraisal of the principles concerning treatment of refugees as adopted by the Committee at its Eighth Session held in Bangkok (Bangkok Principles) in the light of recent developments in the field of international refugee law; and (ii) the question of giving appropriate expression to the general principles governing the right to return, the restoration of property and compensation to Palestinian Arab Refugees and other displaced persons and to formulate the same as a set of principles.

Opening the discussion on the subject in the second meeting the Delegate of JORDAN said that the Principles adopted by the Committee at its Bangkok Session concerned the case of what may be called political refugees, i.e. people who leave their countries of origin of their own accord. The U.N. Convention on Refugees of 1951, according to him, also contemplated such a category of persons and the definition adopted in the OAU Convention spoke of a refugee as a displaced person seeking refuge in another place outside his country of origin or nationality. He held the view that the definition given in the Bangkok Principles, in the U.N. Convention and in the OAU Convention did not take care of the category of displaced persons who were compelled on account

of warlike operations and other difficulties to leave their habitual place of residence but were desirous to go back and were being prevented from doing so by the Government or the military authorities in control of such place of habitual residence. He affirmed that such displaced persons formed a category of refugees and hoped that no one would dispute the humanitarian necessity of providing certain rules for the treatment of these displaced persons. He then referred to the proposed *Addendum* to the Bangkok Principles which he had submitted at the Karachi Session and stated that on further consideration he would like to add to the text of the *Addendum* the following two paragraphs :

"4. Where such a person does not desire to return, he shall be entitled to adequate compensation by the Government or military authorities in control of the place of habitual residence as determined by an international body.

5. If the status of such a person is disputed by the Government or military authority in control of the place of habitual residence, the issue shall likewise be determined by an international body."

He proposed that the *Addendum* suggested by him at the Karachi Session as modified by the addition of the above two paragraphs be considered by the Committee.

The Associate Member of the REPUBLIC OF KOREA in supporting the proposal made by the Delegate of JORDAN stated that the problem of refugees was not merely a humanitarian or social problem. He said that when several millions of refugees were being uprooted and forcibly moved about, solution of the problem acquired an international character which concerned not only one State but several States and should appropriately be dealt with by a regime of international order. He said that the phenomenon of displaced persons had arisen particularly since the Second World War and he thought

it necessary to bring this category of people separately under the regime of international law. He referred to the experience in his own country on the specific issue of the right of return. Commenting on the proposal of the Delegate of Jordan he stated that the compensation payable should be prompt and adequate. He also said that the principle embodied in the Jordan draft should be applicable in relation to a larger category of authorities whether such authorities were recognised as lawful government or not. The Delegate of PAKISTAN stated that his Delegation had moved for the amendment of the definition clause by way of a specific amendment in Article I and consequential amendments in Articles IV and V of the Bangkok Principles, and the two categories of persons which his Delegation had proposed at the Karachi Session to be covered by appropriate definition of refugees were as follows :

"(i) Firstly, persons who have been displaced from a country the sovereignty over which or the international status of which is in dispute, ought to be clearly covered by the definition;

(ii) Secondly, persons who have been displaced from their country as a result of foreign occupation or aggression ought to be also covered by the definition and classified as international refugees."

With regard to the second category, he said, that consultation with various other Delegations revealed that it might be appropriate to state the right of return and the right to the restitution of properties of persons displaced as a result of external aggression or occupation in the form of an *Addendum* to the Bangkok Principles. He stated the Delegate of Jordan, acting on what appeared to be the consensus of opinion of the Delegates, has submitted a draft *Addendum* to the Bangkok Principles at the Karachi Session, and in his view, the logical point to start the discussion in respect of the amendment to the definition of refugees was to consider the last Jordanian proposal which largely covered the second category

of persons contemplated in the joint proposal of Pakistan and Jordan. He stated that all proposals made at the Tenth Session had been deferred for consideration at the Eleventh Session and he would appreciate consideration of the first proposal of Pakistan regarding amendment to the definition so as to include persons who had been displaced from a country the sovereignty or the international status of which was in dispute. He stated that persons who through fear of persecution or otherwise were displaced from their countries ought to be regarded as refugees. This, according to him, was implicit in Article I of the Bangkok Principles and only needed further clarification. He recalled that at the Karachi Session a resolution was unanimously adopted recognising and declaring the right in international law of the Palestinian Arab refugees and that the first step having been achieved, he hoped that the legal basis for adoption of that resolution would be reflected in a formulation in the form of an *Addendum* to the Bangkok Principles.

He then referred to Article IV of the Bangkok Principles dealing with the Right of Return and stated that his Delegation regarded this right as one of the most important rights of refugees, and stressed the need for setting up of international tribunals or commissions for determining differences that may arise between States regarding implementation of this right.

Referring to Article V of the Bangkok Principles which deals with the Right to Compensation, he said that provisions were not adequate and suggested that improvement should be made.

Referring to Article VI of the Bangkok Principles which deals with the question of minimum standard of treatment, he said that the Pakistan Delegation had earlier taken the view that refugees, for humanitarian reasons, should be granted the standard of treatment applicable to the nationals of the country of asylum, but he realised that in certain circumstances

it might be difficult for the receiving State to carry this out in actual practice.

As for the provision of travel documents and other papers for refugees, he said that the issue of such documents would greatly facilitate and secure the rights of refugees as defined in the Bangkok Principles. Alternatively or in addition to issue of travel documents, the Committee might, he suggested, consider the distinction between protection of convenience and genuine protection by the receiving State.

The Delegate of JAPAN thought that the refugee problem was one of the most important problems of the world, but it was essentially humanitarian in character and should be examined as such, as only by so doing it could be solved. Legal aspects of the problem, in his view, constituted only a minor element. He felt that the solution of the refugee problem should first consist in the return of refugees to their homeland, and therefore the importance of the right of return and the obligation of the State to receive its nationals was paramount. The question of assimilation or integration of refugees was a matter of policy for each receiving State. The Bangkok Principles adopted by the Committee at its Eighth Session were sound and acceptable to him. However, in view of the adoption by the UN General Assembly of the Declaration on Territorial Asylum and the adoption by the O.A.U. of the draft Convention of September 1969 it became necessary, in his view, to re-examine the Bangkok Principles in order to ascertain whether it needed to be supplemented or modified in the light of these international instruments. That was the reason why at the Karachi Session the Japanese Delegation had supported the idea of a review of the Bangkok Principles. He said that in view of the adoption of the O.A.U draft Convention, the Committee should follow the example of African States in adopting the definition of refugee which iscontained in Article 1 of that Convention.

As regards those who were displaced from one part of the country to another, he was of the opinion that they should be treated separately assuring them of the right to return to their home place. The United Nations Convention of 1951 did not, in his opinion, legally constitute the minimum standard of treatment. He said that the Committee should adopt the principle of minimum international standard for aliens in the country, for national standard of treatment was not sufficient for aliens lawfully living in a foreign country. He agreed that displaced persons had the right to return to their place of residence, and where need be they had the right to be compensated.

The Delegate of CEYLON stated that the main question for consideration was whether a displaced person fell within the category of refugees, and as the matter had to be looked upon primarily from a humanitarian point of view, the question should be clarified if there was any doubt. He said that there were three ways in which this could be achieved : by amending the definition of refugee in the Bangkok Principles, by adopting an *Addendum* as proposed by the Delegate of Jordan, and thirdly, by adopting an entirely new set of principles applicable to displaced persons as suggested by the Delegate of Japan. He was in favour of the proposal made by the Delegate of Jordan, i.e. for the adoption of an *Addendum* to the Bangkok Principles. He also agreed that the compensation payable should be prompt and adequate and pointed out that of the five clauses of the *Addendum*, clauses (4) and (5) which were introduced at the Eleventh Session were the most important. He, however, felt that the expression 'international body' was too vague and something more concrete should be spelt out.

The Associate Member for the REPUBLIC OF KOREA commenting upon the preceding discussion stated that the international body ought to be a quasi-judicial one. He also suggested that the compensation contemplated for refugees

should be effective. He felt that the case of displaced persons deserved a separate and full treatment and not as part of the refugee problem which should be confined to the refugees in the traditional sense. As regards the standard of treatment, he felt that in view of the very trying circumstances under which a person becomes a refugee, he should deserve better treatment than aliens and the treatment that should be accorded to him should approach the international standard, and in any case he should be granted human rights.

The Delegate of IRAQ referred to the violation of the rule of law as a result of the Zionist aggression against the people of Palestine and their occupation of the territory in flagrant violation of the Charter of the United Nations. He referred to the plight of the Palestinian Arabs and the various resolutions which were passed by the United Nations. He mentioned that the Israeli aggression of 1967 on Arab States had added a new category of persons as refugees and this had aggravated the problem as thousands of people had become homeless and without protection. He said ,that the definition to cover this new category of refugees should be adopted in order to bring these categories of persons within the protection contemplated in the Bangkok Principles. He said that the right of the people expelled from their homelands by occupying powers and the obligation of such powers towards these people were already in existence in customary as well as in conventional international law. Furthermore, the rights of the Palestinians who preferred to return to their homes had been recognized and emphasized in numerous resolutions passed by the United Nations and these, undoubtedly, formed a legal basis for the formulation of the principles on the subject. In his view, the proposal put forward by the Delegate of Jordan regarding incorporation of the *Addendum* to the Bangkok Principles was appropriate and he requested the Committee to consider it.

The Delegate of INDIA stated that in his view the Bangkok Principles were comprehensive enough to cover the

case of displaced Arabs, and in any case the plight of the Palestinian Arab Refugees to return to their homes or to receive compensation had been recognised since 1948 in some 30 resolutions passed by the U.N. General Assembly and the Security Council. He referred to the special resolution which was passed at the Karachi Session dealing with the Palestinian Arab refugees and said that the question which was to be considered at the present session was whether the principles contained in the Bangkok Report should be reconsidered or whether a fresh set of principles be adopted with reference to the category of persons known as displaced persons. He wanted the Committee to decide the basic question as to whether a new set of principles should be prepared on the question of displaced persons. He appreciated the move on the part of the Delegate of Jordan and said that he was prepared to consider the entire proposal sympathetically and carefully.

The Delegate of INDONESIA supported the proposal of the Delegate of Jordan. He said that the problem of refugees in the Middle East should be seen within the framework of the various resolutions passed by the United Nations.

The Delegate of the U.A.R. supported the proposal presented by the Delegate of Jordan. He, however, felt that the expression to be used in the *Addendum* should be 'full compensation' instead of 'adequate compensation' and that the authorities should reasonably be required to pay full compensation.

The Delegate of NIGERIA stated that the proposal of the Delegate of Jordan merited consideration and that the aspects of the problem emphasised by him should be examined in more detail. He wished it to be placed on record that he was in sympathy with the feeling in the Committee on the subject of payment of full compensation to refugees who were unable to return to their homeland.

The Delegate of GHANA said that he was generally in agreement that something should be done to provide a legal basis for the treatment of displaced persons and agreed with the Delegate of Indonesia that the matter needed careful consideration. He said that the points which needed to be considered were as follows : First, whether the objective could be best achieved by means of amendments to the definition of the refugee in the exting Conventions and agreements, or whether it would be better to have a completely new Convention or agreements applying to displaced persons alone. Another matter which, according to him, needed consideration was the nature of the international body which was contemplated for the determination of refugee status and the compensation payable to such persons. Furthermore, what required consideration was the criteria that will entitle a refugee or a displaced person to compensation.

The Representative of the UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES said that the main question which needed to be decided was whether the Bangkok Principles were applicable only to the refugees in the traditional sense or whether they should be enlarged by including displaced persons. He felt that the proposals put forward by the Delegates of Pakistan and Jordan could best be achieved by separating the two categories and by adopting a separate set of principles which will take full account of the special problem with which the group of displaced persons were faced. He then suggested certain amendments to Article III of the Bangkok Principles to bring it in line with the 1967 U.N. Declaration on Territorial Asylum. In this connection, he referred to the question of duties of refugees which required them to abstain from engaging in subversive activities. The question of travel documents, he felt, was a new topic which should be considered by the Committee in the light of recent developments. On the question of the right to return, he said that the High Commissioner considered voluntary repatriation as the primary and natural solution to the refugee situation

which had to be pursued in preference to any other solution. He felt that the problem of repatriation in the case of displaced persons was somewhat different from the problem of repatriation of refugees proper. He also referred to the possible amendment to Article IV of the Bangkok Principles and the standard of treatment for refugees. He pointed out that out of 33 paragraphs of the U.N. Refugee Convention, twenty-two articles had no corresponding reflection either in the Bangkok Principles or the Tokyo Principles of the Committee on the Status of Aliens. With regard to eight other articles of the 1951 Convention, the Bangkok-Tokyo Principles provided a much more restrictive provision.

The Committee then proceeded to appoint a Sub-Committee with Dr. K. Nishimura, leader of the Delegation of Japan as its Chairman, for detailed consideration of the subject. The Chairman of the Sub-Committee reported in the fifth plenary meeting of the Committee held on the 23rd of January 1970 that the Sub-Committee had adopted the proposal put forward by the Delegate of Jordan concerning displaced persons in the shape of an "Addendum" to the Bangkok Principles, and that, thereafter the work of the Sub-Committee had to be stopped in view of difference of opinion among the members of the Sub-Committee on the scope of the terms of reference of the Sub-Committee. He said that one view expressed was that the work of the Sub-Committee was over after consideration of the Jordan's proposal which should be placed before the Committee for its consideration. The other view was that the Sub-Committee was to consider all other aspects of the problem in the light of Resolution No. X (8) adopted by the Karachi Session. He, therefore, sought the direction of the Committee as to how the Sub-Committee should proceed.

Thereupon the Committee generally discussed the scope of the work that had been entrusted to the Sub-Committee as also the question whether Jordan's proposal which had been

accepted by the Sub-Committee should be considered by the Committee itself. After further discussion on the matter in the sixth meeting held on the 26th of January, 1970, the President of the Committee indicated that the Committee should consider the *Addendum* to the Bangkok Principles which had been adopted by the Sub-Committee and that other topics relating to the subject covered by Resolution No. X (8) should be postponed to a future Session. The *Addendum* proposed by the Delegation of Jordan to the Bangkok Principles was adopted in principle. It was, however, agreed that the Chairman of the Sub-Committee should revise the draft in the light of the comments expressed by the Delegations and thereafter place it before the House for formal adoption.

The Delegate of India made a statement that in the view of his Delegation insofar as the Palestinian Arab Refugees and other displaced Arabs were concerned, their right to return to their homeland or to receive compensation had already been recognised and endorsed by the international community. In regard to the general application of the *Addendum*, the Delegation of India reserved its position.

The Observer for TANZANIA pointed out that certain difficulties might arise if the *Addendum* was to have general application in all situations.

During the seventh meeting held on the 27th of January, 1970, the Chairman of the Sub-Committee on the Rights of Refugees placed before the Committee the revised text of the "*Addendum*" to the Bangkok Principles for formal adoption.

The Delegate of GHANA stated that difficulties might arise if the principles contained in the *Addendum* were made universally applicable as had been pointed out by the Observer for Tanzania at the previous meeting. As universal application could lead to very serious difficulties, he associated himself with the views of the Indian Delegation in reserving his position regarding the universal application of the principles.

he President of the Committee then announced the adoption of the *Addendum* subject to the reservation of the Delegations of India and Ghana being recorded regarding the universal applicability of the principles contained in the *Addendum*. The Delegation of Ghana placed before the House draft resolution No. XI (8) regarding future consideration of the subject of refugees. The resolution was adopted.

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IV. "ADDENDUM TO THE PRINCIPLES CONCERNING TREATMENT OF REFUGEES"

(as adopted by the Committee at its Eleventh Session in the Seventh Meeting held on the 27th January, 1970)

WHEREAS it appears to the Committee on further consideration that the principles adopted at its Session held in Bangkok in 1966 mainly contemplate the status of what may be called political refugees who have been deprived of the protection of their own Government and do not provide adequately for the case of other refugees or displaced persons;

AND WHEREAS the Committee considers that such other refugees or displaced persons should enjoy the benefit of protection of the nature afforded by Articles IV and V of those principles;

NOW THEREFORE, the Committee at its Eleventh Session held in Accra between 19th and 29th January, 1970 resolves as follows:

1. Any person who because of foreign domination, external aggression or occupation has left his habitual place of residence, or being outside such place, desires to return thereto but is prevented from so doing by the Government or authorities in control of such place of his habitual residence shall be entitled to return to the place of his habitual residence from which he was displaced.

2. It shall accordingly be the duty of the Government or authorities in control of such place of habitual residence to facilitate by all means at their disposal, the return of all such

persons as are referred to in the foregoing paragraph, and the restitution of their property to them.

3. This natural right of return shall also be enjoyed and facilitated to the same extent as stated above in respect of the dependants of all such persons as are referred to in paragraph 1 above.

4. Where such person does not desire to return, he shall be entitled to prompt and full compensation by the Government or the authorities in control of such place of habitual residence as determined, in the absence of agreement by the parties concerned, by an international body designated or constituted for the purpose by the Secretary-General of the United Nations at the request of either party.

5. If the status of such a person is disputed by the Government or authorities in control of such place of habitual residence, or if any other dispute arises, such matter shall also be determined, in the absence of agreement by the parties concerned, by an international body designated or constituted as specified in paragraph 4 above.

Sd/-
N.Y.B. Adade
President

NOTE: The Addendum was adopted by the Committee subject to reservations made by the Delegates of India and Ghana regarding the universal application of the principles contained in the Addendum as recorded in the minutes of the Sixth & Seventh Meetings of the Committee.

V. RESOLUTION No. XI (8) ADOPTED AT THE ELEVENTH SESSION

The Committee

CONSIDERING that the Government of United Arab Republic by a reference made under article 3 (b) of the Statutes had requested the Committee to consider certain questions relating to Rights of Refugees.

AND CONSIDERING that the Government of Pakistan had requested the Committee to reconsider at its Tenth Session its report on some of the aspects, which request had been supported by the Governments of Iraq, Jordan, and the United Arab Republic.

CONSIDERING FURTHER that it was not possible for the Committee at its Tenth Session to give detailed consideration to the various suggestions made and that by Resolution No. X (8) the Committee had requested the Secretariat to put the item concerning "Rights of Refugees" on the agenda of its Eleventh Session including all the proposals made at the Tenth Session by the delegations of Pakistan and Jordan, and in the meantime, in order to facilitate the work of the Committee, to prepare, in cooperation with the United Nations High Commissioner's Office for Refugees, detailed analysis of the above-mentioned instruments and recommendations including particularly:

(i) the Protocol relating to the Status of Refugees of 31 January, 1967 [General Assembly Resolution 2198 (XXI)];

(ii) the United Nations Declaration on Territorial Asylum of 14 December, 1967 [General Assembly Resolution 2312 (XXII)];

(iii) the Recommendations made by the Addis Ababa Refugee Conference of October, 1967;

(iv) the OAU Convention governing these specific aspects of refugee problem in Africa adopted by the Assembly of Heads of States and Governments at its Sixth Session in Addis Ababa in September, 1969.

CONVINCED that the above-mentioned new instruments and recommendations made an important contribution towards further development in international law relating to refugees.

REQUESTS the Secretariat to put the item "Rights of Refugees" on the agenda of its next session, if possible, for reconsideration of the Principles concerning the Treatment of Refugees adopted at its Eighth Session, in the light of the above-mentioned international instruments and recommendations with a view to bringing these Principles, as far as appropriate, in line with these instruments and recommendations.

Sd/-
N. Y. B. Adade
President

V. THE LAW OF INTERNATIONAL RIVERS

I. INTRODUCTORY NOTE

The subject "the Law relating to International Rivers" was included in the programme of work of the Asian-African Legal Consultative Committee on a reference made by the Governments of Iraq and Pakistan under Article 3(b) of the Statutes of the Committee during the Committee's Eighth Session held in Bangkok in 1966. At that Session it was decided to place this subject on the agenda of the Ninth Session of the Committee.

At the Ninth Session held in New Delhi in 1967, the Delegates of Iraq and Pakistan made their introductory statements setting forth the issues which they wished to be considered by the Committee. After other Delegates had also expressed their views, the Committee directed its Secretariat to prepare the relevant documentation on the issues raised in the course of discussion at that Session for fuller consideration of the subject at the Tenth Session of the Committee.

At the Tenth Session of the Committee held in Karachi in 1969, the subject could not be given full consideration on account of the Committee's preoccupation with the subject of the Law of Treaties. Nonetheless, the Committee took note of the statements made by the Delegates and the Observer for Nigeria (now full member) present at that Session. The Committee also took note of the work done by the International Law Association and other organisations and bodies concerning the subject. Realising the vital importance of the subject to the development of the countries of Asia and Africa, particularly in the context of their food and agriculture programmes, the Committee appointed an Inter-Sessional Sub-Committee to meet in New Delhi prior to the holding of the Eleventh Session and entrusted to it the task of preparing

draft articles on the subject, particularly in the light of the experience of Asian-African countries and reflecting the high moral and juristic concepts inherent in their own civilisations and legal systems for consideration of the Committee's Eleventh Session. The Secretariat of the Committee was directed to assist the Inter-Sessional Sub-Committee.

Accordingly, the Inter-Sessional Sub-Committee met in New Delhi from the 15th to 20th of December, 1969, under the Chairmanship of Hon. Syed Shariffudin Pirzada, the then President of the Committee. It was attended by the representatives of Ceylon, Ghana, India, Indonesia, Iraq, Japan, Jordan, Pakistan and Sierra Leone. The Secretariat of the Committee placed two volumes of briefs on the subject before the Sub-Committee. The discussions in the Sub-Committee were not, however, conclusive and it was, therefore, decided to refer the matter to the Committee at its Eleventh Session.

At the Eleventh Session held in Accra (Ghana) in January, 1970, the prolonged discussions in the Committee centred around the question as to whether the joint proposal submitted by the Delegations of Iraq and Pakistan containing certain draft articles on the subject or the proposal of the Indian Delegation regarding the first eight articles of the Helsinki Rules should be taken as the basis of discussion in the Committee. Discussion also took place on the point whether these proposals should be considered at an Inter-Sessional Sub-Committee to be held before the Twelfth Session of the Committee or at the Twelfth Session itself. Eventually, it was agreed that both the proposals, i.e. the joint proposal of Iraq and Pakistan and the proposal of India regarding the Helsinki Rules be circulated to the Governments of the participating countries eliciting their views and observations and that the consideration of the subject be postponed to the Twelfth Session of the Committee.

II. REPORT OF THE INTER-SESSIONAL SUB-COMMITTEE ON INTERNATIONAL RIVERS, 15TH TO 20TH DECEMBER, 1969

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REPORT OF THE SUB-COMMITTEE

The Inter-Sessional Sub-Committee on the Law of International Rivers, constituted pursuant to the Committee's Resolution No. X (6), met in New Delhi from the 15th to 20th of December, 1969, both days inclusive. The representatives of the Governments of Ceylon, Ghana, India, Indonesia, Iraq, Japan, Jordan, Pakistan and Sierra Leone participated. The President and the Secretary of the Committee also attended the meetings of the Sub-Committee.

The Sub-Committee had before it two volumes of Briefs containing material and documents on the subject prepared by the Secretariat of the Committee. The representatives of Ceylon, Ghana, India, Indonesia, Iraq, Japan, Jordan and Pakistan made statements indicating their approach to the problem. The statements form part of and are annexed to this Report.

As the discussions were not conclusive, the Sub-Committee agreed that all matters referred to it may be discussed further at the Accra Session of the Committee.

Adopted on 20 December, 1969.

Sd/-
Syed Sharifuddin Pirzada
President of the Committee

Sd/-
B. Sen
Secretary

PAKISTAN AIDE-MEMOIRE

At the Tenth Session of the Asian-African Legal Consultative Committee, held in Karachi in January, 1969, a resolution [No X(6)] was adopted in which it was decided that a Sub-Committee consisting of the representatives of Member Governments meet at New Delhi for the purpose of preparing a draft of Articles on the Law of International Rivers for consideration of the Committee at its Eleventh Session. The Government of Pakistan attaches great importance to the forthcoming meeting of the Sub-Committee and considers the subject of international rivers of vital concern to the countries of Asia and Africa. It is highly desirable that this important branch of international law should be systematically declared and codified. The Government of Pakistan would welcome the participation of the..... at the Session of the Sub-Committee likely to be held in New Delhi in December 1969. Pakistan intends to put forward at the New Delhi Session, certain proposals in the form of draft Articles for consideration of the Sub-Committee, the salient features of which are explained in the following paragraphs. The Government of Pakistan would be grateful if the.....considers, and comments on these proposals.

2. In Pakistan's view it is essential that the proposed draft Articles include a statement of the international responsibility of a State in respect of acts done within its territory which have a detrimental effect in the territory of a co-riparian State. There are four such principles which are :—

(i) A State may not take any action in its territory with respect to the flow of an international river which would be against the sovereignty or territorial integrity of a co-riparian State.

(ii) Where utilisation of an international river by a riparian State may result in damage or injury to a co-riparian State, the prior consent of that State is required and there is also an obligation to indemnify that State for the damage or injury caused. This follows from the general principle of law expressed by the Latin maxim : *Sic utere tuo ut alienum non laedas*, that is, no one may exercise his right when this exercise causes damage to another.

(iii) Every riparian State must act in good faith in the exercise of its rights in relation to the waters of an international river flowing through its territory. This principle, well-known as the Abuse of Rights principle, has as its corollary the rule that when a particular right can be exercised by more than one method, it is an abuse of right for a riparian State to adopt the method which would cause injury to a co-riparian State.

(iv) A riparian State may not divert waters of an international river in such a manner that the unconsumed water flows into a channel which is different from the natural course of the river. This not only follows from the principle of Abuse of Rights but is also a general principle of law to be found in Municipal Water Law.

3. Apart from the principles dealing with the responsibility of riparian States, the Government of Pakistan regards it essential that the draft Articles should contain a statement of the well-known principle of international law, in accordance with which each riparian State is entitled, within its territory, to a reasonable and equitable share in the beneficial use of the waters of an international river. This principle has already been affirmed by most of the Delegations during the course of the Tenth Session of the Asian-African Legal Consultative Committee at Karachi, when the subject of international rivers was discussed. The Government of Pakistan

is of the view that in order to determine a reasonable and equitable share regard must be had to all the relevant factors in a particular case.

4. As regards priority of uses, it is well-known that navigation occupied a place of prominence in the past, but that today the development of other uses has put an end to any preferential position that may have been given to navigation. This is specially so in the case of international rivers of Asia and Africa where agricultural and domestic uses, which are the bases of life, have assumed prime importance. In the view of the Government of Pakistan the draft Articles should give due weight to uses that are the very bases of life.

5. Existing reasonable uses also deserve protection to some extent and the draft Articles may provide for this, but not without making provision for the modification or termination of an existing use so as to accommodate a competing use where equity so demands. An existing use may not be protected where the use is established in spite of lawful objections of a co-riparian State that it is contrary to international rights.

6. In consonance with the principle that damage or injury to a co-riparian State must be compensated for, the draft Articles may define the responsibility of a State for substantial injury or damage caused to a co-riparian State by pollution of the waters of an international river.

7. The draft Articles must also reflect the obligations of peaceful settlement of disputes contained in the Charter of the United Nations, *viz.*, that States are under an obligation to settle international disputes as to their legal rights or other interests by peaceful means in such a manner that international peace and security, and justice are not endangered.

The Government of Pakistan looks forward to co-operation between the Delegations of the.....and Pakistan at the forthcoming session of the Sub-Committee on the Law of International Rivers.

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DRAFT ARTICLES ON THE LAW OF INTERNATIONAL RIVERS PROPOSED BY PAKISTAN

Article 1

An international river is one that traverses the boundary of or separates two or more States, or which flows into the said river making a material contribution to its flow.

Article 2

"A riparian State may not take any action in its territory with respect to the flow of an international river which would be against the sovereignty and territorial integrity of a co-riparian State. In particular :—

(a) A riparian State may not utilize the waters of an international river in a manner which would cause grave and permanent damage to the territory of a co-riparian State.

(b) A riparian State may not utilise the waters of an international river in a way which would cause wide-scale environmental, ecological and physical changes in the territory of a co-riparian State".

Article 3

In cases in which the utilization of an international river by a riparian State may result in damage or injury to a co-riparian State, the prior consent of that State is required. Where any damage or injury results, the aggrieved State is entitled to indemnification.

Article 4

Every riparian State must act in good faith in the exercise of its rights in relation to the waters of an international river. Where a particular right can be exercised by more than one method, it is an abuse of rights for a riparian State to adopt the method which would cause injury to a co-riparian State. In particular :—

(a) A lower riparian State may not dam the waters of an international river at a particular site, flooding the territory of an upper riparian State, if an alternative site is available which would avoid such flooding.

(b) An upper riparian State may not divert the waters of an international river without constructing reservoirs for storage of water, where this is possible and which would have the effect of avoiding damage to the lower riparian State.

Article 5

A riparian State may not divert waters of an international river in such a manner that the unconsumed water flows into a channel which is different from the natural course of the river.

Article 6

Each riparian State is entitled, within its territory, to a reasonable and equitable share in the beneficial use of the waters of an international river. What is a reasonable and equitable share is to be determined by considering all the relevant factors in each particular case.

Article 7

A use or category of uses is not entitled to any inherent preference over any other use or category of uses. An international river must be examined on an individual basis and a

determination made as to which uses are more important, giving special weight to uses which are the bases of life.

Article 8

1. An existing reasonable use is to be respected unless the factors justifying its continuance are out-weighed by other factors leading to the conclusion that it would be equitable to modify or terminate it so as to accommodate a competing incompatible use.

2. An existing use is not a reasonable use if :

(a) it is established over the lawful objections of a co-riparian State that the use is contrary to the present article, and

(b) at the time of becoming operational, it is incompatible with a pre-existing reasonable use.

Article 9

If due to human conduct any detrimental change is caused in the natural composition, content, or quality of the water of an international river in one State, which does substantial injury in another State, the former State is responsible for the damage done.

Article 10

States are under an obligation to settle international disputes as to their legal rights or other interests by peaceful means in such a manner that international peace and security, and justice are not endangered. In the case of disagreement between two or more States, it is not permissible for one of these States to act as judge in its own cause and take unilateral and arbitrary action.

OPENING STATEMENT OF THE IRAQI DELEGATE

Mr. Chairman,

I would like to associate myself with the Distinguished Delegates who spoke before me in extending our congratulations to you for occupying the Chair. We are certain that our deliberations would come to fruitful conclusion under your chairmanship and guidance.

The Iraqi Delegation has referred the subject of the Law of International Rivers to the Committee under Article 3 (b) of its Statutes for consideration together with the Delegation of Pakistan due to the importance of that subject.

The Iraqi Delegation is primarily interested in two questions :

1. definition of the term 'International Rivers' ; and
2. rules relating to utilisation of waters for agricultural and industrial purposes apart from navigation.

We wish to reiterate what we have already said in the Karachi Session that we are concerned with the rivers which run through the territories of two or several States or which separate two different States. Such rivers are owned and shared by more than one State.

Since a situation of a joint river raises many difficult problems, they are governed by certain rules which are already in existence. These rules have been derived from international customs practised among different nations, opinions of jurists, decisions of Federal Courts and project treaties.

We should like to emphasize here that these rules are in existence by virtue of the fact that territorial supremacy does

not give an unlimited liberty of action, since absolute liberty of action by a certain co-riparian State might result in an injurious action to the natural conditions of the territory of a neighbouring co-riparian State. The Delegation of Iraq had requested the Secretariat to prepare the necessary documents and reports for discussion. The Secretariat have placed before us a study which we find very valuable.

The Iraqi Delegation proposes to present formally a set of principles in regard to international rivers. These are placed before the Sub-Committee for its consideration and discussion. In presenting these draft principles I wish to say the following:

In dealing with the question of International Rivers there are several views in respect of the international law and principles relating to rivers forming frontiers or crossing them. Some have advocated the principle of absolute territorial sovereignty of the State to dispose of freely of the waters flowing in and through its territory. Others have advocated the principle of absolute territorial integrity by virtue of which a State may not for its part restrict the natural flow of waters flowing through its territory. However, the principle of restricted territorial sovereignty together with restricted territorial integrity seems to have the support of the vast number of jurists.

The view of the Iraqi Delegation supports the third principle, mentioned above, that of the restricted territorial sovereignty together with the restricted territorial integrity. It is our view that the territorial sovereignty of a contributing country or a country through which the water of an international joint river flows should not confer the right to use and dispose of the water within the territory to whatever extent and manner it is desired, if such action causes injury to the other States concerned. We are guided in this connection by the view of Professor Oppenheim who states (and I quote):

> "No State is allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State. For this reason a State is not only forbidden to stop or divert the flow of a river which runs from its own to a neighbouring State, but likewise to make such use of the water of the river as either causes danger to a neighbouring State or prevents it from making proper use of the flow of the river on its part".

The rights of all riparian States must be fully respected since international rivers are rivers which run through several States and are owned by more than one and belong to territories of all the States concerned. Furthermore, such a river is an indivisible physical unit. Consequently, the utilization of the waters of an international river shall be effected in such a way as to bring a maximum benefit to all riparian States and that each one of them is in duty bound to co-operate with the other or others with a view to promote and develop such utilization.

An act which is injurious to the interests and rights of riparian States carried out by a co-riparian State is, therefore, not acceptable by jurists. The principles of absolute territorial sovereignty in this context does not seem to have ground in modern international jurisprudence which tends to restrict the principle of sovereignty resorted to by some States justifying their acts or utilizing waters according to their own wishes and by so doing discarding the interests of others. While it is true that there are no established rules of international law which are binding upon States in the matters of respect for the right to joint waters, this is, however, dealt with through agreements and treaties among the States concerned and have consequently become part of the customary international law.

In drawing up these principles we have to some extent made use of the decisions taken at the Conference of the International Law Association, held in New York in

September 1958, which enunciated agreed principles of international law establishing the idea that a system of rivers should be treated as an integrated unit.

The Conference further agreed on the principle that except as otherwise provided by treaty or other instruments or customs binding upon the parties, each co-riparian State is entitled to a reasonable and equitable share in the beneficial use of the waters of the international river. The co-riparian States are under a duty to respect the legal rights of each co-riparian State in the joint rivers. It could be clearly concluded, therefore, that the acquired rights of all riparian States should be completely recognised and adhered to.

We further maintain that co-riparian States are under a duty to respect the rights of each other and that no riparian State is justified in taking a unilateral action to deviate the waters of an international river in any manner from its natural bed for the use of its waters in other areas which do not belong to its natural locale. We maintain that each co-riparian State has the right to use waters of the river which flows into and through its territory on the condition that it takes into consideration the restrictions imposed by international law and international custom and the rights of other co-riparian States.

As to the economic use of international rivers we hold to the views of Prof. H.A. Smith. These views are embodied in draft Articles 9 and 10 of the principles presented to the Sub-Committee. Articles 11 and 12 are natural corollaries of the previous ones. They also take into consideration the principle of goodwill among nations and the idea of the community of interest and equity.

May I at this juncture take the liberty of referring to the views of several jurists, among them, H.R. Farham who suggests that a river which flows through the territory of several States or nations is their common property. . . Neither

nation can do any act which will deprive the other of the benefits and its right to enjoy the advantages the river offers.

The inherent right of a nation to protect itself and its territory could justify the State lower down the stream in preventing the one further up from turning the river out of its course, or consuming so much of the water for purposes of its own as to deprive the former of its benefits. We, therefore, maintain that an upstream riparian State or the State where the source of the international river is located may not carry out an act for exploitation of the waters of the river that which may constitute an injury to the natural conditions of the co-riparian State or the acquired rights of the latter. In order to contain these valid ideas we have suggested in Article 12 a principle coherent with these views. We are also guided by these views when presenting the principles embodied in Articles 15 through 19.

Article 20 deals with the shares to be enjoyed by co-riparian States. The factors enumerated in that Article are of common interest to all. While the principle in Article 21 discusses resolving of differences by reference to international law, agreements, court judgments and views of international jurists which are the regular and acceptable channels in international conduct.

I place these draft principles at the disposal of the Sub-Committee.

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DRAFT PRINCIPLES PRESENTED BY THE IRAQI DELEGATION

1. The topic of discussion is the question of joint rivers shared by several States, the utilization of their waters, their exploitation for agricultural and industrial purposes.

2. International rivers in this context mean joint rivers which flow through several States and are considered to be a part of the common property of those riparian States. The river itself is an indivisible and natural geographic physical unit.

3. Complete recognition of the acquired rights of all riparian States and full adherence to those rights.

4. A system of rivers and lakes located at the delta and river basin is an integrated indivisible unit.

5. Except as otherwise provided by treaty or other instrument or customs binding upon the parties, each co-riparian State is entitled to a reasonable and equitable share in the beneficial uses of the waters of the international river.

6. A riparian State is under a duty to respect the legal rights of other co-riparian States in the international river.

7. No riparian State may take a unilateral action to deviate the flow of waters of an international river in any manner from its natural bed for use of its waters in other areas which do not belong to its natural locale.

8. Each State has the right to use waters of the joint river which flows into and through its territory on condition that it takes into consideration the restrictions imposed by international law and international custom, and the rights of other co-riparian States.

9. No riparian State may undertake a project on an international river within its territory in a manner that would cause or threaten to cause an injury to the lawful interests for the use of those waters by any other co-riparian State; or constitutes an infringement of the acquired rights of those States unless the former co-riparian State gives guarantee to the other concerned co-riparians to enjoy specific benefits; or be compensated fully for the loss or injury that might occur as a result of such an undertaking, providing adequate provision for future security.

10. No State is to undertake a project on an international river without the prior consent of other co-riparian States concerned. In case of disagreement the said State should enter into negotiations to come to an agreement within a reasonable period of time. It is advisable in such a case to refer the matter to a technical commission or to a specialised establishment in an effort to reach a solution which would guarantee maximum benefit to all parties concerned, or to refer the matter for arbitration.

11. In coherence with the principle of goodwill among nations, no reparian State may begin work during the negotiations on the undertakings or projects which are subjects of dispute, and refrain from taking up any measure which might result in making the differences sharper between the negotiating States.

12. An upstream riparian State or the State where the source of a joint river is located may not carry out an act for exploitation of the waters of the river, that which may constitute an injury to the natural conditions of the other co-riparian States, or the acquired rights of the latter.

13. If the waters of the river are not being utilised by the upstream riparian State, the downstream State has the right to exploit these waters.

14. If the upstream State is not utilising the waters of a joint river, the downstream State has the right to exploit the waters; and in case the upstream State decides thereafter to exploit or make use of waters which flow into and through its territory, the latter should in that event respect and take into consideration the rights of the downstream State.

15. The upstream co-riparian State may not exploit or utilise the waters of an international river in a manner which would bring about a basic change in the nature of the river.

16. A riparian State may not change the course of an international river at the point where it enters the territories of the other co-riparian States.

17. No riparian State may make alterations or change the course of an international river which would decrease the amount of its waters in the downstream co-riparian State.

18. No co-riparian State may undertake projects or construct dams on the river within her territory, if these undertakings would result, or would amount to an injurious act to the rights of the downstream co-riparian State.

19. No co-riparian State may carry out an act or construction on a joint river in her territory that might cause drought in the other co-riparian States or which would prevent the entry of water into the territory of the latter.

20. When deciding the shares of riparian States of the waters of international rivers, emphasis should be laid on the acquired rights of the States concerned, the areas of the agricultural lands which are actually under cultivation and other cultivable areas, and other relevant factors.

The following principles should be taken into consideration when deciding the shares of the riparian States in the

waters of an international river; these are according to priority :

(a) Local municipal consumption.

(b) Agricultural consumption and consumption by livestock.

(c) Power production.

(d) Other industrial uses.

(e) Navigational purposes.

(f) Fishing.

(g) Other uses that might be decided by specialised technical authorities.

21. In case of a conflict or disagreement regarding joint international rivers, the above principles should be taken into consideration. Reference to international law, bilateral and multilateral treaties, court judgments, and views of international jurists are also reliable sources for resolving such conflicts and disagreements.

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STATEMENT BY THE CEYLONESE REPRESENTATIVE

In terms of the mandate given by its Resolution X (6) adopted by the Asian-African Legal Consultative Committee at its Tenth Session in Karachi, the purpose of the Sub-Committee meeting is to prepare a set of draft Articles on the Law of International Rivers for consideration by the AALCC at its Eleventh Session in Accra.

The subject of international waters, as a whole, is one of considerable political significance for the countries of Asia and Africa. Much of this area is arid and consequently the ability of many of the States in this region to support their respective populations is governed to a large extent by the resources of water which each State possesses.

Since Ceylon does not have any international rivers and consequently possesses little legal expertise on the subject, what we propose to do at this stage is merely to indicate certain broad principles and concepts which we would like to see reflected in the draft Articles and leave the actual drafting of the articles to those countries more directly concerned with the subject. We could then study the draft Articles and make our detailed comments at the Accra Session.

The main points which we would like to see reflected in the draft Articles concern the following :

Scope of the subject,

Definition of 'International River',

Basic principles, and

Settlement of disputes

Scope of the subject

Although current legal thinking tends to the view that it should be the river basin as a whole which should be the subject of study and not merely the river itself, we feel that because of the difficulties inherent in the consideration of so wide a subject—e.g. the problem of underground waters, it would be advisable for the Sub-Committee to confine itself to the matter actually referred to it by the Asian-African Legal Consultative Committee, *viz.* the question of international rivers.

We also agree with the view expressed by the Delegate of Iraq at the Ninth Session and others during this meeting that the emphasis should be on the uses of the rivers for agricultural, industrial and domestic purposes. While international law has already developed extensive rules regarding navigation on international rivers culminating in the Barcelona Convention of 1921, the rules regarding the uses of international rivers for agricultural, industrial and domestic purposes are comparatively undeveloped. The formulation of such a set of rules is, therefore, a matter of the utmost importance and urgency, particularly to the countries of Asia and Africa which are more concerned with the uses of water for agricultural and domestic purposes than for navigation.

Definition of 'International River'

The definition of an international river as one which flows between or traverses two or more States, is so widely accepted that generally it should not be the subject of comment.

Basic Principles

(i) Assuming that the emphasis at this meeting will be on the uses of an international river for agricultural, industrial and domestic purposes, we are of the view that the basic rule should be such that each riparian State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses

of the waters of an international river. As to what constitutes a reasonable and equitable share should be determined in the light of all the relevant factors in each particular case.

Article V (2) of the "Helsinki Rules" prepared by the International Law Association in 1966 has listed such factors as follows :—

"Relevant factors which are to be considered to include, but are not limited to :

(a) the geography of the basin, including in particular the extent of the drainage area in the territory of each basin State;

(b) the hydrology of the basin, including in particular the contribution of water by each basin State;

(c) the climate affecting the basin;

(d) the past utilisation of the waters of the basin, including in particular existing utilization;

(e) the economic and social needs of each basin State;

(f) the population dependent on the waters of the basin in each basin State;

(g) the comparative costs of alternative means of satisfying the economic and social needs of each basin State;

(h) the availability of other resources;

(i) the avoidance of unnecessary waste in the utilization of waters of the basin;

(j) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among users; and

(k) the degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State".

The Helsinki Rules go on to state that the weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable share, all relevant factors are to be considered together and a conclusion reached on the basis of the whole.

While not all the factors listed in the Helsinki Rules would be of equal relevance to the countries of the Afro-Asian region, nevertheless (it is suggested that) its Article V (3) might usefully constitute a suitable basis for discussion on this aspect of the subject.

Connected with the concept that each riparian State is entitled to a reasonable and equitable share in the waters of an international river, is its corollary that 'one must so use his own as not to do injury to another'. Thus, while a State is entitled to a reasonable and equitable share of the waters of an international river, the effect of making use of this share should not be such as to cause injury to the other riparian State.

Settlement of Disputes

It is essential that there should be included in the draft articles provisions for the peaceful settlement of all disputes that may arise in connection with international rivers.

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STATEMENT BY THE GHANA REPRESENTATIVE

The Government of Ghana after carefully studying the Aide-Memoire and draft Articles submitted by the Government of Pakistan agrees, in principle, with the draft Articles and proposes that the draft Articles should be accepted at the Inter-Sessional Sub-Committee Meeting in New Delhi as basis for discussion.

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STATEMENT BY THE INDIAN REPRESENTATIVE

Mr. Chairman,

The Sub-Committee on International Rivers is to prepare a draft of Articles on the subject for consideration by the Asian-African Legal Consultative Committee. The Government of Pakistan had addressed an Aide-Memoire to our Government, and we understand to the other Member Governments of this Committee also, suggesting the approach which the Sub-Committee may adopt in preparing the draft Articles. At the previous meeting held on the 16th of December, 1969, the Distinguished Delegate of Pakistan circulated a set of draft Articles for consideration of the Sub-Committee. Another set of draft formulations was also proposed by the Distinguished Delegate of Iraq at the same meeting. In his statement, he also referred to the note so ably prepared by their Legal Adviser, Dr. Hasan Al-Rawi, which was circulated at the close of the Karachi Session in January 1969 and which has been included in the Brief of Documents prepared by the Committee's Secretariat. We are grateful to both the Delegations for the suggestions they have made in regard to the consideration of this subject. We are also grateful to the Distinguished Delegate of Japan for his contribution at that meeting, to which I shall refer again in the course of our statement. We are also grateful to the Distinguished Delegates from Ceylon, Ghana, and Jordan for their statements.

2. We are also grateful to the Secretariat for assembling the voluminous data on the subject, both at their own initiative as well as at the request of the Governments of Pakistan and the U.A.R. The volumes reached us only a few weeks ago, one of them only a few days ago. As we proceed in our considera-

conduct of nations within an international drainage basin".

5. As the distinguished Delegates are aware, the Helsinki Rules were the culmination of intensive and extensive studies of the entire legal literature on the subject as well as on State practice. They also took into account the reservoir of technical knowledge on the uses of waters, not only from the navigational point of view which occupied a place of great importance so far in the world, but also the multiplicity of other uses which have been made possible by the technological advances of this country. A perusal of these rules will indicate that they are not such as to favour any particular riparian interests but, in the context of the importance of the optimum development of water resources on which millions of people depend, they emphasise that each State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters. The basis of an optimum development of water resources lies in the consideration of the various sources of water—surface water, ground water, springs, etc.—as an integrated unit, a point which was also emphasised by the distinguished Delegates from Pakistan and Iraq. It was in realisation of this important consideration that the concept of an international drainage basin took shape taking the place of the concept of international river which had beed developed in the past with special reference to navigational use only.

6. Mr. Chairman, you are fully aware on a personal basis of the work of ILA Committee. You have been associated with it at least since 1962 and both of us have participated in its deliberations. Other distinguished lawyers and engineers in Pakistan have also participated in its deliberations. Indian Members of the ILA have also been attending the meetings of this Committee. In addition, the U.A.R. and Sudan have also contributed to its work. You are also aware that, since 1966, the ILA has established a new Committee on the International Water Resources Law, which has appointed six working groups to further study the various uses of waters e.g. Navigation,

Underground Waters, Pollution, General Uses of Waters, Relationship of Waters to other Natural Resources and so forth. In the work of this Committee and the working groups also, members from India and Pakistan, among others have been participating.

7. In view of this, it appears to my Delegation that the proposal put forward by the distinguished Delegate of Japan would be the proper course to be adopted for a study of the law on the subject of the uses of waters of international rivers, namely that the questions relating to the uses of waters should be resolved on a bilateral or, where appropriate, on a regional basis. Subject to such agreements or regional custom, the legal position regarding the uses of waters should be examined on the basis of the Helsinki Rules. The Helsinki Rules represent an element of agreement which could be reviewed by the Members of this Committee from the Asian-African viewpoint. If, on the other hand, we make an altogether separate effort, by starting afresh with controversial propositions, we would, I am afraid, be indulging in an exercise which will be time consuming and would have to cover the entire ground again. I am not sure whether that would be the best way of building up areas of agreement.

8. We, therefore, support the proposition that the Sub-Committee may take up the Helsinki Rules as the basis of its study. These rules may be circulated among the Member Governments of this Committee and they may be requested to offer their comments relating thereto. To begin with, we may restrict our study to Articles I to VIII of the Helsinki Rules which contain general provisions and relate to the equitable distribution of waters of an international drainage basin. The Member Governments may be invited, while commenting on these Rules, to supply the Committee with such material as they would like the Committee to consider in its study of the subject.

9. I should also like to invite the attention of the distinguished Members of the Sub-Committee to the fact that the Helsinki Rules might be taken up as an item for consideration by the General Assembly at its next session. In fact, as was mentioned by the Ceylon High Commission in their letter of 18 June 1969 (Brief of Documents, Volume I, page 83), this subject was to be introduced at the twenty-fourth session of the UN General Assembly, which is just coming to a close. Dr. Manner, the Chairman of the ILA Committee on International Water Resources Law, has now informed the Secretary of this Committee in his letter of 24 November 1969, that Finland proposes to raise the item at the next session of the General Assembly in 1970. This is all the more reason why we should not embark on a new formulation of our own but concentrate our attention on the Helsinki Rules to review their suitability for the Asian and African countries.

10. In view of this proposal, I do not wish, Mr. Chairman, to offer our comments on the draft articles proposed by the Delegate of Iraq as well as those proposed by the Delegate of Pakistan. Many of the ideas contained therein are also contained in the Helsinki Rules and we would offer our comments on them while discussing the Helsinki Rules. Some other articles are new articles which have not been included in the Helsinki Rules and which may be controversial. By way of example, I could refer to the doctrine of "Abuse of Rights". A review of literature on the subject would show that the subject is intensely controversial. *Lauterpacht* and *Cheng* support the concept, but recognise the controversy. *Kunz*, *Guggenheim* and *Schwarzenberger* deny the existence of the doctrine under international law and question its utility. According to *Schwarzenberger*, the abuse of rights is neither a part of Roman Law nor of Common Law, nor can it acquire legitimacy or authority by citing a Latin phrase in its support. In fact, Professor *Schwarzenberger* wrote an exhaustive article on the subject entitled "Uses and Abuses of the Abuse of Rights in International Law", published

in *Transactions of the Grotius Society* (1957) at pages 157-179. Others who deny the existence of the concept are *Gutteridge*, *Brownlie*, and the French authority, *J. D. Roulet*. I do not wish to discuss the existence and non-existence of the concept at this stage, or its application to the question of water rights. All I wish to emphasise at this stage is that before we go into the question of "abuse of rights" and "State responsibility", another complicated question which is presently being considered by the International Law Commission, we should concentrate our efforts on defining the rights of a State in the waters of an international drainage basin. I should also like to mention that the Helsinki Rules, while dealing with the equitable utilisation of waters, have not made any provision on "abuse of rights". In view of this, the best course for us to adopt would be to proceed with the Helsinki Rules to reach an understanding about the rights, rather than start an academic discussion on the doctrine of "abuse of rights".

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STATEMENT BY THE INDONESIAN REPRESENTATIVE

Mr. Chairman,

I have listened with interest to the speakers who spoke before me and who have outlined their positions *vis-a-vis* the subject before us. Allow me to make some observations, and I would like to do so in the framework of the AALCC Resolution No. X (6) passed at the Karachi Session last January.

Firstly, the Committee is aware of the spadework which has been done by the International Law Association and other organizations and bodies both Governmental and non-Governmental concerning the Law of International Rivers. Secondly, the Committee also realizes that the development and codification of the principles governing the Law of International Rivers are of vital significance to the emerging countries of Asia and Africa, particularly in the context of their food and agricultural development programmes.

In instructing this Sub-Committee to prepare a draft of articles on the Law of International Rivers, particularly in the light of the experience of the countries of Asia and Africa, the Committee in fact has given expression of a consciousness that the work done in this field does not reflect sufficiently the special needs of our regions. I think that this Sub-Committee does agree that the above guidelines given by the Committee provide the framework within which this meeting should fulfil its task.

The Sub-Committee should, therefore, endeavour as much as possible to make fresh contributions to the body of thinking and recommendations already existing in this field,

and at the same time it should avoid duplications. Secondly, while giving due consideration to the existing rules, such as the Helsinki Rules, the Sub-Committee should concentrate on aspects having direct and actual relevance to the problems, needs and conditions of the Afro-Asian region, such as the uses of water for agricultural and industrial purposes.

I am aware that the task before us is not an easy one, because the national interests of sovereign States are involved and because this meeting is actually trying to establish rules which restrict the national rights of nations. It is for these reasons that we have to tread carefully, though I hope, not without despatch.

My Government would like to see that the principle of solidarity be applied in the preparation of draft articles on the Law of International Rivers. This principle may provide the necessary scope in which riparian States can cooperate for the peaceful and fruitful development of the region concerned, and to avoid disputes which only unnecessarily consume our time and energy that should be applied to the speedy development of our economy.

The statement made by my distinguished colleague from Ceylon is of special interest to me, because being also an island-country our positions have much in common. I would like to make further comments on the Ceylonese statement if the occasion arises.

Mr. Chairman, the meeting has heard the proposals forwarded by the respective Delegations. The positions are now known to a certain extent. I hope that this will be a starting point for us to go deeper into the subject and that this Sub-Committee will succeed in producing results as expected by the Committee. Thank you, Mr. Chairman.

ORAL STATEMENT OF THE JAPANESE REPRESENTATIVE

The position of the Japanese Government on the uses of the waters of international rivers was stated clearly by Dr. Nishimura, Member of the Asian-African Legal Consultative Committee from Japan, at the Tenth Session held in Karachi last January.

This is namely :

Japan recognises quite well the keen necessity of formulating some general rules on the problem of the uses of the waters of international rivers.

Japan also considers that these general rules should be used as guiding principles for solution of a particular problem which, by nature, should be solved on the bilateral or regional basis.

Japan further considers that as the basis of our work of formulating these general rules, we should take up the Helsinki Rules on the Uses of the Waters of International Rivers prepared by the International Law Association in 1966. The best starting point of our work may be to supplement and make more comprehensive these Rules, particularly on the subject of consumptive uses of waters of international rivers.

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STATEMENT BY THE JORDAN REPRESENTATIVE

Mr. Chairman,

It is for me a great pleasure to start my brief statement on the Law of International Rivers, with a welcoming salutation to your most respected person, for presiding over this meeting, as I am quite confident that the presence of such a highly legal authority will facilitate our task and render our discussions fruitful and objective.

As far as the Law of International Rivers is concerned, I would take this opportunity to reiterate what has already been stated on the subject by the Jordan Delegate to the Karachi Meeting of the Committee.

The Law of International Rivers takes up the question of relations among States; but regulations related to such rivers, and disputes arising out of the question of International Rivers may, however, occur between a State and an illegal occupying force, such as the situation between the Arab States and the so-called "State" of Israel.

I would request that what has been said by the Jordan Delegate at the Karachi Session, regarding the Holy Jordan River, should be taken into consideration in the course of our deliberations.

I have to comment with satisfaction that the Draft Principles introduced by the distinguished Iraqi Delegate in the Sub-Committee, answer in spirit the problem mentioned above, particularly Articles 7, 12, 15, 17, 18 and 19 of the Iraqi principles.

I have equally the pleasure to confirm that the draft articles proposed by the distinguished Delegate of Pakistan offer a great contribution to the work of our Sub-Committee and tackle the problem of the Jordan River. I have to mention in particular Article 2 (with some suggested amendment and addition in order to suit the terms "occupying force" and "occupied territory of a riparian State"), Article 3 Article 4 (b) and Article 5.

While repeating my welcome to you, Hon'ble Mr. Chairman and you dear colleague Delegates, I have to mention with recognition and appreciation the studious work of the Secretariat of the Committee who rendered our work easy to manage aud control.

I wish with all my heart all the success to our distinguished Asian-African Legal Consultative Committee hoping that it will enlarge soon its membership and the scope of its work.

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FURTHER STATEMENT OF THE PAKISTAN REPRESENTATIVE

Mr. Chairman,

The subject for consideration of this inter—sessional Sub-Committee, in accordance with the terms of reference, is to prepare draft articles on the Law of International Rivers, particularly in the light of the experience of the countries of Asia and Africa and reflecting the high moral and juristic concepts inherent in their own civilizations and legal systems. The Government of Pakistan had addressed an *Aide-Memoire* to the member Governments of the Committee on this important subject. At that time we had communicated our intention of submitting detailed draft articles for consideration of the Committee based on the general principles already enunciated in the *Aide-Memoire*. At the beginning of the Session of the Sub-Committee we explained the general principles contained in the *Aide-Memoire* and also submitted the draft articles for consideration of the Sub-Committee. We were amply rewarded by the views expressed by the distinguished members here. At the outset the distinguished Delegate of Iraq introduced the draft principles on behalf of the Government of Iraq. We find much common ground between these general principles and the draft articles that we have proposed. We are happy to note that the distinguished Delegate of Ghana had stated that his Government found nothing objectionable with the principles embodied in our *Aide-Memoire*. The distinguished Delegates of Ceylon and Indonesia had expressed the view that the Sub-Committee may consider the proposals made by the Governments of Iraq and Pakistan and attempt to suggest concrete guidelines in accordance with the terms of reference of the Committee. We welcome this point of view and hope that the various proposals currently sub-

mitted are considered by the Committee in formulating draft articles on the Law of International Rivers. The distinguished representative of Jordan has proposed an amendment to Articles II, III and V of our draft articles to take into consideration the obligation of an "occupying force" in this respect. We concur with the suggestion of the distinguished Delegate of Iraq that this amendment is both realistic and reasonable. The distinguished representative of Japan emphasised that an area of agreement already existed in the Helsinki Rules on the uses of the Waters of International Rivers, and that the said Rules may be taken as a basis for discussion but that efforts should be made to improve these rules taking into consideration the interests of Afro-Asian States. The distinguished Delegate of India also emphasised the area of agreement existing under the Helsinki Rules but expressed reluctance to add to these rules as in his opinion new proposals might be controversial in nature. He has also made some other observations but for want of time we reserve our position in respect thereof.

2. It is the view of my Delegation that the Sub-Committe must endeavour to perform the work assigned to it by the Committee under Resolution No. X(6) and to prepare draft articles on the Law of International Rivers. It is clear from this resolution that not only the work of the International Law Association but that the work of other organisations and bodies, both governmental and non-governmental must be taken into consideration. The fourth preambular paragraph of the resolution reads: "also noting the work done by the International Law Association and other organisations and bodies, both governmental and non-governmental, concerning the Law of International Rivers". It is thus clear that the Committee envisages a more comprehensive basis for the work of the Sub-Committee. And it was in the spirit of this resolution that we have submitted these draft articles for the consideration of the Committee. Accordingly, our draft articles took into consideration the Helsinki Rules along with the work of other

international organisations. It may also be mentioned that the Helsinki Rules must be considered in the context of their comments. We have also taken into consideration international custom, the general principles of law existing in the legal systems of the world, international river treaties, the opinion of jurists and other precedents. I would also like to emphasise that we have tried to keep our specific proposals as objective as possible and not directed against upper or lower riparian States in particular.

3. I now give a brief explanation of the draft articles circulated by us earlier. Article 6 of these draft articles provides: "Each riparian State is entitled within its territory to a reasonable and equitable share in the beneficial use of waters of an international river. What is a reasonable and equitable share is to be determined by considering all relevant factors in each particular case". The examination of the Helsinki Rules will show that this formulation combines Article IV and Article V (i) of those Rules. The principle of equitable apportionment is universally recognised. We have not, however, attempted to define which factors would be relevant in order to determine the equitable apportionment of the waters of an international river. We thought it would suffice to state that this can be done in the light of all the relevant factors in each particular case.

4. Article 7 of the draft articles proposed by us states as follows: "A use or category of uses is not entitled to any inherent preference over any other use or category of uses". This corresponds to Article VI of the Helsinki Rules. We have also added the words "an international river must be examined on an individual basis and a determination made as to which uses are more important giving special weight to uses which are the basis of life". The regions of Africa and Asia being relatively arid with large populations to support are badly in need of agricultural development and these uses must be given more importance in determining priorities amongst uses.

5. Article 8 of the draft articles proposed by us provides that "an existing reasonable use is to be respected unless the factors justifying its continuance are outweighed by other factors leading to the conclusion that it would be equitable to modify or terminate it so as to accommodate a competing incompatible use". This corresponds to Article VIII para (i) of the Helsinki Rules. In our view, however, an existing use is not worthy of protection if (a) it is established over the lawful objections of a co-riparian State that the use is contrary to the Law of International Rivers and (b) at the time of becoming operational it is incompatible with a pre-existing reasonable use.

Article 9 of our draft articles combines the substance of Articles IX and X(a) of the Helsinki Rules.

Articles 10 of the draft articles proposed by us provides : "States are under an obligation to settle international disputes as to their legal rights or other interests by peaceful means in such a manner that international peace and security and justice are not endangered..." This part of the formulation is the same as Article XXVII, paragraph (i) of the Helsinki Rules which states, "Consistently with the Charter of the United Nations, States are under an obligation to settle international disputes, as to their legal rights or other interests by peaceful means in such a manner that international peace and security and justice are not endangered." In our formulation we have added the words "in the case of disagreement between two or more States it is not permissible for one of these States to act as judge in its own cause and take unilateral and arbitrary action". We feel that the requirement of good faith implies that no one party will prejudice the interest of the other by taking unilateral and arbitrary action. This is a rule which also follows from the principle of good neighbourly relations between States. We have tried to state the existing obligations regarding the pacific settlement of disputes without proposing any recommendations as in Article VI of the Helsinki Rules.

6. I would now like to refer to Article 1, which defines an international river. The definition has been suggested keeping in view the current thinking that an international river ought to be treated as an integrated whole. Thus, *J. L. Brierly* states as follows : "This practice of States as evidenced in the controversies which have arisen about this matter, seems now to admit that each State concerned has a right to *have a river system considered as a whole*, and to have its own interests weighed in the balance against those of other States and that no State may claim to use the waters in such a way as to cause material injury to the interest of another, or to oppose their use by another State unless this causes material injury to itself". We have taken into consideration all waters that flow into an international river. This view is amply supported in the practice of States as is clear from pages 17-20 of Vol. II of the Brief of Documents.

7. Article 2 of the draft articles proposed by us recognises that certain actions by one riparian State in its own territory may result in such grave damage to the territory of the other that the action would constitute a violation of the sovereignty and territorial integrity of the latter. In such cases because of the extreme gravity of the injury the act may be regarded as an act of aggression rather than merely a tortious act. In these circumstances compensation would not appear to be an adequate remedy and the right of self-defence may well exist. These acts have to be prohibited in no uncertain terms in the interests of peace and security of riparian States.

8. In support of this principle, we may mention that there is an obligation under the Charter of the United Nations to refrain from acts against the territorial integrity or political independence of any State. Thus Article 2(4) provides as follows :—

> "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State."

The term 'force' is to be interpreted to mean "all forms of pressure". In interpreting Article 2(4) of the Charter in the General Assembly's Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Algeria, Cameroons, Ghana, India, Kenya, Madagascar, Nigeria, Syria, the United Arab Republic and Yugoslavia put forward a joint proposal defining 'force' as follows :

> "All forms of pressure, including those of political or economic character against the territorial integrity or political independence of any State."
>
> (See report of the Special Committee on Principles of International Law concerning Friendly Relations *Official Records of the 23rd Session*—Document A/7326, paras 26, and 49-54).

In respect of this draft article we welcome the suggestion of the distinguished Delegate of Jordan, as supported by the distinguished Delegate of Iraq, that the operation of this principle may be extended and applied to an "occupying force".

9. Article 3 of the draft articles proposed by us states a fundamental principle of law which is absent from the Helsinki Rules. In accordance with this article "in cases in which the utilisation of an international river by a riparian State may result in damage or injury to a co-riparian State, the prior consent of that State is required. Where any damage or injury results, the aggrieved State is entitled to indemnification". This formulation is based on the Latin maxim : *Sic utere tuo et alienum non laedas* (i.e. so use your own so as not to injure another's property). *Lauterpacht* states that this maxim is applicable to the relations of States no less than to those of individuals, it underlies a substantial part of the law of torts in English law and the corresponding branches of other systems of law. (*Brief of Documents*, Vol. II, page 23).

This principle has been incorporated in Articles II and III of the Declaration of Montevideo adopted at the Seventh Inter-American Conference held in 1933 (*Brief of Documents*, Vol. II, page 253).

The principle also finds its place in the Statement of Principles adopted in 1956 at Dubrovnic by the International Law Association. Principle No. 4 states as follows :

> "A State is responsible, under international law, for public or private acts producing change in the existing regime of a river to the injury of another State, which it can have prevented by reasonable diligence."

Similarly, the Inter-American Juridical Committee on the Industrial and Agricultural uses of International Rivers and Lakes have suggested as recently as 1965 the formulation of this principle as follows :

> "In cases in which the utilisation of an international river or lake results or may result in damage or injury to another interested State, the consent of that interested State shall be required, as well as the payment of indemnification of any damage or harm done when such is claimed."

There are numerous other precedents supporting this important principle. However, it is of such a fundamental nature as not to require any further justification.

10. In Article IV we have stated the well-known principle of abuse of rights in this form "every riparian State must act in good faith in the exercise of its rights in relation to the waters of an international river". As a corollary to this principle, we have added the rule that "where a particular right could be exercised by more than one method, it is an abuse of rights for a riparian State to adopt the method which would cause injury to a co-riparian State". The principle as stated by us enjoys wide recognition in international law. Thus, *Oppenheim* is of the view that "the responsibility of a State may

become involved as the result of an abuse of right enjoyed by virtue of international law. This responsibility of a State occurs when a State avails itself of its right in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by a legitimate consideration of its own advantage".

Ricci-Busatti, the Italian jurist, states that "the principle which forbids the abuse of rights is one of the general principles of law recognised by civilized nations, to be applied by the world court" (*Brief of Documents*, Vol. II page 93).

Politis, the French jurist, has taken the view that the doctrine of abuse of rights is of great importance for the development of international law relating to State responsibility and he advocated its progressive application as one of the general principles of law referred to in Article 38 of the Statute of the International Court. (*Brief of Documents*, Vol. II, page 93).

Cheng takes the view that "the principle of good faith which governs international relations controls also the exercise of rights by States. The theory of abuse of rights recognised in principle both by the Permanent Court of International Justice and the International Court of Justice, is merely an application of this principle to the exercise of rights". (*Brief of Documents*, Vol. II, page 95).

Harle states that "every improper exercise of a right with the intention to harm the person inconvenienced by the legal claim in a manner contrary to good faith can enjoy no legal protection under the legal order". (*Brief of Documents*, Vol II, page 93).

The Permanent Court of International Justice has recognised the existence of this principle in two cases i.e., *Certain German Interests in Polish Upper Silesia* (*1926*) between Germany and Poland, and in the case of the *Free Zones of Upper Savoy and the District of Gex* (*Brief of Documents*, Vol.

II, page, 97). The *Trail Smelter Arbitration* is also often quoted as an application of this principle (*Brief of Documents*, Vol. II, page 101). But most important of all, I would like to refer to the observations of the Secretariat of AALCC at page 97 of Vol. II of *Brief of Documents* which are as follows :

> "To sum up, it may be pointed out that the theory of abuse of rights is one of the general principles of law recognised by several legal systems of the world. This doctrine was applied by the Asian-African Legal Consultative Committee in its Final Report on the Legality of Nuclear Tests where it was stated that even if such tests are carried out within the territory of the testing State, they are liable to be regarded as an abuse of rights."

It is important, therefore, to note that the principle of abuse of rights is a principle accepted as a rule of international law and has already been applied by this Committee.

11. Lastly, in Article 5 of the draft articles proposed by us, we have stated the principle that "a riparian State may not divert waters of an international river in such a manner that the unconsumed water flows into a channel which is different from the natural course of the river". This is a general principle of law recognised by States in relation to municipal water rules and is, therefore, a principle which can be usefully applied to the relations of States by virtue of the accepted theory of sources of law as embodied in Article 38 of the Statute of the International Court of Justice. In France and Germany, in accordance with the Civil Law, the riparian has the right to the free use of water for agricultural and industrial proposes, but he must return it without any excessive diminution to the water course when it leaves his land. The upper riparian cannot lead all or almost all water for the purpose of irrigation contrary to the interests of the lower riparian. (See *Brief of Documents* Vol. II, page 32). The laws of Belgium and Spain relating to the regulation of water

rights are more or less similar to the law of France (See *Brief of Documents*, Volume II, page 33).

The common law also appears to have the same principle. Thus *Kent* says "a riparian proprietor has no property in the water itself, but has simple usufruct while it passes along..... though he may use the water while it runs over his land as an incident to the land; he cannot unreasonably detain it or give it another direction and he must return it to its ordinary channel when it leaves his estate. In *Masou V Hill* the court referred to *Blackstone* and interpreted this and other statments to mean that first riparian could not deprive the latter one of the right the natural flow of the water (See *Brief of Documents*, Vol. II, page 41).

Mr. Chairman, with these remarks I commend that the draft articles proposed by us be taken into consideration by the Committee in pursuance of Resolution X (6) adopted at the Karachi Session.

FURTHER STATEMENT OF THE IRAQI REPRESENTATIVE

We are most grateful to the contribution made by our distinguished colleagues from Pakistan, Ceylon, Ghana, India, Jordan, Indonesia and Japan. Their reference to the draft principles presented by my Delegation is highly appreciated. The draft articles presented by the distinguished Delegate of Pakistan and the formulation in the Pakistan *Aide-Memoire* are of great value to the work of our Sub-Committee and my Delegation is happy to note that they correspond and add to our draft principles.

In regard to the views expressed by the distinguished representative of Ceylon, I wish to say that his reference to include the term 'drainage basin' in our discussion is certainly of importance. In fact, our definition of the term 'International River' includes that meaning since we referred to International River as an indivisible geographic physical unit.

As to the terms 'reasonable' and 'equitable', I agree with my Ceylonese colleague that they are philosophical more than technical ones. But I believe my Pakistani colleague has answered this point. The distinguished colleagues from Japan and India have suggested confining our efforts to the Helsinki Rules. You will agree, Sir, I am sure, that the draft principles which we have presented are largely derived from those rules, or are in harmony with them. In fact, our distinguished colleague from India was so kind as to confirm that point in the statement which he so eloquently presented.

But, Sir, I must submit that to rely entirely on those rules is not an advisable course to take. The distinguished Delegate of India speaking of those rules said, and I quote: "We, therefore, support the proposition that the Sub-Committee may

take up the Helsinki Rules as the basis of its study. These rules may be circulated among the Member Governments of this Committee and they may be requested to offer their comments relating thereto. To begin with, we may restrict our study to Articles I to VIII of the Helsinki Rules which contain general provisions and relate to the equitable distribution of water of an international drainage basin. The Member Governments may be invited, while commenting on these Rules to supply the Committee with such material as they would like the Committee to consider in its study of the subject". To us the topic would not be complete by merely discussing the rights without the factors which abuse those rights and the measures to restrict them.

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FURTHER STATEMENT OF THE INDIAN REPRESENTATIVE

In answer to the statement made by the distinguished Delegate of Pakistan in the Sub-Committee's meeting held on the 20th December, 1969 at 10.30 a.m., the Indian Delegate made the following points.

Dealing with the question as to the scope of the Committee's work on the Law of International Rivers, he recalled that the name of the Committee was Asian-African Legal Consultative Committee. In other words, it was an inter-governmental body established for mutual consultation. Its consultative status was also clear with reference to Article 3 of its Statute which indicated the subjects which it could take up for consideration and on which it could make recommendations to Member Governments. These subjects were those which were being considered by the International Law Commission, those which may be referred by any of the participating countries and those upon which exchange of views and information will be of common concern.

The subject of International Rivers had been referred to the Committee by the Governments of Iraq and Pakistan for the Committee's consideration under Article 3 (b) of its Statutes. The Committee might make such recommendations to Governments as might be thought fit, as was specified in Article 3 (b). The Committee had throughout been a forum for mutual consultation and expression of views on matters of common interest in the field of International Law. The Committee had worked on numerous subjects since 1956 when it was established, such as, Diplomatic Immunities and Privileges, State Immunity, Extradition, Treatment of Aliens, Rights of Refugees, and the Law of Treaties. Normally the

work on each subject had taken from three to four years to complete. In some cases, the end-product was described as guiding principles, such as those relating to Sovereign Immunity and Extradition, or as articles, such as, those relating to the Rights of Refugees. In either case, these were not binding upon the Governments. For instance, the principles of extradition were drafted in the form of a draft agreement which could be taken into account by States in entering into bilateral or multilateral arrangements or for modifying their local laws. These principles were adopted in 1961. No multilateral convention on extradition applying to Asian-African countries appears to have been arrived as yet. Even the bilateral agreements or arrangments have not yet been concluded. Nor has extradition legislation of the Member States necessarily been modified after 1961. It may also be pointed out that on the question of refugees, although articles were finalized in 1966 at Bangkok, the Government of Pakistan considered it appropriate in 1968 to open them for reconsideration. The request was circulated among the Governments and accordingly the matter was discussed in Karachi in January 1969 and may also be discussed in Ghana in January 1970. Thus, throughout its work the Committee had adopted a flexible approach and its rule had been consultative and advisory, and not legislative one. It could not lay down the law or "declare the existing law" in a definitive manner. What form the conclusion of the work of international rivers should take would also depend upon the views of the Governments participating in this work.

2. On the question of how to proceed further in the subject, the Indian Delegate suggested that the proper course for the Committee to take will be to take a standard formulation as its starting point. If the Committee is to proceed to consider the existing law in the subject and may be *lex ferenda* also, the best course under the circumstances may be the one suggested by the Delegate of Japan namely, to take the Helsinki Rules of 1966 as a starting point and to examine the

proposals of various Governments made or which may be made in this connection. Otherwise it may be difficult to decide as to how two or three or more proposals made by the various Governments should be considered at the same time.

3. The Indian Delegate then addressed himself to the various points made by the Delegate of Pakistan with reference to the draft articles proposed by them. He said that since he was dealing only with the procedural question at that stage, he would not be making detailed comments on the various articles. These would be offered at the appropriate time. He, however, emphasised that if, in the place of starting with the existing rules, as the Pakistan Delegate intended to do, the Committee started on controversial propositions developed by the Pakistan Delegate under Article 2 of his draft articles, wherein he had asserted that any action taken by a riparian State in its territory which resulted in damage to the territory of another State was an act of aggression, the proper remedy for which would not be compensation but the right of self-defence, it might lead to unneccessary argumentation. He thought that the proposition advanced by Pakistan was far too exaggerated and was not at all supportable or maintainable by any authority or by State practice. Nor was Article 2, clause 4, of the U.N. Charter relating to the prohibition of the threat or use of force relevant in the context of water rights. As regards the meaning of the word "force" as "*any form of pressure*", he recalled the proposal which India had co-sponsored with other non-aligned countries in the U.N. Committee on Friendly Relations, of which Pakistan was not a member. He further referred to the fact that both Pakistan and India had co-sponsored a similar proposal with reference to an article (Article 49) of the Law of Treaties at the Vienna Conference in 1968 and in 1969. The proposal had no application to the question of water rights and wrong analogies would not lead to crystallising legally sustainable propositions. It would be too wide and dangerous a doctrine to apply the concept of aggression and the right of self-defence to the adjustment

of water rights among co-riparian States. He, therefore, suggested that the Pakistan Delegation may kindly reconsider their views on this subject, in particular.

The Pakistan Delegate took the floor to reply, and stated that the Sub-Committee would be bound by its mandate, given by the resolution, and the rules of the Committee or its Statutes could not change that mandate, namely, to prepare a draft of articles on the Law of International Rivers. Whether these were described as recommendations would not affect the status of those rules, if they were supportable by existing law and the experience of Asian-African States. His Delegation could not agree to starting the work with the Helsinki Rules, unless these were proposed by a Government. As to the question of aggression and the right of self-defence, he thought that these propositions were supported by law and authority. Any act of a State which caused damage to another was an act of aggression.

The Delegate of Iraq supported the Delegate of Pakistan and said that the Committee was master of its rules.

The Indian Delegate replied that the Committee may change its rules of procedure but could not change its mandate established by Governments. A resolution of the Committee could not override the Statutes. Nor was every act of a State causing damage to another an act of aggression. Remedy against damage was compensation and not self-defence. Aggression was a qualitatively different concept.

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III. DRAFT ARTICLES ON THE LAW OF INTERNATIONAL RIVERS JOINTLY PROPOSED BY THE DELEGATIONS OF IRAQ AND PAKISTAN AT THE ELEVENTH SESSION

Article 1

An international river is one that traverses the boundary of or separates two or more States, including the tributaries which flow into the said river making a material contribution to its flow.

The river with its tributaries is considered to be the common property of the co-riparian States and is an indivisible unit.

Article 2

(a) A riparian State should respect the acquired rights of the co-riparian States in the international river.

(b) A riparian State may not utilize the waters of an international river or take action in its territory in a manner which would cause grave and permanent damage to the territory of a co-riparian State.

(c) A riparian State may not utilise the waters of an international river in a way which causes widescale environmental, ecological and physical changes in the territory of a co-riparian State.

Article 3

In cases in which the utilization of an international river by a riparian State may result in damage or injury to a co-riparian State, the prior consent of that State is required.

Where any damage or injury results, the aggrieved State is entitled to indemnification.

Article 4

Every riparian State must act in good faith in the exercise of its rights in relation to the waters of an international river. Where a particular right can be exercised by more than one method, it is an abuse of right for a riparian State to adopt the method which would cause injury to a co-riparian State, in particular :

(a) A lower riparian State may not dam the waters of an international river at a particular site, flooding the territory of an upper riparian State, if an alternative site is available which would avoid such flooding.

(b) An upper riparian State may not divert the waters of an international river without constructing reservoirs for storage of water, where this is possible and which would have the effect of avoiding damage to the lower riparian State.

Article 5

(a) A riparian State may not divert waters of an international river in such a manner that the unconsumed water flows into a channel which is different from the natural course of the river.

(b) A riparian State may not change the course of an international river at the point where it enters the territory of other co-riparian State.

(c) A riparian State may not alter or change the course of an international river which would decrease the amount of its water in the downstream of the co-riparian State.

Article 6

Each riparian State is entitled, within its territory, to a reasonable and equitable share in the beneficial use of the

waters of an international river. What is a reasonable and equitable share is to be determined by considering all the relevant factors in each particular case.

Article 7

A use or category of uses is not entitled to any inherent preference over any other use or category of uses. An international river must be examined on an individual basis and a determination made as to which uses are more important, giving special weight to uses which are the basis of life, such as agriculture and consumptive uses.

Article 8

If due to human conduct any detrimental change is caused in the natural composition, content, or quality of the water of an international river in one State, which does substantial injury in another State, the former State is responsible for the damage done.

Article 9

States are under an obligation to settle international disputes as to their legal rights or other interests by peaceful means in such a manner that international peace and security, and justice are not endangered. In the case of disagreement between two or more States, it is not permissible for one of these States to act as judge in its own cause and take unilateral and arbitrary action.

The States shall refer the dispute within reasonable time to arbitration and shall abide by its decision.

Article 10

The general rules of International Law as set forth in these draft articles are applicable to the international river and the use of its waters except as may be provided otherwise by convention, agreement or binding custom among the co-riparian States.

IV. PROPOSAL OF THE INDIAN DELEGATION ON THE LAW OF INTERNATIONAL RIVERS MADE AT THE ELEVENTH SESSION

The Delegation of India proposes that the Helsinki Rules adopted by the International Law Association in 1966, should be the basis of the Committee's study of the Law of International Rivers. To begin with, the following rules may be taken up for study :

Article I

The general rules of international law as set forth in these articles are applicable to the uses of waters of an international drainage basin except as may be provided otherwise by convention, agreement or binding custom among the basin States.

Article II

An international drainage basin is a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus.

Article III

A "basin State" is a State the territory of which includes a portion of an international drainage basin.

Article IV

Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.

Article V

(1) What is a reasonable and equitable share within the meaning of Article IV is to be determined in the light of all the relevant factors in each particular case.

(2) Relevant factors which are to be considered include, but are not limited to :

(a) the geography of the basin, including in particular the extent of the drainage area in the territory of each basin State;

(b) the hydrology of the basin, including in particular the contribution of water by each basin State;

(c) the climate affecting the basin ;

(d) the past utilization of the waters of the basin, including in particular existing utilization ;

(e) the economic and social needs of each basin State ;

(f) the population dependent on the waters of the basin in each basin State ;

(g) the comparative costs of alternative means of satisfying the economic and social needs of each basin State ;

(h) the availability of other resources ;

(i) the avoidance of unnecessary waste in the utilization of waters of the basin ;

(j) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses, and

(k) the degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State ;

(3) The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable share, all relevant factors are to be considered together and a conclusion reached on the basis of the whole.

Article VI

A use or category of uses is not entitled to any inherent preference over any other use or category of uses.

Article VII

A basin State may not be denied the present reasonable use of the waters of an international drainage basin to reserve for a co-basin State a future use of such waters.

Article VIII

1. An existing reasonable use may continue in operation unless the factors justifying its continuance are outweighed by other factors leading to the conclusion that it be modified or terminated so as to accommodate a competing incompatible use.

2. (a) A use that is in fact operational is deemed to have been an existing use from the time of the initiation of construction directly related to the use or, where such construction is not required, the undertaking or comparable acts of actual implementation.

(b) Such a use continues to be an existing use until such time as it is discontinued with the intention that it is abandoned.

3. A use will not be deemed an existing use if at the time of becoming operational it is incompatible with an already existing reasonable use.

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V. SUMMARY RECORD OF DISCUSSIONS HELD AT THE ELEVENTH SESSION, ACCRA

The subject *The Law of International Rivers* was considered by the Committee during the Third, Fourth, Seventh and Eighth Meetings of its Eleventh Session held at Accra (Ghana).

The Delegate of IRAQ introduced before the Committee a set of draft articles being joint proposal of the Delegations of Iraq and Pakistan and requested the Committee to give consideration to the draft articles. In his introductory statement, the Delegate of Iraq referred to the various principles which had been advocated from time to time and stated that the draft articles in the joint proposal of Pakistan and Iraq were derived from international custom practised among different nations, opinions of jurists, decisions of courts and treaties concluded between States as also the decisions and resolutions of international associations and bodies. He then dealt with the different articles contained in the joint proposal and explained the background and scope of the principles contained in the draft articles. The three main principles contained in the draft articles, according to him, were : that a State was not to be allowed to alter the natural conditions on its own territory to the disadvantage of the natural conditions in the territory of its neighbouring State ; (ii) the rights of riparian State must be fully respected and the waters of international rivers should be so utilised as to bring maximum benefit to all riparian States ; and (iii) the obligation of States to submit water disputes for arbitration when other peaceful means of settlement were not affective. He invited the Committee to proceed to consider the draft articles as the basis of discussion.

The Associate Member of the Republic of KOREA stated by way of preliminary observation that the agricultural use of

the waters of an international river was of vital importance especially to Asian-African countries and it was necessary to consider this important subject as traditional law and practice did not fully govern and deal with the new problems of Asian-African countries. He stated that it would be useful at the outset to consider the Report of the Inter-Sessional Sub-Committee.

The Delegate of PAKISTAN affirmed that the development and utilisation of water resources on an equitable basis was vital for sustaining the life and economy of the ever-growing populations of Asian-African countries. Recalling the discussions in the Inter-Sessional Sub-Committee he stated that at that meeting the Delegate of Iraq and also the Delegate of Pakistan had put forward certain draft articles for consideration of the Sub-Committee and that after considering these proposals and hearing the views of the other Delegations, the Iraq and Pakistan Delegations had now put forward their joint proposal which he wished the Committee to take as the basis of discussion. He said that if the Helsinki Rules were to form the basis of discussion as suggested by the Delegates of India and Japan, it would be time consuming process. He suggested that the Committee should start with the concrete proposals which were before the House in the shape of draft articles as contained in the joint proposal of Iraq and Pakistan.

The Delegate of INDIA after reviewing the discussions at the Karachi Session and the Inter-Sessional Sub-Committee stated that before the Inter-Sessional Sub-Committee there were three major proposals, namely a set of draft principles proposed by the Delegate of Iraq ; a set of draft articles proposed by the Delegate of Pakistan ; and the proposal of Japan to proceed on the basis of the Helsinki Rules which was supported by India. He mentioned that most of the States represented in this Committee were riparian States and the interests of those States should be reconciled on a rational and fair basis. The first endeavour, in his view, should be to build up a body of

positive law on the subject and to find out the basic principles embodied in the treaties and agreements on the subject and in States practice. If the existing law was not complete or adequate, the second initial step, according to him, would be to develop the law by filling the gaps and by making proposals. He said that there were two methods which were open to the Committee in discussing this subject, namely either to embark on a research into the treaties and States practice all over the world with a view to ascertaining the general rules or principles or alternatively the Committee could proceed on the basis of work already done by international associations and bodies. He said that the second alternative would ensure speedy progress and suggested that the Helsinki Rules which were adopted by the International Law Association in 1966 should be taken as the basis for discussion in the Committee. He gave detailed reasons for his proposals as to why the Helsinki Rules should be taken as a starting point and mentioned that these rules were likely to be taken up as an item for consideration by the U.N. General Assembly at its next session.

The Delegate of CEYLON whilst reserving his comments on the joint proposal presented by Iraq and Pakistan recalled that owing to differing opinions in regard to the starting point of discussion the Inter-Sessional Sub-Committee was unable to perform the task which the Committee had entrusted to it at the Karachi Session. He said that the question to be decided by the Committee was one of procedure, namely the basis on which the Committee was going to proceed in regard to formulation of rules on the subject of International Rivers. Referring to the draft articles which were presented before the Inter-Sessional Sub-Committee by the Delegate of Pakistan, he pointed out that those draft articles were either identical with or based on the Helsinki Rules. In view of this, he said agreement should be reached on a starting point so that some progress could be made on the subject.

The Delegate of JAPAN fully recognised the vital importance of the problem of the use of waters of international

rivers and the need to formulate general principles for solution of particular problems on the basis of bilateral or regional agreements among the interested States. He suggested for consideration of the Committee that the Helsinki Rules should be taken as the basis of the Committee's work for formulating the general rules and this could be supplemented or modified or adapted to suit the particular conditions of Asian and African regions. He suggested that the joint draft proposed by Iraq and Pakistan might be entitled as "Supplementary Rules to the Helsinki Rules" and that since the subject on the settlement of disputes was dealt with in Chapter VIII of the Helsinki Rules in a detailed and concrete manner, the draft articles proposed by Iraq and Pakistan had better leave the matter entirely to the Helsinki Rules. As regards the substantive rules, he drew the particular attention of the Committee to Article VI of the Helsinki Rules which provided that a use or category of uses was not entitled to any inherent preference over any other use or category of uses.

The Delegate of IRAQ stated that the Committee should proceed on the basis of the joint proposal of Pakistan and Iraq and not on the basis of the Helsinki Rules as those did not reflect the particular views of Asia and Africa on the question.

The Delegate of INDONESIA stated that although his country was not directly concerned with the topic, he would like to see all its aspects considered with the aim of achieving an equitable solution of the problem of uses of waters of international rivers and any probable outcome of deliberations in the matter should have the common aim of attaining long-term cooperation between the countries concerned.

The Delegate of JORDAN said that the divergence of opinion between the Delegations regarding the matter of approach was merely technical and not of substance. While admiring the work done by the International Law Association, he felt that this Committee was charged with the function of dealing with the problems peculiar to the region and this was

reflected in the resolution of the Karachi Session constituting the Inter-Sessional Sub-Committee. He felt that since concrete proposals had been made in the joint Iraq-Pakistan draft, it might be appropriate to go through those proposals and see how for these were suitable.

The Associate Member for the Republic of KOREA stated that the Committee should first have the report on the work done by the Inter-Sessional Sub-Committee and also hear general statements and explanations from the proposers of the draft articles and thereafter the same should be scrutinised by a Sub-Committee.

The Delegation of U.A.R. suggested that the joint proposal of Iraq and Pakistan should be taken as the basis on which discussions should start in the Committee.

The Delegate of GHANA said that the subject of international rivers was very important and this was reflected in the number of conventions and the treaties and also in the evolution of customary rules to govern the uses of international rivers. He suggested that an *Ad hoc* Sub-Committee might be constituted to find out what was common between the Helsinki Rules and the draft articles put forward by Iraq and Pakistan. He said that those Delegates who wanted to rely on the Helsinki Rules could put forward those Rules whilst considering the draft articles submitted by Iraq and Pakistan.

The Delegate of INDIA once again reiterated his stand that the Committee should proceed on the basis of the Helsinki Rules as being a formulation of independent and impartial body of jurists. He said that if the procedural question could not be resolved, the proper course for the Committee would be to refer the proposals of Iraq and Pakistan to the Governments of the participating countries which could be looked into by each Government and the Governments could decide whether they would like to start from the approach of international river as a unit or on the basis of a river basin approach. The appro-

priate course, according to him, ought to be to build up areas of agreement first and see how far the propositions adopted by the Committee were acceptable to Asian and African countries rather than to start with the difference of opinion between the various Delegations.

The Observer from the League of Arab States as also the Observer from COMBODIA made general statements on the subject.

At the end of the above discussion, the Chairman appointed an Ad Hoc Sub-Committee to go into the question of finding a starting point for discussion and to report back to the Committee at its next meeting. The Ad Hoc Sub-Committee consisted of the delegates of India, Pakistan, Iraq, Ghana and Japan.

In the Fourth Meeting held on 22nd January, 1970, the Chairman of the Ad Hoc Sub-Committee reported that the Ad Hoc Sub-Committee had agreed to recommend that the Committee should devote its attention to the uses of waters particularly in the context of food and agricultural programmes of Asian and African countries. The Chairman added that although this was the general consensus in the Ad Hoc Sub-Committee, the Delegate of Japan was of the view that the subject should be considered with particular reference to agricultural, industrial and consumptive uses of waters. As regards the basis for discussion, the Chairman said that the Ad Hoc Sub-Committee had agreed that the Sub-Committee should take up the joint proposal of Iraq and Pakistan and the first eight articles of the Helsinki Rules which would be formally introduced by the Delegation of India as their proposal for the basis of discussion.

The Delegate of Japan stated that the industrial uses of waters could become a vital question for the Asian-African countries in the process of their industrialisation and consequently he felt that the industrial uses of waters should be given no less priority than other uses of waters when the

Committee considered the subject. He pointed out, however, that if the consensus in the Committee was to adhere to the Karachi Session resolution, his delegation would leave the matter for the decision of the Committee.

The Delegate of IRAQ stated that he wished to make it clear that the joint proposal of Pakistan and Iraq and the proposal of India for proceeding on the basis of the Helsinki Rules should have the same status.

The Delegate of PAKISTAN stated that the Karachi Session resolution contemplated examination of the problem in the context of food and agricultural developments and that the approach of the Committee should, therefore, be to formulate the rules on that basis.

The Delegate of INDIA said that since the joint proposal of Iraq and Pakistan had been moved within the past twenty-four hours, it was essential that it was circulated to the Governments of the participating countries for comments before it was examined by the Committee.

The Delegate of IRAQ suggested that the Committee should prepare a new draft on the basis of the two proposals and thereafter the new draft could be referred to the Governments for their comments. He recommended a study of the two proposals by a Sub-Committee.

The Delegate of NIGERIA stated that the Committee should concentrate on the ways and means by which international rivers could be developed. He felt that the rules and practices hitherto adopted by the European powers should only serve as guiding factors or possible means to an end in the search for possible avenues to meet the special requirements of the two continents. He stated that since international rivers run through the territories of more than one State, it was essential that such rivers must be utilised by the riparian States without adversely affecting the legitimate interests of one another. In this connection, he mentioned certain broad principles

for consideration of the Committee. He expressed satisfaction that the *Ad hoc* Sub-Committee had found a solution and said that the Committee should consider the joint Pakistan-Iraq draft and also the Helsinki Rules. He suggested that the two proposals should be sent to the Governments and their replies obtained and thereafter the Secretariat should prepare a text incorporating the various views and areas of agreement. This, in his view, would facilitate the task of the Committee.

The Associate Member for the Republic of KOREA suggested that instead of simply sending the proposals to the Governments, the Committee should first listen to the proposals, find out what they meant, and also hear the views of other Delegates, and thereafter the proposals should be sent to Governments together with the comments and explanations that might be given in the course of discussion in the Committee. This, he said, would facilitate the task of the Governments in giving consideration to the problem. He supported the view of the Delegate of Japan that the industrial uses of international rivers should also be considered by the Committee.

The Delegate of PAKISTAN supporting the proposal of the Delegate of Iraq stated that the Committee should consider all the proposals at this stage as there was nothing new in the joint proposal of Iraq and Pakistan. So far as the Helsinki Rules were concerned, he said, the Committee was aware of their existence all along.

The Delegate of INDIA reiterated his position that the proposals having been made so recently, he had no time to consider them in detail and that his Delegation would like to obtain the Governments' views on the various draft articles.

The Delegate of JORDAN stated that no useful purpose would be served by inviting opinions of the Governments at this stage and that the proper procedure should be to consider the two drafts and see what the consensus was on them and thereafter the matter could be referred to the Governments.

The President then summed up the discussion and invited the Committee to indicate in concrete terms as to what was to be done. After some discussion, it was decided to constitute a Sub-Committee to go into the subject.

The Chairman of the aforesaid Sub-Committee reported in the Seventh Meeting held on 27th January, 1970, that no progress could be made on the subject in the Sub-Committee. It was decided that the report of the Chairman be kept on record and circulated.

The Committee then decided to consider as to how best the subject could be discussed in the future. Divergence in views centred around the question as to whether the subject should be considered at an Inter-Sessional Sub-Committee or at the next session of the Committee. There was also a discussion on the question as to what should be taken as the basis of discussion, i.e. whether the Helsinki Rules or the joint proposal of Iraq and Pakistan or both.

There was further discussion on this matter in the Eighth Meeting held on 28th January, 1970. The Delegates of Iraq and Pakistan pressed for the constitution of an Inter-Sessional Sub-Committee for consideration of the subject in view of the move by Finland for bringing up the Helsinki Rules for the consideration of the United Nations. The Delegates of IRAQ and PAKISTAN stated that they would have no objection to proceed on the basis of the Helsinki Rules as suggested by the Delegation of India provided their own proposals were considered at the same time.

The Delegate of INDIA said that he had two alternatives to suggest : either the Committee should take up the subject at its next session when the joint proposal of Iraq and Pakistan together with the proposal of India could be considered article by article or if it was decided to set up an Inter-Sessional Sub-Committee to consider the matter in view of the Helsinki Rules being taken up for discussion in the U.N. General Assembly, he

would have no objection if the Helsinki Rules were taken as the basis of discussion. He reiterated the advisability of considering the subject at the next session as Delegations would have sufficient time to prepare themselves and discussions would be proceeded with straight away by considering article by article without having to spend any time on procedural discussions.

The President proposed that the subject be taken up at the next, i.e. twelfth session in order to make discussions effective and to avoid discussion on procedural matters. The proposal of the President was adopted by the Committee. It was also decided that the joint-proposal of Iraq and Pakistan as also the proposal put forward by the Indian Delegation be circulated to the Governments of Member States inviting their comments.

VI. THE LAW RELATING TO INTERNATIONAL SALE OF GOODS

I. THE LAW RELATING TO INTERNATIONAL SALE OF GOODS

The subject "International Sale of Goods" was included in the programme of work of the Asian-African Legal Consultative Committee under Article 3 (c) of its Statutes at the suggestion of the Government of India. A study concerning the rules of conflict of laws relating to International Sales was prepared by the Secretariat of the Committee and placed before the Committee at its Fourth Session held in Tokyo in 1961. The matter was considered by a Sub-Committee at that Session which recommended collection of further material. Attempts at collection of material from Member Countries did not bear much fruit and it was not possible to bring up the subject for further consideration by the Committee in view of the fact that other important items required urgent consideration.

The United Nations Commission on International Trade Law (UNCITRAL), which was constituted by the U.N. General Assembly resolution No. 2205 (XXI), held its First Session in New York in 1968 and the major items which were selected for study and consideration by the UNCITRAL included the topic of International Sale of Goods. At the Second Session of the UNCITRAL which was held in Geneva during March 1969 this subject was taken up for further discussion and some progress was made. The UNCITRAL decided to set up two inter-sessional working groups : (i) on the International Sale of Goods, which met in January 1970 in New York to examine the extent to which the Hague Conventions of 1964 and 1955 could be used as a basis for a world-wide unification of law; and (ii) to report on the question of time-limits and limitations (prescription) in relation to sale of goods. This working group

met in Geneva in August 1969. The subject was further considered at the Third Session of the UNCITRAL on the basis of the recommendations made by these working groups.

At the Second Session of the UNCITRAL, the representatives of Ghana and India made statements suggesting that the Asian-African Legal Consultative Committee should revive its consideration of the subject of International Sale of Goods so as to reflect Asian-African viewpoint in the work of the UNCITRAL and that the subject might be taken up at the Eleventh Session of the Committee to be held in Accra. In view of this proposal, the subject was placed on the agenda of the Eleventh Session and the Secretariat of the Committee transmitted a request to the Governments of Asian-African States, Chambers of Commerce and international organisations, both governmental and non-governmental, for views and information. In response, replies were received from some Governments and institutions and the material so received was included in the Brief of Documents prepared by the Secretariat and placed before the Eleventh Session.

The Eleventh Session of the Committee was attended by Mr. M. H. van Hoogstraaten, Secretary-General of the Hague Conference on Private International Law, Mr. John Honnold, Chief of the International Trade Law Branch of the United Nations and Mr. A. M. Akiwumi, Regional Adviser on the Economic Commission for Africa.

Summary Record of Discussions held at the Eleventh Session

The Committee considered this topic at the fifth, sixth and tenth meetings of the Eleventh Session held respectively on 23rd, 26th and 29th January, 1970.

Initiating the discussion in the fifth meeting held on 23rd January, 1970, the Delegate of GHANA made a detailed statement and suggested that the Delegates should give their comments on the Hague Conventions of 1964 and on the needs of the developing countries generally in the area of international

trade law. Further, he proposed that a Sub-Committee should be appointed to identify in precise terms those parts of the Conventions which were unacceptable and to prepare a concise statement of the requirements of the developing countries in the field of international trade law. He also proposed that the Committee should circulate the recommendations of the Sub-Committee to the governments of the Member States for their comments and that a permanent Sub-Committee be appointed to prepare proposals in the light of the aforesaid Sub-Committee's recommendations and the comments of the Member Governments thereon.

The Delegate of PAKISTAN made a detailed general statement on the subject indicating the work done by the International Institute for the Unification of Private Law and the Hague Conference on Private International Law. He pointed out that the developing countries were not associated with the drafting of the two Hague Conventions and that their interests were not fully taken into account in either of them. In considering this subject, he said, three fundamental aspects had to be borne in mind, namely the definition of international sale, the determination of the scope of the operation of the law, and the stipulation of remedies for the violation of obligations. He said attempt should be made : (i) to have progressive unification of the law of international sale of goods, substantive as well as conflict norms, (ii) to prepare a standard form of contract, and (iii) to eliminate diversity in the periods of prescription and time-limitations.

The Delegate of CEYLON said that the Hague Conventions were on the whole favourable to the seller at the expense of the buyer. He felt that in formulating any principles on the subject, the needs of developing countries should be taken into account.

The Delegate of JAPAN felt that the Committee could make a more effective and useful contribution if it took up the subject after some concrete work was done by the UNCITRAL.

He suggested that the twelve Asian and African Member States of the UNCITRAL should first of all find out where the problem lay and thereafter develop a consensus in the UNCITRAL itself in order to draw up and reflect their views in the work of that U.N. body. He, therefore, did not favour the appointment of a Sub-Committee to look into substantive issues of the subject at this stage.

The Delegate of INDONESIA stated that the present conditions in International Trade showed the ever increasing gap between the developed and developing nations and he appreciated the efforts that were being undertaken to minimise that gap. He affirmed his support for the initial effort of harmonisation, and if necessary, for unification of a set of rules.

The Secretary-General of the *Hague Conference on Private International Law* stated that the subject of international sale of goods was a matter of world wide interest. He indicated the work that had been done by the Hague Conference and also explained the scope of the various conventions.

The Observer for the *League of Arab States* referred to the work done by that body concerning the subject.

The Delegate of PAKISTAN stated that whatever good there was in the existing conventions, the Committee would accept, but where there were deficiencies, it should seek to find out a remedy, and where it was found that the provisions were detrimental to the interests of Asian-African community, then steps should be taken for suitable modifications and alterations.

The Delegate of JORDAN associated himself with the remarks of the other Delegates and said that the countries of Asia and Africa must have a hand in the preparation of a set of principles which was acceptable to all nations.

The Secretary of *UNCITRAL* made a detailed statement on the work done by the Commission and also by its working

group which had met in New York. He also circulated the report of the working group for consideration of the Delegations.

Further discussion on the subject took place in the sixth meeting held on the 26th January, 1970. The Delegate of INDIA after referring to the progress made on the subject in the two sessions of the UNCITRAL said that to begin with, the Asian-African countries should look into the matter, familiarise themselves with what were the issues involved so that some preliminary preview might be had of the problems that were likely to come up before the UNCITRAL. The first question, he said, therefore, was to decide as to what direction should be given to the Asian-African community in its handling of the subject and other related problems.

The Associate Member of the Republic of KOREA considered the subject to be a very important one because if harmony and consensus could be reached on this complex and difficult problem, it would have a far-reaching effect on the work of this Committee.

The Delegate of IRAQ said that his Delegation was in full agreement with the views expressed by the other Delegates. He thought it was essential to study the subject as it was of particular importance to all the developing countries.

At the end of the discussion, the Committee set up a Sub-Committee of seven consisting of the Delegates of Ceylon, Ghana, India, Japan, Nigeria, Pakistan and the U.A.R. to give detailed consideration to the subject.

An interim report of the aforementioned Sub-Committee was presented in the Tenth Meeting held on the 29th January, 1970. The Chairman of the Sub-Committee said that a further report will be sent to the Secretariat for circulation among Member Governments. In the interim report a suggestion was made for the establishment of a Standing Sub-Committee with a view to making a report at the Twelfth Session of the Committee. The interim report was adopted by the Committee.

II. INTERIM REPORT OF THE SUB-COMMITTEE APPOINTED AT THE ELEVENTH SESSION

Mr. President, Distinguished Delegates and Observers,

I have the honour to submit an interim report of the Sub-Committee on International Sale of Goods. The Sub-Committee was established on the 26th January, 1970 after the general statements had been made in the open sittings of the Committee which were held on the 23rd and 26th January, 1970. The Sub-Committee consisted of the Delegates of Ceylon, Ghana, India, Japan, Nigeria, Pakistan and the U.A.R. The Sub-Committee held three meetings between the 26th and 28th January, 1970. The Delegate of Pakistan and the Delegate of India were unanimously elected as Chairman and Rapporteur of the Sub-Committee respectively.

In the meetings of the Sub-Committee, apart from the members of the Committee, observers from other Governments and international organisations also participated.

The report of the Sub-Committee has not yet been completed and will be circulated among Member Governments as soon as it is ready.

In the meanwhile, I should like to report that the work of the Sub-Committee was concentrated on two points :

(1) to increase familiarity of the members of the Committee with the work being done on the subject by UNCITRAL and other organisations, and

(2) to make recommendations regarding the manner in which the subject may be discussed in the Committee on a regular basis.

As regards the first point, the Secretary of UNCITRAL, Prof. Honnold, was invited to acquaint the Sub-Committee with the work of UNCITRAL as well as its working groups on International Sale of Goods and on Time-Limits and Prescription. The Working Group on Prescription had held its meeting in Geneva in August 1969; the Working Group on Uniform Law had held its meeting in New York in January 1970.

Thereafter, the Secretary-General of the Hague Conference was invited to address the Sub-Committee on the relation between the Hague Convention of 1955 on Applicable Law and the Hague Convention of 1964 on Uniform Law.

The discussions in the Sub-Committee concentrated on the following items:

(1) relations between unification of conflict norms and unification of substantive rules on International Sale of Goods;

(2) relations between the Convention proposed by the Working Group on Prescription and the Uniform Law on International Sale of Goods;

(3) the manner in which Uniform Law, whether of substantive rules or conflict norms, or a combination thereof, should be embodied in the final texts; whether the final texts should be a Convention or a Code or should take some other form ?

(4) encouragement of conclusion and adoption of standard contracts especially in the regions of Asia and Africa;

(5) promotion of uniform interpretation of Convention or Code and of standard terms of contract.

Mr. President, I do not wish to go into the details of the subject-matter discussed under these headings. These matters

as well as references to the United Nations and other documents will be included in the report of the Sub-Committee.

On the second question, namely the organisational aspect of our further study of the subject, the Sub-Committee agreed to make the following recommendations :—

(1) The Sub-Committee should continue to function as a Standing Committee for exchanging views on the subject of International Sale of Goods. The views and suggestions will be exchanged through correspondence and by circulation of documents. If it becomes necessary, the Sub-Committee may meet on a formal basis as may be arranged by the Secretariat.

(2) The Secretary of the A.A.L.C.C. will keep the members of the Sub-Committee informed about the developments in the UNCITRAL and its working groups in regard to the study of the subject. He will provide such services to the Sub-Committee as may become necessary, including the circulation of relevant documents.

(3) The Secretary will keep the Member Governments informed about the work of the Sub-Committee, its recommendations and suggestions, and will send them necessary materials.

I take this opportunity to express deep appreciation of the Sub-Committee of the contributions made by the Secretary of UNCITRAL, the Secretary-General of the Hague Conference and our Rapporteur.

III. REPORT OF THE SUB-COMMITTEE ON INTERNATIONAL SALE OF GOODS

The subject of International Sale of Goods was taken up by the Asian-African Legal Consultative Committee in its Plenary Session on the 23rd and 26th January, 1970. General statements on the subject were made by a number of Delegates and Observers as well as by the Secretary of UNCITRAL and the Secretary-General of the Hague Conference on Private International Law. A Sub-Committee was appointed on the 26th January, 1970. The Sub-Committee consisted of the Delegates of Ceylon, Ghana, India, Japan, Nigeria, Pakistan and the UAR. The Sub-Committee held three meetings between 26 and 28 January, 1970. The Delegate of Pakistan, Mr. Sharifuddin Pirzada, and the Delegate of India, Dr. S. P. Jagota, were unanimously elected as Chairman and Rapporteur of the Sub-Committee, respectively.

2. An interim report of the Sub-Committee was submitted to the Committee by its Chairman on the 29th January, 1970.

3. In the meetings of the Sub-Committee, apart from the members of the Committee, observers from other Governments and international organizations also participated.

4. After some discussion, it was decided that the Sub-Committee should concentrate its attention on two points : 1) increase familiarity of the members of the Committee with the work done by UNCITRAL and other organizations, and 2) make recommendations regarding the manner in which the subject may be discussed in the Committee on a regular basis.

5. The discussion on these two aspects is summed up hereunder under I and II.

6. Keeping in mind the suggestions made in the *Brief of Documents* prepared by the A. A. L. C. C. Secretariat at pages 23-29, as well as in the Secretary's introduction to the *Brief*, and the work of UNCITRAL done heretofore, and in particular of its Working Group on Sale of Goods which had held its session in New York from January 6 to 16, 1970, about which Professor Honnold, Secretary to UNCITRAL, had made a short report in the Committee on January 23, 1970, the discussions on the Sub-Committee concentrated on the following items:

(1) relations between unification of conflict rules and unification of substantive rules on International Sale of Goods;

(2) other subjects considered by UNCITRAL Working Group;

(3) relations between the Convention proposed by the Working Group on Prescription and the Uniform Law on International Sale of Goods;

(4) the manner in which Uniform Law, whether of substantive rules or conflict rules, or a combination thereof, should be embodied in the final text, namely, whether in the form of a Convention or a Code or in some other form;

(5) encouragement of conclusion and adoption of Standard Contracts or General Conditions of Sale especially in the regions of Asia and Africa; and

(6) promotion of uniform interpretation of Convention or Code.

7. Where appropriate, the introductory statement was made either by the Secretary of UNCITRAL, or by the Secretary-General of the Hague Conference on the Unification of Private International Law. The discussion on the items referred to above may be summed up item-wise as follows :

(1) Relations between unification of conflict rules and unification of substantive rules on International Sale of Goods

8. On this item, detailed statements were made by the Secretary of UNCITRAL and the Secretary-General of the Hague Conference. The Secretary of UNCITRAL recalled that this subject had been extensively discussed in UNCITRAL Working Group in New York in January 1970. On this point a number of Governments had made comments. It was realized that although most Governments would prefer unification of substantive rules, this by itself would not eliminate the need for conflict rules. On the question of the relations between the Hague Convention of 1955 on Applicable Law (unification of conflict rules) and the Hague Convention of 1964 on Uniform Law (substantive rules), no definitive opinion had emerged. But on the question of the applicability of conflict rules in relation to substantive rules, which was dealt within Article 2 of the Hague Convention of 1964, a number of proposals were made. In its present text, Article 2 excluded the application of rules of private international law, subject to any provision to the contrary in the said law. The UNCITRAL Working Group, Professor Honnold reported, had suggested the revised rule to read as follows :

"1. The Law shall apply where the places of business of the contracting parties are in the territory of States that are parties to the Convention and the law of both these States makes the Uniform Law applicable to the contract;

2. The Law shall also apply where the rules of private international law indicate that the applicable law is the law of a contracting State and the Uniform Law is applicable to the contract according to this law."

9. Thus, the Uniform Law will apply where the places of business of the contracting parties are in the territories of the States parties to the Convention. It will also apply, if under the rules of private international law, the proper law of the contract is the law of a contracting State. The rules of private international law will be applied by the forum in which remedy is sought, and will thus depend upon whether or not such rules have been unified. Thus, if the rules of private international law have been unified, such as in the Hague Convention of 1955 on Applicable Law, these rules will apply among parties to that Convention. Among States not parties to the Hague Convention of 1955 or other similar agreements or codes, the rules of private international law followed by the forum will apply.

10. The need for the unification of conflict rules and the desirability of the adoption of the Hague Convention of 1955 was highlighted by the Secretary-General of the Hague Conference in his intervention in the Sub-Committee. In his view, the unification of rules of choice of law would promote uniformity of internal laws of the nations. This was particularly needed, since the unification of substantive law rules may take a long time. The uniform rules of choice of law would promise immediate progress, and should not be neglected. In our contemporary world, the basic element of justice for the courts was to take into account the position of those parties to the contract whose activities had been pursued under a foreign law, and to apply that foreign law if the contract had its closest connection with that country. He argued that even after the adoption of Uniform Law in its 1964 text or as may be revised by UNCITRAL, conflict rules would be necessary (1) for the subject-matter not covered by Uniform Law, (2) where Uniform Law itself required such reference, and (3) among States not parties to the Convention on Uniform Law or those making one or more important reservations. In his view, therefore, international codification of choice of law rules would have a use and would eliminate a point of uncertainty of the law.

Against this background, he commended the revised text of Article 2 considered by the UNCITRAL Working Group.

(2) Other subjects considered by UNCITRAL Working Group

11. The Secretary of UNCITRAL briefly described the subjects, other than the one referred to in item (1) above which were considered by UNCITRAL Working Group on Sale of Goods (reported in A/CN. 9/35). With reference to the subjects suggested by the A.A.L.C.C. Secretariat in its *Brief of Documents*, these subjects were as follows :

(1) Definition of "International Sale of Goods" for the purpose of defining the scope of the Uniform Law.

(2) The relationship between Uniform Law and the proposed Convention on Prescription [referred to in item (3) below], and

(3) Principles of interpretation of the Uniform Law.

12. The other items considered by UNCITRAL Working Group were the following :

(1) Uniform Law provisions on the binding effect of the general usages,

(2) Rules of avoidance or cancellation of contracts, with special reference to whether a contract could be deemed avoided or cancelled without notice of that fact, and

(3) Time-limits with which a buyer must give the seller notice with respect to defects in the goods.

13. He also mentioned that on the question whether the Commission may consider the adoption of a new convention, the UNCITRAL Working Group decided to consider it after further study of existing texts, "since this would indicate the number and nature of any modifications required for the production of a more widely acceptable text". Since the members

of the Sub-Committee had not perused the report of the UNCITRAL Working Group, which had just been distributed to them, no discussion took place on these items, except those which are covered elsewhere in this report.

(3) Relations between the Convention on Uniform Law and the proposed Convention on Prescription

14. The Secretary of UNCITRAL referred to the report of UNCITRAL Working Group on Prescription (A/CN.9/30) which held its meetings at Geneva from 18 to 22 August 1969. The report will be presented to the Third Session of UNCITRAL in April 1970. He said that studies submitted by States show that the prescriptive limits varied widely among the different national systems. It was difficult to predict which national law would apply, particularly in view of the fact that under some legal systems the running of the prescriptive limit was considered to extinguish the substantive right, while under others a prescriptive limit was considered a rule of procedure so that the forum could apply its own law even though it was different from the limit fixed under the substantive law applicable to the claim. He mentioned that the UNCITRAL Working Group on Prescription had suggested that the scope of the proposed Convention and the types of transactions and claims should be the same as covered by the Convention on Uniform Law. As regards the commencement of the period of prescription, the Working Group had considered three alternative tests to cover when time would start running, namely (1) from the date on which the breach of contract occurred, (2) from the day on which action could first have been taken, and (3) from the date on which the fulfilment of the obligation first became due. The opinion in the Working Group was divided equally between the first and the third alternative, hence no choice was definitely made. As to the length of the prescriptive period, the period favoured was 3 or 5 years, again without a definitive choice. The Working Group on Prescription had also dealt with the suspension or prolongation of the prescriptive

period when suit was made difficult or impossible under various circumstances. The Group also considered the question of extending the statutory period by agreement. All these questions would come up before the Third Session of UNCITRAL, when the Commission would consider the further programme for completing a Convention on Prescription, whether separately or as part of the Convention on Uniform Law.

15. It was further reported that the UNCITRAL Working Group on Sale of Goods (New York, January 1970), had proposed the deletion of Article 49 of the Uniform Law which deals with the prescriptive limit of one year for remedies against defects in goods. The question of set-offs and counter-claims was still under consideration. The question of notices of breach of obligations would continue to be regulated by Uniform Law, such as in Article 39.

16. Upon this item also there was not much discussion in the Sub-Committee.

(4) Whether the final text of Uniform Law, substantive rules or conflict rules, or a combination thereof, should be a convention or a code or should take some other form

17. This subject had been discussed at the Second Session of UNCITRAL but not at the UNCITRAL Working Group's Session in New York. The Indian Delegate explained the three views held on the subject in Geneva in March 1969, and the reasons therefor. Those who wanted a convention emphasised the need for establishing a clear obligation relating to uniform law so that uniform law will be applied effectively in the territories of the contracting States. Those who pressed for a code, such as Professor David of France, highlighted the difficulties in increasing the number of ratifications of conventions and the resulting ineffectiveness of uniform law. If the emphasis was on promoting uniform law, its rules should be embodied in a code which should be applied by the courts or the arbitration tribunals in all the States, except in regard to the mandatory provi-

sions of the local law or where the local law had made specific exceptions relating thereto. The third course was to consider a system of code as adopted in the General Conditions of Delivery established among members of the Council of Mutual Economic Assistance (CMEA), which although named a code applied automatically in all Member States without the need for ratification or express legislation.

18. The views expressed in the Sub-Committee supported the approach of a Convention which would clearly establish the obligations to be accepted by contracting States.

(5) Conclusion and adoption of Standard Contracts in Asia and Africa

19. The Secretary of UNCITRAL enquired if AALCC would consider the desirability of holding regional conferences to encourage the conclusion and adoption of standard or model contracts, confined in the beginning to special commodities of interest to the buyers and sellers in the region. He cited the example of the UN Economic Commission for Europe which had brought together sellers and buyers of specific commodities (plant and machinery, lumber, citrus, etc.) and adopted standard or model contracts relating thereto.

20. The Delegate of Ghana expressed the view that the promotion of standard contracts or general conditions of sale should not adversely affect the free bargaining capacity of various parties, nor freeze their bargaining positions at the time of the conclusion of the standard contract. The Delegate of UAR enquired whether the standard contract would in effect be adhesion contract, that is "take-or-leave it" contract, would it be a model contract which may be accepted in whole or in part or which may be varied. In reply, the Secretary of UNCITRAL stated that it would be a model contract, concluded under international supervision, which could be revised or modified to suit the needs of the parties. The General Conditions of Sale or Model Contracts had achieved considerable

success in Europe and to some extent in its trade with other regions.

These had been developed in the interest of fairness to all parties and were simple enough to be understood by parties in different countries and legal systems. This clarity reduced misunderstanding and disputes. The representative of the Economic Commission for Africa informed the Committee that although the ECE General Conditions of Sale had been referred to them, and they had circulated them among Governments and other bodies, only three replies had been received, which were non-commital.

21. The Sub-Committee was of the view that each Government would have to consider the desirability of promoting contracts in conjunction with the trading organizations and interests concerned, and that the matter may be reviewed by the Committee at its next session.

(6) Uniform interpretation of convention or code

22. On the question of uniform interpretation, an interesting statement was made by the Secretary-General of the Hague Conference. He explained the difficulty in promoting the jurisdiction of the International Court of Justice for giving definitive interpretation of conventions, particularly those dealing with private law questions. Short of that, it would be up to States of each region to establish a common court or other institutions for the purpose, such as the Court for the European Economic Community. Failing this, the convention must make provisions within its own text to promote uniform interpretation. This could be done by a) providing that the uniform law should be interpreted "in conformity with the general principles" on which that law was based (see Article 17 of Uniform Law), b) including neutral terms in the convention rather than technical terms or terms of art having different meanings in different systems, and c) by ensuring uniformity in drafting in the various languages.

II

23. Apart from gaining familiarity with the subject-matter of International Sale of Goods, the Sub-Committee devoted its time to the question of the organizational set up necessary for the further study of the subject, and made the following recommendations :

(1) The Sub-Committee should continue to function as a Standing Committee for exchanging views on the subject of International Sale of Goods. The views and suggestions will be exchanged through correspondence and by circulation of documents. If it becomes necessary, the Sub-Committee may meet on a formal basis as may be arranged by the Secretariat.

(2) The Secretary of the Asian-African Legal Consultative Committee will keep the members of the Sub-Committee informed about the developments in the the UNCITRAL and its Working Groups in regard to the study of the subject. He will provide such services to the Sub-Committee as may become necessary, including the circulation of relevant documents.

(3) The Secretary will keep the member Governments informed about the work of the Sub-Committee, its recommendations and suggestions, and will send them necessary materials.

24. A brief reference to the relevant U.N. documents on the subject covered is enclosed.

S. P. Jagota
Rapporteur

SELECTED BIBLIOGRAPHY

1. Reports of the U.N. Commission on International Trade Law:

(i) Report of the UNCITRAL on its First Session-29 January-26 February 1968, General Assembly Official Records : Twenty-third Session, Supplement No. 16 (A/7216).

Text of resolution 2205 (XXI) adopted by the General Assembly on 17 December 1966, establishing UNCITRAL, is given as Annex to UNCITRAL report on its First Session.

(ii) Report of UNCITRAL on its Second Session 3-31 March 1969, General Assembly Official Records : Twenty-fourth Session, Supplement No. 18 (A/7618).

List of documents of the First Session and the Second Session of UNCITRAL are given in the Reports cited above, respectively.

2. Other important documents :

(i) A/6396 (23 September 1966) : *Progressive Development of the Law of International Trade, Report of the Secretary-General.*

(ii) A/CN.9/5 : *Survey of activities of organizations concerned with the harmonization and unification of the law of international trade; note by the Secretary-General.*

VII. INTERNATIONAL LEGISLATION ON SHIPPING

I. INTRODUCTORY NOTE

At the second session of the United Nations Conference on Trade and Development (UNCTAD) held in New Delhi during February-March, 1968, the importance of a review of the International Legislation on Shipping was emphasised by many Delegates, mostly from Asian and African countries. The matter was discussed in detail at the Fourth Committee of the Conference. The Asian-African Legal Consultative Committee, followed the discussions on the subject in the Fourth Committee, mainly with a view to understanding the issues involved, which were important from the viewpoint of the Asian and African countries. On the conclusion of the aforesaid session of the UNCTAD, the Secretariat of the Committee prepared a *Report on the Legal Issues before UNCTAD-II*, summing up the legal issues of importance to the Afro-Asian community arising out of the deliberations of the Conference. The said Report was circulated to the Member Governments of the Committee.

Subsequently, upon the suggestion of the UNCTAD, the U.N. General Assembly in its resolution 2421 (XXIII) of 18 December 1968 recommended that the topic of International Legislation on Shipping be included among the priority topics for consideration by the United Nations Commission on International Trade Law (UNCITRAL) in its programme of work. The UNCITRAL during its second session held in Geneva in March 1969 created a Working Group to indicate the topics and method of work on this subject. This Working Group met in January, 1970.

In April 1969, the UNCTAD Shipping Committee also created its Working Group "to make recommendations and to prepare the necessary documentation relating thereto to serve

as a basis for further work in this field." The Shipping Committee also directed its Working Group to include in its programme of work, the topics of Charter Parties, Marine Insurance, General Average, Bills of Lading and other related matters. This Working Group met in December, 1969.

Both the aforesaid U.N. bodies, namely the UNCTAD and the UNCITRAL had requested this Committee to assist them in their work by studying this subject and making available to them the Asian-African perspective on the matter. The Committee was also invited to be represented in the meetings of their Working Groups.

Pursuant to the aforesaid requests of the UNCTAD and UNCITRAL, and also in view of the fact that the subject is of particular significance to the developing countries of Asia and Africa, the matter was placed on the agenda of Eleventh Session of the Committee held in Accra for preliminary discussion. After general statements were made by the Delegates of Ghana, India, Pakistan and Ceylon at the Accra Session, a Sub-Committee was appointed to indicate the topics which should be studied by the Committee. The Sub-Committee suggested that the first topic to be considered by the Committee should be the question of the Bills of Lading.

II. A PRELIMINARY STUDY ON INTERNATIONAL LEGISLATION ON SHIPPING

Prepared by the Secretariat of the Committee

PART I

Meaning and Scope

1. "International legislation and practices in the field of shipping" constitute a vast body of law and custom, international and national, public and private, governing all the legal and practical relationships involved in the international transportation of persons and goods. The expression "international legislation on shipping" is used to describe "both the process and the product of the conscious effort to make additions to, or changes in",[1] the principles of contemporary international law pertaining to shipping. The legal instruments usually employed to make such additions and changes, are international agreements, treaties and conventions. The said expression is different from "international law of shipping", since the latter merely identifies the body of existing principles of international law, relating to shipping. It is also different from the expression "maritime law", which denotes the body of the principles of contemporary international law governing maritime intercourse, naval warfare and neutrality. Custom is the most important source of international maritime law, and the greatest contribution in the field was made by the Admiralty Courts and the naval officers and practitioners in the British Commonwealth and the United States of America. As stated above, the process of legislation in the field came

1. Manley O. Hudson, *International Legislation*, Vol. 1 (1931), p. XIII.

about through international agreements, treaties and conventions among States.

2. In the present Note the term "international legislation on shipping" is used to describe the process and product of development of international conventional law, as distinguished from international customary law, pertaining to shipping. Since the said term is more restricted in scope than the expression "international maritime law", the present Note does not deal with the legal problems concerning the delimitation of territorial waters, the continental shelf, fishing and conservation of the living resources of the sea, naval warfare and neutrality, international shipping in time of war and the status of warships. The present Note seeks to set out briefly the existing state of, and the activities of various international organizations in regard to, international legislation on shipping. The subject can be divided into three main categories, viz., (1) International legislation concerning the status of ships and regulation of sea traffic, (2) International legislation on commercial and economic aspects of shipping, and (3) International legislation on other aspects of shipping. Various topics relating to shipping can be classified under the aforesaid categories, in the following manner :

International legislation concerning the status of ships and regulation of sea traffic :

(i) Status of ships,

(ii) Freedom of navigation and transit,

(iii) Facilitation of maritime traffic,

(iv) Tonnage measurement,

(v) Load lines,

(vi) Safety legislation,

(vii) Jurisdiction in cases of collision between vessels,

(viii) Salvage and assistance,

(ix) Maritime mortgages and liens,

(x) Limitation of shipowners' liability,

(xi) State immunity,

(xii) Protection of sub-marine cables, and

(xiii) Liner conferences.

International legislation on commercial and economic aspects of shipping :

(xiv) Carriage of goods and shipping documents,

(xv) Bill of lading,

(xvi) Charter-party,

(xvii) Marine insurance and general average, and

(xviii) Containers and unitized cargoes.

International legislation on other aspects of shipping :

(xix) Carriage of passengers,

(xx) Pollution,

(xxi) Sanitation, and

(xxiii) Labour.

3. Each of these topics has been briefly dealt with in the present Note, on the basis of the aforesaid classification.

PART II

History of International Shipping Legislation

4. Dr. T. K. Thommen, in his report on "International Legislation on Shipping",[2] points out : "The practice of

merchants engaged in international shipping plays an important part in the formulation of legal rules. In earlier centuries, when sovereign States had not, as yet, intervened by means of legislation to regulate the sea trade, the merchants followed their own rules of conduct which were primarily derived from ancient maritime codes like the Rhodian Sea Law, the Basilika, the Assizes of Jerusalem, the Rools of Oleron, the Laws of Wisby, the Hanseatic Code, the Black Book of the British Admiralty, *Consolato del Mare* and others." An important role in formulation of principles of international law out of these rules, has been played by the courts of several maritime States. The growth of international trade made it necessary for States to regulate international navigation. National laws, incorporating mainly the practice and usage in the field of shipping, were enacted by many maritime States. However, this led to divergencies and conflicts between national laws in the different aspects of international shipping, so that uniformity of legislation became necessary. This was sought to be achieved through international treaties and conventions on the subject. Mr. A. N. Yiannopoulos points out : "Beginning with the last decade of the past century, it has become increasingly apparent that a higher measure of certainty and predictability could be achieved by making uniform, first, the conflict rules, and then the substantive law prevailing in various parts of the world. While uniformity of law and decision can be achieved in several ways, adoption of international conventions, incorporating the rules intended to become uniform in all of the contracting States, has emerged as, perhaps, the most important method."[3]

2. UNCTAD document No. TD/32/Rev. 1.

3. In his article on "The Unification of Private Maritime Law by International Conventions", *Law & Contemporary Problems*, Vol. 30, 1965, at p. 371.

5. The first efforts towards the unification of the law of merchant shipping came in the later part of the last century. The Institute de Droit International (the Institute of International Law), a non-governmental organization founded in 1873 in Ghent considered and passed resolutions on topics such as the freedom of the high seas, and it was due to its efforts that the Convention on the Protection of Sub-marine cables, was adopted in Paris on March 14, 1884.[4] Another non-governmental organization, the International Law Association which originally was called "The Association for the Reform and Codification of the Law of Nations" also devoted considerable attention to matters connected with shipping. These provide interesting instances of attempts at international unification of maritime rules through non-official and voluantary organisations, and not by State legislation or multilateral treaties. In 1877 this Association at its Antwerp Conference achieved unification of the Rules of General Average which came into use as the York-Antwerp Rules of General Average.

6. The volume of work involved in the field of maritime law was such that it became necessary to set up a separate organization devoted to the problems of shipping. Thus, the Committee Maritime International (International Maritime Committee), a non-governmental organization, was born in Antwerp in 1897 with the cooperation of the International Law Association. The objects of the International Maritime Committee are : (a) to further by conferences (of the Committee) and by publications and diverse works the unification of maritime law; (b) to encourage the creation of national associations for the unification of maritime law; and (c) to maintain between the associations regular communication and united action. The Committee prepares draft conventions on various aspects of maritime law and these are submitted for the approval of States at diplomatic conferences convened by the Belgian Government.

4. Sources of text : II Malloy 1969.

7. In 1901 the International Law Association adopted the Glasgow Marine Insurance Rules of 1901.[5] One of the first subjects considered by the Committee Maritime International, was the liability of shipowners in case of collision between vessels, and on September 23, 1910, the Brussels Diplomatic Conference adopted the International Convention for the Unification of Certain Rules of Law with Respect to Collisions between Vessels. It also adopted the International Convention for the Unification of Certain Rules of Law relating to Salvage and Assistance at Sea, on September 23, 1910.[7] The Convention on Collisions contains several important provisions regarding compensation due for damage caused to vessels or persons or things on board owing to collisions at sea. The Convention apportions the damages payable according to the degree of fault. The Convention concerning Assistance and Salvage deals with the problem of payment of remuneration to persons who have taken part in salvage operations.

8. The year 1919 saw the establishment of the International Labour Organization (ILO) to advance the cause of social justice by establishing international labour standards by means of Conventions and recommendations. The ILO has been concerned with the interests of seafarers almost from its inception, and has adopted a number of Conventions and recommendations concerning maritime labour.[8]

These Conventions and Recommendations regulate variety of matters relating to employment of seamen, their certificates of qualification and identity documents, wages, hours of work and manning, social security, welfare of seafarers and the like.

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5. See Report of the International Law Association, 20th Session, held at Glasgow, pp. 213 to 219.
6. See *British Shipping Law Series*, Vol. 8 on "International Conventions of Merchant Shipping", by Dr. Nagendra Singh, at p. 1047.
7. *Ibid.*, at p. 1112.
8. Some of these are : (i) Convention for Establishing Facilities for Finding Employment for Seamen (9 of 1920); (ii) Convention fixing

In 1920, at its Antwerp meeting, the governing body of the ILO appointed the Joint Maritime Commission, to assist the technical maritime service of the Labour Office and to act as a preparatory and advisory body on all Maritime Labour questions. During the past 49 years of its existence, the Commission has advised the ILO on subjects mentioned above.

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the Minimum Age for Admission of Children to Employment at Sea (7 of 1920); (iii) Convention concerning Unemployment Indemnity in case of Loss or Foundering of Ship (8 of 1920); (iv) Recommendation concerning Unemployment Insurance for Seamen (10 of 1920); (v) Recommendation concerning the Establishment of National Seamens' Code (9 of 1920); (vi) Convention fixing the Minimum Age for the Admission of Young Persons to Employment as Trimmers or Stokers (15 of 1921); (vii) Convention concerning the Compulsory Medical Examination of Children and Young Persons employed at Sea (16 of 1921); (viii) Convention concerning Seamen's Articles of Agreement (22 of 1926); (ix) Convention concerning the Repatriation of Seamen (23 of 1926); (x) Recommendation concerning the Repatriation of Masters and Apprentices (27 of 1926); (xi) Recommendation concerning the general principles for the Inspection of the Conditions of work of Seamen (28 of 1926); (xii) Recommendation concerning the Protection of Emigrant Women and Girls on Board Ship (26 of 1926); (xiii) Convention concerning the Protection against Accidents of Workers Employed in Loading and Unloading Ships (28 of 1929); (xiv) Recommendation concerning Reciprocity as regards the Protection against Accidents of Workers employed in Loading and Unloading Ships (33 of 1929); (xv) Recommendation concerning the consultation of Workers' and Employers' Organisation in the Drawing up of Regulations dealing with the Safety of Workers Employed in Loading or Unloading Ships (24 of 1929); (xvi) Convention concerning the Protection against Accidents of Workers Employed in Loading or Unloading Ships (32 of 1932); (xvii) Recommendation for Expediting Reciprocity as provided for in the Convention adopted in 1932 concerning the Protection Against Accidents of Workers Employed in Loading or Unloading Ships (40 of 1932); (xviii) Convention fixing the Minimum Age for the Admission of Children to Employment at sea (58 of 1936); (xix) Convention concerning the minimum Requirements of Professional Capacity for Masters and Officers on Board Merchant Ships (53 of 1936); (xx) Convention concerning Hours of Work on

9. The International Law Association, at its 30th Conference held at the Hague in 1921, formulated a body of rules

Board Ship and Manning (57 of 1936); (xxi) Recommendation concerning Hours of Work on Board Ship and Manning (49 of 1936) (xxii) Convention concerning Annual Holidays with Pay for Seamen (54 of 1936); (xxiii) Convention concerning the Liability of shipowners in case of Sickness, Injury or Death of Seamen (55 of 1936); (xxiv) Convention concerning Sickness Insurance for Seamen (56 of 1936); (xxv) Recommendation concerning the promotion, of a Seamen's Welfare in Ports (48 of 1936); (xxvi) Recommendation concerning the Organization of Training for Sea Service (77 of 1946); (xxvii) Convention concerning the Medical Examination of Seafarers (73 of 1946); (xxviii) Convention concerning the Certification of Able Seamen (74 of 1946); (xxix) Convention concerning Wage Hours of Work on Board Ship and Manning (76 of 1946); (xxx) Convention concerning Vacation Holidays with Pay for Seafarers (72 of 1946); (xxxi) Convention concerning Social Security for Seafarers (70 of 1946); (xxxii) Recommendation concerning Agreements relating to the Social Security of Seafarers (75 of 1946); (xxxiii) Recommendation concerning Medical care for Seafarers' Dependents (76 of 1946); (xxxiv) Convention concerning Seafarers' Pension (71 of 1946); (xxxv) Convention concerning Crew Accommodation on Board Ship (75 of 1946); (xxxvi) Recommendation concerning the Provision to crews by shipowners of Bedding, Mess utensils and other articles (78 of 1946); (xxxvii) Convention concerning Food and Catering for Crews on Board Ship (68 of 1946); (xxxviii) Convention concerning Wages, Hours of Work on Board Ship and Manning (93 of 1949); (xxxix) Convention concerning Vacation Holidays with Pay for Seafarers (91 of 1949); (XLI) Recommendation concerning the Engagement of Seafarers for Service in Vessels Registered in a Foreign Country (107 of 1958); (XLII) Convention concerning the Seafarers' National Identity Documents (108 of 1958); (XLIII) Convention concerning Wages, Hours of Work on Board Ship and Manning (109 of 1958); (XLIV) Recommendation concerning Wages, Hours of Work on Board Ship and Manning (109 of 1958); (XLV) Recommendation concerning Social conditions and Safety of Seafarers in relation to Registration of Ships (108 of 1958); (XLVI) Recommendation concerning the contents of Medical Chests on Board Ship (105 of 1958); and (XLVIII) Recommendation concerning Medical Advice by Radio to Ships at Sea (106 of 1958).

known as the Hague Rules, 1921,[9] defining in clear terms the risks to be assumed by sea carriers under Bills of Lading. The League of Nations was instrumental in the conclusion of the two Barcelona Conventions : the Convention and Statute on Freedom of Transit, April 20, 1921[10] and the International Convention and Statute concerning the Regime of Navigable Waterways of International Concern, April 20, 1921[11] and adoption of the Declaration Recognizing the Right to Flag of States Having No Sea-Coast, Barcelona, April 20, 1921.[12] The aforesaid two conventions lay down the principle of allowing foreign vessels freedom of navigation and transit on a footing of equality.

10. The Hague Rules of 1921 were considered at the Diplomatic Conference on Maritime Law which was held at Brussels in October 1922, and were amended in 1923 by a Special Committee appointed by the Conference. The League of Nations Transit Organization did useful work in the field of international transport and communications and its main achievement in the field of shipping was the International Convention on the Regime of Maritime Ports, Geneva, December 9, 1923.[13] The Convention affirms the principle of allowing foreign vessels freedom of access to maritime ports used for foreign trade. The Pan American Conference, at its Santiago Session in 1923, passed several resolutions on inter-American steamship services, shipping documents, and maritime law. The Pan American Maritime Sanitary Code was signed at the Havana Conference on November 14, 1924.[14]

9. See Report of the International Law Association, for the 30th Conference (1921), pp. 212 to 218.

10. *British Shipping Law* Series Vol. 8 (Nagendra Singh) at. p. 1230.

11. *Ibid.*, at p. 1236.

12. *Ibid.*, at p. 1221.

13. *Ibid.*, at p. 1222,

14. *Ibid.*, at p. 851.

11. The efforts on the Comitè Maritime International led to adoption of the International Convention for the Unification of Certain Rules relating to Bills of Lading, by the Diplomatic Conference on Maritime Law, at Brussels, on August 25, 1924.[15] This Convention lays down provisions concerning the contracts of carriage covered by a bill of lading or any similar document of title. The lack of uniformity in the laws of maritime nations as regards the limitation of liability of a shipowner for the wrongful acts of the master or any person in the service of his vessel, also engaged the attention of the Comitè Maritime International. As a result of its efforts the International Convention for the Unification of Certain Rules relating to Limitation of the Liability of Owners of Seagoing Vessels was signed at Brussels on August 25, 1924.[16] The Convention adopted the principle that the shipowner's liability is limited to an amount equal to the value of the vessel, the freight, and the accessories of the vessel, in respect of certain property claims as well as in respect of salvage remuneration, general average contribution and obligations arising out of contracts entered into by the master for the presentation of the vessel while away from the home port. The International Law Association at its 33rd Conference framed the new revised York-Antwerp Rules of 1924 on general average.

12. The efforts of Comitè Maritime International led to adoption, in 1926, of two Conventions : the International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages, Brussels, April 10, 1926,[17] and the International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships, Brussels, April 10, 1926.[18] The liens and mortgages Convention recog-

15. *Ibid.*, at p. 1080.

16. *Ibid.*, at p. 1051.

17. *Ibid.*, at p. 1087.

18. *Ibid.*, at p. 1121.

nized a number of maritime claims for maritime nations against foreign ships lying in their waters, as maritime liens. The Immunity Convention sought to settle, to some extent, the question of jurisdictional immunity of State-owned vessels. With the object of preventing the spread of diseases on account of international shipping, an International Sanitary Convention was signed in Paris, in 1926.

13. In 1929, the Conference held in London 'at the invitation of the Government of the United Kingdom, adopted the International Convention on Safety of Life at Sea, 1929,[19] laying down uniform measures for the safety of life at sea. In 1930, the International Convention respecting Loadlines was signed in London, on July 5, 1930,[20] for the purpose of adopting common rules as regards the loading of vessels, so that life and property were not jeoparized on the seas by the manner in which vessels were loaded. Also in 1930, the League of Nations convened the Hague Codification Conference, which prepared a draft Convention on "the Legal Status of the Territorial Sea". However, the Conference was not able to reach agreement on the subject of territorial waters.

14. In 1931, the Simla Rules,[21] concerning safety of life at sea, were adopted to enforce compliance with the requirements of Chapters II and III of the International Convention for the Safety of Life at Sea, 1929. In 1932, the Rules for C.I.F. Contracts, known as Warsaw-Oxford Rules,[22] were adopted by the Oxford Conference of the International Law Association. These Rules provide for duties of the seller as to shipment, bills of lading, condition of goods, insurance, duties of buyer as to payment of price and his rights as to inspection of goods; and time and notice of shipment etc. In 1934,

19. *Ibid.*, at p. 101.

20. *Ibid.*, at p. 58.

21. *Ibid.*, at p. 101.

22. *Ibid.*, at p. 1092.

through the efforts of the League of Nations, the Convention relating to Tonnage Measurement of Merchant Ships was adopted at Warsaw on April 16, 1934,[23] seeking to lay down uniform rules for tonnage measurement of ships. In 1936, came the Convention regarding the Regime of Straits, Montreux, July, 1936,[24] as a result of efforts of the League of Nations.

15. In 1940, at the Second South American Congress on Private International Law held at Montevideo on March 6 to 19,1940, the International Convention on Commercial Navigation Law[25] was adopted. The Convention makes provisions in regard to vessels, collisions, assistance and salvage, average, ship-master and personnel on board ship, charter-parties and transport of merchandise or persons, insurance, hypothecation, bottomery loans, and vessels belonging to the State.

16. The first inter-governmental organisation to deal with shipping matters was set up in 1944. This organization was called the United Maritime Authority and its object was to arrange for necessary shipping for the requirements of demobilisation, civil needs and relief and rehabilitation. It was replaced in 1946 by the United Maritime Consultations Council. The Council, in its two Sessions, held in June and October, 1946 at Amsterdam and Washington respectively, prepared a draft convention for the setting up of a permanent inter-governmental maritime organisation.

17. In 1947, the Convention for a Uniform System of Tonnage Measurement was signed at Oslo on June 10, 1947,[26] on the basis of a draft proposed by the technical experts of the League of Nations Transit Committee. The draft forms an annex to the Convention.

23. *Ibid.*, at p. 631.

24. *Ibid.*, at p. 1189.

25. *Ibid.*, at p. 1099.

26. *Ibid.*, at p. 633.

18. In 1948, at the instance of the Economic and Social Council of the United Nations, a Conference of representatives of Governments on a world-wide basis was called at Geneva, which adopted the Convention on the Inter-Governmental Maritime Consultative Organization.[27] The Convention establishes the organization (IMCO) and lays down its scope and functions. The aims of IMCO are to achieve the highest practicable standards of Maritime safety and efficient navigation, the prevention of pollution of the sea by oil, and the unification of regulations for the tonnage measurement of ships, among other things. The Convention also affirms the principle of non-discrimination between vessels on the basis of the flag, and freedom of shipping of all flags to participate in international trade. Also in 1948, the Conference on Safety of Life at Sea adopted the International Convention for Safety of Life at Sea and the International Regulations for Preventing Collisions at Sea.[28]

19. The York-Antwerp Rules of 1950, concerning general average, were adopted by a Conference convened by the Comitè Maritime International and the International Law Association. **Rule A** stated : "There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety or the purpose of preserving from peril the property involved in a common maritime adventure". **Rule B** provides that general average sacrifices and expenses shall be borne by the different constituting interests.

In 1951, the World Health Organization was instrumental in adoption of the International Sanitary Regulations, Geneva 1951.[29]

20. As a result of efforts of the Comitè Maritime International, three conventions were concluded in Brussels on

27. *Ibid.*, at p. 1253.

28. *Ibid.*, at p. 102.

29. *Ibid.*, at p. 783 (The regulations were amended by the World Health Assemblies of 1955, 1956 and 1961).

May 10, 1952, the International Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision, May 10, 1952, [30] the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collisions and other Incidents of Navigation, May 10, 1952,[31] and the International Convention relating to the Arrest of Sea-going ships, May 10, 1952.[32] The Convention concerning Civil Jurisdiction seeks to minimize conflicts of jurisdiction in cases of collisions. The Convention concerning Penal Jurisdiction provides for proceedings against the master or any other person responsible for the damage caused by his ship, and also for arrest or detention and investigation of the ship. The Convention concerning Arrest of Sea-going Ships, provides for arrest by the contracting parties to secure a maritime claim.

21. On the initiative of the United Kingdom Government, an International Conference on Prevention of Pollution of Sea by Oil was convened in London in 1954, which adopted the International Convention for the Prevention of Pollution of Sea by Oil, 1954.[33] This Convention deals with cases of pollution of sea caused by vessels which discharge into the sea large quantities of oil while washing their tanks and disposing of oily ballast water leading to serious damage to coasts and beaches and also destruction of sea birds and damage to fish.

22. In 1957, the efforts of Comitè Maritime International led to adoption of two Conventions: the International Convention for the Unification of Certain Rules relating to the Limitation of Liability of Owners of Sea-going

30. *Ibid.*, at p. 1131.

31. *Ibid.*, at p. 1134.

32. *Ibid.*, at p. 1126.

33. *Ibid.*, at p. 1157.

Vessels, Brussels, October 10, 1957,[34] and the International Convention relating to Stowaways, Brussels, October 10, 1957. [35] The Convention of Limitation of Liability revised the 1924 Convention on the subject and established a fixed liability of 1,000 gold francs for each ton of ship's tonnage in respect of property claims and 3,100 gold francs for each ton of the ship's tonnage in respect of claims for loss of life and personal injury. The provisions of the Convention apply not only to the owner of the vessel, but also the charterer, manager and operator as well as the master, crew and other servants. The Convention concerning stowaways lays down that if a stowaway is discovered in a port or at sea, the master may deliver him to the appropriate authority at the first convenient port of a contracting State and he may be sent to the State of which he claims to be a national at the shipowner's expense. In 1957, the Agreement relating to Refugee Seamen was also adopted at the Hague on November 23, 1957.[36]

23. In 1958, the U.N. Conference on the Law of Sea held at Geneva, adopted the Convention on Territorial Sea and Contiguous Zone,[37] and the Convention on the High Seas.[38] Under the Convention on Territorial Sea and Contiguous Zone, all foreign merchant ships in the territorial waters of a State are subject to local jurisdiction, except in regard to exercise of their right of innocent passage, which right has been recognized by the Convention. The Convention of High Seas provides in regard to grant of nationality by a State to ships, their registration in its territory and the right to fly its flag; the rights and obligations of such State in regard to the said ship; and the right of hot pursuit by a warship.

34. *Ibid.*, at p. 1050.

35. *Ibid.*, at p. 1064.

36. *Ibid.*, at p. 1040.

37. *Ibid.*, at p. 1139.

38. *Ibid.*, at p. 1145.

Both the above-mentioned Conventions draw a distinction between government ships "used only on governmental non-commercial service" and other governmental ships, and recognize the immunity of the former from the jurisdiction of any State other than the flag State, while the latter are treated on a par with private merchant ships.

24. In 1960, the Inter-Governmental Maritime Consultative Organization (IMCO) convened the International Conference on Safety of Life at Sea, which, thoroughly revised the earlier Conventions and Regulations on the subject, and adopted the International Convention for the Safety of Life at Sea, June 17, 1960,[39] and the International Regulations for Preventing Collisions at Sea, June 17, 1960.[40] The Convention contains provisions relating to construction, survey and certificates, communications, casualties, fire protection, life-saving appliances applicable to passenger and cargo ships, carriage of grains, carriage of dangerous goods and nuclear ships. The Convention and the Regulations are administered by IMCO.

25. The efforts of the Comitè Maritime International led to adoption, on April 29, 1961, of the International Convention for the Unification of Certain Rules relating to the Carriage of Passengers by Sea.[41] The Convention contains a number of provisions which may be relevant to certain aspects of the problems concerning the carriage of goods by sea. It provides for certain obligations of the carrier and the shipowner. Also on the initiative of the Comitè Maritime International, the International Convention on the Liability of Operators of Nuclear Ships, May 25, 1945,[42] was adopted at Brussels. Further in 1962, the

39. *Ibid.*, at p. 114.

40. *Ibid.*, at p. 260.

41. *Ibid.*, at p. 1067.

42. *Ibid.*, at p. 1071.

IMCO was instrumental in amendment of the International Convention for the Prevention of Pollution of Sea by Oil of 1954.[43]

26. The U.N. General Assembly, by its resolution 1945 (XIX) of December 30, 1964, established the United Nations Conference on Trade and Development (UNCTAD) as a permanent organ of the Assembly, to consider *inter alia*, the appropriate institutional means for dealing with the problems of shipping. The Trade and Development Board of UNCTAD, by its resolution 11 (I) of April 29, 1965 established a Committee on Shipping, and by its decision 12(I) called on the Committee to "study and make recommendations on the ways in which, and the conditions under which, international shipping can most effectively contribute to the expansion of world trade, in particular the trade of developing countries. Particular attention was required to be paid to economic aspects of shipping, to those shipping matters which affect the trade and balance of payments of developing countries and to related shipping policies and legislation of governments on matters which fall within the competence of the Trade and Development Board". The UNCTAD also convened the United Nations Conference on the Transit Trade of Land-Locked Countries, which on July 8, 1965, adopted the Convention on Transit Trade of Land-Locked States.[44] The Convention reaffirmed, among other things, the principle adopted by the UNCTAD that in territorial and internal waters, the coastal State shall not discriminate between vessels of Land-Locked States and those of other States. Vessels flying the flag of land-locked States shall have the same freedom of access to and the use of seaports, as is accorded to the vessels of the coastal State or any other State.

43. *Ibid*, at p. 1173.

44. See Official Records of the Trade & Development Board, Second Session, Annexes, Agenda item 10, Document TD/B/18.

27. Also in 1965, at the invitation of the IMCO, a Conference was held in London, which adopted the Convention on Facilitation of International Maritime Traffic, April 9, 1965. [45] The Convention seeks to provide for appropriate measures to facilitate and expedite international maritime traffic and for persons and property on board. The Annex to the Convention lays down facilitation provisions relating to the arrival and departure of ships.

28. The U.N. General Assembly, by its resolution 2209 (XXI) of December 17, 1966, established the United Nations Commission on International Trade Law (UNCITRAL), to promote "the progressive harmonization of the law of international trade". In the report of the Secretary-General of the U.N., which served as the basis of discussion on the subject by the Assembly, carriage of goods by sea was listed under the heading "Transportation", as being one of the topics falling within the scope of the law of international trade. Also in 1966, the IMCO convened the International Conference on Load-Lines in London, which adopted the 1966 International Convention on Load-Lines.[46] The Convention lays down uniform principles and rules regarding the limits to which ships on international voyages may be loaded, having regard to the safety of life and property at sea. The Convention on Water-Borne Transportation of the Countries of the Latin American Free Trade Association, was adopted on September 30, 1966.

29. In 1967, the efforts of the Comitè Maritime International crystallized into adoption, at Brussels, of the revised Convention on Maritime Liens and Mortgages, May

45. See Final Act of the International Conference on Facilitation of Maritime Travel and Transport, March 24 to April 9, 1965, Cmnd, 2746, Misc. No. 18 (1965).

46. Final Act of International Conference on Load-Lines, 1966, April 5, 1966, and Attachment 1.

27, 1967, and the Convention relating to Registration of Rights in Respect of Ships Under Construction, May 27, 1967, and the International Convention for the Unification of Certain Rules relating to the Carriage of Passengers' Luggage by Sea, May 27, 1967. Also through the efforts of the said Committee, the Protocol to amend the 1924 Brussels Convention for the Unification of Certain Rules of Law relating to Bills of Lading, was adopted in 1968.

30. At the Second Conference of the UNCTAD held in February-March, 1968, the Fourth Committee (on Shipping) considered the question of Review of International Legislation on Shipping. In its Resolution 14 (II) of March 25, 1968, the Conference, recognized "that the existing international legislation on shipping does not cover many important economic and commercial aspects of maritime activity"; emphasized "the need for an early review of some areas of the existing international legislation concerned with commercial and economic aspects of shipping"; and recommended "that the Trade and Development Board instruct the Committee on Shipping of the UNCTAD to create a working group on International Shipping Legislation, from amongst the member countries", "to review commercial and economic aspects of International Legislation on Shipping in order to identify areas where modifications are needed and to make recommendations concerning new legislation which has to be drafted". The Resolution also envisaged that "the Committee on Shipping, upon recommendation of the Working Group, may ask the UNCITRAL to take up the work of drafting new Conventions on the subjects identified by the Working Group and also to set up a special subsidiary body for the purpose of such drafting, and that "if it should appear that UNCITRAL is not able to draft the required legislation according to the time schedule requested by the Committee on Shipping, that Committee should consider other steps to finalize the drafting". The Resolution also recommended "that the following subjects, among others,

should be taken up for drafting appropriate conventions or for revising existing legislation: (i) charter-parties; (ii) marine insurance; and (iii) amendments to the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1924". The Resolution further recommended "that the Working Group should examine the feasibility of drafting a general instrument (Convention or Agreement) on Maritime Transportation and Development, dealing with International Relations in Shipping, for the consideration by an International Conference to be convened under the auspices of the United Nations".[47]

31. The Trade and Development Board, by its Resolution 46 (VII) of September 21, 1968, instructed the Committee on Shipping to create a Working Group on International Legislation on Shipping and to determine its terms of reference and programme of work in the light of the provisions of Conference Resolution 14 (II).[48] The U.N. General Assembly, by its Resolution 2421 (XXIII) of December 18, 1968, recommended "that the United Nations Commission on International Trade Law should...consider the inclusion of International Shipping Legislation among the priority topics in its work programme". In 1968, a Joint Shipping Legislation Unit (UNCTAD/Office of Legal Affairs of the U.N.) was also set up.

32. Also in 1968, the International Law Association, at its Buenos Aires Conference, considered the report of its Committee on International Trade and Investment, which includes among its topics, one on discrimination in international transport. Part I of the Report on this topic consists of a summary of replies from nine regional branches of the Association to a questionnaire on Discrimination in International Transport by Sea. The questions and replies are arranged under the following headings: Transport of Goods; Ocean Freight Rates; Method of Payment and Trade Terms; Regulation of Shipping Industries; Regulation of Shipping Conferences; and Legislation and other provisions and/or Services. Part IV of the Report on this topic consists of a summary of replies from four of the branches to a questionnaire on shippers.[49]

47. UNCTAD Document TD/II/Res. 14.

48. Document A/7214, Part Two, Annex I, and UNCTAD Document TD/B/C. 4/41, Annex I.

33. The United Nations Commission on International Trade Law (UNCITRAL), during its Second Session, held in Geneva in March 1969, adopted a Resolution, on March 27, 1969, which took into account Resolution 14 (II) of March 25, 1968 of UNCTAD and Resolution 46 (VII) of September 21, 1968 of the Trade and Development Board; recalled the U. N. Resolution 2421 (XXIII) of December 18, 1968; and decided "to include International Legislation on Shipping among the priority items in its programme of work", and "to set up a Working Group consisting of representatives of Chile, Ghana, India, Italy, the United Arab Republic, the Union of Soviet Socialist Republics and the United Kingdom of Great Britain and Northern Ireland, which may be convened by the Secretary-General either on his own initiations or at the request of the Chairman, to meet some time before—preferably shortly before—the commencement of the Third Session of the Commission to indicate the topics and method of work on the subject, taking into consideration the study prepared by the Secretary-General, if it is ready, and giving full regard to the recommendations of UNCTAD and any of its Organs, and to submit its Report to the Commission at its Third Session".[50]

49. See Report of the International Law Association, for its 53rd Session, Buenos Aires, 1968.

50. See General Assembly, Official Records, Twenty-fourth Session, Supplement No. 18(A/7618), at pp. 59. and 60.

34. The UNCTAD Committee on Shipping, by its Resolution 7 (III) of April 25, 1969, concerning creation of a Working Group on International Shipping Legislation, recalled the Conference Resolution 14 (II) of March 25, 1968 and the Trade and Development Board Resolution 46 (VII) of September 21, 1968; noted the above-mentioned Resolution of March 27, 1969, of UNCITRAL adopted at its Second Session; recognized "the need for co-ordination of the efforts of the United Nations Bodies concerned with this matter, with a view to avoiding any duplication of the international activities in this field"; and decided "to establish a Working Group on International Shipping Legislation composed of thirty three representatives,[51] elected from among the member States in accordance with the principle of equitable geographical distribution", "(a) to review economic and commercial aspects of international legislation and practices in the field of shipping from the standpoint of their conformity with the needs of economic development, in particular, of the developing countries, in order to identify areas where modifications are needed; (b) in the light of this review, to make recommendations and prepare the necessary documentation relating thereto to serve as a basis for further work in this field, to be submitted to the United Nations Commission on International Trade Law for the drafting of new legislation or other appropriate action and, when necessary, to consider other measures to implement fully the provisions of paragraph 1 of Resolution 14 (II); (c) to report its findings and recommendations to the Committee on Shipping". The Resolution further recommended "that the Working Group, in drawing up its programme of work, should include, *inter alia*, the following topics : (a) Charter-parties; (b) Marine

51. Nigeria, Argentina, Belgium, Brazil, Bulgaria, Canada, Ceylon, Chile, Colombia, Czechoslovakia, Ethiopia, Federal Republic of Germany, France, Gabon, Ghana, Greece, India, Indonesia, Iran, Iraq, Ivory Coast, Japan, Mexico, Norway, Pakistan, the Philippines, Poland, Spain, Sweden, USSR, UK and USA.

Insurance and General Average; (c) Bills of Lading and related Matters". It also required the Working Group to hold its First Session before the meeting of the UNCITRAL Working Group on the subject, and authorized it to transmit its Report to the latter for consideration.[52]

35. In May 1969, on the initiative of IMCO, the Convention on Tonnage Measurement, 1969, was adopted.

36. The Institute for the Unification of Private Law (UNIDROIT) issues two specialized publications providing information on the work of unification done by the various organizations and on the leading cases decided by national courts concerning the interpretation of international conventions, including the International Conventions on Maritime Law and the Inland-Navigation.

PART III

Need for the Review of International Legislation on Shipping

37. Dr. T.K. Thommen, in his Report on "International Legislation on Shipping",[53] stated : "It is to avoid conflicts and divergencies between national laws in the different spheres of International Shipping that a body of internationally accepted legal norms has been adopted by means of Conventions. The principal object of a maritime convention, whether it formulates existing norms or creates new norms or amalgamates conflicting norms, or whether it lays down rules of public law or private law, is therefore to build up a body of internationally accepted legal norms for the settlement of problems connected with Maritime Trade". In this

52. UNCTAD Document TD/B/240, Annex I, at pp. 26 and 27. The UNCTAD Working Group is scheduled to meet in December, 1968, and the UNCITRAL Working Group is to meet sometime thereafter, but before the Third Session of UNCITRAL (New York), April 6 to 30, 1970.

53. UNCTAD Document TD/32/Rev. 1.

connection, it may be helpful to bear in mind, that while the broad outlines of international legislation and practices in the field of shipping show remarkable degree of uniformity, there exist nevertheless considerable differences with respect to particular rules and their application in different countries. This may be particularly apparent in the possible differences of approach of common and civil law systems, which may show considerable differences with respect to form, as also substance.

38. A review of International Legislation on Shipping is particularly important from the viewpoint of the developing countries, as many States consider that the high cost of shipments is a major factor in their balance-of-payments difficulties and the cost of their exports. Mr. Khalil of the United Arab Republic stated, before the Fourth Committee at the Second Session of the UNCTAD, that a review of international legislation in the field of shipping was needed to eliminate past mistakes and to provide a truly international system which would be beneficial to developing countries alike.[54]

Mr. Ansieta of Chile pointed out the need for adoption of common legal standards in the field of shipping. He also stated that as a branch of law, shipping had been continually subject to revision by international treaties or by private contractual arrangements. The difference between countries with a codified legal system and common law countries had given rise to endless disputes over interpretation.[55] Mr. Khabur of the U.S.S.R. stated that international shipping was a complex subject and required unified principles to govern it.[56]

39. It was pointed out by Mr. Mirbaha of Iran that the principal source of International Shipping Law was inter-

54. UNCTAD Document TD/II/C.4/SR. 14.
55. In his statement of February 20, 1968, before the Fourth Committee of UNCTAD-II. See Document TD/II/C.4/SR.19.
56. *Ibid.*

national custom, which itself was based partly on the national laws of the traditional maritime nations.[57] Mr. Radkovski of Bulgaria expressed the view that most of the Conventions on the subject had been concluded in the past by the developed countries in order to protect the interests of their shipping companies.[58] According to Mr. Rouanet of Brazil, the existing Conventions were weighted in favour of the carrier or shipowner, to the detriment of the shipper—and hence of developing countries.[59] Mr. Adebanjo of Nigeria expressed the view that the existing Conventions on shipping lacked the force of law.[60] Many representatives were of the view that there were gaps in the existing legislation on shipping, which needed to be filled.[61] Mr. Khabur of the U.S.S.R. and Mr. Ahmed of Pakistan pointed out that maritime law still respected obsolete practices which did not take due account of the interests of shippers as well as shipowners. Mr. Umar of Indonesia pointed out that the governments of the developing countries were not always in a position to give effect to certain Shipping Conventions because of their lack of technical capacity and financial implications.[62]

40. Mr. Adebanjo of Nigeria thought it important to pay attention to such questions as the need for universality in Conventions on Shipping; the need to avoid conflict in their

57. *Ibid.*
58. In his statement of February 19, 1968, before the Fourth Committee of UNCTAD-II. See UNCTAD Document TD/II/C.4/SR.14.
59. *Ibid.*
60. *Ibid.*
61. Mr. Rouanet of Brazil (TD/II/C.4/SR. 14);
Mr. Ahmed of Pakistan (TD/II/C.4/SR. 19);
Mr. Malivoneski of the UNCTAD Secretariat (TD/II/C.4/SR.16).
62. In their statements of February 20, 1968 before the Fourth Committee of UNCTAD-II. See UNCTAD Document TD/II/C.4/SR.15.

interpretation or application; and the need for clarity in their formulation.[63] In regard to the gaps to be filled in International Legislation on Shipping, Dr. Nagendra Singh of India pointed out three aspects : "(i) Co-ordination, (ii) Consolidation of existing International Legislation, and (iii) New fields to be covered.[64] Mr. Khalil of the United Arab Republic suggested that a Convention providing for a truly international system, which would benefit all countries, should be prepared and submitted to an International Conference convened for its adoption. He further suggested that legislation be undertaken on questions, such as Charter-parties and Marine Insurance which were not yet covered by Conventions and which were affecting the process of development.[65] According to Mr. Rouanet of Brazil, the proposed Convention should cover the points in respect of which there were gaps in the existing legislation and suitably adapt the existing Conventions wherever they were incompatible with the interests of developing countries.[66] Dr. Nagendra Singh favoured the idea of convening an International Conference and drafting a Convention for ratification by sovereign States. In this connection, he regarded it necessary to have a thorough review of all the matters on which legislation was required, bearing in mind particularly the interests of the developing countries and their need for guidance on international legislation.[67] Mr. Khabur of the U.S.S.R. favoured the idea of preparing a universal international instrument to govern the relations between States in the sphere of shipping.[68] Mr.

63. In his statement of February 10, 1968, before the Fourth Committee of UNCTAD-II, See TD/II/C.4/SR.14.
64. *Ibid.*
65. *Ibid.*
66. *Ibid.*
67. *Ibid.*
68. In his statement of February 20, 1968, before the Fourth Committee of UNCTAD-II. See UNCTAD Document TD/II/C.4/SR.15.

Radkovsky of Bulgaria supported this proposal.[69] Mr. Pavera of Czechoslovakia regarded it advisable to draft an International Convention proclaiming the major principles which should govern co-operation and relations between States in the field. He felt that a Convention of this kind would serve as a model for national legislation.[70]

41. Mr. Schuld of the Netherlands pointed out that views as to how much regulation was necessary were bound to be different between countries in which shipping was a purely private activity and those in which there was active government participation in shipping. He stated that in his country, where shipping was a private activity, it would be impossible for the government to participate in international regulation unless it was clear that such regulation was in the general interest.[71] However, most of the representatives from developing countries at the Fourth Committee of UNCTAD-II, wanted UNCTAD to undertake the task of review of International Shipping Legislation and preparation of Convention on the subject. The representatives from the socialist countries while favouring the idea of a Convention on International Shipping Law, wanted UNCTAD to avoid duplication and to work in collaboration with other international bodies.

PART IV

Status of Ships

42. The relevant Conventions providing for the principles of international law concerning the status of a ship are as follows :

(i) The Geneva Convention on the High Seas, 1958,[72] which makes provisions in regard to grant by a State

69. In his statement of February 22, 1968. Doc./TD/II/C.4/SR.17.
70. *Ibid.*
71. In his statement of February 20, 1968. Doc. TD/II/C.4/SR.15.
72. See *British Shipping Laws Series*, Vol 8, on "International Conventions on Merchant Shipping" (by Dr. Nagendra Singh), at p. 1145.

of its nationality to ships, their registration in its territory, and their right to fly its flag, and the rights and obligations of such State in respect of the said ships. The Convention provides, in paragraph 1 of Article 5, that each "State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory and for the rights to fly its flag", and that there "must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag". In paragraph 2 of Article 5, the Convention provides that "each State shall issue to ships to which it has granted the right to fly its flag documents to that effect".

(ii) Declaration recognizing the Right of Flag of State Having No Sea-Coast, Barcelona, April 20, 1921.[73]

(iii) Treaty on International Commercial Navigation Law, Montevideo, March 19, 1940,[74] Articles 1 to 4. The Convention was adopted by the Second South American Congress held at Montevideo on March 6 to 19, 1940.

(iv) Convention relating to Registration of Rights in respect of Ships under Construction, May 27, 1967, which came to be adopted through the efforts of the Comitè Maritime International.

43. It may be stated that even though the Convention on High Seas refers to the terms "genuine link", it does not define the same. Dr. T.K. Thommen points out that while "some States insist that a ship can be registered only if it is owned by nationals of the State of registration, States like Liberia and

73. *Ibid.*, at p. 1221.
74. *Ibid.*, at p. 1099.

Panama do not seem to have any strict requirements as to the nationality of the owners. There are obvious disadvantages in this lack of uniformity. The registration of ships is a matter of considerable importance to the State as it adds to its national tonnage, and it will be of advantage to the interests concerned in maritime commerce if the criteria for the determination of the genuine link are specified".[75]

PART V

Freedom of Navigation and Transit

44. Dr. T.K. Thommen, in his report on "International Legislation on Shipping", presented to UNCTAD-II points out that "it is in the interest of maritime trade that vessels of all nations are treated equally in foreign waters".

The existing Conventions in this field are as follows :

(i) and (ii) Convention and Statute on Freedom of Transit, Barcelona, April 20, 1921,[76] and the International Convention and Statute concerning the Regime of Navigable Waterways of International Concern, Barcelona, April 20, 1921,[77] both of which came to be adopted as a result of efforts of the League of Nations. The said Conventions lay down the principle of allowing foreign vessels freedom of navigation and transit on a footing of equality.

(iii) The International Convention and Statute on the Regime of Maritime Ports, Geneva, December 9, 1923,[78] which affirms the principle of allowing foreign vessels freedom of access to maritime ports used for foreign trade.

75. In his report on "International Legislation on Shipping," UNCTAD Document TD/32/Rev. 1.
76. See British Shipping Laws Series, Vol. 8, on "International Conventions of Merchant Shipping" by Dr. Nagendra Singh at p. 1230.
77. *Ibid.*, at p. 1236.
78. *Ibid.*, at p. 1221.

(iv) Draft Convention on the Legal Status of Territorial Sea, prepared by the Hague Codification Conference of 1930, convened by the League of Nations. However, the Conference could not reach an agreement on the subject of territorial waters.

(v) The Convention on the Inter-Governmental Maritime Consultative Organization of 1948,[79] adopted by a Conference of Plenipotentiaries convened at the instance of the Economic and Social Council of United Nations. The Convention affirms the principle of non-discrimination between vessels on the basis of the flag, and the principle of freedom of shipping on all flags to participate in international trade.

(vi) and (vii) The Geneva Convention on Territorial Sea and Contiguous Zone 1958,[80] and the Geneva Convention on High Seas, 1958,[81] adopted by the 1958 U.N. Conference on the Law of Sea. The first Convention recognizes the right of innocent passage of foreign merchant ships through the territorial waters of the State. Article 24 of the Convention provides that ship of all States, "whether coastal or not, shall enjoy the right of innocent passage through the territorial sea". The Convention on High Seas recognizes that the freedom of the high seas include freedom of navigation, and vessels and things and persons therein are subject to the jurisdiction of the flag State while they are on the high seas. Both the Conventions provide that, the Government ships engaged in commercial services are treated on a par with private merchant ships.

(viii) The Convention on the Transit Trade of Land-locked Countries, July 8, 1965,[82] adopted by the U.N. Conference on the Transit Trade of Land-locked Countries convened by UNCTAD. The Convention provides that in the

79. *Ibid.*, at p. 1153.

80. *Ibid.*, at p. 1139.

81. *Ibid.*, at p. 1145.

territorial and internal waters, the coastal State shall not discriminate between vessels of Land-locked States and those of other States. Vessels flying the flag of Land-locked States shall have the same freedom of access to, and the use of, sea ports, as is accorded to the vessels of the coastal State or any other State.

45. In regard to freedom of maritime navigation and transit, one of the questions to be considered is the one relating to flag discrimination. The International Chamber of Commerce, in co-operation with the International Chamber of Shipping, has been attempting for many years to focus attention to the damage which flag discrimination causes to international trade as a whole and, consequently, to those countries which believe they are helping their nationals by applying such measures.[83] Another question, which is under consideration of the Legal Committee of the IMCO, concerns legal problems arising from scientific oceanic research and the exploration and exploitation of the sea-bed and ocean floor including (i) the legal status of platform rigs, artificial islands and manned and unmanned devices used in oceanographic investigation; and (ii) peaceful uses of the sea-bed and ocean floor beyond the limits of present national jurisdiction.

PART VI

Facilitation of international maritime traffic

46. The existing conventions on this topic are as follows :

(i) International Convention on Navigation Law, Montevideo,[84] adopted at the Second South American Congress on Private International Law.

82. See Official Records of the Trade and Development Board, Second Session, Annexes, agenda item 6, Document TD/18.

83. A reference in this connection may also be made to a publication on "Flag Discrimination" by Mr. Jorge Allard P., under the auspices of the Latin American Shipowners' Association.

84. See *British Shipping Laws Series*, Vol. 8 on "International Conventions of Merchant Shipping", by Dr. Nagendra Singh, at p. 1099.

PART VII

Tonnage measurement of ships

51. Dr. Thommen, in his report stated that the "measurement of the tonnage of vessels is a matter on which uniformity of rules is desirable. A ship pays dues to port and harbour authorities, lighting authorities, the Suez and Panama Canal authorities on the basis of tonnage, and if uniform rules regarding the measurement are not followed by maritime nations serious difficulties will arise for vessels proceeding from port to port".

52. The conventions concerning this question are as follows :

(i) The Convention relating to Tonnage Measurement of Ships, Warsaw, April 19, 1935,[87] adopted through the efforts of the League of Nations, seeking to lay down uniform rules in this regard.

(ii) The Convention for a Uniform System of Tonnage Measurement of Ships, adopted at Oslo on June 10, 1947,[88] on the basis of a draft proposed by the technical experts on the League of Nations Transit Committee. The draft forms an annex to the Convention.

(iii) The Convention on Tonnage Measurement of Ships, London, May 1969, prepared by the Sub-Committee on Tonnage Measurement of IMCO, seeking to revise the 1947 Convention.

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86. UNCTAD Document TD/32/Rev.

87. See *British Shipping Laws Series*, Vol. 8 on "International Conventions of Merchant Shipping", by Dr. Nagendra Singh, at p. 631.

88. *Ibid.*, at p. 633.

PART VIII

Load Lines

53. It may be noted that often in the past life and property were jeopardized on the seas by the manner in which vessels were loaded. There was no uniformity in the principles and rules adopted by various maritime nations with regard to the limits to which ships could be loaded on their international voyages.

54. The existing Conventions concerning the subject are as follows:

(i) The International Convention respecting Load Lines, London, July 5, 1930,[89] which sought to lay down common rules as regards depth to which ships engaged in international commerce might be loaded. It required that ships of participating countries engaged in international voyages be surveyed for structural efficiency and certain safety requirements and marked with load lines as specified in the Convention. The Convention recognized that the load lines might, with full regard to safety, differ at varying seasons of the year and in different parts of the oceans of the world and therefore fixed zones and seasons in which and during which, different rules for fixing the load lines should apply.

(ii) The International Convention on Load Lines, 1966,[90] prepared and opened for signature and accession, by the International Conference on Load Lines, held at London from March 3 to April 5, 1966, upon the invitation of IMCO, for the purpose of updating the 1930 Convention. The 1966

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89. *Ibid.*, at p. 58.

90. Final Act of International Conference on Load Lines, 1966, April 5, 1966, and Attachment 1 [International Convention on Load Lines (1966)]. As of July 21, 1968, the required 15 Countries had accepted the Convention thus bringing it into force on that date.

Convention seeks to establish uniform principles and rules with respect to the limits to which ships on the international voyages might be loaded having regard to the need for safeguarding life and property at sea. Under the Convention, it is provided that no ship to which the Convention is applicable, shall proceed to sea on an international voyage after the date on which the Convention enters into force, unless it has been surveyed, marked, and provided with an International Load Line Certificate (1966) or, where appropriate, an International Load Line Exemption Certificate.

PART IX

Safety Legislation

55. The sinking of the *Titanic* in 1912 impressed on the maritime nations the need for uniform regulations for preventing collisions at sea. Conferences were held in London at the invitation of the United Kingdom Government in 1914, 1929 and 1948 for the purpose of adopting uniform measures for the safety of life at sea.

56. The existing legislation in this field is as follows :

(i) The Convention for promoting Safety of Life at Sea, London, May 31, 1929,[91] and the Simla Rules, 1931 concerning safety of life at sea.[92]

(ii) The International Convention for the Safety of Life at Sea, 1948[93] and the International Regulations Preventing Collisions at Sea, adopted by the 1948 Conference on Safety of Life at Sea.

91. IV Hudson, *International Legislation* (1932), 2724.

92. *British Shipping Laws Series*, Vol. 8 on "International Conventions of Merchant Shipping" by Dr. Nagendra Singh, at p. 101.

93. *Ibid.*, at p. 102.

(iii) The International Convention for Safety of Life at Sea, June 17, 1960,[94] and International Regulations for Preventing Collisions at Sea, June 17, 1960,[95] adopted by the International Conference on Safety of Life at Sea, convened in 1960 by the IMCO. This Convention and the Regulations revised the earlier conventions and regulations thoroughly. The Convention contains provision relating to construction, survey and certificate, communication, casualties, fire protection, life-saving appliances applicable to passenger and cargo ships, safety of navigation, carriage of grain, carriage of dangerous goods and nuclear ships. This Convention came into force on May 26, 1965. The Convention and the Regulations are administered by the IMCO. Amendments to the Convention respecting fire safety measures for future passenger ships were adopted by the Fifth IMCO Assembly in October 1967.

(iv) An *Ad Hoc* Sub-Committee for IMCO on revision of Simla Rules met from 23 to 27 September 1968 in order to consider all aspects of revision of the Simla Rules of 1931 which deal with safety requirements for unberthed passenger ships in pilgrim and other special trades.

(v) The IMCO has produced a revised Code of Signals related essentially to the safety of navigation and persons suitable for signalling by all means, including radio-telegraphy and radio-telephony. The Code of Signals came into force as from April 1, 1969.

(vi) An International Maritime Dangerous Goods Code covering the classification, documentation, indentification and marking, labelling, packaging, storage and segregation of dangerous goods transported by sea and including provisions for fire precaution and fire-fighting, has been developed by the IMCO.

57. At the Second Conference of the UNCTAD, held in February-March 1968, Mr. Umar of Indonesia pointed

94. *Ibid.*, at p. 114.

95. *Ibid.*, at p. 260.

out before the Committee on Shipping that the Governments of the developing countries were not always in a position to give effect to certain shipping conventions, such as safety conventions, because of their lack of technical capacity and the financial implications. According to him, the developing countries were unable to ratify these conventions, in as much as they required very high standards of safety and efficiency. He further stated that the inability of developing countries to meet these standards might create difficulties for their vessels in foreign ports.[96] Mr. McQueen of the U.K. felt that this was no reason for the safety standards to be lowered or that they should differ according to whether a country was developed or developing.[97]

58. The current activities of some of the international bodies relating to this matter are as follows:

(i) The IMCO has prepared (a) amendment to the 1969 Convention in relation to the carriage of shipborne navigational equipment, the use of the automatic pilot and the carriage of nautical publications, and is going to recommend them to governments for adoption. Amendments to the Convention were also prepared with a view to improving the arrangements for life-saving appliances. Preparation of a revised version of Chapter VI (Grain Rules) of the Convention is in its final stages. A number of recommendations aiming at improving the safety of navigation have been adopted by the Maritime Safety Committee, (b) also a Code of Safe Practices for Bulk Cargoes has been formulated under the aegis of the IMCO. This Code sets standards for the safe storage and carriage of bulk cargoes, including ore, ore content rates and similar materials. The Code also recommends that a

96. In his statement of Feb. 21, 1968: See UNCTAD Doc. TD/II/C.4/S.R. 15.

97. In his statement of Feb. 21, 1968: See UNCTAD Doc. TD/II/C.4/S.R.16.

Certificate stating the transportable moisture limits and the certified moisture content of the cargo shall be provided at the loading point to the shipmaster and to the appropriate authority, (c) also, in cooperation with F.A.O. and I.L.O., IMCO is compiling a Code of Safety for Fishermen and Fishing Vessels. The Code consists of two parts, of which Part B is "Code of Safety and Health Requirements for the Construction and Equipment for Fishing Vessels".

(ii) The International Chamber of Shipping has continued to cooperate with IMCO in its work on maritime safety. The Chamber has prepared tanker safety guides in relation to the carriage of both petroleum and chemicals in bulk. The draft of the Petroleum Guide has been circulated to the relevant IMCO Sub-Committee, and close liaison is being maintained in the preparation of the Chemical Guide and the international group concerned with oil tanker terminals and with classification societies, to ensure mutual compatibility with similar work being undertaken by those bodies.

(iii) The Council for Mutual Economic Assistance(CMEA) drafted regulations on working conditions and safety standards and on sanitary and living conditions on board merchant ships, in collaboration with the bodies responsible for the technical inspection and classification of the vessels of countries cooperating under the Agreement of December 15, 1961. These regulations were subsequently recommended for application to new designs of ships for use in inter-CMEA trade.

PART X

Jurisdiction in cases of Collisions between vessels

59. It has been the practice of several States to assume jurisdiction over foreign merchant ships in regard to collisions on the high seas. The jurisdiction in such cases is, however, exercised only when the foreign ship in question enters internal waters. There has been a lack of uniformity in the practice of

States as regards civil jurisdiction in collision cases involving conflict of laws.....As regards the penal jurisdiction of a State in matters of collision on the high seas, it may be said that, despite the decision of the Permanent Court of International Justice in one *Lotus case*, it is now generally agreed that criminal or disciplinary proceedings may not be instituted against the master or any other person responsible for the damage caused by his ship except before the courts of the flag State or of the State of which such person is a national. In a penal case arrest or detention of a ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State.....There are cases where jurisdiction can be exercised even when a foreign merchant ship remains on the high seas, warships of all nations have the right to require any suspicious merchant ship on the high seas to show its flag.

60. The existing treaties and conventions on this subject are as follows :

(i) The International Convention for the Unification of Certain Rules of Law respecting Collisions between Vessels, Brussels, 1919.[98] The Convention did not decide the question of the competence of courts.

(ii) Treaty on International Commercial Navigation Law, Montevideo, March 19, 1940,[99] adopted by the Second South American Congress on Private International Law held at Montevideo from March 6 to 19, 1940. Articles 5 to 11 of the Convention provide for jurisdiction in respect of civil and criminal matters arising out of collisions between vessels.

(iii) International Convention for the Unification of Certain Rules relating to Civil Jurisdiction in Matters of

98. *British Shipping Laws Series*, Vol. 8 on "International Conventions of Merchant Shipping" by Dr. Nagendra Singh, at p. 1047. The Convention adopted on the initiative of C.M.I.

99. *Ibid.*, at p. 1099.

Collisions, Brussels, May 10, 1952.[100] The Convention seeks to minimize conflicts of jurisdiction in cases of collisions. The Convention provides that an action for collision between vessels can be introduced either before the Court where the defendant has his habitual residence or place of business, or before the court of the place where the defendant's vessel has been arrested or where arrest could have been effected and bail or other security has been furnished, or before the court of the place of collision, when collision has occurred within the internal waters of a State. In regard to salvage suits, the national courts generally exercise the same type of jurisdiction as they have in collision cases.

(iv) International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collisions and other Incidents of Navigation, Brussels, May 10, 1952.[101] The Convention provides in respect of proceeding against the master or any other person responsible for the damage caused by his ship, and in regard to arrest or detention and investigation of the ship.

(v) The Geneva Convention on the High Seas, 1958,[102] adopted at the Conference on the Law of the Sea, held at Geneva. Article 11 of the Convention provides for penal jurisdiction in matters of collisions. Article 22 provides that a warship may board a foreign merchant ship on the high seas provided that there is reasonable ground for suspecting that the latter ship is engaged in piracy or in the slave trade, or that it is of the same nationality as the warship, although flying a foreign flag or refusing to show its flag. Article 23 recognizes the right to hot pursuit. The authorities of a State can authorize their warships to pursue a foreign ship even on the high seas in certain circumstances if they have reason to suspect that the ship has violated the laws and regulations of that State whilst in its internal or territorial waters.

100. *Ibid.*, at p. 1131. Adopted at the initiative of C.M.I.
101. *Ibid.*, at p. 1134. Adopted on the initiative of C.M.I.
102. *Ibid.*, at p. 1145.

PART XI

Salvage and assistance

61. The existing legislation on the subject is as follows :

(i) The International Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea, Brussels, 1910.[103] The Convention deals with the problem of payment of remuneration to persons who have taken part in salvage operations. Article 2 of the Convention lays down the principle that every act of assistance or salvage which has a useful result gives rise to a claim for equitable remuneration, but in no case shall the amount to be paid exceed the value of the property salvaged. Article 3 provides that persons who have taken part in salvage operations despite the express and reasonable prohibition of the vessel assisted, are denied any right to remuneration. Article 9 provides that no remuneration is due from persons whose lives are saved, provided that nothing in the Convention shall affect national laws on the subject. Legal action is barred after the expiry of two years from the day on which the operations of assistance or salvage terminate, under Article 10. Article 11 provides that "every Master is bound, so far as he can do so without serious danger to his vessel, her crew and passengers, to render assistance to every body, even though an enemy, found at sea in danger of being lost".

(ii) Treaty on International Commercial Navigation Law, Montevideo, March 19, 1940,[104] adopted at the Second South American Congress on Private International Law. Articles 12 to 14 of the Convention provide in regard to the law applicable to assistance and salvage matters and the forum for settlement of disputes relating to these matters.

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103. *Ibid.*, at p. 1112. Adopted on the initiative of C.M.I.

104. *Ibid.*, at p. 1099.

(iii) The 1958 Geneva Convention on the High Seas,[105] which in Article 12, imposes a duty on every State to require the master of a ship sailing under its flag to render assistance to persons and ships in distress at sea insofar as he can do so without serious danger to his own vessel and persons thereon.

62. It may be stated that the Legal Committee of the IMCO has sent questionnaires to governments to elucidate their practice relating to salvage of ships in distress.

PART XII

Maritime Mortgages and Liens

63. Most maritime nations assume jurisdiction in respect of maritime claims against foreign ships lying in their waters. A foreign ship which is within jurisdiction can be arrested by the local authorities to enforce a maritime claim.

64. The existing legislation on the subject is as follows :

(i) The International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages, Brussels, April 10, 1926.[106] The Convention recognizes a number of claims as maritime liens.

(ii) Treaty on International Commercial Navigation Law, Montevideo, March 19, 1940,[107] adopted by the Second South American Congress on Private International Law, held at Montevideo from March 6 to 19, 1940. Article 31 of the Convention provides for hypothecations.

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105. *Ibid.*, at p. 1145.

106. *Ibid.*, at p. 1087. Adopted on the initiative of C.M.I.

107. *Ibid.*, at p. 1099.

(iii) International Convention relating to the Arrest of Sea-going Ships, Brussels, May 10, 1952.[108] The Convention provides for arrest of a ship by the contracting parties to secure a maritime claim. According to Article 1(2) "Arrest" in this context means "the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment." Under Article 7(1), the Courts of the country in which a ship has been arrested may determine the case according to its merits, provided that they are empowered to do so by the domestic law of that country, or in any of the cases enumerated under the said Article. Article 1(1) of the Convention enumerates the maritime claims in respect of which a contracting State may arrest a foreign ship.

(iv) The revised Convention on Maritime Mortgages and Liens, of May 27, 1967.

65. It may be pointed out that the two Conventions on maritime liens and mortgages of April 10, 1926 and May 27, 1967 might affect the purchase and ownership of vessels by developing countries.

PART XIII

Liability of carriers

66. Mr. Georges Ripert has termed limitation of the shipowner's liability as a "fundamental principle" of maritime law.[110] All maritime nations follow some scheme of limitation of the shipowner's liability. However, there was no

108. *Ibid.*, at p. 1126. Adopted on the initiative of C.M.I.

109. Pointed out in a Working Paper on International Shipping Legislation, prepared by the UNCTAD Secretariat : Doc. No. BD/B/C. 4/15L/2.

110. *Droit Maritime*, p. 139 (4th Edn. 1952).

uniformity in the laws of these nations until 1924 as regards the limitation of liability of a shipowner for the wrongful acts of his master on any person in the service of his vessel. The principle adopted for the limitation of such liability varied from nation to nation. Some nations limited the liability of a shipowner to the value of the wreck in addition to the freight and "accessories". This want of uniformity was obviously unsound and the Comitè Maritime International directed its efforts to finding a basis of common agreement consistent alike with the interests of those connected with shipping, merchants, the travelling public and underwriters.

67. The existing legislation on the subject is as follows :

(i) The International Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Sea-going Vessels, Brussels, August 29, 1924.[111] Under the Convention, the liability of the ships-owner is generally limited to the value of the vessel, its freight, and accessories; but in specified instances the shipowner may further limit his liability for property damage to a lessor amount of £8/- per ton.[112] Freight is always fixed at ten per cent of the value of the ship at the commencement of the voyage.[113] Claimants of damages for death or personal injuries have exclusively at their disposal an additional fund of £8/- per ton, and if they are not fully satisfied, they rank equally with other claimants in the distribution of the general fund.[114] The various claims connected with a signal accident rank with one another against the amount representing the extent of the owner's liability.[115] The Convention spe-

111. *L.N.T.S.*, Vol. 120 (1931), p. 125. In force, June 21, 1931. Adopted on the initiative of C.M.I.

112. Article 1.

113. Article 4.

114. Article 7.

115. Article 6.

cifies the time of valuation,[116] and the method of calculation of tonnage.[117] While the monetary unit referred to mean gold values, States have reserved the right to translate the sum in terms of their own monetary systems and to accord to the debtor the right to pay in national currency at the rate of exchange at the time of valuation.[118] Limitation of liability is excluded with respect to obligations arising out of personal acts or faults of the shipowner and out of engagements of persons in the service of the vessel.[119] The Convention applies to sea-going vessels belonging to a contracting State and in all other cases provided for by national laws. A contracting State, however, is free not apply the Convention in favour of nationals of non-contracting States.[120] By express provisions, the Convention does not apply to ships of war and government vessels serving exclusively a public purpose,[121] nor does it affect matters before national courts.[122]

(ii) The International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships, Brussels, October 10, 1957,[123] adopted on the basis of a new text of Convention on the subject, prepared by the Comité Maritime International. Under this Convention, the shipowner may limit his liability in respect of claims arising from a number of enumerated

116. Article 3.
117. Article 11.
118. Article 15.
119. Article 2.
120. Article 12.
121. Article 13.
122. Article 14.
123. See *British Shipping Laws Series*, Vol. 8 on "International Conventions of Merchant Shipping" by Dr. Nagendra Singh, at p. 1064 (1963).

instances (exclusive of salvage, contribution in general average, and contracts for personal services), unless the occurrence giving rise to the claims has resulted from the actual fault or privity of the owner.[124] Subject to certain exceptions, the same right is accorded to the Charterer, Manager or Operator of the ship and to the servants of the owner....[125] the *lex fori* determines who has the burden of proof of the owner's fault or privity.[126] The limits of liability are set out in Article 3 under which the liability is limited to the tonnage of the vessel, which is easily ascertainable, and not to the value of the vessel. Where the occurrence has given rise to property damage only, the limit is 1,000 francs per ton. Where the occurrence has given rise to claims for death and personal injuries only, the limit is 3,100 francs per ton. Where it has given rise to both property damage and personal claims, the limit is still 3,100 francs but the first 2,100 are appropriated exclusively to the payment of personal claims and the rest to claims for property damage, with unsatisfied claimants of the first category ranking equally with claimants of the second category in the distribution of the second portion of the fund. The fund must be constituted for each distinct occurrence.[127] The details of construction and distribution of the fund and all rules of procedure are matters governed by the national laws of the contracting States.[128] The Convention applies to sea-going ships,[129] but the contracting States have the right to decide what other classes of ships will be treated in

124. Article 1.
125. Article 6.
126. Article 1, Section 6.
127. Article 2.
128. Article 4.
129. Article 1, Section 1.

the same manner.[130] The Convention further applies whenever a person entitled to claim limitation seeks to limit his liability or to procure release of property before the courts of a contracting State. The contracting States, however, are free not to apply the Convention in favour of a non-contracting State, a person who has his residence or principal place of business in a non-contracting State, or ship which flies the flag of a non-contracting State.[131]

(iii) International Convention relating to Stowaways, Brussels, October 10, 1957.[132] The Convention lays down that if a stowaway is discovered in a port or at sea, the master may deliver him to the appropriate authority at the first convenient port of a contracting State and he may be sent to the State of which he claims to be a national at the shipowner's expense.

(iv) The International Convention for the Unification of Certain Rules relating to the Carriage of Passengers by Sea, April 29, 1961,[133] approved at the 1961 Brussels Conference on Maritime Law. Article 6 of the Convention provides that the "liability of the carrier for the death of or personal injury to a passenger shall in no case exceed 250,000 francs, each franc consisting of 65.5 milligrams of gold of millesimal fineness 900"; that "nevertheless the national legislation of any High Contracting Party may fix as far as the carriers who are subjects of such State are concerned a higher per capita limit of liability"; and that the limits of liability therein prescribed "shall apply to the aggregate of the claims put forward by

130. Article 8.
131. Article 7.
132. See *British Shipping Laws Series*, Vol. 8 on "International Conventions of Merchant Shipping" by Dr. Nagendra Singh, at p. 1064. Adopted on the initiative of C.M.I.
133. *Ibid.*, at p. 1067.

or on behalf of any one passenger, or his personal representatives, heirs or dependants on any distinct occasion".

(v) The International Convention on the Liability of Operators of Nuclear Ships, Brussels, May 25, 1962,[134] dealing with the problems of liability for damage resulting from the operation of atom-powered vessels. The Convention imposes absolute liability on the operation of a nuclear ship for any damage caused by a nuclear incident involving the nuclear fuel of, or radio-active products or waste in the ship.[135] This liability is limited to 1,500 million convertible gold francs in respect of any nuclear incident even if caused by the fault or privity of the operator.[136] The Convention further provides for limitation of actions,[137] jurisdiction of national courts,[138] satisfaction of judgments,[139] and settlement of disputes between contracting States either by arbitration or submission to the International Court of Justice.[140] The contracting States have reserved the right to deny access to their waters and harbours by ony nuclear ship.[141] The Convention applies to nuclear damage occurring in any part of the world and involving the nuclear fuel or radioactive products or waste produced in a nuclear ship flying the flag of a contracting State.[142]

134. *Ibid.*, at p. 1071.
135. Article 2.
136. Article 3.
137. Article 5.
138. Article 10.
139. Article 11.
140. Article 20.
141. Article 17.
142. Article 13.

(vi) The Protocol to amend the 1924 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1968.[143] The Protocol deals chiefly with raising the limits of liability of the carrier, as laid down by the 1924 Convention on the subject.

68. Dr. T. K. Thommen, in his report on "International Legislation on Shipping", has pointed out : "The vessels and cargoes are in most cases insured and therefore claims arising out of collisions or loss of or damage to cargoes are now predominantly disputes between underwriters representing the the rival interests. Owing to the limitation of the shipowner's liability under these two (1924 and 1957) Conventions and owing to the immunities granted to them under the Hague Rules, the shippers are often compelled to insure the cargoes to their full value, lest they should find themselves without any adequate remedy. As a consequence, the same cargo is likely to be insured twice—once by the shipowner and again by the owner of the cargo. When claims arise in respect of the cargo, the dispute is carried on by the underwriters, albeit in the names of the shipowners and cagro owners". At the second session of the UNCTAD, held in February-March, 1968, Mt. Khalil of the U.A.R. expressed the view that the 1924 Convention was adopted at a time when most of the present developing countries were under colonial rule, so that the Conventions mainly served the shipowner's interests. According to him, the 1957 Convention also favoured the shipowners rather than the shippers. He also stated that the double insurance by the shipper and the shipowner worked to the benefit of Insurance Company and the detriment of developing countries.[144] Mr. McQueen of the U.K. stated that limitation of liability of the shipowner was a commonly

143. Adopted on the initiative of C.M.I.

144. In his statement of February 19, 1968 before the Fourth Committee : See UNCTAD Doc. TD/II/S.R. 14.

accepted principle applying to all means of transport. He thought that if such limitation were abolished, shippers would have to pay higher insurance premia, which would increase freight rates still further. According to him such a step would be detrimental to shippers in developed and developing countries alike.[145]

69. The current activities of international bodies in the field of limitation of shipowner's liability are as follows :

(i) The Legal Committee of the IMCO is likely to deal with this matter in the near future. The Committee has concentrated on the determination of the burden of liability—with all its attendant complexities—for the consequences of a casualty on the high seas leading to accidental pollution on a large scale.

(ii) The UNIDROIT is also holding some Conferences with a view to co-ordinating the work of unification concerning the liabilities of carriers for personal injuries sustained by passengers. The Institute has also prepared a draft convention on the limitation of liability of owners of inland ships, and a draft convention on the liability of the carrier of goods by inland ships.

PART XIV

State immunity

70. In view of the increasing practice of governments of owning or operating a large number of merchant ships, the question of the jurisdictional immunities of these ships is of practical importance.

71. The existing legislation on this matter is as follows :

(i) International Convention for the Unification of Certain Rules relating to the Immunity of State-

145. *Ibid.*, in his statement of Feb. 12, 1968, Doc. TD/II/C. 4/S.R. 15.

owned Vessels, signed at Brussels on April 10, 1926,[146] and the Additional Protocol signed at Brussels on May 24, 1934. The Convention sought to settle, to some extent, the question of jurisdictional immunity of State-owned vessels.

(ii) Treaty on International Commercial Navigation Law, Montevideo, March 19, 1940,[147] adopted at the Second South American Congress on Private International Law. In Articles 34 to 42, the Convention makes provisions in regard to vessels belonging to the State.

(iii) and (iv) The Geneva Conventions on the High Seas, 1958,[148] and on the Territorial Sea and Contiguous Zone,[149] adopted at the 1958 UN Conference on the Law of Seas. Both the Conventions draw a distinction between government ships "used only on Government non-commercial service" and other government ships. Further, they recognize the immunity of the former ships from the jurisdiction of any State other than the flag State, while the latter ships are treated on a par with private merchant ships.

72. Referring to the provisions of the aforesaid Geneva Conventions, Dr. T. K. Thommen, in his report on "International Legislation on Shipping" expresses the view that "It is not, however, always clear when a government ship is engaged in purely non-commercial service and when it is not."

PART XV

Protection of Sub-marine cables

73. The existing legislation on the question of protection of sub-marine cables is the Convention on the Protection of Submarine Cables, Paris, of March 14, 1884.

146. L.N.T.S. Vol. CLXXVI, 1937, No. 4062.
147. *British Shipping Laws Series*, Vol. 8 on "International Conventions of Merchant Shipping" by Dr. Nagendra Singh, at p. 1099.
148. *Ibid.*, at p. 1145.
149. *Ibid.*, at p. 1139.

PART XVI

Liner Conferences

74. "The governments of several nations assist their shipping industry, and in this context the question of flag discrimination assumes importance. The Convention on the Intergovernmental Consultative Organization mentions in paragraph (b) of Article 1 that one of the purposes of the Organization is "to encourage the removal of discriminatory action affecting shipping engaged in international trade so as to promote the availability of shipping services to the commerce of the world without discrimination." The Convention thus affirms the principle of non-discrimination between vessels on the basis of the flag. It is, however, specifically provided in the Convention that assistance and encouragement given by a State for the development of national shipping and for purposes of security would not be discriminatory, provided that such assistance and encouragement are not designed to restrict the freedom of shipping of all flags to participate in international trade.[150]

75. At the Second Session of UNCTAD, Mr. Rouanet of Brazil, while speaking before the Fourth Committee of the Conference, referred to the possibility of recommending that the governments of developing countries give consideration to the need for appropriate legislation on maritime transport to provide the measures needed to promote expansion of their merchant marines and to obtain more control over decisions affecting the carriage of goods to and from their territories. He suggested that a second recommendation could be addressed to the governments of developed countries—particularly the large maritime powers—inviting them to consider regulating, by appropriate legislation, the practices and policies of their national shipowners and, through them, international liner conferences, in order to encourage practices consistent with the interests of the developing countries. He suggested that the

150. UNCTAD Document, TD/32/Rev. 1.

UNCTAD Secretariat should circulate periodical information on progress made by the developed countries in enacting legislation to regulate the practices of their national shipping liner.[151] Mr. Boum of the Cameroons emphasized that it was indispensable that Shipper's Council should act in conformity with the legislation of the countries concerned, so that none of their decisions could run counter to the national interests.[152] However, Mr. Richard of Sweden, while agreeing that national legislation could influence the policy of the liner conferences, pointed out that that might lead to disputes which would be harmful not only to shipowners but to shippers.[153] Mr. Schuld of the Netherlands pointed out that views as to how much regulation was necessary were bound to be different between countries in which shipping was a purely private sector and those in which there was active government participation in shipping. He stated that in his country, where shipping was a private activity, it would be impossible for the government to participate in international regulation unless it was clear that such regulation was in the general interest.[154]

76. Some of the activities of the international bodies in the matter of liner conferences are as follows :

(i) The Fifth Regular Assembly of Latin American Shipowners Association (ALAMAR) met in Bogota in November 1967 and decided to establish an *Ad Hoc* Committee of Latin American Shipping Conferences to prepare a model statute for shipping conferences. In 1967-68 ALAMAR studied the question of establishment of a multilateral shipping line.

(ii) The Third Joint Meeting of the ECA Working Party on Intra-African Trade and the OAU Expert Committee on Trade and Development (Geneva, January 1969), noted that shipping

151. In his Statement of Feb. 19, 1968 : Doc. TD/II/C.4/S.R. 14.

152. In his Statement of Feb. 7, 1968 : Doc. TD/II/C.4/S.R. 4.

153. In his Statement of Feb. 13, 1968 : Doc. TD/II/C.4/S.R. 9.

154. In his Statement of Feb. 20, 1968 : Doc. TD/II/C.4/S.R. 15.

countries had not cooperated as fully as could have been expected in the UNCTAD studies on conference lines. The meeting further recommended that assistance be sought by the African countries from developed countries to establish and expand their merchant marines.

(iii) Since the agreement reached between European Conference lines and the National Shippers Council of Europe, embodied in the Note of Understanding of December 1963, Joint Plenary Meetings have been held in London (1964), Brussels (1965), Amsterdam (1966), Marseilles (1967) and Hamburg (1968). A great deal of the discussion at these meetings has been directed towards achieving more uniform patterns of procedure in liner trade matters through adoption of joint recommendations.

PART XVII

Carriage of Goods by Sea (including relations between Shippers and Shipowners)

77. Dr. C. John Colombos, in his book on *The International Law of the Sea* points out: "A contract for the carriage of goods in a ship is usually described as "a contract of affreightment" and is expressed in writing in a document called a "bill of lading" (or charter-party, when the vessel is chartered)". In case "the shipowner agrees to carry a complete cargo of goods, or to make available a ship for such purpose, the contract of affreightment is generally contained in a document called the charter-party. The shipowner lets, and the charterer hires, the ship for the purpose of carrying goods in it. Where the agreement is for the purpose of carrying goods which forms only a part of the intended cargo of the ship, the contract of affreightment for each parcel of goods shipped is usually expressed in a document called the "bill of lading".[153]

155. Dr. T. K. Thommen, in his report on "International Legislation on Shipping".

Dr. Colombos also points out that the terms embodied in a contract of affreightment "vary in form in different countries and the law on the subject was beginning to grow seriously confused. Uuiformity was, therefore, highly desirable on this ground".

78. The existing legislation on the subject, apart from bills of lading and charter-parties which have been dealt separately in the present note, is as follows :

(i) The Hague Rules 1921, adopted by the International Law Association at its Hague Conference of 1921.[156] which was attended by a representative body of jurists, shipowners and merchants. Under the rules the rights and liabilities of cargo owners and shipowners respectively were formulated and defined.

(ii) Warsaw—Oxford Rules of 1924 concerning C. I. F. contracts, adopted by the Oxford Conference of the International Law Association.[157] The rules provide for rights and duties of buyer and seller in regard to sale and purchase of goods on C. I. F. terms. However, it may be pointed out that the law repsecting C. I. F. and F. O. B. contracts, is very largely customary although certain countries have codified it, and is to be determined by reference to custom, especially as interpreted by the courts and also through standard definition promoted by international commercial associations.

79. At the Second Session of the UNCTAD, Mr. Khalil of the U. A. R. referred to absence of principles governing relations between shippers and shipowners. He also emphasized the need to have international legislation on carriage of goods by sea.[158] In this regard it may be pointed out that the "area of particular concern is that commonly covered by that

156. 30th Report, Vol. 2, pp. 254 to 266.
157. *British Shipping Laws Series*, Vol. 8, p. 1092.
158. UNCTAD Doc. TD/II/C.4/S,R. 14.

part of maritime law which governs the existing relationships and arrangements between parties engaged in the international carriage of goods and persons, and centered on the rights and duties of the passenger, shipper, insurer, assured, carrier and receiver, including all intermediary and interconnected parties, such as banks, port authorities, etc., and their servants, agents and independent contractors".[159] Dr. T. K. Thommen, in his report on "International Legislation on Shipping" raises the question of the advisability of allowing the carrier excessive privileges *vis-a-vis* the cargo-owner. The question deserves to "be examined from the standpoint of economic progress of the developing countries, bearing in mind, at the same time, the general interest of the shipping trade and the export-import business of the trading nations".[160] The need is to harmonize and develop international shipping law to meet these requirements.

80. As pointed out above, carriage of goods is governed by contract between the parties. Although in theory the parties to a contract of carriage enjoy complete freedom of contract, subject of course to the Hague Rules in the case of bills of lading and the mandatory provisions of the law applicable to contracts generally, in actual practice it would appear to be doubtful whether the majority of cargo owners generally enjoy any appreciable freedom of contract. Bills of lading and charter-parties are standard contracts printed in advance with a large number of clauses protecting the interest of the ship owners to the maximum extent possible. They are usually drafted by experts employed by associations in which the interest of the shipowner generally predominates. With the exception of those relatively few cargo-owners who are able to assert themselves by virtue of their powerful economic position the cargo-owners generally have no alternative but to accept these printed standard form contracts. Courts of law, when

159. UNCTAD Doc. TD/B/C. 4/ISL/2.
160. *Ibid.*

seized of cases arising from these contracts, are not likely to interfere with the "freedom" of contract unless their terms are contrary to the mandatory provisions of the applicable law or are so oppressive and unconscionable that it is unlikely that the Courts would enforce them. In most cases, therefore, it would appear that the cargo-owner is relatively at a disadvantage". In order to remedy this situation, it may be necessary to examine the provisions of various standard charter-parties and bills of lading in common use and to work out modification with a view to maintaining a balance between the conflicting interests of the carrier on the one hand and the cargo owner on the other—"a fair balance of equities as between parties concerned". It may also be necessary in this connection to review the Hague Rules and comparable legislation and practices covering shipping, marine insurance and general average with a view to reducing the gap between various interests.

81. Some of the activities of the international bodies in the matter of carriage of goods by sea, are as follows :

(i) The UNIDROIT prepared (a) a draft Convention on the Contract of International Combined Carriage of Goods and (b) a draft Convention on the Contract of International Forward Agency of Goods. A draft Convention on the Contract for the Carriage of Passengers and Luggage by Inland Waterways is to be completed by the UNIDROIT.

(ii) Joint Plenary Meetings of representatives of the Liner Conferences and European Shippers' Council, were convened under the auspices of the European National Shipowners' Association (CENSA). Their recommendations refer to 'introduction of, and alterations in, shipper's contracts and agreements, and provide for advance consultation by the Conference concerned with an appropriate shippers' body

on the introduction of new contracts or alterations of principle to existing contracts or agreements. They also refer to "measurement rules" which set out recommended basic rules for the measurement of cargo in the interest of facilitating port operations and shippers' estimations of freight costs.

(iii) The International Law Association issued a questionnaire to its regional branches on the question of transport of goods by sea.

(iv) The CMEA Standing Committee on Foreign Trade approved a revised version of the General Conditions for Commodity Deliveries by Foreign Trade Organizations of the Member Countries of the Council (1968), which also include regulations for the transport of goods by water including maritime transport. The Consultative Conference of Representatives of Charterers' and Shipowners' Organizations are working on the standardization of shipping and chartering documents.

(v) The International Chamber of Shipping, under the guidance of its Shipping Documentation Committee, has continued its work on the standardization and simplification of documentation, and the establishment of forms suitable for universal use. The Chamber is preparing a standard manifest aligned with the standard bill of lading to meet the content and layout requirements of the cargo declaration recently recommended by IMCO to member governments.

PART XVIII

Bill of Lading

82. A bill of lading is a receipt for goods shipped on board a vessel, signed by the shipowner, or by the master or other agent of the shipowner. This document contains the terms upon which the goods were delivered to, and received

by the ship. An endorsement of the bill of lading, by the custom of merchants internationally accepted, confers upon the endorsee all the rights and liabilities of the shipper as if the contract contained in the bill of lading had been originally made with him. The bill of lading is a document of title, entitling its holder to delivery of the goods. Until 1924 there was no uniformity in the laws of maritime nations in regard to contracts of affreightment covered by bills of lading. The terms embodied in the bill of lading varied from one country to another, and the law on the subject was far from clear. Shipowners could avoid liability by inserting escape clauses or exceptions in the documents, and in the course of years these exceptions grew in number and complexity to such an extent that it became difficult to ascertain what rights were conferred on the shippers or the consignees of goods as against the shipowners. Bills of lading are not only contracts of affreightment, but also, unlike charter-parties, documents of title. They pass from hand to hand and from country to country, conferring on their holder both rights and liabilities. Persons not parties to the original contract become interested in the bills of lading. This situation made it necessary to unify the laws of different nations in regard to bills of lading and define the carrier's rights and obligations.[161] Dr. A.N. Yiannoponlous, in his article on "The Unification of Private Maritime Law by International Conventions",[162] states : "Already by the end of past century, divergencies in the regulation of the sea-carriers' liability under contracts of affreightment evidenced by bills of lading had attracted attention and had caused concern. The most spectacular conflict in that regard involved the question of validity of "negligence" clauses, namely clauses designed to exonerate the carrier from liability for his or his servants' negligence in connection with damage to the cargo.....Moreover, the

161. UNCTAD Doc. TD/32/Rev. 1.

162. *Law and Contemporary Problems*, Vol. 30 (1965), at p. 386.

national policy favouring the shipper or the carrier was frequently extended in the field of conflict of laws by adoption of choice-of-law rules designed to safeguard application of national laws to bills of lading involving international contracts. Thus, due to a variety off substantive standards and conflict rules, a negligence clause inserted in an international bill of lading could be valid in one country and invalid in another, and the liability of the carrier could differ with the fortuitous or selected forum. As a result, security in international transactions was minimised, the negotiability of bills of lading was imperilled, and world trade was seriously hampered. The United States, having first succeeded in reaching a compromise between the conflicting interests of shippers and carriers in its Charter Act, 1892, took lead in urging uniform international regulation of the sea-carriers' liabilities. After several decades of preparatory work and back-stage negotiations, the International Law Association adopted at its Hague meeting of 1921 a body of rules known as the Hague Rules, 1921".

83. The existing international legislation relating to bills of lading is as follows:

(i) The Hague Rules, 1921, adopted by the International Law Association at the Hague Conference of 1921.[163] The rules were, "at first, intended to be incorporated in bills of lading by the voluntary agreement of the parties to the contract of affreightment, but the movement in favour of compulsory uniform legislation in the various countries eventually resulted in the resolution taken by the delegates to the Diplomatic Conference on Maritime Law, held in Brussels in October 1922, to recommend to their respective Governments the adoption of "The Hague Rules" as a basis of legislation. "The Rules", after having

163. Report for the 30th Conference (1921), at pp. 212 to 218.

been amended by a Special Committee at a meeting also held in Brussels in 1923, were finally approved in the following year.[164]

(ii) The International Convention for the Unification of Certain Rules relating to Bills of Lading, Brussels, August 25, 1924,[165] adopted by the Diplomatic Conference on Maritime Law, 1924, as a result of the efforts of the Comité Maritime International and the International Law Association. The Convention had been adopted by 28 countries as of December 1967. The Convention applies only to a contract of carriage which is covered by a bill of lading or any similar document of title. The definition also includes a bill of lading or similar document of title issued under or pursuant to a charter-party. Such a bill of lading will come within the definition only from the moment at which it "regulates the relations between a carrier and a holder of the same". It would appear, therefore, that the Convention does not apply to a bill of lading issued by a shipowner to a charterer until the charterer has endorsed the document for valuable consideration in favour of a third person. On endorsement of the bill of lading, the endorsee obtains the protection of the provisions of the Convention which the charterer himself could not claim, and the obligations mentioned in the Convention are imposed on the shipowner. Under Article 2 of the Convention, the carrier is subject to the responsibilities and liabilities, and entitled to the rights and immunities set forth in the Convention in relation to the loading, handling, storage, carriage, custody, care and discharge of the goods which he has undertaken to carry. Article 1(e) of the Convention states that "carriage of

164. Colombos, in his book on *International Law of the Sea*, at p. 312.

165. *British Shipping Laws Series*, Vol. 8, at p. 1086.

goods" covers the period from the time when the goods are loaded on, to the time they are discharged from the ship". Article 2 of the Convention refers to the obligations and immunities of the carrier in regard to the whole operation of carriage beginning with the loading and ending with the discharge of goods. It is not clear from the wording of this article whether the carrier is obliged to perform, or undertake responsibility for, the entire loading and discharging, or whether he is only responsible for that part of the loading or discharging which takes place on the ship's side of the ship's rail, or whether his responsibility is limited to that part of the loading or discharging which he has agreed to perform. The language of the article would seem to show that the carrier is responsible for the entire operation of loading and discharging and cannot contract out of this responsibility. However, the English Courts seem to have taken the view that the carrier is responsible only for that part of the loading or discharging which he has undertaken to perform. Article 3 refers to the responsibility of the carrier to "load, handle, stow, carry, keep, care for, and discharge the goods carried". If, accordingly, the entire operation of carriage is governed by the Convention, it would appear to be strange that the carrier should still be free to contract out of the obligations imposed on him in relation to loading and discharging. This is particularly so in the light of paragraph 8 of Article 3. Article 3(1) states that the "carrier shall be bound before and at the beginning of the voyage to exercise due diligence" to make his ship seaworthy. The absolute undertaking of seaworthiness is not a principle accepted by the Convention. The carrier has discharged his responsibility if he has exercised due diligence to make the ship seaworthy. His duty to exercise such due

diligence is limited to a period before and at the beginning of the voyage. If therefore he has exercised due diligence to make the ship seaworthy before and at the beginning of the voyage, he will not be held liable if the master negligently fails to remedy a defect which has developed since the voyage began. Article 4 enumerates the carrier's rights and immunities. Article 4(2) (a) states that "neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship". The carrier is absolved from all liabilities arising from the act, neglect or default of his servant in the navigation or management of the vessel. This protection and the provision in Article 3 relating to seaworthiness considerably secure the position of the shipowner. It may, however, be pointed out that a distinction can be drawn between negligence in the navigation or management of the ship and negligence otherwise than in such navigation or management. The shipowner is protected only from the consequences of the former. English Courts have held that if the cause of the damage is traced to negligence in taking reasonable care of the cargo, the ship is liable. On the other hand, if the damage arises from negligence in taking reasonable care of the ship, as distinct from the cargo, the ship shall not be liable. The Convention has not defined the meaning or effect of the words "navigation or management", and decisions of the courts reveal the difficulties in drawing a logical distinction between negligence in the navigation or in the management of the vessel and negligence otherwise than in such navigation or management. It is difficult to understand the logic of any such distinction, for the two types of activities

are so closely inter-connected. The very purpose of the operation of the vessel is the transport of goods. Any negligence in the navigation or management of a vessel intended for the transport of goods is a negligence affecting the very purpose to be accomplished. In the days when the modern developments in communications were not visualized, there was probably some reason for giving this immunity to the shipowner, for he had little control over the operation of the vessel after it had begun its voyage. Article 3(6) provides that notice of loss or damage should be given in writing to the carrier or his agent before the removal of the goods, or if the loss or damage was not apparent, within three days. If such notice is not given, the article states, the carrier is deemed to have delivered the goods in conformity with the bill of lading. Whether this provision has legal effect or not is doubtful. In any case, the onus of proving loss or damage lies on the person asserting it, whether notice has been given or not. The article further provides : "In any event the carrier and the ship shall be discharged from all liability unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered". Article 4 (5) of the Convention limits the liability of the shipowner to a maximum of £100 per package or unit unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

(iii) The Rules for C.I.F. Contracts (Warsaw-Oxford Rules), 1932,[166] adopted at the Oxford Conference of the International Law Association. Rule 7 provides in regard to duties of seller as to bills of lading.

166. *Ibid.*, at p. 1992.

(iv) Protocol of February 23, 1968, amending the 1924 Convention of Bills of Lading, signed at Brussels as a result of efforts of the Comité Maritime Inter national. The Protocol deals chiefly with raising the limits of liability of the carrier.

84. Some of the problems concerning bills of lading, that need remedying, are as follows :

(i) Dr. T. K. Thommen, in his report on "International Legislation on Shipping" expresses the view that the 1924 Convention was intended to apply to both outward and inward bills of lading. He points out that the Carriage of Goods by the Sea Act of 1924 of the U.K., adopting the Hague Rules, provides in Section 1 that the Rules shall apply only to "ships carrying goods from any port in Great Britain". He further states : "As the Act has no application to inward bills of lading, a carrier of goods consigned to persons in England can avoid the Hague Rules by excluding any reference to the Rules and by referring to English Law as the proper law of the contract. Similarly, in respect of an outward bill of lading, it would seem that, in view of the Privy Council decision in the *Vitae Food Products* v. *Unus Shipping Co.*, a carrier can avoid the Hague Rules by choosing the law of a foreign State as the proper law of the contract and by not referring to the Hague Rules in the bills of lading unless the foreign law applies to both inwards and outwards bills of lading and the shipment is to that State. This is a striking example of the effect of a Convention being whittled down by partial adoption and divergent interpretation".

(ii) At the Second Session of the UNCTAD, Mr. Khalil of the U.A.R. expressed the view that the 1924 Convention was adopted at a time when most of the present developing countries were under colonial

rules, so that the Convention mainly served the shipowners' interests. He also referred to the inadequacy of the Convention and the practices relating to bills of lading, and conflicts between charter-party and bill of lading.[167] The 1924 Convention needs revision so as (a) to remedy the vagueness of certain provisions of the Convention, and (b) to fill in certain gaps which appear to exist in the Convention in regard to shipowner's freedom of action in regard to clausing of the bill of lading. It may also be necessary to deal with the problem of conflict between charter-party and bill of lading and to examine the advisability of compulsorily applying the Hague Rules to the bills of lading, as is done in the Netherlands in cases where the Netherlands Code is applicable. The question of clausing the bills of lading, so as to avoid "dirtying", which impairs its negotiability, may also be looked into.

(iii) (a) Many difficulties are encountered by cargo owners when receiving goods from a chartered vessel under a bill of lading containing a "demise clause". (b) Also it is necessary to clarify as to how much reliance the receivers of cargo and third party endorsees can place on the statements in bills of lading as to how much cargo has been shipped. (c) Cargo owners are also placed at a financial disadvantage when strike or similar esculpatory clauses in the bills of lading often apparently entitles shipowners to discharge their cargo at ports other than the port of destination, leaving to the cargo ownert he risk and expense of removing his goods to the original port mentioned in the bill of lading. (d) Another difficulty relates to jurisdiction clauses inserted in many standard bills

167. While speaking before the Fourth Committee of the UNCTAD. Doc. TD/II/C. 4/SR. 14.

of external trade documents, including the maritime bill of lading; the latter is being studied in close cooperation with the I.C.S. (International Chamber of Shipping).

(*viii*) *International Chamber of Shipping*

Under the guidance of its Shipping Documentation Committee, the I. C. S. has continued its work on the standardization and simplification of documentation. The I. C. S. is preparing a standard manifest aligned with the standard bill of lading to meet the content and layout requirements of the Cargo Declaration recently recommended by the IMCO to member governments. It has kept in close touch with discussion within the IMCO on the establishment of forms suitable for universal use.

(*ix*) *International Maritime Committee* (*Comité Maritime International*)

The question of letters of guarantee delivered in exchange for a bill of lading issued without indemnity is under study by the IMCO.

PART XIX

Charter-party

85. There are three types of charter-parties: first, charters by demise; secondly, time charters (not by way of demise) and thirdly, voyage charters. In the case of a charter by demise, the ship itself is leased to the charterer. The charterer becomes for the term of the charter the owner of the ship, and the master and crew to all intents and purposes become his servants for the duration of the charter. Through the master and crew the charterer obtains possession of the vessel. In the case of a time charter, on the other hand, the ownership and possession of the ship remains with the shipowner, who merely agrees with the charterer to render services by his master and crew to carry goods placed on board his ship during a certain

period specified in the agreement. A voyage charter is a contract to carry specified goods on a defined voyage or voyages. There is no international convention concerning charter-parties. A charterer may himself ship goods on the vessel he has chartered or he may enter into sub-contracts of carriage with various shippers. In the latter case, as each shipper ships his goods, a bill of lading is issued to him evidencing a contract between the shipper on the one hand and the shipowner (in some cases the charterer) on the other. Such a contract, in the absence of an express stipulation, is independent of the contract contained in the charter-party. On the other hand, when the charterer himself is the shipper and a bill of lading is issued to him by the shipowner, such a document is only a receipt for the goods. As between him and the shipowner the contract of affreightment is contained in the charter-party and, in the absence of an express provision to the contrary, the bill of lading does not alter the contract. However, if the bill of lading is endorsed by the charterer to a third person for valuable consideration, the latter becomes entitled to delivery of the goods represented by this document under the terms and conditions set out in it and irrespective of the provisions of the charter-party except insofar as these provisions are incorporated. The 1924 International Convention for the Unification of Certain Rules relating to Bills of Lading does not make provisions in regard to charter-parties, so that the shipowner still enjoys unlimited freedom to insert in his contract any number of protective clauses in the charter-party. Very often charter-parties contain stipulations which, when incorporated into bills of lading, place the receivers of cargo at a great disadvantage. The question whether the incorporation of any such stipulation derogates from the protection given to the receivers of cargo under the Convention often leads to fine distinctions being drawn by courts. The Convention is silent on the question of the incorporation of charter-

party provisions in bills of lading. In this connexion, it may be of interest to note that the Netherlands which acceded to the Convention in 1955, applies the Hague Rules to charter-parties and bills of lading where the Netherlands Code is applicable. The only Convention which makes certain 'provisions in regard to charter-parties is the International Convention on Navigation Law, Montevideo, March 19, 1940[168] (adopted at the Second South American Congress on Private International Law), which, in Articles 25 to 27, provides in regard to the law governing contracts of charter-party and the forum for settlement of disputes relating to these contracts.

86. At the Second Session of UNCTAD, Mr. Khalil of the U. A. R. referred to the absence of any Convention dealing with charter-parties, which, according to him, was a matter of great importance to many developing countries that had to charter ships to export their goods. He also referred to absence of limitation on the shipowner's freedom of action in respect of clauses in charter-parties which are more advantageous to shipowners than to shippers, and conflicts between charter-parties and bills of lading.[169] However, Mr. Schuthe of Canada did not think the absence of a Convention on charter-parties was a tragedy, since, according to him, the charter-party was a type of freight contract in which the contracting parties could insert whatever clauses they deemed necessary. He suggested that if some clauses were more advantageous to shipowners than to shippers, they could be discussed by the consultative machinery on shipping.[170] Mr. Dalst of Norway expressed a similar viewpoint.[171] The advisability of having a Convention governing charter-parties has to be viewed in the light of the

168. *British Shipping Laws Series*, Vol. 8. at p. 1099.
169. In his statement of February 1968, before the Fourth Committee : UNCTAD Doc. TD/II/C. 4/SR. 14.
170. UNCTAD Doc. TD/II/C. 4/SR. 18.
171. UNCTAD Doc. TD/II/C. 4/SR. 16.

fact that there are different types of charter-parties and there are different forms of charter-parties for different groups of commodities, as also different forms of charter-parties negotiated by different groups of shipowners and shippers. This may prove to be a serious impediment to laying down a uniform pattern of legislation or to having a convention in this area. However, the possibilities of having six or seven model forms of charter-parties that may cover all the situations deserves to be explored. Principles may also be formulated with a view to limiting the shipowners' freedom of action in respect of such clauses in charter-parties as are prejudicial to the interests of shippers or receivers of cargo, or are more advantageous to the shipowners than to shippers. It is also necessary to deal with the problem of conflict between charter-party and bill of lading and to examine the advisability of applying the Hague Rules to charter-parties, as is done in the Netherlands in cases where the Netherlands Code is applicable.

87. (a) Charter-parties are governed in part by national statutory and customary law, and by the custom of those engaged in the shipping trade Thus the standard contract forms, especially those prepared by associations of shipowners and importers engaged in the carriage of particular raw materials assume great importance. (b) As far as charter-parties are concerned, the Hague Rules do not apply unless they are incorporated into the contract, and the shipowner still enjoys unlimited legal freedom to insert in his contract any number of protective clauses. And even under the Hague Rules the shipowner apparently enjoys privileges which considerably secure his position *vis-a-vis* the cargo owner. This aspect deserves to the looked into. It is most desirable that standard contracts are not drafted in such a way that one party to the contract is placed at a disadvantage, and that a balance is maintained between the conflicting interests. (c) It is also necessary to scrutinize the main types of charter-parties used in various trades, clause by clause, and to recommend the drafting of new legislation for minimum obligations and

liabilities to be imposed on shipowners concerning their principal duties to cargo interests from which they will not be permitted under the law to derogate. It is also necessary to formulate generally acceptable definitions of important technical terms used in chartering, for example as in computing "lay time" words such as "working days", "weather working days", etc. and other phrases and clauses whose meanings are constantly being reconstrued by Courts, thus causing confusion.

88. Some of the aspects which deserve to be examined are : contract by charter-party, printed forms of standard contracts and effects of alterations; responsibilities and liabilities of the shipowner and the charterer; exceptions relieving the shipowner and the charterer; relation of bill of lading and charter-party; incorporation of the charter-party provisions in the bills of lading; and conflicts between charter-party and bill of lading.

89. Some of the activities of international bodies in this area are as follows :

(i) Under the auspices of the Council for Mutual Economic Assistance (CMEA), the Consultative Conference of Representatives of Charterers' and Shipowners' Organisations continued its work on the standardization of shipping and chartering documents. In this work an active part was played by the Conference's executive organ, the Bureau for the Co-ordination of Ship-Chartering.

(ii) *O.A.S.*—The third Inter-American Port and Harbour Conference, which was held at Vina del Mar, Chile, from 15 to 24 November, 1968, considered the question of the general utilization of standard shipping documents which have been submitted to member States for approval.

(iii) *Baltic and International Maritime Conference* (*BIMC*) —Almost since its foundation, BIMC and its Documentary Council have been active in preparing standard shipping documents, such as charter-parties and bills of lading, some of which are known and used internationally.

(iv) *International Maritime Committee* (*Comité Maritime International*)—The question of the international interpretation of chartering terms is under study by the Committee.

PART XX

Marine Insurance

90. A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in the manner and to the extent agreed, against losses incidental to marine adventure. The contract of marine insurance is embodied in a written document called the policy. The monetary consideration in return for which the insurer undertakes to indemnify the assured is called the premium. The insurer is commonly called the underwriter. The object or property insured is called the subject-matter of insurance, and the interest which the assured has in such an object or property is known as insurable interest. The ship or goods, freight, profits or any other interests arising out of a marine adventure may be subject of marine insurance. The losses insured against are the perils of the sea, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, detainments of princes and peoples, jettisons' barratry, and any other perils which may be mentioned in the policy. These perils are called the perils insured against or losses covered by the policy. When the insurer's liability begins under the contract, the policy is said to attach; or the risk is said to attach.

91. The Institute of International Law drafted at its Brussels Conference of 1885 a Code on a "uniform law on

maritime assurances".[172] At its Glasgow Conference of 1901, the International Law Association discussed the benefits which would accrue to the various interests concerned if a standard form of policy, containing uniform rules on maritime risks, could be adopted on the example of the York-Antwerp Rules on general average. The Association at the said conference, adopted draft rules, known as "Glasgow Marine Insurance Rules of 1901".[173] Some of the questions of marine insurance on which international agreement is desirable seem to be the following : "(a) definition of total loss of ship, freight and cargo insured under a marine policy and the right of abandonment connected therewith; (b) the precise effect of the principle of subrogation as between the insurer and the assured in respect of the loss of property covered by the insurance policy; (c) the effect of faults of the assured and his agents or servants resulting from the unseaworthiness of the insured ship or the inherent vice of the insured goods; and (d) the definition of double insurance and its influence on other sub insurances contracted either simultaneously or subsequently in one or more countries."[174] Rule 12 of the Warsaw-Oxford Rules, 1932,[175] provides in regard to duties of the seller as to insurance. Further, the Treaty on International Commercial Navigation Law, Montevideo, March 19, 1940,[176] adopted by the Second South American Conference on Private International Law, provides, in Articles 28-30, laws governing contracts of insurance and the forum for settlement of disputes concerning them.

92. Dr. T.K. Thommen in his Report to UNCTAD II had stated that "Marine insurance is essentially international in character as the subject-matter insured is generally involved

172. *Annuaire*, Vol. 8, pp, 125-126.

173. 20th Report (1901), at p. 213.

174. Colombos in his book on *International Law of the Sea*, at p. 318.

175. *British Shipping Laws Series*, Vol. 8, at p. 1096.

176. *Ibid.*, at p. 1099.

in international trade. There is no international convention on marine insurance. Although it is highly desirable to reconcile the existing divergencies in the marine insurance laws of various countries, there has been little success in this field. It may be of interest to consider whether international legislation is possible on several aspects of marine insurance. Some of the questions on which an attempt might be made to formulate international rules are : a definition of the terms "total loss" and "the right of abandonment"; measure of indemnity; rights of the insurer after payment of the indemnity; the effect of the faults of the assured and his agents or servants and double insurance." At that Session Mr. Khalil of the U.A.R. pointed out that, under the 1924 and 1957 Conventions relating to limitation of shipowners' liability, shippers had to insure to the full value of their goods, and there was often double insurance by the shippers and shipowners—to the benefit of Insurance Companies and to the detriment of the developing countries.[177] Mr. Umar of Indonesia referred to absence of principles governing marine insurance.[178] The law governing marine insurance is national statutory or customary law, which in turn is partly derived and greatly influenced by the standard policies, contracts and standard clauses of the insurance trade, particularly that of London and New York, and the general customs of underwriters. A number of texts also exist prepared by international trade associations providing definitions for standard terms used in marine insurance contracts.[179]

93. What has been stated in the present Note in regard to standard form contracts equally applies to marine insurance policy forms. These policy forms, which are prepared by the insurers, contain many complicated and archaic clauses which are not apparently uniformly interpreted in many countries

177. UNCTAD Doc. TD/II/C. 4/SR. 14.

178. UNCTAD Doc. TD/II/C. 4/SR. 14.

179. International Union of Marine Insurance, Tables of Practical Equivalents, No. 3.

and have been "subject of repeated demands for reconstruction and simplification. Mere unification of the legal rules on an international plane might not be effective in maintaining a balance between the conflicting interests of the insurer and the assured unless the terms of the policy are also internationally unified along equitable lines". It may be necessary "to examine the clauses used in policy forms in different countries and consider the desirability of recommending their simplification and unification so that they may be easier understood and may carry the same meaning everywhere in appropriate cases".[180] The matters that need examination are : nature of marine insurance; what is insured; insurable interest; principle of indemnity; principle of utmost good faith; formation of the contract; the policy; types of policy; rules of construction of the policy; evidence of usage; consignment of the policy; warrants-nature of warranties; effect of non-compliance with warranties; express and implied warranties; the voyage-change of voyage; deviation from voyage; abandonment of voyage, delay in voyage; perils insured against losses for which insurer is not liable; proximate cause of loss; insurer's liability in respect of a general average loss or contribution; insurable value; particular average; particular charges; salvage charges; suing and labouring clause; memorandum in the policy; measure of indemnity; total loss; actual total loss and constructive total loss; total loss of ship, freight and cargo; rights of the assured; notice of abandonment; the principle of subrogation; the effect of the faults of the assured and his agents or servants; double insurance; circumstances in which premimum is returnable; reinsurance; and standard clauses in policy forms.

94. The International Chamber of Commerce has given priority, *inter-alia*, to insurance and documentation, in close co-operation with UNIDROIT and the Comité Maritime International.

180. UNCTAD Doc. TD/B/C. 4/ISL. 2.

PART XXI

General Average

95. The York-Antwerp Rules provide an interesting instance of international unification of maritime rules by means of voluntary agreements, and not by State legislation or multilateral treaties. The York-Antwerp Rules, 1950,[181] were adopted by a Conference convened by the International Maritime Committee to replace the York-Antwerp Rules of 1924. The 1924 Rules, as well as the earlier Rules known as the York-Antwerp Rules, 1890, were prepared by conferences convened by the International Law Association. The York-Antwerp Rules have established a body of principles as regards the adjustment and contribution to be made by the several interests concerned in a general average. The interests involved are the ship, the freight and the cargo. *Rule A* of the York-Antwerp Rules, 1950, states : "There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involving in a common maritime adventure." *Rule B* provides that "general average sacrifices and expenses shall be borne by the different constituting interests."

The third International General Average Congress at York, in 1864, drafted eleven rules (The York Rules) and a proposed bill to be adopted by the legislative branches of the various governments. Amendments and additions to these Rules were made by the Antwerp Rules, 1877, drafted by a Committee of the Congress of the Association for the Reform and Codification of the Law of Nations, at Antwerp. The York-Antwerp Rules finally took shape at the Conference of the Association, at Liverpool, in 1890 with certain modifications and additions to the previous rules. There was virtually a

181. *British Shipping Laws Series*, Vol. 8, at p. 1105.

universal acceptance by the mercantile interests of inclusion by reference of the York-Antwerp Rules in bills of lading and charter-parties. However, the Rules of 1890 were largely provisions for the handling of specific and individual questions; they did not constitute a general code. The movement for such a Code led to adoption of a new set of rules under the title of York-Antwerp Rules, 1924, at Stockholm, by the 33rd Conference of the International Law Association. These contained both a statement of general principles in the "lettered" rules and specific provisions for the decision of individual points of practice in the "numbered" rules. In the late 1940's there was a movement to revise, simplify and reform the 1924 Rules. The Comitè Maritime International at its meeting at Amsterdam in September 1949, considered a revision of the Rules. In September 1950 the revised rules were formally approved by the Copenhagen Conference of the International Law Association. The Rules are not law in a public sense; they represent a system recommended to private interests for inclusion by them in their private contracts, bills of lading charter-parties and similar maritime documents. Under the Rules only such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average. This excluded loss or damage sustained by the ship or cargo through delay, whether on the voyage or subsequently, such as demurrage, and any indirect loss whatsoever, such as loss of market.

96. The Treaty on International Commercial Navigation Law, signed at Montevideo on March 19, 1940[182] in articles 15 to 19, provides in regard to the law governing average and the forum for settlement of disputes concerning the average.

97. At the Second Session of the UNCTAD, Mr. Khalil of the U.A.R. expressed the view that the 1950 Rules favoured the shipowners rather than the shippers. As stated above, there is no convention on the subject. Nevertheless, the 1950 York-

182. *British Shipping Laws Series*, Vol. 8, at p. 1099.

Antwerp Rules, though not incorporated as such into statutory law, have had a profound impact on the practice of the shipping industry and are widely accepted as part of general international commercial usage. As such, a review of the subject for the purpose of having a convention on the subject has to be made in the light of international practice relating to general average. It is necessary to explore "the possibility of simplifying general average procedure and the York-Antwerp Rules which are difficult to understand and even more difficult to apply. Average adjustment is a notoriously complicated and time-consuming process and its ultimate incidences fall upon the underwriters representing the different interests. These underwriters often belong to different departments or subsidiaries of the same Insurance Company or group. The task of "adjustment" is so difficult that a considerable "mystique" has grown up around the subject, and a specialized body of highly trained professional "average adjusters" are employed to do full justice to it. All this is expensive and is eventually reflected on freight. Whether it would be an advantage to abolish general average altogether and let the loss lie where it falls so that the particular underwriter of the interest concerned bears the burden, is another question which deserves thorough investigation. If sufficient evidence is adduced to work this as a practicable proposition, contracts of carriage will have to be materially revised, for example, in regard to the treatment of common charges met initially by shipowners as bailees. Consideration would also have to be given to the inter-relationship with salvage." The conclusion may possibly be "that in view of the extreme complexity of the issues involved, and in consonance with recent practice in the insurance market, it might be advisable to study first prospects of simplifying general average procedures, and later go on to study the reduction or abolition of contribution in selected instances where the equitable principle of beneficiaries proportionately absolving costs incurred in their common interest may be found to have least value". It may then be necessary to "tackle the

economic effects of particular contentious situations which really always cause difficulty in general average and where State practices vary, as for example in "port of refuge or call situations".[183] Some of the specific aspects which deserve a thorough study are principles of general average; general average sacrifice of cargo, of ship or tackle or freight; general average extraordinary expenditure and expenses in port; contribution to sacrifices and expenditure; contributions to and from freight; master's duty to collect general average; who can sue and be sued for general average; rules of general average adjustment; and application of York-Antwerp Rules.

PART XXII

Containers and unitized cargoes

98. The existing legislation on the subject of containers is the Customs Convention on Containers of 1966. The Comitê Maritime International, in March-April 1969, at its Tokyo Conference, adopted a draft convention on "Combined Transport", which also deals with the subject of containers. The legal and economic issues connected with the carriage of containerized cargo need to be examined. At present the Comitê Maritime International is studying the question of liability of the operator of a container in international carriage done partly by sea.

99. The Legal Committee of the IMCO took note of the Secretariat's suggestion that the question of legal problems arising from maritime transport of containers, may be considered ripe for study. The organization (IMCO) is becoming increasingly involved in the safety, technical facilitation and other aspects of containerization. Studies in this field are broadly subdivided as follows :

(a) *Containers* : dimensions, rating, strength, construction, testing, certification, marking, etc.;

183. UNCTAD Doc. TD/B/C. 4/ISL/2.

(b) *Ships carrying containers* : stability, fire protection, construction of specially built ships including strength of cargo doors, hatch covers, guide rails of container cells, etc.;

(c) *Carriage of containers* : carriage of dangerous goods, stowage, security on board and inside containers, safe handling, forward visibility of ships carrying containers on deck;

(d) *Administrative matters* : problems of an administrative nature arising from the consideration of the above items, such as the mutual acceptance of safety certificates by inspecting authorities, arrangements for periodical inspection of containers, arrangements for inspection and inter-change of existing containers and the testing and certification of containers; and

(e) *Facilitation aspects*: Certain other matters such as requirements for documentation in connection with the handling and forwarding of containers and the contents and form of documentation.

100. Some of the activities of international bodies in the field of containers and unitized cargoes are as follows :

(i) The United Nations Inter-regional Seminar on Containerization and other Unitized Methods for International Movement of Freight (London, May 1967), where a paper was presented on the situation regarding containerization in Latin-America.

(ii) The first Inter-American Port and Harbour Seminar (Unitized Cargoes) was held by the O.A.S. at Bogota in March 1968. On the basis of the discussions and the supporting documents, the participants arrived at a number of conclusions concerning the measures required in the various countries to facilitate the movement of unitized cargo. These conclusions

showed the value of standardizing internal transport and cargo-handling equipment, and unifying government regulations, procedures and techniques and customs regulations in member States. Conclusion III called on governments to give active support to the preparation of a Convention on Unitized Cargoes for submission to the Third Inter-American Port and Harbour Conference. The said Conference, which was held at Vina del mar, Chile, in November 1968 gave careful consideration to the draft Convention on the subject.

(iii) The Council for Mutual Economic Assistance (CMEA) has been working on the completion of a Unitized Cargo Classification for recording and coordinating the transport of goods among the member countries of CMEA.

(iv) The Economic Commission for Europe is currently considering the revision of the Customs Convention on Containers of 1956. The Inland Transport Committee and its Working Party on Customs Questions affecting Transport has adopted a number of resolutions on customs aspects of container transport, which may have repercussions on customs formalities at ports. The results of the work of the *ad hoc* meeting to prepare a uniform container manifest (November 18 to 22, 1968) may affect documentary requirements for container movement by sea and through ports.

(v) National Shippers' Councils of Europe and Committee of European National Shipowners' Associations, in the Joint Plenary Meetings, held in London (1964), Brussels (1965), Amsterdam (1966), Marseilles (1967) and Hamburg (1968), adopted recommendation concerning fibreboard containers and cartons, which declares undesirable the automatic "clausing" of bills of lading covering goods packed in fibreboard

containers and cartons. This recommendation arises from the recognition of technical developments in the packing industry.

(vi) The International Chamber of Commerce is actively at work on the problems raised by container ships. The Chamber's International Bureau of Chambers of Commerce is very carefully following the work on customs problems which is being done within the United Nations Economic Commission for Europe (ECE) and the Customs Cooperation Council. A guarantee system intended to facilitate container movement across boundaries is being discussed with the latter.

(vii) The International Chamber of Shipping (ICS) has formed an ICS Container Committee to deal with the development of the concept of through transport of goods, particularly by container; to coordinate the views of shipowners on container developments; and to study such questions as customs procedures affecting containers, the standardization, inspection and certification of containers, and health regulations. The documentation relating to containers are studied by a special sub-committee of the Shipping Documentation Committee.

PART XXIII

Carriage of Passengers

101. The existing legislation on this subject is as follows :

(i) International Convention for the Unification of Certain Rules relating to the Carriage of Passengers by Sea, Brussels, April 29, 1961,[184] adopted through

184. *Britis Shipping Laws*, Vol. 8, at p. 1067.

the efforts of the Comite' Maritimè International. It was based on a draft prepared at the Madrid meeting of the Comitè Maritime International in 1955 and adopted by the Diplomatic Conference on Maritime Law, held at Brussels on October 10, 1957. "The Convention contains many provisions which may throw light on certain aspects of problems arising in the carriage of goods by sea. Article 2 states that the Convention shall apply to any international carriage if either the ship belongs to a contracting State or if the place of departure or destination is in a contracting State. Article 3 provides that the shipowner shall exercise due diligence, and shall ensure that his servants and agents, acting in the course of their employment exercise due diligence to make and keep the ship seaworthy and properly manned, equipped and supplied at the beginning of the carriage and at all times during the carriage. The carrier is responsible for the death or bodily harm of a passenger if it is caused by the neglect of his servants. Article 4 provides that in the absence of evidence to the contrary, the fault or neglect is presumed when death or bodily harm results from shipwreck, collision, stranding, explosion or fire. The liability of the carrier is limited to 2,50,000 gold francs for the death or personal injury of a passenger (each franc consisting of 65.5 milligrams of gold of millesimal fineness 900) (Article 6)".[185]

(ii) International Convention for the Unification of Certain Rules Relating to the Carriage of Passengers' Luggage by Sea, May 27, 1967, adopted through the efforts of the Comitè Maritime International.

185. Dr. T. K. Thommen, in his report on "International Legislation on Shipping", UNCTAD Doc. TD/32/Rev. 1.

102. The subject of coordination of luggage convention and passenger convention was considered by the General Assembly of the Comitè Maritime International held in Tokyo from March 30 to April 5, 1969.

PART XXIV

Pollution

103. The existing legislation on the subject is the International Convention for the Prevention of Pollution of Sea by Oil, 1954,[186] adopted by the International Conference on Prevention of Pollution of Sea by Oil, convened in London in 1954 on the initiative of the U. K. Government. The Convention provides in regard to oil pollution of sea caused by vessels which discharge into sea large quantities of oil while washing their tanks and disposing of oily ballast water, leading to serious damage to coasts and beaches, the destruction of sea birds, and damage to fish. The Convention was amended in 1962, by a conference covened by the IMCO. The conference envisaged the provision of facilities for the reception of oil residues and oily water mixtures at ports and a resolution of the conference provided that progress in the provision of such facilities should be kept under review by the IMCO.

104. (i) Following the *Torrey Canyon* accident, which brought to light a number of problems calling for international action concerning accidental pollution, the IMCO is giving urgent consideration to the development of measures which would minimize the risk of such accidents, and the measures to be undertaken following such an accident. Consideration is also being given to the various associated legal problems, such as those concerning the right of a coastal State to intervene in cases of grave and imminent hazard to its coastline and the problem of liability involved with respect to compensation and damage. The Legal Committee of the IMCO concentrated on two principal facets of the problem of accidental pollution on a

186. *British Shipping Laws*, Vol. 8, at p. 1157.

large scale or its threat. The first is the right of a coastal State to intervene when a casualty occurs on the high seas which causes, or might cause, pollution. The second is the determination of the burden of liability—with all its attendant complexities—for the consequences of such a casualty. The Legal Committee is also likely, in the near future, to consider legal problems relating to marine pollution from noxious or hazardous cargo other than oil.

(ii) *International Maritime Committee* (*Comite' Maritime International*): The subject of third party liability in the matter of oil pollution on the High Seas (the problem of the *Torrey Canyon*) was considered by the General Assembly of IMC, held in Tokyo from 30 March to 5 April 1969.

(iii) *International Chamber of Shipping* : The ICS has continued to cooperate with other international organizations including IMCO in regard to measures to prevent the recurrence of incidents like that involving the *Torrey Canyon*. It is seeking to insure that no national legislation which might complicate the situation is enacted while the whole question is under international consideration.

PART XXV

Sanitation

105. The existing legislation on this subject is as follows :

(i) Pan-American Sanitary Code, Havana, November 14, 1924,[187] adopted at the Havana Conference of 1924.

(ii) International Sanitary Convention, Paris, 1926, providing for measures for prevention of the spread of diseases on account of international shipping.

187. *Ibid.*, at p. 851.

(iii) International Convention for Mutual Protection Against Dengue Fever, Athens, July 25, 1934.[188]

(iv) International Sanitary Regulations, Geneva, 1951,[189] adopted through the efforts of World Health Organization (WHO). The Regulations were amended in 1955, 1956 and 1961.

106. In collaboration with the bodies responsible for the technical inspection and classification of vessels of countries cooperating under the Agreement of December 15, 1961, agreed resolutions on sanitary conditions on board merchant ships were drafted by the CMEA, and were recommended by it for application to new designs of ships for use in intra-CMEA trade. The regulations lay down standard for sanitary and other conditions in seamen's quarters (living quarters, mess rooms, conveniences, etc.).

PART XXVI

Labour matters

107. The existing legislation on labour matters in the field of shipping is set out in foot-note 8, to the present note. The conventions and recommendations set out in the said foot-note were adopted by the International Labour Organization (ILO), in order to advance the cause of social justice by establishing international labour standards in the field of shipping. These conventions and recommendations deal with the multifarious aspects of the interest of seamen, such as, employment of seamen; their certificates of competency and qualifications and identity documents; wages; hours of work on board ship and manning; training; recruitment; social security; welfare of seafarers; crew accommodation on board ship; food and catering; articles of agreements; holidays; and the like. The conventions are the legal instruments binding on the

188. *Ibid.*, at p. 871.

189. *Ibid.*, at p. 783.

States which have ratified them, while recommendations are essentially guides for national action."[190] The Conventions and Recommendations taken together form a body of international standards which is currently known as the "International Seafarers' Code" and their provisions have been included in the relevant legislation of most of the maritime countries.

108. (i) The International Labour Conference has also adopted five conventions relating to fishermen and two relating to dockers. The ILO is also concerned with the implementation of the Brussels Convention on the Treatment of Venereal Diseases among Seamen, of December 1, 1924.[191]

(ii) In cooperation with F.A.O. and I.L.O. the IMCO is compiling a "Code of Safety for Fishermen and Fishing Vessels". Part A of the Code, consisting of two parts, is "Code of Safety and Health Practice for Shippers and Crew".

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190. Dr. T. K. Thommen : UNCTAD Doc. TD/32/Rev. 1.

191. *British Shipping Laws*, Vol. 8, at p. 1037.

III. SUMMARY RECORD OF DISCUSSIONS HELD AT THE ELEVENTH SESSION, ACCRA

The topic of *International Legislation on Shipping* was on the agenda of the Eleventh Session of the Committee for a preliminary discussion only. The subject was discussed at the sixth and tenth meetings held on 26th and 29th January, 1970, respectively.

Initiating the discussion in the sixth meeting the Delegate of INDIA broadly indicated the scope of the work of the UNCTAD and the UNCITRAL on the topic and suggested that the Committee should make its recommendations to the aforesaid U.N. bodies. Among the important topics, he said, which were under the consideration of the UNCTAD were Bills of Lading, Charter Parties and Marine Insurance, and he felt that it would be useful to examine some of these topics although it would be difficult to do all at the same time.

The Delegate of PAKISTAN made a general statement on the topic indicating the progress made by the two U.N. bodies and stated that a review of international legislation on shipping was important from the viewpoint of developing countries as several countries considered that the high cost of shipment was a major factor in their balance of payments difficulties. He pointed out that the major topics which needed study were Bills of Lading, Charter Parties, General Average, Marine Insurance and Shipping Practice and general conventions and suggested that the Committee should coordinate its work with the efforts of the U.N. bodies concerned, but at the same time it should make its own contribution in the field having regard

to the special needs and requirements of the continents of Asia and Africa.

The Delegate of GHANA said that it could be legitimately presumed that the earlier conventions or international legislation on shipping were formulated by the developed countries to protect the interests of their shipping companies and consequently there was a need for the injection of fair and more equitable principles into the existing legislation and also for the formulation of new rules which will be mutually advantageous not only to the developed and developing nations but also to the shipowner and the shipper. He felt that the time had come to take a fresh look at some of the accepted but older conventions dealing with the liabilities of carriers in the Bills of Lading. He also supported the proposal that the Committee should fully cooperate with the U. N. bodies dealing with this topic. He suggested examination of five topics : carriage of goods and shipping documents, Bills of Lading, Charter Parties, Marine Insurance, General Average and containers and unitized cargoes.

The Delegate of JAPAN said that out of the many aspects of shipping legislation, the developing countries were mainly concerned with the economic and commercial aspects of international shipping, namely Charter Parties, Marine Insurance, General Average and Bills of Lading, because they felt that existing conventions on these aspects of international shipping were more favourable to the shipowner than to the shipper. He pointed out that his Delegation would approach the problem not only from the shipowner's point of view, but also from that of the shipper. He suggested that the Committee should take up this topic only after some clear direction on the scope and method of work was given by the UNCTAD and the UNCITRAL. He added that the Secretariat of the Committee should keep the Committee informed of the progress made on the subject by the U.N. bodies from time to time.

The Delegate of CEYLON stated that the international shipping legislation was a matter of great concern to the developing countries of Asia and Africa, and that the existing legislation was weighted heavily in favour of shipowners as against ship-users. He recalled the work done by the UNCTAD which had taken up the following topics in order of priority, namely : Bills of Lading, Charter Parties, General Average, Marine Insurance and economic and commercial aspects of international legislation and practices in the field of shipping. He felt that although the long term work of the Committee should be to review the entire subject, it would be advisable for a start that the Committee should concentrate on a few topics which were already before the Working Group of UNCTAD.

At the conclusion of the aforesaid preliminary discussion, it was decided to set up a Sub-Committee consisting of four persons to indicate the topics which should be studied by the Committee. The Chairman of the Sub-Committee made an oral statement in the tenth meeting held on 29th January 1970 wherein he said that it was essential to arrange for the maintenance of harmony between the UNCTAD and UNCITRAL in their study of the subject of shipping. He suggested that the first topic which the Committee might take up was the question of Bills of Lading. As to how the Committee should consider this subject, he felt, that this would have to be reviewed from time to time having regard to the progress made in the UNCTAD and the UNCITRAL. The Committee accepted the suggestions of the Chairman of the Sub-Committee.

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