Document:-
A/CN.4/146

Report on the fifth session of the Asian-African Legal Consultative Committee (Rangoon, January 1962) by Mr. Radhabinod Pal, observer for the Commission

Topic:
Cooperation with other bodies

Extract from the Yearbook of the International Law Commission:-
1962 , **vol. II**

CO-OPERATION WITH OTHER BODIES

[Agenda item 4]

DOCUMENT A/CN.4/146

Report on the fifth session of the Asian-African Legal Consultative Committee (Rangoon, January 1962), by Radhabinod Pal, Observer for the Commission

OBSERVER'S REPORT

As desired by Dr. Grigory I. Tunkin, our revered Chairman of the thirteenth session, under the authority of the decision of the Commission taken in this respect during the last session at its 621st meeting, I attended the fifth session of the Asian-African Legal Consultative Committee held at Rangoon from 17 to 30 January 1962 as observer on behalf of the International Law Commission. The actual working meetings of the session covered the period from 17 to 26 January, both days inclusive. The period from the 27th to 30th was covered by a social programme outside Rangoon.

The session was attended by delegates from Burma, Ceylon, India, Indonesia, Japan, Pakistan, Thailand and the United Arab Republic. Besides these delegates there were observers from Ghana, Laos, the Philippines and the League of Arab States. There was also an observer on behalf of the United Nations Secretariat in the person of Mr. Oscar Schachter, Director of the General Legal Division of the Office of Legal Affairs, United Nations Secretariat.

Mr. M. C. Setalvad, Attorney-General of India, the leader of the Indian delegation, was unanimously elected President of the session and Mr. A. T. M. Mustafa, Barrister-at-Law, Standing Counsel, Government of Pakistan, leader of the Pakistan delegation, was unanimously elected Vice-President of the session.

During this session, a sub-committee was constituted with members from Burma, Ceylon, Indonesia, India, Japan, Pakistan, Thailand and the United Arab Republic to consider and report amongst other matters on "co-operation with other organizations", and the Sub-Committee, with the member from India in the chair, recommended *inter alia* to amend article 3 (*a*) of the Committee's Statute extending the power of the Committee

> "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 commission; to consider the reports of the commission and to make recommendations thereon to the Governments of the participant countries".

This recommendation of the Sub-Commitee was accepted by the Committee without any division.

The main subjects that were taken up for consideration by the Committee during the session were:

1. The question of dual nationality;
2. The question of legality of nuclear tests.

Besides these the Committee also considered draft articles on the immunities of the privileges of the Asian-African Legal Consultative Committee comprising seven articles.

As regards the question of "dual nationality", the subject was referred to the Committee by the Government of Burma. It was felt that dual and multiple nationality was encountered amongst citizens of almost all countries as a result of conflict of laws in the various States. In introducing the subject for discussion it was observed:

> "International Law recognizes that a State can by its own municipal laws determine as to who its nationals should be and most States have as criteria for their nationality, the place of a person's birth or his descent. As a result of the various nationality laws it sometimes happens that one and the same person is regarded as a national by two or more States and thus occur the cases of dual or multiple nationality. Dual nationality results in conflicting obligations which the person may owe to each of the States of his nationality. It is not possible to eliminate cases of dual or multiple nationality altogether. Efforts have however been made in the past by the international bodies to minimize or reduce occurrence of such cases."

The Committee considered this question with a view to formulating model rules on the subject for consideration of the member Governments. The Committee had before it certain draft rules on the subject prepared by the delegation of the United Arab Republic.

The Committee at its third session held in Colombo in January 1960 decided to take up for consideration the question of Legality of Nuclear Tests, a subject which had been suggested by the Government of India under article 3 (*c*) of the Statutes of the Committee "being a matter of Common Concern to all the participating States in this Committee". The Committee decided to take up this subject, being of opinion that "this matter had not been considered by any other Body from the legal point of view, nor had it been adequately dealt with by any of the authorities on International Law". The Committee also took note of the fact that several nuclear tests had been carried out in parts of the Asian-African Continents or in areas adjacent thereto, and as such the problem was of great concern to the Asian-African countries. The Committee had directed its secretariat to collect the factual and scientific data that were available on the effects of the nuclear tests and also to prepare a list of topics for discussion on the legal aspects of the matter.

At its fourth session held in Tokyo in February, 1961, the secretariat of the Committee presented before

it what the secretariat considered to be relevant materials both from the scientific and legal point of view. These materials formed the basis of discussions at that session. The members for Burma, Ceylon, India, Indonesia, Iraq, Japan, Pakistan, Morocco and the United Arab Republic stated their respective viewpoints. The Committee also heard statements from the observer for Ghana and Mr. F. V. Garcia Amador, then a member of the International Law Commission, in his personal capacity as a recognized expert. The Committee, after a general discussion, decided to study the matter further and to take up the question for fuller consideration at its fifth session. The Committee, however, indicated the scope of its study and directed its secretariat to collect further materials on those lines. The Committee decided that it was not concerned with the controversial and debatable question regarding use of nuclear weapons in time of war but that it should confine itself to an examination of the problem of legality of nuclear tests in times of peace. In accordance with this decision taken by the Committee at its Tokyo session, the secretariat prepared a comprehensive brief which was placed before the present session and on the basis of which the questions were more fully considered.

During the present session, the President of the Committee introduced the subject and drew attention to the list of topics for discussion given in the brief of documents. Indicating the scope of discussion, the President again pointed out that the Committee was not concerned with the war-time use of nuclear weapons, but only with the question of nuclear tests carried out in times of peace. He observed that there were three heads under which the subject fell to be considered, namely:

1. Whether there were any known and accepted principles of international law which could be applied to the situation.

2. If no such rule of international law was directly applicable, could any principles of any international law be adapted or extended to the present case?

3. Whether the principles of civilized jurisprudence recognized in the municipal laws of the various States could be relied upon to evolve new principles of international law.

He wondered whether international law which had in the past met many new situations by evolving new principles would not in the present case similarly attempt to counter the grave threats to which the peoples of the world were exposed by these tests by formulating suitable doctrines based on the principles of civilized jurisprudence.

The deliberation which followed was on the basis of the following eight questions:

1. Is a State responsible or ought it to be so for direct damages, caused to the inhabitants of the area where the tests are carried out, due to deaths of human beings and destruction of their property resulting from explosions of atomic devices, under the law of tort or principles analogous thereto?

2. Can it be said that a State which carried out atomic tests in its own territory is endangering the safety and well-being of its neighbouring States and their inhabitants due to possibilities of radio-active fall-out; and, if so, whether the use by a State of its own territory for such purpose is not contrary to the principles of international law?

Can it be said that the use by a State of its own territory for the purpose of carrying out nuclear tests by explosion of atomic devices amounts to an abuse of its rights in respect of use of its State territory?

3. If it is established that explosion of nuclear devices results in pollution of the air with radio-active substance and that such contaminated air is injurious to the health of the peoples of the world, would the State carrying out the tests be said to be responsible for an international tort in accordance with the principles laid down in the Trail Smelter Arbitration case?

4. In an action based on commission of an international tort, would it be necessary for the claimant State to prove actual damage, or is the general scientific and medical evidence on the effects of nuclear explosions sufficient to maintain the action?

5. Even if the harmful effect resulting from contamination of the air can be confined within the territories of the particular State, can it be said that the State has violated the human rights of the citizens and aliens living in its territory, and if so, whether the State is responsible for the harm caused to the aliens under the principles of international law relating to State responsibility?

6. Does the interference with the freedom of air or sea navigation resulting from declaration of danger zones over the areas where the tests may be carried out amount to violation of the principles of international law?

7. Is the destruction of living resources of the sea which results from nuclear tests on islands or areas of the high seas to be regarded as violative of the principles of international law?

8. Is it lawful for a trustee authority to use territories, which it holds on trust from the United Nations, for purposes of holding nuclear tests?

The delegates of Ceylon, India, Indonesia, Burma, Japan, Pakistan, Thailand and the United Arab Republic made statements indicating their views in respect of these questions.

The discussion that took place was indeed a learned one, and I listened with deep and admiring attention to every word that fell from the honourable members of the Committee in respect of these questions, and I must say that if the popular will of the world is at all a force, then the developments thus helping to bring together so many influential friends from the diverse parts of the world would be sure to help them to find out that propelling coefficient of driving forces which would finally weld their souls and spirits in one flaming effort in this respect. The sense of injustice thus universally felt being an indissociable blend of reason and empathy, though evolutionary in its manifestations, offering as it were only a common language for communication, will, I felt, have to be heeded.

This is indeed the most troublesome of the numerous hosts whom history has been pleased to place beside us and with whom we must come to terms in order to discharge our obligations to build up world communal life. The matter, however, can hardly be decided by appeal only to the conscience of the community.

If any specific legal provisions may, on the one hand, be the instruments of the conscience of the community, seeking to subdue the potential anarchy of forces and interests into a tolerable harmony, they are, on the other hand, to be the formulations of given tensions and equilibria of life and power, as worked out by the unconscious interactions of social life.

Usually the norms of law are compromises between the rational moral ideals of what ought to be, and the possibilities of the situation as determined by given equilibria of vital forces.

The social harmony of living communities is to be achieved by an interaction between the normative conceptions of morality and law and the existing and developing forces and vitalities of the community.

The shape which any embodiment in historical law takes to express elements of ideals of justice is the consequence of pressures and counter-pressures in a living community. Such embodiments are indeed rationalizations of the interests of the dominant elements of a community.

In the course of this discussion, I was invited in my capacity as an observer on behalf of the International Law Commission, as also in my personal capacity, to take part in the deliberation of the Committee. I observed that the question really was one that should immediately exercise the minds of all men of good will. Indeed it raises, I said, a grave and anxious issue demanding immediate decision and I congratulated the secretariat of the Committee on its collection of materials having immensely relevant bearing on the questions. I however, expressed my inability to participate in the deliberation in my capacity as observer on behalf of the International Law Commission, having pointed out that the question, though in a partial form, came before the Commission as far back as 1956. The question, I pointed out, came up before the Commission in some form twice in the course of the same session, once in connexion with the question of freedom of the high seas and again in connexion with the question of pollution of the high seas, including the air space above. I drew the Committee's attention to the summary of the deliberation on those occasions in the Commission's Yearbook for 1956, vol. I, at pages 11 to 62, under articles 2 and 23 of the draft on the law of the sea, and also pointed out that this draft was ultimately substantially adopted by the nations in the shape of the Geneva Convention of 1958.

I also declined in my personal capacity to join the deliberation as I had not the questions before me before I went to Rangoon and thus I had no opportunity of thoroughly examining any of them. I felt that without such a study one should not venture any comment or opinion on them. Frankly speaking, I felt that the questions involved deep study of many fundamental matters. The developments in question have indeed driven us so helplessly to live with the horror of our achievements that I ventured not to trust my ability to keep my capacities distinct and therefore refrained from saying anything on the subject.

I, however, drew the attention of the Committee to the typical justifying attempts appearing in the editorial note by Prof. Myres S. McDougal of the Editorial Board of the *American Journal of International Law* in 1955[1] which note was provoked by the condemnation of such tests by Earl Jowitt in the British House of Lords[2] as also by a very comprehensive attack on the test by Dr. Emanuel Margolis in the *Yale Law Journal*.[3]

Being invited by the President, Mr. Oscar Schachter, Personal Representative of the Secretary-General, expressed his views of the questions in some general terms. In doing so, he expressed forcefully a few words of caution against any hasty resolution in respect of the questions.

After discussion, the Committee did not declare any final opinion on the questions. It only decided that the delegations should, if they so wish, send to the secretariat of the Committee by the first day of May 1962 their comments on the draft report and the secretariat would thereafter send the draft report together with the comments so received to the member Governments for their consideration and that the matter should be placed before the next session of the Committee as a priority item on the agenda.

Before concluding this report, I must express my heartfelt gratitude to the Committee, as also to the people and the Government of Burma, for the kind reception that I received at their hands. On behalf of the Commission, I extended an invitation to the Committee to continue its co-operation with the Commission and to send an observer to attend the next session of the Commission. I really was very much impressed with the high level of deliberations that took place during the session and I frankly told the Committee that "I have seen in the conduct of its business a real conference where all the distinguished members came really to confer and not to differ in the name of conference. Indeed the entire deliberation amply indicated that the member nations are prompted by the urge to find a way to a new wholeness." I also expressed my hope that "all the Asian-African nations would join the organization and help building up this new wholeness, always remembering that our environment now is no longer the world about us but rather the world". In conclusion I told the Committee I shall leave the meeting with a new faith in the great principles that have actuated the organization.

---

[1] McDougal, "The Hydrogen Bomb Tests and the International Law of the Sea", *American Journal of International Law*, vol. 49 (1955), p. 356.

[2] *House of Lords Debates (Fifth Series)*, vol. 186, pp. 808-09 (1954).

[3] Margolis, "The Hydrogen Bomb Experiments and International Law", *Yale Law Journal*, vol. 64 (1955), p. 629.