INDIA'S INTERNATIONAL DISPUTES

A Legal Study

by
J. S. BAINS

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TO

Roop, Anoop
and
Swroop

PREFACE

FOR some time past I had felt that while a great deal of interest and endeavour had gone in understanding India's foreign policy in the context of broad international problems, hardly a work had come into existence which sought to study India's international disputes from an international law stand-point. That is why in the last few years I concentrated my research activities with a view to study the many international disputes to which India happens to be a party and to evaluate whether India's attitude may be found to conform to any set pattern. Of course not all issues discussed here may be technically categorized as disputes but because they have a direct bearing on other disputes and have brought India's name into international view, I thought it desirable to study all such cases.

I am indebted to many scholars for their kind help and guidance in the final preparation of this work. I would like to mention especially the following: Professors Hans Kelsen, Josef Kunz and Lawrence Preuss for their comments on the paper discussing the theoretical issues of international law involved in the problem of persons of Indian origin in the Union of South Africa; to Professor Julius Stone for his many valuable observations on the preliminary paper dealing with Jammu and Kashmir issue submitted to him when he came to Delhi two years ago as Visiting Professor of International Law in the Indian School of International Studies; to Professor (now Judge) Philip Jessup for shedding light on some tenuous points of the law of treaties relevant in a discussion of some of the disputes; to Mr. Eli Lauterpacht for his observations on the Right of Passage Case; to Professor Quincy Wright who happened to be in India immediately after the Goa action and was very kind in giving his forthright views on the liberation of Goa in the context of the rules of international law, and to Professor C. J. Chacko and Dr. K. Krishna Rao for their many suggestions regarding the border dispute with China and the Tibetan problem. It must be made clear, however, that while I have drawn heavily from their mature and distinguished scholarship, I have on many points disagreed with them and hence they should not in any way be held responsible for the views expressed here.

I was also very fortunate to have the opportunity to exchange views on almost all these disputes with many other academicians at the Hague where in the summer of 1960 I, along with 14 others from different parts of the world, attended a seminar under the auspices of the Hague Academy of International Law. Similarly some of these papers in earlier stages were read at the meetings of the Indian Society of International Law, and the Delhi Univeristy Political Science Teachers' Association, and the comments of the members were extremely useful.

I am also thankful to Mr. Daljit Singh, Tutorial Fellow in Political Science, University of Delhi who besides preparing the index helped me in checking the documentation and correcting the proofs. For any mistake of commission or ommission I hold myself responsible.

J. S. BAINS

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CONTENTS

	Preface	vi
I.	TREATMENT OF PEOPLE OF INDIAN ORIGIN IN THE UNION OF SOUTH AFRICA	1
II.	INDO-PAKISTAN WATER DISPUTE	29
III.	THE JAMMU AND KASHMIR QUESTION	62
IV.	PROBLEM OF PERSONS OF INDIAN ORIGIN IN CEYLON	87
V.	THE TIBETAN IMBROGLIO	114
VI.	SINO-INDIAN BORDER DISPUTE	136
VII.	CASE CONCERNING RIGHT OF PASSAGE OVER INDIAN TERRITORY	165
VIII.	THE LIBERATION OF GOA	195
IX.	AN EVALUATION	209
	Index	217

I

TREATMENT OF PEOPLE OF INDIAN ORIGIN IN THE UNION OF SOUTH AFRICA

THE treatment of the people of Indian origin in the Union of South Africa has been under consideration by the United Nations ever since its inception. The study of the problem is of importance at least on account of two reasons. Firstly, a large number of disputes involving the same basic issues have been brought to the United Nations. This has brought into existence a great deal of documentary material bearing on the issue. Moreover, in all such cases the United Nations has adopted resolutions and has expressed its interest in the matter and thereby turned down the moves for referring the matter for advisory opinion to the International Court of Justice. Secondly, a study of the material reveals that the discussion, to a great extent, has centered on the fundamental question of State sovereignty which is one of the central concepts of international law. Keeping these considerations in view, it has been found appropriate to interpret the United Nations Charter in the context of the concrete issues involved and at the same time correlate it to the main currents of juristic thinking on the matter.

HISTORICAL BACKGROUND

In the mid-nineteenth century, on account of the abolition of slavery and other factors, there occurred a shortage of native labour in the sugar and tea plantations of the colony of Natal. Although, in the beginning, the British government did not view favourably the request of the Natal Legislative Council for the importation of Indian contract labour, as a result of political pressure and economic necessity she agreed to make arrangements with the Indian government. According to the understanding of the Indian government such indentured labour was to serve in Natal for three years (subsequently increased to five years) after which they could either stay and work as free labourers or return

to India by utilizing free passage facilities. After the expiry of the contract period, they were to be entitled to the equal protection of the local law. The *SS Truro* left Madras on 13 October 1860 with the first batch of Indian labourers and weighed anchor at Durban on 16 November.[1]

On account of trade depression and the ill-treatment meted out to the Indian labourers, the Indian government discontinued such emigration from 1866 to 1874 and resumed it only after the Natal government gave an assurance that those labourers who may wish to stay after the expiry of the ten year period, would be given land by the government. In the meantime some Indian traders also followed their compatriots to Natal. The immigrants, by hard work, enterprising spirit and thrifty habits improved their lot which was resented by the white labourers. This engendered anti-Indian feelings which were precipitated on a large scale in 1887.[2]

In 1891 the Legislative Council of Natal resolved that either the Indian indentured labour should reindenture or return to their homeland. Both these proposals were rejected by the Indian government. In 1895 a law was passed which required that those Indians who failed to comply with the above mentioned proposals must buy a licence each year on payment of £ 3. Two years later the Immigration and the Trade Licencing Acts allowed immigration only to those who passed the dictation test in one of the European languages and possessed at the time of disembarkation a specific sum of money.[3]

From Natal the Indians began to move into the other three colonies known as Transvaal, the Orange Free State and the Cape Colony. There also they met with the same kind of treatment. They were required to be finger-printed and carry identification cards. The Precious and Base Metals Act and the Township Act of 1908 virtually excluded them from the townships.[4]

[1] For the early history of indentured labour see *India Government's Memorandum* submitted to the United Nations. *U.N.* Doc. A/68, Joint First and Sixth Committee Meetings (21-30 November 1946), Annex. 1a., pp. 53-81; *Report of the Asiatic Enquiry Commission* (Simla, 1921), pp. 2-4, 10-12. Also Sir Shafa'at Ahmed Khan, *The Indians in South Africa* (Allahabad, 1946), pp. 5-56; W. W. Hancock, *Survey of British Commonwealth Affairs* (London, 1937), Vol. I, pp. 166-209.

[2] Sir Shafa'at Ahmed Khan, *op. cit.*, pp. 124-7.

[3] *India Government's Memorandum*, p. 56.

[4] *Ibid.*, pp. 58-9. Also *Report of the Indian Penetration Commission* (Pretoria, 1942), pp. 19-44.

After the establishment in 1909 of the Union of South Africa the same policy was continued. The Immigration Regulation Act of 1913 entitled the Minister of the Interior to prohibit all Indian immigrants to move from one province to another. It was against this piece of legislation that Mahatma Gandhi led his Satyagraha movement which culminated in the Gandhi-Smuts agreement of 1914. It provided that poll-tax and restrictions on marriage and movement within the Union be scrapped, and that negotiations regarding franchise, occupation, and ownership of real property be conducted later. Assurances were also given that the existing laws would be administered justly.[5]

After the First World War the government stepped up its campaign for anti-Indian legislation. Laws were passed in 1919, 1922, 1923 and 1924 imposing restrictions on the grant of new trade licences, buying or leasing of land belonging to the municipalities and setting apart special segregated areas for residential purposes. In spite of the Capetown agreements of 1927 and 1932 in which the Union government had recognized the special problems of the persons of Indian origin and the desirability of helping them to adjust to the soil, the authorities violated the letter and spirit of these undertakings and faithfully followed its policies of racial discriminations.[6] In 1943 the Pegging Act was passed prohibiting the purchase of property in certain areas. In 1946 the Asiatic Land Tenure and Indian Representation Act furthered the process culminating in discrimination on all levels. The net result of this legislation was that persons of Indian origin became victims of racial discrimination regarding immigration, interprovincial migration, acquisition of land, trade, education, marriage, travel, industry and other professions, pensions, employment in public services, local government and even carrying of arms and ammunition.[7]

[5] *Report of the Asiatic Enquiry Commission* (Simla, 1921), pp. 16-24, 77-8; J. Radhakrishnan, "South African Indians: 100 Years of Repression", *The Times of India*, 13 November 1960.

[6] For the texts of the Capetown agreements see *India Government's Memorandum*, *op. cit.*, pp. 66, 67.

[7] For details regarding such legislation see, *Disabilities of the Non-White Peoples in the Union of South Africa* (New Delhi, 1953); Margaret Cornell, "The Statutory Background of Apartheid: A Chronological Survey of South African Legislation", *The World Today*, Vol. 16 (May 1960), pp. 181-94; P. R. Pather, "Group Areas Act: Its Effects on Indians", *The Hindu*, 29 March 1959.

Protesting against this policy the Indian government recalled its High Commissioner from South Africa and suspended all trade relations with the Union government. As there was no response on the part of the Union government, India brought before the General Assembly of the United Nations the question of the persons of Indian origin in the Union of South Africa under Articles 10 and 14 of the United Nations Charter.[8]

THE TENOR OF DISCUSSION IN THE UNITED NATIONS

In 1946 the matter was referred to the joint meeting of the First and Sixth Committees where the Indian case was presented by Mrs. Vijaylakshmi Pandit, the leader of the Indian delegation. Mrs. Pandit traced the whole history of Indian emigration pointing out how the treatment of persons of Indian origin was against the basic undertakings of the Union government and how these discriminatory policies conflicted with the various provisions of the UN Charter. She affirmed India's faith in fundamental human rights and her determination "to provide social progress and better standards of life in larger freedom." She argued that since India was responsible for sending these immigrants to South Africa she was morally and politically obliged to look after their comforts. The UN, she argued, was perfectly competent to take up the matter.[9] This line of reasoning was also followed by delegates from China, Byelorussia, Guatemala, Egypt, Iran, USSR, Yugoslavia and many others.[10]

A completely contrary position was taken by Field-Marshal Smuts of the Union of South Africa who argued that since the immigration policies of a State was a domestic matter covered by Article 2(7) of the UN Charter, the world organization had no competence to deal with the Indian complaint. He argued that

[8] This item was brought to the notice of the General Assembly for the first time in a letter dated 22 June 1946. It gave a brief resume of the case and pointed out that the reactions to these measures (Asiatic Land Tenure and Indian Representation Bill) have been so serious in India that the Government of India has had to give notice of termination of trade agreements between the two countries and recall their High Commissioner for consultation. *Joint First and Sixth Committee Meetings*, *op. cit.*, Annex. 1, pp. 52-3.

[9] *U.N.* A/C. 1 & 6/1 (21 November 1946), pp. 1-3, 24-7. Also Doc. A/PV. 50 (7 November 1946), p. 1012.

[10] Mr. Manuilsky (USSR), *Ibid.*, pp. 4-5; Mr. Kiselev (Byelorussia), *Ibid.*, p. 5; Mr. Bartos (Yugoslavia), *Ibid.*, p. 6; Mr. Koo (China), *Ibid.*, pp. 6-7; Mr. Fawzi (Egypt), *Ibid.*, pp. 7-8; Mr. Entzem (Iran), *Ibid.*, p. 8.

the various agreements concluded with the Indian government did not create legally binding obligations on the Union government and added that, since in the international sphere no definite and concrete formulation of fundamental rights and freedoms was made, the United Nations Charter at the most created moral obligations which the Union government was not bound to put into practice. He very vehemently opposed discussion of the matter and declared that the Charter did not sanction intervention in matters relating to the position of citizens in a State.[11] Delegates from many member States like Brazil, Ecuador, New Zealand, Norway, United Kingdom and the USA also supported this position.[12]

Inside the committees and the plenary sessions the arguments have centered on the point whether the subject was a matter of domestic jurisdiction and hence barred by Article 2(7). Finally a French-Mexican resolution was passed by a two-thirds majority calling upon the Union government to frame its legislation in conformity with international obligations assumed under the various agreements and the various provisions of the UN Charter and requested the two governments to report to the next session of the United Nations.[13]

Ever since 1946, except once, this question has been raised in the United Nations and the world organization has, in one form

[11] *Ibid.*, pp. 3-4; also Doc. A/P.V. 50 (7 December 1946), pp. 1008-9. For the Memorandum of the Government of the Union of South Africa see, *U.N.* Doc. A/167 as Annex 1b & c *Joint Committee of the First and Sixth Committees* (1946), pp. 81-131.

[12] Sir Hartley Shawcross (UK): *Ibid.*, pp. 13-15; Mr. Fahy (USA) *Ibid.*, pp. 15-16; Mr. De Olivier (Brazil): *Ibid.*, p. 31.

[13] *U. N.* A/44 (8 December 1946). It reads as follows:

" The General Assembly,

Having taken note of the application made by the Government of India regarding the treatment of Indians in the Union of South Africa, and having considered the matter:

1. States that because of that treatment, friendly relations between the two Member States have been impaired and, unless a satisfactory settlement is reached, these relations are likely to be further impaired;
2. Is of the opinion that the treatment of Indians in the Union of South Africa should be in conformity with the international obligations under the agreements concluded between the two Governments and the relevant provisions of the Charter;
3. Therefore requests the two Governments to report at the next session of the General Assembly the measures adopted to this effect." *Resolutions Adopted by the General Assembly,* A/64/Add 1 (31 January 1947), p. 69.

or the other, passed resolutions instructing the parties to arrive at an amicable settlement of the dispute.[14] Even though the United Nations has passed resolutions ranging from a bare majority to a two-thirds majority, the Union government has intransigently refused to abide by the UN decisions and has repeatedly declared that the matter is essentially within its own domestic jurisdiction and that Article 2(7) forbids such intervention. The South African government has very fanatically insisted that the correctness of its legal position be recognized and that she would be willing to negotiate with India and Pakistan not on the basis of the UN resolutions but outside the purview of the world organization.[15] This means that the Union government wants to exercise a domestic jurisdiction veto on a question which for long may have become a matter of international concern. It is imperative, therefore, that we should examine the nature of the domestic jurisdiction concept both from theoretical and practical standpoints.

NATURE AND ORIGIN OF THE CONCEPT OF DOMESTIC JURISDICTION

Article 2 paragraph 7 of the United Nations Charter contains

[14] The matter was not discussed in the 4th Session of the General Assembly. Exception had been made on that occasion because negotiations were in progress at the time between the Governments of India and Pakistan and the Government of the Union of South Africa. For a summary of arguments on both sides see M. S. Rajan, *United Nations and Domestic Jurisdiction* (Bombay, 1958), pp. 313-41.

[15] During the 9th session, the General Assembly had authorized the Secretary General to designate a person to help the parties to negotiate directly. The Secretary General informed the 10th Session of the General Assembly with regard to the attitude of the Union Government, by quoting from the latter's communication :

"It (South Africa) has always maintained that the position of persons of Indian origin who have for many years been citizens of the Union of South Africa, is a matter of purely domestic concern, and that the United Nations is precluded by the provisions of Article 2, paragraph 7, of the Charter from intervening in the matter, either by way of discussion in, or by resolution of the Assembly, or by the appointment of a representative of the United Nations in terms of paragraphs 2 and 3 of General Assembly resolution 816 (IX). The Union Government has the highest regard for Sr. de Faro's capabilities and appreciate his willingness to be of assistance in the matter but, in view of what is stated above, must regretfully decline to prejudice its juridical position by collaborating with the distinguished gentleman." *U.N.* General Assembly, *Official Records* of the General Assembly, Tenth Session, Annexes, Doc. A/300 (25 October 1955), pp. 1—2.

the domestic jurisdiction clause. It reads as follows:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Three propositions are quite evident in this provision. First, the United Nations as an organization is prohibited from intervention in matters which are essentially within the domestic jurisdiction of any State. Conversely the Members of the United Nations are not obliged to submit such matters to settlement under the Charter. The third proposition contains the only exception according to which the foregoing barriers become extinct. This is with respect to enforcement measures to be taken under Chapter VII.[16]

It is clear, therefore, that the domestic jurisdiction clause envisages an area of jurisdiction where the law of the United Nations will not be applicable or will be applicable negatively giving the States plenary authority in dealing with their internal affairs. This clause reveals that there are certain matters which, by their very nature, are within the " privative " powers of the States and consequently they can not part with competence over them. On the one hand this theory propounds the thesis that there are inherent limitations on the power of the modern States to conclude treaties, on the other it rekindles the flickering flame of the doctrine of nonjusticiability of disputes.[17]

Such a reservation is necessarily implied by the nature of a decentralized international community. Historically it appears to be a successor to the reservation of " vital interests, honour and independence " appended to the various treaties for the obligatory arbitration of international disputes.[18] It made its debut in the League Covenant from where it was borrowed for the UN

[16] Hans Kelsen, *Law of the United Nations* (London, 1951), pp. 769-70.

[17] For a theoretical analysis of the problem see my paper entitled " Domestic Jurisdiction and International Law: A Theoretical Analysis". in J. S. Bains (Ed.), *Studies in Political Science* (Bombay, 1961), pp. 110-29.

[18] Lawrence Preuss, " Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic jurisdiction", *Recueil des Cours*, LXXIV (1949-I), p. 557-8; C.H.M. Waldock, "The Plea of Domestic Jurisdiction before International Legal Tribunals", *British Yearbook of International Law* (1954), p. 100.

Charter.[19] At the time this clause was inserted in the Covenant, grave misgivings were expressed as to its utility. Professor Brierly characterized it as " a new catchword, capable of proving as great a hindrance to the orderly development of the subject (of International Law) as the somewhat battered idols of sovereignty, State equality and the like have been in the past."[20] In practice, however, it did not serve as an appreciable barrier. The purpose was served because the Council was authorized to decide about the character of the matter.[21]

The Charter provision considered in this light was a backward step. It not only failed to mention as to who was the determining authority but by deleting the words " by international law " introduced a political element in an otherwise legal document. Moreover, the substitution of the word " essentially " for " solely " and the presence of the words " to intervene " have brought about vagueness, uncertainty and confusion.[22] That is why a learned delegate referred to this clause as " notable " for the profundity of its ambiguity.[23] It is no accident, therefore, that it is one of the most-discussed clauses and a large number of disputes have been brought to the United Nations hinging on the validity of this provision. The South African government have interpreted this clause in conformity with its own national interest.[24]

[19] Article 15(8) of the Covenant of the League of Nations contained the domestic jurisdiction clause : " If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement."

[20] J. L. Brierly, " Matters of Domestic Jurisdiction ", *British Yearbook of International Law* (1925), p. 8.

[21] Preuss, *op. cit.*, p. 562.

[22] Leo Gross, " The Charter of the United Nations and the Lodge Reservations ", *American Journal of International Law*, XLI (1947), p. 543 ; also my article, " Revision of the U. N. Charter : The Domestic Jurisdiction Clause ", *The Spokesman* (New Delhi), Independence Number 1955, pp. 21-2.

[23] Sir Carl Berendsen (Newzealand) : *U.N.*, A/C. I/SR. 107 (12 November 1947), p.11. Also my article "Revision of the UN Charter: The Domestic Jurisdiction Clause ", *The Spokesman*, 24 August 1955, p. 11 : " The vagueness of the clause lends itself to no single interpretation. The draft is so involved that sometimes entirely contradictory meanings can be read into it without providing any satisfactory solution of the problem. This is either a testimony to the poor draftsmanship of those responsible for the Charter or a monument to the ingenuity of the statesmen who consicoulsy desired a document which might be interpreted in accordance with national self-interest ".

[24] Upto 31 August 1954, 23 cases in which such objections were raised,

PROCEDURAL WRANGLES

Unlike the Covenant, the Charter provision has left open the question as to who is the determining authority in case one of the parties raises the plea of domestic jurisdiction. That is why interested parties have been prompted to challenge the competence of the United Nations even at the initial stages. Ever since 1946 the South African representatives have questioned the legality of accepting the Indian complaint on the agenda and have charged it as a " violation of the Charter ", an action " wholly unjustified and without legal foundation and valid reason " and in " flagrant contradiction with the fundamental principles of the Charter ".[25] What the framers of the Charter had in mind, the Union representatives have argued, was that the United Nations should not " intervene in any way in the affairs of a sovereign State either by a discussion of such affairs, or still less by the adoption of resolutions concerning them ". They have expressed grave doubts that under this provision a question which was essentially within the domestic jurisdiction of the Union should be " entertained, discussed or even decided upon " by the General Assembly.[26]

It must be said, however, that the argument of the Union government is based on very unsound reasoning. The competence of the United Nations can be challenged only when she is seized of the case and an item cannot be seized unless it has been adopted on the agenda. On the agenda stage, the United Nations has been guided by a well-recognized and correct rule which requires that in order that an item may be adopted on the agenda, it should be of sufficient importance to warrant its consideration and if need be its settlement. In other words unless the item is of such " a minor, frivolous and trivial character ", the United Nations should accept it on the agenda in order to decide whether it has competence over the matter and if so as to the necessary action which may be called

had been brought to the United Nations. See *Repertory of United Nations Practice* (1955), Vol. I, p. 59.

[25] Mr. Louw (South Africa), U.N. General Assembly, 3rd Session, Part. I, General Committee, *Summary Records* (2 September 1948), p. 12 ; *Ibid.*, A/PV. 146 (28 September 1948), p. 224. Also in the Apartheid Case : Mr. Fourie (South Africa), S/PV. 851 (30 March 1960), para. 46.

[26] Mr. Louw (South Africa), *Ibid.*, General Assembly, 3rd Session, Part. II, First Committee, *Summary Records* (10 May 1949), pp. 274-7 ; Mr. Jooste (South Africa), A/PV. 341 (13 November 1951), para 33 ; *Ibid.*, A/PV. 380 (16 October 1952), paras. 130-34 ; *Ibid.*, A/PV. 435 (17 September 1953), paras. 6-12.

for.[27] Contrary to the arguments of the Union government the practice of the United Nations has incorporated into its jurisprudence the rule that the adoption of the agenda does not decide the issue of competence and the action cannot be considered as an intervention in the internal affairs of the State concerned. The agenda merely serves the purpose of notifying the interested parties that the matter included is of sufficient importance to be dealt by it. This presumption can be refuted later.[28]

There is not the least shadow of a doubt that the problem of persons of Indian origin cannot be categorized under matters of " minor, frivolous and trivial character ". The importance of the matter is quite evident from the fact that the racialist policies of the Union government have come under fire not only through this item but also from a broader practice of " apartheid " under which heading the matter has been discussed by the General Assembly for more than a decade, and more recently the Security Council has taken due note of the gravity of the situation brought about by the policies of the Union government.[29] It is therefore not possible

[27] This rule was explained in the following words by Dr. Evatt who had played a very important part in the deliberations of the San Francisco Conference : " The United Nations was competent both to determine its own competence and to discuss a question which concerned human rights. In order to establish the competence of the United Nations, indeed, no clause in any treaty could rule out the competence of the Organization. The problem before the General Committee was whether the question proposed for inclusion in the agenda of the General Assembly was of sufficient importance to warrant its consideration and, if need be, its settlement by the General Assembly." *Ibid.*, General Assembly, 3rd Session, Part. II, General Committee (6 April 1949), p. 17.

[28] For a representative view see Mr. Llyod (UK) and Mr. Pathak (India) : *Ibid.*, Doc. A/BUR/SR. 79 (15 October 1952), p. 6 ; also Mr. Lodge (USA) in the Apartheid Case : *Ibid.*, S/PV. 851 (30 March 1960), para 26 : " The United States views on the interpretation and application of Article 2(7) of the Charter have been clearly established. I myself stated in the discussion of the question of Tibet at the last Session of the General Assembly : 'In the years since the establishment of the United Nations certain principles and rules concerning the application of Article 2, Paragraph 7 have emerged. It had become established, for example, that inscription, and the discussion of an agenda item do not constitute intervention in matters which lie essentially within domestic jurisdiction'. We hold the same view with respect to the Security Council that we do in the General Assembly."

[29] The question of race conflicts in the Union of South Africa was brought to the General Assembly by a letter dated 15 September 1952 by representatives of 13 Member States. This letter contended that by its racial policy the Government of the Union was "creating a dangerous and explosive situation which

to agree with the Union government that the acceptance of this item on the agenda is prohibited by Article 2(7) of the Charter.

Just as the admission of an item on the agenda is a necessary part of a procedure to settle controversies, it is all the more essential to have a discussion on the same in order to decide the issue of competence. It might have been the understanding at San Francisco that discussion and recommendation on the substantive issue should follow only a positive and favourable decision on the jurisdictional question.[30] But a final decision on the jurisdictional issue cannot be made unless sufficient data are made available on the basis of which the competence of the appropriate organ of the United Nations may be determined.[31] As will be shown later, the determination of matters of domestic jurisdiction cannot be made according to some cut-and-dried formula nor does it operate according to some mechanical test. It is a relative concept and depends on the facts of a particular situation at a particular time. In order to establish the accuracy of facts and thereby the question of jurisdiction, discussion of substance is essential and any argument against this process would amount to depriving the United Nations of one of its very essential functions. The question of competence can appropriately be raised only when the Organization is fully cognizant of the subject matter.[32]

constitutes both a threat to international peace and a flagrant violation of the basic principles of human rights and fundamental freedoms which are enshrined in the Charter". For a summary of discussion see *Repertory of United Nations Practice*, Vol. I, pp. 95-101. For a representative view on the majority side in the Apartheid Case: Mr. Michalowski (Poland), *U.N.* S/PV.854 (31 March 1960), para 87: "From the legal point of view, the objection to the Council's competence on the basis of Article 2, paragraph 7—is to our mind unacceptable. The fact that the General Assembly had dealt with the problem at various sessions, that it has established a subsidiary organ to study the question and that it has made recommendations to the Union Government which express the disapproval of the policy of racial discrimination and segregation, constitutes an undeniable precedent that the principle of non-intervention laid down in Article 2, paragraph 7, cannot be used to prevent United Nations organs from fulfilling their duties under Articles 55 and 56 of the Charter, and specifically the duties associated with promoting universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

30 Preuss, *op. cit.*, p. 583.

31 Mr. Pathak (India) *U.N.* Doc. A/AC. 38/SR. 41 (14 November 1950), pp. 247-8 ; also Mr. Ammoun (Lebanon), *Ibid.*, p. 248.

32 Mr. Akzaul (Lebanon), *Ibid.*, A/AC. 72/SR. 19 (26 October 1953), paras. 36-7. This was also true in the case of the Covenant of the League of Nations. See Robert Redslob, *Theorie de la Societe des Nations* (Paris, 1927), p. 84.

In the 1950 session of the United Nations, the Union representative started challenging the competence of the General Assembly without allowing the Indian representative to present his case. But he was overruled and the majority of the members recognized that the facts must be presented before the competence can be decided. The Indian delegate voiced the opinion of the Assembly when he said :

> The question of competence was substantive rather than procedural. It was impossible to judge the nature and character of the subject matter of an item unless the facts were well stated. The question of competence would be one of the points of substantive discussion. All questions must be raised on the basis of the facts as presented by the mover of the draft resolution. The question of competence, or lack of competence, could appropriately be raised only when the Committee was fully cognizant of the subject matter[33]

The validity of this analysis finds its expression in the rules of procedure of the General Assembly also. The Charter makes the General Assembly the master of its own rules of procedure,[34] and the discussion stage has found a prominent place in its rules. In the committee as well as the plenary sessions the competence of these bodies to accept a proposal can be formally challenged by a motion. But this motion can be put to vote only immediately before a vote is taken on the proposal itself. It means that the discussion on the matter will necessarily take place before the issue of competence can be decided. This virtually sanctions unlimited discussion on the substantive issue although an affiirmative vote on the motion challenging competence would prevent any vote on the proposal itself.[35] This shows that contrary to the contention of

[33] *U.N.* Doc. A/AC. 38/SR. 41 (14 November 1950), pp. 247-8. Also Mr. Cayco (Philippines): "And in 1946, at the request of India, the problem had been placed before the General Assembly for the first time; and the Assembly had since adopted a series of resolutions expressing the hope that a final and satisfactory solution would be found. In adopting those resolutions, the General Assembly had in fact not only recognized the justice of the original complaint submitted to it, it had also made the cause its own". *Ibid.*, A/SPC/SR. 173 (9 December 1959), para. 11.

[34] Article 21 of the United Nations Charter.

[35] U.N. *Rules of Procedure of the General Assembly,* Rules No. 80 and 120. Doc. A/520. Rev. 2 (5 June 1951). With regard to the same question before the World Court, a competent writer has said that: "It is obvious

the Union of South Africa, discussion cannot be forbidden by Article 2(7) of the Charter.

The practice of the United Nations may be taken as having overruled the objections of the Union government. The acceptance of an item on the agenda, its discussion and proper recommendations for more than a decade, is based on the presumption that the United Nations has jurisdiction over the matter.[36] Moreover, at least once the United Nations has faced this problem squarely. In the Fifth Session in the Ad Hoc Political Committee when the South African representative raised the issue of competence basing it on familiar arguments, the Syrian representative moved a formal motion which had the approval of the Union representative. It read :

> The Ad Hoc Political Committee, in view of the fact that the question of competence regarding the item on the agenda relative to the treatment of people of Indian origin in the Union of South Africa has been considered, in view of the discussion on this subject and the proposals submitted, decides that it is competent to consider and vote on such proposals as have been submitted.[37]

This motion was adopted by 35 votes to 3 with 17 abstentions which set at rest any doubt about the question of jurisdiction. This has also happened in the many such motions moved by the representatives of South Africa in the Apartheid case which have been rejected.[38] The Special Commission after making a thorough study of the issue of competence came to the conclusion

that a preliminary objection founded on a domestic jurisdiction clause is a frail instrument for stopping the proceedings *in limine*. Only when it is manifest on a summary view of the case presented by the claimant will the Court be likely to refrain from joining the preliminary objection to the merits and to stop the case *in limine*. When the Court joins a preliminary objection to jurisdiction to merits, it will, in its judgement on the merits, make a decision first on the preliminary objection and if it upholds the objections, it will not deal further with the merits". Waldock, *op. cit.*, p. 116.

[36] Mr. Jha (India) in the Apartheid Case : *U.N.* S/PV. 855 (1 April 1960), para-58. Also Quincy Wright, *International Law and the United Nations* (Bombay, 1960), p. 54.

[37] *U.N.* Doc. A/AC. 38/L. 40 (9 May 1949), p. 246.

[38] *U.N.*, A/PV. 381 (17 October 1952) para. 167, *Ibid.*, A/PV. 401 (5 December 1952), para. 89; *Ibid.*, 3rd Session. Pt. II, First Committee (9 May 1949), pp. 252-3.

that the Assembly was authorized by the Charter to undertake studies and make recommendations in connection with the implementation of the principles to which the Member States had subscribed by signing the Charter and that exercise of such functions in order to safeguard human rights did not constitute intervention.[39]

THE RELATIVE CHARACTER OF DOMESTIC MATTERS

The South African argument that the racial policies of its government are essentially a domestic matter is apparently based on the view that there are certain matters which by their very nature are such that no international authority can ever claim jurisdiction. This argument springs from the idea that matters of domestic jurisdiction are of such essential importance to the structure and existence of the State as an entity that its submission to arbitration or judicial settlement would deprive it (the State) of its attributes of being a State. This notion is the offspring of the doctrine of fundamental rights of States.[40]

This attitude, however, is the product of fallacious logic and wrong thinking. There are no matters that cannot be regulated by a rule of customary or contractual international law, and if a matter is regulated by a rule of international law, it is no longer within the domestic jurisdiction of the state concerned.[41] Hence the matters of domestic jurisdiction cannot be enumerated before hand. As pointed out by Professor Hans Kelsen " the fact that such matters as form of government, acquisition or loss of citizenship or immigration are not normally regulated by a rule of international law is no reason to assume that they are ' essentially ' within the jurisdiction of State ; they can be the object of treaty ".[42] In 1923 the Permanent Court of International Justice in the case of Nationality Decrees in Tunis and Morocco made it quite clear that no hard and fast rule can be laid down to determine such matters. The Court pointed out that " the question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative

39 *U.N.*, Doc. A/25058 A/2505/Add., (1953), para. 893.

40 Hans Kelsen, *Principles of International Law*, p. 197, n. 70.

41 Hans Kelsen, *Law of the United Nations*, p. 771; for a discussion of this problem see G. Gidel, "Droits et Devoirs des Nations: la Theorie Classique des droits Fondamentaux des Etats". *Recueil des Cours* (1925-V), pp. 541-97.

42 Hans Kelsen, *Principles of International Law*, pp. 196-8.

question; it depends on the development of international relations ".[43] Three years earlier the Committee of Jurists had also given a similar opinion in the Aaland Island case.[44] The Institute of International Law at its 1954 session adopted a similar definition of domestic jurisdiction when it said that " the extent of this domain depends on international law and varies according to its development."[45] World famous international lawyers like Borel, Bourquin, Brierly, Guggenheim, Jessup, Kelsen, Kunz, Lauterpacht, McDougal, Preuss, Scelle, Segal, Verdross, Wehberg and many others also support this position.[46]

The practice of the United Nations in the case of persons of Indian origin in the Union of South Africa and in the case dealing with its apartheid policies has also sustained the idea of the relative character of domestic matters. In 1946 the General Assembly by a two-thirds majority instructed the Union government to abide by the relevant treaties with India and act in conformity with the human rights provisions of the UN Charter. It means that these criteria, singly or otherwise, have made the problem of persons of Indian origin in the Union of South Africa a matter of international concern.[47]

[43] *PCIJ*, Series, B/4., p. 24. Commenting on the decision of the World Court in this case, Professor Preuss said: " Viewed thus relatively, the sphere of domestic jurisdiction is not an irreducible sphere of rights which are somewhat inherent, natural or fundamental. It does not create an impenetrable barrier to the development of international law. Matters of domestic jurisdiction are not those which are unregulated by international law, but are those which are left by international law for regulation by States. There are, therefore, no matters which are domestic by their ' nature', and may become the subjects of new rules of customary law or of treaty obligation". Preuss, *op. cit.*, p. 568.

[44] League of Nations, *Official Journal*, Spec. Suppl. No. 3 (October 1920), p. 6

[45] *Annuaire*, Vol. 45 (1954), pp. 150, 299.

[46] For a summary of their views see Bains, *op. cit.*, pp. 119-27. Also, Paul Guggenheim, *Traite de Droit international public* (Geneve, 1953), Tome, I, pp. 257-8; P. Jessup, *A Modern Law of Nations* (New York, 1949), pp. 41-2; Myres S. McDougal and Associates, *Studies in World Public Order* (New Haven, 1960), p. 359; Hans Wehberg, *Archiv d. Volkerrechts*, Vol. 2 (1950), p. 261.

[47] John P. Humphrey, " International Protection of Human Rights", *Annals of American Academy of Political and Social Sciences*, Vol. 255 (January 1948), pp. 17-18; Helen Hart Jones, " Domestic Jurisdiction—From the Covenant to the Charter", *Illinois Law Review*, Vol. 46(1951-52), p. 256; Julius Stone, *Legal Controls of International Conflict* (London, 1954), p. 254, n. 53; U. Scheoner, " Sovereignty and the United Nations", in *The United Nations: Ten Years Legal Progress* (The Hague, 1956), pp. 36-7.

It is of interest to note that the future of the persons of Indian origin in the Union of South Africa has, for almost a century, been the subject of negotiation with India. An analysis of the Capetown agreements of 1927 and 1932 reveals that the Union government had agreed not to use its own discretion in deciding the future of these persons and act arbitrarily in depriving them of their status and vocation there.[48] Since the issue had been a subject of discussion at the Imperial conferences of 1917, 1921, 1924 and 1926, the matter can no longer be considered to be within the domestic jurisdiction of the Union government. As pointed out by the Indian representative " the question of domestic jurisdiction involves a number of factors the first of which is the historical background of the dispute. The fact that negotiations had taken place between the Indian and South African governments over many years and that agreements had been signed between them proved beyond doubt that the question had never been solely one of domestic jurisdiction ".[49] The case is in many respects similar to the problem of Nationality Decrees in Tunis and Morocco regarding which the Court said that if there were no treaty between France and Great Britian covering the status of British nationals, the matter would have been within the domestic jurisdiction of the former government. But since France had assumed obligations by a treaty, the Court decided in favour of the British claim and disregarded the domestic jurisdiction argument advanced by France.[50]

The practice of the United Nations suggests so many other criteria which may make a traditionally domestic matter, one of international concern. It has been pointed out that if a national regime is incompatible with the new international order; if the origin, nature, structure and actions of such a regime show trends

[48] For the texts of these agreements see, *Indian Government's Memorandum, op. cit.*, pp. 66, 67.

[49] Mr. Menon (India) : *U.N.* A/AC. 72/SR. 20 (27 October 1953), para. 43. Also Mr. Chagla (India), *Ibid.*, A/C. 1 & 6 (25 November 1946), p. 10 ; Mr. Reddy (India), *Ibid.*, A/SPC/SR. 170 (7 December 1959), para. 9 ; Mr. Adamiyat (Iran), *Ibid.*, para. 17.

[50] *PCIJ*, Series B/4, pp. 31-2 ; Mr. Allouni (Syria) : *U.N.* A/AC. 72/SR. 19 (26 October 1953), para. 58. On this particular point, the General Assembly has, upto 1954, adopted six resolutions. The first resolution 44(I), referred expressly to the international agreements invoked during the debates. The third, 395(V), fourth, 511(VI), fifth, 615 (VII), and sixth, 719(VIII), recalled the first resolution. The second resolution, 265(III), contained no reference, direct or indirect, to these international agreements. See *Repertory of United Nations Practice*, Vol. I, pp. 141-2.

contrary to the purposes and principles of the United Nations and if its disapproval resulted in closing of frontiers, severing of diplomatic relations and recognition of rival governments, such a regime could no longer be considered as a domestic matter but the concern of all the members of the international community.[51] Moreover, if an essentially domestic matter like nationalization of foreign interests resulted in unfair appropriations;[52] if there was maltreatment of the native population by a colonial power belonging to a different racial stock;[53] if a government created a situation which is not in conformity with international law and[54] if the United Nations has shown interest in a matter by passing resolutions repeatedly,[55] such matters were no longer within the domestic competence of the State concerned and Article 2(7) would not have been applicable. All this shows that matters of domestic jurisdiction cannot be measured by absolute standards but are the products of standards which in themselves are always subject to change.[56]

It is clear, therefore, that the argument of the South African government regarding the sanctity of her racial policies must be viewed in the light of her international commitments and the various criteria which have become a part of United Nations jurisprudence. Such policies have led to unfriendly relations between countries and are likely to impair the general welfare and is one of the situations under Articles 10 and 14 of the Charter which can form the subject of recommendation of the General Assembly.[57]

[51] Mr. Bonnet (France) in the Spanish Case: U.N. Security Council, *Official Records*, Ist year, Ist Series, No. 2 (17 April 1946), p. 169; Col. Hodgson (Australia): *Ibid.*, (18 April 1946), p. 195.

[52] Mr. Quevedo (Ecuador) in the Iranian Case: *Ibid.* S/PV. 562 (17 October 1951), p. 6.

[53] Mr. Riaz (Egypt) in the Indonesian Case: *Ibid.*, Security Council, *Official Records*, Ist year, Ist Series, No. 1 (10 February 1946), p. 213.

[54] Mr. Ocampo (Chile): *Ibid.*, General Assembly, 3rd Session Part. I, Sixth Committee, Summary Records (2 December 1948), p. 722; Sir Claude Corea (Ceylon) in the Apartheid Case: *Ibid.*, S/PV. 852 (30 March 1960), para.7.

[55] Sub-Committee Report on Franco's Spain: *U.N.*, Doc. S/75 (1 June 1946), p. 2; Also Mr. Sobolev (USSR) in the Apartheid Case: *Ibid.*, S/PV. 854 (31 March 1960), para. 35.

[56] Bains, *op. cit.*, pp. 126-7.

[57] Mr. Gromyko (USSR): *U.N.*, A/PV. 120 (20 November 1947), p. 1163; Mr. Liu (China), *Ibid.*, 3rd Session, Part II, First Committee (10 May 1949), p. 289; Maharaja Jam Saheb (India): *Ibid.*, 5th Session, General Committee (21 September 1950), p. 3; Mr. Akzoul (Lebanon): *Ibid.*, A/AC. 72/SR. 19 (26 October 1953), para. 40. Professor Jessup also supports this interpretation. Jessup, *op. cit.*, p. 88.

Besides these general standards, the doctrine of relativity of domestic jurisdiction finds its expression in another sphere also. If an essentially domestic matter is not covered by any of the foregoing criteria, its authenticity may still remain in doubt if such matter created a situation which may be a threat to international peace and security.[58] Even those countries which have otherwise challenged the competence of the UN in such matters accept the view that under such circumstances the matter becomes one of international concern and the restriction of the domestic jurisdiction clause will cease to apply. In the Spanish case it was pointed out that the domestic jurisdiction clause would not be applicable even when there was only a potential threat to international peace much less an actual threat.[59] Similarly in the case concerning persons of Indian origin in the Union of South Africa, the Polish representative pointed out that acts of racial discrimination could even endanger peace and security and consequently the way a government treated its own nationals was no longer its own concern.[60] In the same case the Indian representative had mentioned that the legislation which the Government of India indicted was contrary to the object of the Charter, and the law to which it was opposed had already compromised relations between two Member States since it led to a severance of relations.[61] In the case of race conflicts resulting from the apartheid policies of the South African government Mr. Leslie Monroe of New Zealand had recognized that if segregation constituted a threat to international peace, the Assembly could demand urgent consideration of the matter.[62] It

[58] Memorandum by Dr. H. V. Evatt on behalf of the Australian Delegation : *UNCIO*, Vol. VI, p. 440.

[59] *U.N.* Doc. S/75 (1 June 1946), pp. 2-3. A similar argument had been advanced by Mr. Jha (India) in the Apartheid Case : *U.N.* S/PV. 852 (30 March 1960), paras. 59, 60, 64.

[60] Mr. Katz-Suchy (Poland): *Ibid.*, General Assembly, 3rd Session, Part. II, First Committee, Summary Records (11 May 1949), p. 308 ; Mr. Quiros (El Salvador) : *Ibid.*, A/AC. 72/SR. 19 (26 October 1953), para. 20.

[61] Mrs. Pandit (India): *Ibid.*, Joint First and Sixth Committee Meetings, *op. cit.*, p. 2 ; Mr. Setalvad (India) : *Ibid.*, 3rd Session, Part II, First Committee (9 May 1949), p. 257.

[62] *Ibid.*, 7th Session, Doc. A/AC. 61. 14 (12 November 1952), p.73 ; Also the report of the UN Commission A/2953 (1955), para. 296. Referring to the legislation enacted by the Union government Mr. Dzirasa (Ghana) said: "The record of that legislation was melancholy: people of Indian origin lacked the franchise ; their property rights were seriously restricted, they were virtually barred from employment in the public services; and their opportunities for education were gravely impaired. The Union Government

was also argued that even if the South African legislation did not constitute a threat to international peace, it still tended to disturb friendly relations among nations and create tension between them so that it warranted action by the General Assembly.[63] In the same case before the Security Council Mr. Jha of India had posed the problem very clearly when he said that "events which cause world-wide concern, which have potentialities for international friction and disharmony and which are directly opposed to the spirit and letter of the Charter cannot be brought within the strait-jacket of Article 2, paragraph 7."[64] The action of the Security Council in denouncing the massacres at Lagos and Sharpeville is based on the assumption that the apartheid policies of the Union government have reached a stage where it can never by any stretch of imagination be covered by the domestic jurisdiction clause.[65]

had systematically violated its undertakings, and its open flouting of international agreements and the respect due to human rights was a danger to the whole international community". *U.N.* A/SPC/SR. 172 (8 December 1959), para. 17.

63 *Ibid*, A/AC. 61.14 (12 November 1952), p. 74. Also Mr. Sobolev (USSR): *Ibid.*, S/PV. 854 (31 March 1960), para. 37; Mr. Slim (Tunisia), *Ibid.*, 851 (30 March 1960), paras. 91, 116; Mr. Khan (Pakistan), *Ibid.*, 852 (30 March 1960), para. 122.

64 *Ibid.*, para. 97.

65 The resolution reads as follows:

The Security Council having considered the complaint of twenty nine members concerning the situation arising out of the large-scale killings of unarmed and peaceful demonstrators against racial discrimination and segregation in the Union of South Africa,

Recognizing that such a situation has been brought about by the racial policies of the government of the Union of South Africa and the continued disregard by that Government of the resolutions of the General Assembly calling upon it to revise its policies and bring them into conformity with its obligations and responsibilities under the Charter,

Taking into account the strong feelings and grave concern aroused among Governments and peoples of the world by the happenings in the Union of South Africa,

1. Recognizes that the situation in the Union of South Africa is one that has led to international friction and if continued might endanger international peace and security.
2. Deplores that the recent disturbances in the Union of South Africa should have led to the loss of life of so many Africans and extends to the families of the victims its deepest sympathies.
3. Deplores the policies and actions of the Government of the Union of South Africa which have given rise to the present situation.
4. Calls upon the Government of the Union of South Africa to initiate measures aimed at bringing about racial harmony based on equality in order

HUMAN RIGHTS

In the case under discussion an overwhelming opinion in the United Nations has supported the Indian position that the discriminatory policies of the Union government cannot be covered by the domestic jurisdiction clause because of the international agreements and more particularly because human rights and fundamental freedoms in themselves are guaranteed by the United Nations Charter. During the last sixteen years a large mass of documentary material bearing on the issue has come into existence.[66] A large number of delegates have made a scathing criticism of the policies of the Union government and considered its actions a flagrant violation of the UN Charter. Many a distinguished international lawyer has also expressed identical views. It was pointed out that if a particular matter is covered by some provision of the Charter, it had become a matter of international concern. The prominent position accorded to human rights through Articles 1(3), 13, 55, 56, 62 and 76, according to the exponents of this view, " are no mere embellishment of a historical document" nor are they "the result of an after-thought...accident of drafting...or the vague expression of a trend or a pious hope ". Rather, the cumulative legal results of these pronouncements implied mandatory obligations which would remain even if no provision for its implementation were made.[67]

to ensure that the present situation does not continue or recur and to abandon its policies of apartheid and racial discrimination

Requests the Secretary General, in consultation with the Government of the Union of South Africa, to make such arrangements as would adequately help in upholding the purposes and principles of the Charter and to report to the Security Council whenever necessary and appropriate." *Current History*, (June 1960), pp. 364—5.

[66] See the following studies for appropriate comments on the problem : H. Lauterpacht, *Internatioal Law and Human Rights* (London, 1950) ; Raghubir Chakravarti, *Human Rights and the United Nations* (Calcutta, 1958); James Frederick Green, *The United Nations and Human Rights* (Washington, 1956); Moses Moskowitz, *Human Rights and World Order* (New York, 1958) ; Pieter N. Drost. *The Crime of State : Penal Protection for Fundamental Freedoms of Persons and Peoples*, (Leyden, 1959), 2 vols. ; Kamleshwar Das, "*Human Rights and the United Nations*" ; *The Indian Year Book of International Affairs*, Vol. VII (1958), pp. 52-88 ; Boris Mirkine-Guetzevitch, "L' O.N.U et la doctrine moderne des droits de l'homme", *Revue generale droit internationale publique*, Vol. XXII (1951), pp. 16-98 ; *Ibid.*, Vol. XXIII (1952), pp. 34-60 ; Myres S. McDougal and Associates, *Studies in World Public Order* (New Haven, 1960), pp. 335-403 ; Quincy Wright, "National Courts and Human Rights : The Fujii Case", *American Journal of International Law*, XLV (1951), pp. 62-83.

[67] Lauterpacht, *op. cit.*, pp. 147, 151.

"If...the inspiring words, so many times repeated, of the United Nations Charter are not to be taken as sheer mockery and humbuggery of the people of the world, that Charter itself, with its clear statement of major purpose and several undertakings, must be construed not as precluding member States from further concern and agreement about human rights but rather as obligating them to such action".[68] It was also argued that the practice of States has long justified intervention by one State in the affairs of another on the grounds of humanity. Hence the provisions of the Charter together with the resolutions of the Economic and Social Council should certainly be considered as an advance on the previous position and the Assembly was entitled to take notice of such situations.[69] A very spirited defence of human rights and fundamental freedoms was made by Dr. Alfaro of Panama who along with Dr. Evatt of Australia had played a very prominent part in the formulation of the domestic jurisdiction clause. Criticizing the policies of the South African government regarding the persons of Indian origin he said:

> Now, is paragraph 7 a real barrier? Are human rights essentially within the domestic jurisdiction of the States? My answer is no, and a hundred times, no. I submit that by the San Francisco Charter, human rights have been taken out of the province of domestic jurisdiction, and have been placed within the realm of international law. I submit that the United Nations have undertaken collectively to proclaim, to promote and to protect human rights, and by so doing, the Members of the community of States, by the greatest of all covenants of history, the San Francisco Charter, have given birth to a new principle of the law of nations, the principle that the individual as well as the State is subject to international law.[70]

[68] McDougal, *op. cit.*, pp. 359, 372.

[69] Mr. Colina (Mexico): *U.N.* General Assembly, Ist Session, Part II, A/C. 1 & 6 (26 November, 1946), p. 23; Dr. Evatt (Australia) in the Mindzenty Case: *Ibid.*, 3rd Session, Part II, General Committee (6 April 1949), pp. 15-16; Mr. Ocampo (Chile) in the Russian Wives Case: *Ibid.*, Part I, Sixth Committee (2 December 1948), pp. 723-5; Mr. Gross (USA): *Ibid.*, (3 December 1948), p. 738; Mr. Spiropolous (Greece): *Ibid.*, (7 December 1948), p. 765; Mr. Belaunde (Peru): *Ibid.*, 3rd Session, Part II, Plenary Meetings (12 April 1949), p. 28

[70] *Ibid.*, Ist Session, Part II, Plenary Meetings, Verbatim Records (8 December 1946), p. 1026 Dr. Evatt further added: "That principle has ceased to be the mere speculation of jurists and writers of pure theories of academies and

In the same case referring to the importance of the Declaration of Human Rights Mr. Romulo of the Philippines said :

> If the Union Government had signed the Charter on the understanding that no effort would be made to define human rights at a later stage, it has committed an error. The authors of the Charter had clearly anticipated the definition of human rights and the formulation of measures to implement them. Their concern was reflected in the fact that the Commission on Human Rights was the only functional commission mentioned by name in Article 60 of the charter and was among the first of such bodies to be created by the Economic and Social Council. The definition of human rights had been deferred to a later stage for the same reasons which caused the United States Bill of Rights to be added to the Constitution twelve years after the drafting of the latter document.[71]

The American representative who also criticized the policies of the Union government added that " there was an important distinction to be drawn between the haphazard, vestigial, unsanctioned violation of human rights which continued to occur in all countries and a government policy which ran counter to the whole current of modern philosophy and scientific knowledge and to the line of social and humanitarian conduct recommended in the Charter ".[72]

institutes. It is now constitutional law, conventional law, positive law, written, the supreme law of humanity. Human rights and freedoms, of course, must necessarily be protected and can only be violated within the frontiers of the State. If the State steps out of its own territory to violate human rights within the territory of another State, then that is an act of war, that is aggression, and that is a fact that comes within the purview of the other provisions of the Charter. Therefore, we must not confuse intra-territorial action with domestic jurisdiction, and we are bound to conclude that although human rights must be exercised and can be violated within the frontiers of the State, the promotion and protection of human rights and freedoms is a matter essentially within the jurisdiction of international law, essentially within the sphere of action of the United Nations." *Ibid.*, pp. 1026-27. A similar argument was also advanced by Mr. Setalvad (India) : *Ibid.*, 3rd Session, Part I, First Committee, *Summary Records* (11 May 1949), p. 309.

71 *U.N.* Doc. A/AC. 38/SR (15 November 1950), p. 263.

72 Mr. Cohen (USA) : *Ibid.*, 3rd Session, Part II, Ad Hoc Political Committee, *Summary Records* (19 April 1949), pp. 89-90; Mr. Harrison (USA) in the Apartheid Case : *Current History*, June 1960, p. 361. Mr. Lionaes (Norway) ; *Ibid.*, Doc. A/SPC/SR. 141 (2 November 1959), para 6 ; Mr. Shanahan (New Zealand), *Ibid.*, A/SPC/SR. 142 (3 November 1959), para. 4.

Field-Marshal Smuts and later representatives of the Union government have taken the stand that mere mention of human rights in the various provisions of the Charter, does not testify to their binding effect ; that they were incorporated into the Charter in order to serve as goals to be aspired for; that the human rights and fundamental freedoms are not defined in the Charter but had been left as " uncertain, vague and nebulous concepts, so that Member States could not be said to have undertaken any obligations whatever moral obligations may rest upon them."[73]

This position which has been maintained by the South African government and supported by many others rests on an evasion of the issue rather than on refutation of India's argument. For, this view rests on the assumption that the human rights provisions are not binding because the particular rights are not specifically defined and the scope of the subject matter is not clear. It would mean that whenever an international standard would be made available, the Charter provisions would begin to apply retrospectively. In other words, if it be recognized that the Universal Declaration of Human Rights has filled the gap, and it certainly does so, then a standard has become available and the provisions of the Charter should be considered as applicable. But this has been denied at a later stage arguing that human rights will cease to be domestic only when a convention to that effect may have been signed and ratified by the respective States.[74]

It must be pointed out that the Charter, despite the difficulties of interpretation, cannot be considered as absolutely barren of legal norms regarding human rights. For if it be presumed that all these provisions represent only the aspirations of the world community, it would do injustice to the seeming pledge contained in Article 56 and amount to a *reductio ad absurdum* of some of the most vital provisions of the Charter.[75] The practice of the United Nations has underlined the necessity of distinguishing civil and political rights from economic and social rights. While the first category must be considered as outside the reserved domain, the latter would constitute the aspirations of the world community and consequently restricted by Article 2(7) of the Charter.[76] The activities

[73] *Ibid.*, Ist Session, Part II, A/C. 1 & 6 (21 November 1946), p. 4; Mr. Gonges (South Africa) : *Ibid.*, Doc. A/AC.38/SR. 41 (24 November 1950), p. 252.

[74] For example see the observations of Sir Hartley Shawcross (UK), *Ibid.*, Ist Session, Pt. II, A/C. 1 & 6 (25 November 1946), p. 15.

[75] Preuss, *op. cit.*, p. 584; Lauterpacht, *op. cit.*, p. 178.

[76] Preuss, *Ibid.*, p. 586. The Report of the Commission on Human Rights

of the Union government certainly come within the first category. This position can be maintained not only on the basis of the views of the majority of delegates who have consistently maintained the competence of the United Nations in the human rights sphere, but even out of the arguments of the most zealous adherents of the sanctity of Article 2(7). There is no doubt that the South African government has stood for a strict sanctity of domestic jurisdiction but at the same time she has recognized that there are certain rights which cannot be suppressed without violating the Charter. In a memorandum submitted during the Second Session of the General Assembly, the Union government argued that the Charter protected only fundamental and essential rights and reference to distinctions of "race, sex, language or religion" occurring in Articles 1(3), 13, 55(*c*) and 70(*c*) do not apply to independent rights in themselves but occur in juxtaposition with, and as an amplification of the meanings of the words " human rights and fundamental freedoms ". Hence unless the fundamental nature of a right was shown, the restriction of Article 2(7) would stand. As "human dignity", the statement added, " in itself did not constitute a recognized fundamental human right, the racial policies of the Union government could not be restricted by the human rights provisions of the U.N. Charter."[77] Mr. Lawrence of South Africa argued this point in the following words :

> In fact, there are certain basic rights with which no one would disagree, such as the right to exist, and to obtain the means of subsistence, the right of freedom of conscience and of speech, the right of free access to courts of justice. Those were the basic rights without which there could be no human dignity. South Africa recognized those rights and had not violated them. Moreover, it observed the terms of the Charter which stated that there should be no distinction based on race, sex, religion or language in respect of such rights.

He could not agree, however, that "human dignity con-

says: "The 'domestic jurisdiction' of States to which the above-mentioned article referred, if rightly interpreted, only covered questions which have not become international in one way or another. Once States agreed that such questions should form the subject of a Declaration or Convention, they clearly place them outside their 'domestic jurisdiction' and Article 2 paragraph 7 became inapplicable." *U.N.* Economic and Social Council, 3rd year, 6th Session, Suppl. No. 1, *Report of the Commission on Human Rights*, p. 36.

[77] *Ibid.*, Doc. A/387 (15 September 1947), pp. 5-6.

stituted a recognized fundamental human right, since the elements of human dignity had yet to be defined. In fact human susceptibilities varied so much between nations and between individuals that it was difficult to say what those elements were."[78]

The argument of the Union government had a positive aspect also. While on the one hand she has refused to be held responsible for the violation of the human rights provisions of the Charter, on the other she has insisted that its policies were fully in line with promoting fundamental human rights and freedoms. She has argued that the policies of racial discrimination were essential in order to guarantee to every racial group the unquestioned and fundamental right of survival and advancement which could be guaranteed to the coloured people only by putting into effect the segregation laws. Segregation, it was argued, was not devised as an instrument of oppression but as a means to the achievement of the very object of the prevention of the liquidation of racial groups as well as the " great losses to humanity in the form of cultural and other contributions represented by that human group." Consequently its policies helped the coloured people to protect and preserve their culture and hence the various laws were consistent with the purposes and principles of the Charter. Rather, these policies contributed to the great goals which the United Nations had in mind. In the language of the memorandum :

> The effect of the abolition of all distinctions would be among others, to throw open to European...penetration, all native reserves in the Union and in South West Africa, where economically less powerful racial groups are today protected against acquisition by Europeans and Indians of the land without which these groups would be lost in one heterogeneous mass of landless paupers ; it would entail the repeal of statutes which allow members of native races to live and arrange their affairs according to their own native laws or customs or which require children of a racial group to receive tuition in their mother tongue. —Not only would modern arms and ammunition be made freely available to races still in a relatively primitive state of development, to conduct faction fights with deadly effect, but they would also have free access to intoxicant liquors, which has in other continents led to the decimation of aboriginal inhabitants of a

[78] *Ibid.*, General Assembly, 2nd Session, First Committee, Summary Records (17 November 1947), p. 474.

more advanced development. This the Union Government conceive to be a denial of the unquestioned fundamental right which every race including the European races of the Union as well as the most primitive of the native races, has to advancement and survival, a right which the General Assembly recognized in no uncertain terms when it declared genocide to be an international crime.[79]

There is no doubt that the South African delegation engaged in these legal niceties in order to wear down the argument of India and other protagonists of the expanded role of the United Nations rather than with the intention of accepting the validity of even this narrow sector of human rights.[80] It shows that the Charter is not absolutely barren of legal norms regarding human rights and fundamental freedoms. The recognition of this limited sector as regulated by a positive norm of United Nations jurisprudence adds to the efficacy of the view that certain human rights can no longer be claimed to rest within the domestic jurisdiction of States. We may, therefore, conclude that the whole case of the Union of South Africa regarding the policies of apartheid is based on very weak foundations and is contrary to the great tide of international dependence towards which the world is moving. The Declaration of Human Rights, the activities of the Human Rights Commission and the discussion and recommendations regarding several such matters by the General Assembly "shows an increasing concern of the United Nations for the protection of human rights in individual countries." This is an attitude which seems successively to override and reject arguments based on a restrictive interpretation of Article 2(7). Moreover, a general study of the provisions relating to the Purposes and Principles of the Charter and powers and limitations of the principal organs of the United Nations in carrying them out, leaves no room for doubt that under the Charter, the General Assembly is empowered to undertake any investigations and make any recommendations to Member States that it deems desirable in order to enforce the Purposes and Principles of the Charter among which the respect for human rights and fundamental freedoms is outstanding. The exercise of the powers and functions devolving on the Assembly in such matters does not constitute an interven-

[79] *Ibid.*, Doc. A/387 (15 September 1947), pp. 8-9.

[80] Mr. Gallagan (USSR) called these interpretations "ludicrous attempts" to justify racial discrimination. *Ibid.*, Plenary Meetings, Verbatim Records (20 November 1947), p. 1144.

tion within the meaning of Article 2(7) of the United Nations Charter.[81]

CONCLUSION

The opinions of international lawyers, judges of the international court of justice as well as of many national judicial tribunals, and the practice of the United Nations overwhelmingly support the contention of the Indian government that the discriminatory policies of the South African government is an item which may legitimately be dealt with by the United Nations. It is quite evident that discussion of such a matter together with all the means " necessary and proper " towards satisfying the procedural requirements cannot be barred by the limitation of Article 2(7). Moreover, since the so-called matters of domestic jurisdiction are always relatively so, the interested party cannot be allowed to interpret the term broadly in its favour. As in this case, treaties have been concluded between India and South Africa regarding the subject-matter; the development of international law on the subject has made such matters of international concern as is quite evident from the opinion of the World Court in the case of Nationality Decrees in Tunis and Morocco. In such cases it is the world organization which should have the final determining authority. The interest which the various States have shown in the betterment of the Asian and Native people in the Union of South Africa and the resentment and protests which the apartheid policies have generated all over the world cannot by any stretch of imagination be considered as the private affair of the Union government. Not only the General Assembly but the Security Council also has taken positive action calling upon the Secretary General to make arrangements for upholding the UN Charter in South Africa.[82] This should convince the Union government that the opposition of the UN members to the policies of apartheid springs from a genuine concern on the part of world public opinion. To let the South

[81] See the statement of the Chairman of the African Group at the United Nations, 23 March 1960 on the Sharpeville incident. *Current Studies*, June 1960, p. 360. Also Hugo Tamm in *Jus Gentium Acta Scandinavica*, Vol. 1 (1949), p. 381 ; Jones, *op. cit.*, p. 256 ; McDougall, *op. cit.*, pp. 335-403 esp. 402-3 ; Jessup, *op. cit.*, p. 88.

[82] See the arguments of Mr. V. K. Krishna Menon (India) on 5 November 1959 in the Special Political Committee of the UN. *Foreign Affairs Record* (December 1959), p. 466 ; Mr. De Souza (Brazil) : *U.N.* Doc. A/AC. 72./SR. 19 (26 October 1953), para. 27. *Supra.*, n. 65

African government exercise a domestic jurisdiction veto in the matter would be tantamount to allowing her to become a judge in her own cause. That would be contrary to the very idea of justice itself.[83]

[83] Professor Waldock has concluded his study of this point in the following words: "In general it seems that the doctrine of the reserve domain, as a limit upon the jurisdiction of the legal tribunals, is both artificial and destructive of the avowed object of the acceptance of their jurisdiction. For it confuses jurisdiction with substantive rights and obligations. It tends to give air of respectability to what is nothing more than a refusal to allow international obligations to be juridically enforced by a spurious appeal to a constitutional doctrine. If given wide scope it tends to emasculate the vital principle of international law that a State may not plead its own domestic law...as an excuse for not performing its international obligations." Waldock, *op. cit.*, p. 142. Also see the views of Professor McDougal on "Perspectives for an International Law of Human Dignity", *op. cit.*, pp. 987-1019. This treatment is sympathetic to such a development.; also Jessup, *op. cit.*, p 41.

2

INDO-PAKISTAN WATER DISPUTE

THE Indo-Pakistan water dispute which is a legacy of the withdrawal of the British from the Indian sub-continent, is one of the most widely publicized disputes which has arisen in recent years. The importance of such a dispute lies in the fact that water used for irrigation and electric energy is an indispensable means of economic growth and social welfare. This is all the more true in the case of those countries which have achieved independence recently and hence are anxious to modernize their agriculture and step up industrial production. Such improvements would, therefore, depend on tapping all the available resources, actual and potential. It is no accident that a scramble for water has taken place between India and Pakistan both of which have backward agricultural economies.

But, while by its very nature water creates problems of economics, if it is the subject of an international dispute, it must be viewed in the context of the rules of internationl law. However desirable it may be to meet the essential economic needs of the States concerned, such a justification must be sought in the existing rules of international law which regulate relations among those States on the specific issues. The law of international rivers should serve as a guide in such controversies.

HISTORICAL BACKGROUND

In the north-west of the Indian sub-continent, the British government laid a vast net-work of canals in order to supplement the poor rainfall vitally needed for irrigation purposes. These canals were fed with the waters of the river Sindh and its five tributaries the Jhelum, the Chenab, the Ravi, the Beas and the Sutlej. This arrangement was helpful in making the dry and arid land vulnerable to fruitful cultivation and permanent colonization. It was on account of these irrigation facilities that agriculture made tremen-

dous strides and the area had come to be known as the granary of India.[1]

The river Sindh has its source in Tibet and after flowing through Kashmir enters Pakistan before it empties into the Arabian sea. The river Jhelum rises in Kashmir and enters Pakistan after it emerges from the hills. With the exception of the Beas which flows wholly in India and the Sutlej which rises in Tibet, the other rivers have also their sources in India and enter Pakistan before flowing through the Indian plains.[2]

The partition of the Indian sub-continent into the sovereign States of India and Pakistan, besides creating problems of economic and social nature, brought about an important change in the geographical setting. A line was drawn through the heart of the Punjab with the consequence that the western part containing heavily developed irrigated areas together with a major part of the canal system was given to Pakistan while the eastern part containing very meagre irrigation facilities was allotted to India. But since the tributaries of the Indus river flow through India before feeding the net-work (now in Pakistan), India was put in the position of an upper riparian State possessing the capacity to control the flow of water. In some cases while the canal is located in Pakistan, the headwork is situated in India.[3] The Indian Independence Act of 1947 and the Radcliffe Award failed to provide for any predictable procedure for the solution of conflicts arising from the use of such water.[4]

The dawn of Independence in India brought about a new awareness and a sense of responsibility to the Indian people regarding their economic condition. Punjab, which at one time was a surplus wheat producing area, could not produce enough even for her own people. In order to exploit water sources both for power and irrigation, the Indian government chalked out elaborate plans. In the Punjab, schemes were finalized in order to make the region a surplus grain producing area. This could be done by using all land

[1] For the topography of the Indus plains see, O.H.K Spate, *India and Pakistan* (London, 1954), pp. 454-84. Regarding the early development of irrigation in Punjab, A.N. Khosla, "Development of the Indus River System: An Engineering Approach", *India Quarterly*, Vol. XIV (1958), pp. 239-43; F. J. Fowler, "The Indo-Pakistan Water Dispute", *The Year Book of World Affairs* (1955), pp. 196-111.

[2] *The Indus Basin Irrigation Water Dispute* (New Delhi, 1953), p. 3; Khosla, *op. cit.*, pp. 233-5.

[3] Fowler, *op. cit.*, pp. 111-12.

[4] But for a contrary view see *ibid.*, p. 111.

for cultivation with the help of a net-work of canals. The Bhakra Dam is a symbol of new India marching towards the goals of economic self-sufficiency. India thus could very conveniently divert the flow of the Indus tributaries in order to achieve her objective of irrigating lands hitherto uncultivated and within a generation create fertile lands and blooming gardens.[5]

As India needed water for her own development plans it was natural that she would tap all the available resources. This action was bound to affect the normal supply of water to Pakistan through channels of the pre-partition days. That is why Pakistan charged India with intent and conspiracy to starve Pakistani people by stopping water supply and turning west Punjab into a wasteland.[6] India on her part has pointed out that the three western rivers which flow primarily through Pakistan have between them sufficient water not only to feed the existing net-work but even to cope with extensive developmental schemes. Hence she has every right to exploit the water vitally needed for her existence and Pakistan cannot veto Indian schemes for the utilization of water supply simply because it would disturb the normal flow of water in her canals.[7]

In the context of this controversy it is relevant to discuss the positions of the two parties under customary rules of international law and with reference to treaties which may have been concluded by them.

PRACTICE ACCORDING TO CUSTOMARY INTERNATIONAL LAW

Since irrigation affects the volume of a river's flow, the diversion of water from an international river is bound to lessen the normal supply of water to the lower riparian States. To the extent that the various riparian States depend on this water, their interests are consequently bound to come into conflict with each other. It is no accident, therefore, that a great many disputes originating from diversion of such waters have come into existence.[8]

[5] For the Indian plans regarding the development of irrigation in the Indus Basin see, *The First Five Year Plan* (New Delhi, 1951), p. 267.

[6] For Pakistan's case, *The Indus Basin Waters Dispute between India and Pakistan* (New York: Institute of Pacific Relations, 1958) cyclostyled paper read at the I.P.R. Conference held at Lahore in 1958, pp. 1-12.

[7] *Indian Record* (London), Vol. I, No. 38 (1949), p. 5.

[8] This section is substantially based on my article entitled "The Diversion of International Rivers", *Indian Journal of International Law*, Vol. 1 (July

As irrigation on an extensive scale has been resorted to only during the last sixty odd years, the practice of States has not evolved any positive rule of international law imposing limitations on the freedom of a State to use such waters at her own discretion. Both custom and treaties fail to point to a customary norm. The lack of a positive rule of customary international law is quite evident from the standard treatises on the subject which even fail to discuss the problem. Those who have made a passing mention of the problem have tried to formulate a rule without investigating the material. They have rather been carried away by emotional bias and wishful thinking.[9] If there is no norm of conventional or custo-

1960), pp. 38-52. The subject of diversion of international rivers has come into prominence in recent years. Most of the material regarding international rivers deals primarily with navigation. For a proper understanding of the problem, the following studies are helpful: F. J. Berber, *Rivers in International Law* (London, 1959); W. L. Griffin, "The Use of Waters of International Drainage Basins under Customary International Law", *American Journal of International Law*, Vol. 53 (January 1959), pp. 50-80; J. Simsarian, *Diversion of International Waters* (Washington, 1939); H. A. Smith, *The Economic Uses of International Rivers* (London, 1931); and *Legal Aspects of Hydro-Electric Development of Rivers and Lakes of Common Interest, U.N.* Doc. E/ECE/136. Besides the disputes regarding the waters of the Rio Grande, the Columbia and the Indus and its tributaries, live controversy has arisen regarding the Nile and the Jordan. See, *The Nile Waters Question—The Case for the Sudan and the Case for Egypt and the Sudan's Reply* (Khartoum: Ministry of Irrigation and Hydro-Electric Power, 1955); also "The Nile Waters Agreement", *The Egyptian Economic and Political Review*, May-June, 1960, pp. 31-3. Also M. G. Ionides, "The Disputed Waters of Jordan", *The Middle East Journal*, Vol. VII (1953), pp. 153-64; C.A. Pompe, "The Nile Waters Question", *Symbolae VERZIJL* (The Hague, 1958), pp. 276-94.

[9] The lack of a customary rule of international law is quite evident from a perusal of some of the standard works on international law. In the following books a discussion of navigation of international rivers has been made with nothing whatsoever regarding the diversion of international waters for irrigation purposes. This would mean that in the opinion of these writers no positive rule worth the name had come into existence and the subject was not, therefore, of any considerable importance. Baty, *International Law* (London, 1909); Birkenhead, *International Law* (London, MCMXVII); Dickinson, *The Equality of States in International Law* (Cambridge, 1920); Hatschek, *An Outline of International Law* (London, 1930); Hall, *A Treatise on International Law* (Oxford, 1890); Lawrence, *The Principles of International Law* (London, 1937); Redlich, *The Law of Nations* (New York, 1937); Twiss, *The Law of Nations* (Oxford, 1884). A recent writer of note has dealt with only navigation which gives the presumption that in his view rules regarding diversion did not exist. See, P. Corbett, *Law and Society in the Relations of States* (New York, 1951). Even Oppenheim's treatise on International Law refers only to a general principle. It was only after the publication of Smith's book that Prof. Lauterpacht in a recent edition

mary international law imposing upon a State the obligation to behave in a certain way, the State is under international law legally free to behave as it pleases.[10] Unless it is shown to the contrary, it is a rule of international law that the State concerned has the unrestricted right to the water flowing through her territory. A clear formulation of this rule was made by Attorney General Harmon in 1895 while justifying the action of the United States in reducing the flow of the river Rio Grande which was ordinarily used by the people in Mexico. Arguing on the premise of the territorial jurisdiction of the sovereign State he reached the conclusion that " the rules, principles and precedents of international law impose no liability or obligation on the United States " to behave otherwise.[11] This doctrine which has become a part of international jurisprudence has served as a sheet-anchor of later writers and statesmen.[12]

added a rule regarding diversion. This is so recognized by the distinguished writer. *International Law* (London, 1955), Vol. I, 8th Edition, p. 475, Note. 2. The same is also true of Prof. Brierly who has also borrowed it from Smith. But the incorporation of this rule is of doubtful validity because even Professor Smith recognizes that " it would be premature at present to claim them [general trend of practice] as positive rules which the consent of states has incorporated into the accepted body of international law ". Smith, *op. cit.*, p.150. Professor Brierly also says that " the customary law [on this point] is still in an earlier stage of development ". Brierly, *The Law of Nations* (Oxford, 1955), p. 204.

[10] " . . . . That there is no rule referring to a case can only mean that there is no rule imposing upon a state...the obligation to behave in this case in a certain way. He who assumes that in such a case the existing law cannot be applied ignores the fundamental principle that what is not legally forbidden to the subject of law, is legally permitted to them . . . ." Hans Kelsen, *Principles of International Law* (New York, 1952), p. 306.

[11] " . . . . That the rules of international law imposed upon the United States no duty to deny to its inhabitants the use of the waters of that part of the Rio Grande lying wholly within the United States, although such use resulted in reducing the volume of water in the river below the point where it ceased to be entirely within the United States, the supposition of the existence of such a duty being inconsistent with the sovereign jurisdiction of the United States over the national domain." The Attorney General in concluding his opinion said : "The case presented is a novel one. Whether the circumstances make it possible or proper to take any action from considerations of comity is a question which does not pertain to this Department ; but that question should be decided as one of policy only, because, in my opinion, the rules, principles and precedents of international law impose no liability or obligation upon the United States." Quoted in J. B. Moore, *A Digest of International Law* (Washington, 1906), Vol. I, p. 654.

[12] This practice was accepted as law even by the International Waterway Commission, embracing an equal number of Americans and Canadians as

Those who endeavour to show that the Harmon doctrine has been repudiated even by the United States, point to the international regimes which have been established by the United States and other countries in order to settle mutual controversies. They argue that the existence of a number of treaties dealing with the diversion of international waters show that the doctrine as such has not been put into practice and thus has lost all validity. They

members, in the course of a joint report of 15 November 1906, on the application of the Minnesota Canal and Power Company of Duluth, Minnesota, for permission to divert certain waters in the State of Minnesota from the boundary waters between the United States and Canada. It said: " It can hardly be declared that, in the absence of treaty stipulation, a country through which streams have their course or in which lakes exist can in the exercise of its sovereign powers, rightfully divert or otherwise appropriate the waters within the territory for purposes of irrigation, the improvement of navigation, or for any other purpose which the government may deem proper. This principle was lucidly stated by Mr. Harmon...Gt. Britain has also insisted upon the same principle in the matter of the navigation of the lower St. Lawrence. It would seem, therefore, to be settled international law, recognized by both countries, that the exercise of sovereign power over waters within the jurisdiction of a country, cannot be questioned, and that, notwithstanding such exercise may take such form that will be injurious to another country through which the waters of the same streams or lakes pass, it cannot be rightfully regarded as furnishing a cause of war . . . ."Compiled Reports of the International Waterway Commission 1905-1913, Sessional Papers No. 19a, Canada Sessional Papers, Vol. XLVII(1913), pp. 3635 quoted in C. C. Hyde, *International Law Chiefly as Interpreted by the United States* (Boston, 1945), Vol. I, p. 567, note. 5. Also see the remarks of Mr. Adee, Acting Secretary of State to the Mexican Ambassador at Washington on 1 May 1905. "A careful examination of the law of nations on the subject has failed to disclose any settled and recognized right created by the law of nations by which it could be held that the diversion of the waters of an international boundary stream for the purpose of irrigating lands on the other side of the boundary and which would have the effect to deprive land on the other side of the boundary of water for irrigation purposes would be a violation of any established principle of international law. Nevertheless the Government of the United States is disposed to govern its action . . . in accordance with the high principles of equity and friendly sentiments which should exist between good neighbours ". *Ibid.*, p. 567. For a similar view of a Canadian member of the International Joint Commission (Mr. George Kyte) see, R.D. Scott, "The Canadian-American Boundary Waters Treaty: Why Article II", *The Canadian Bar Review*, Vol. XXXVI(4) (1958), p. 532. In 1907 Mr. C. P. Anderson advised the Secretary of State thus: " It will be observed that so far as these matters, (i.e., use and diversion of waters) are embraced wholly within the territory of either the United States or Canada or relate to waters not actually contiguous to the boundary line, or to waters flowing from one country into the other across the boundary, international law is not directly concerned with them." Quoted by Scott, *ibid.*, pp. 543-4. J. Simsarian after making an authoritative study of disputes in the

operate on the assumption that once the interests of the lower riparian State have been recognized by a treaty, even if to a very minor extent, the matter no longer remains within the domestic jurisdiction of the upper riparian State and the grounds for the exercise of the Harmon doctrine are no longer present.[13]

It must be pointed out that this kind of thinking is based on faulty logic and lack of clear understanding of international law.[14] In international law a State has every right voluntarily to assume obligations or give up rights enjoyed by custom or treaty. In the Wimbledon Case, the Permanent Court of International Justice had made it quite clear that through the exercise of the treaty-making power a State may even part with its sovereignty.[15] In the matter of diversion of international rivers, an upper riparian State is not obliged under international law to cater to the needs of the lower State. But there is nothing which prevents her from voluntarily conferring certain rights on the other party. The States enter into

American and European jurisdictions reached a similar conclusion: "There is increasing tendency of States to seek to settle conflicts involving their rights to divert international waters, by means of agreements embodying compromises to the mutual benefit of the States affected by the use of such international waters . . . . However, until such conventions are put into effect, the rights of States are determined by governing rules of customary international law which place no limitations on the right of a State to divert the waters of a tributary (wholly within a State) of boundary waters and the waters of a river which crosses an international boundary line." *The Diversion of International Waters*, p. 111. For views based on the Harmon doctrine (Kluber, Heffter, Bousek, Schade, Mackay, Hyde, Fenwick and Briggs) see Berber, *op. cit.*, pp. 14-19.

[13] The representative view in this case is that of Mr. John G. Laylin, "Principles of Law Governing the Use of International Rivers", *Proceedings of the American Society of International Law*, April 25-27, 1957, p. 36; also his paper read at the Buenos-Aires conference of the Inter-American Bar Association Meeting held in 1957. Library of Congress, Catalogue Card Number 58-1212 (Washington, D.C. April, 1958), pp. 7-9.

[14] Mr. Laylin has tried to develop the principle of equitable apportionment on the basis of the various treaties settling water disputes, decisions of the US Supreme Court regarding inter-state controversies and recommendations of the various private bodies favouring codification of water rules. It must be pointed out that Mr. Laylin's is an attempt at a restatement of law as it ought to be rather than as it is. This section very clearly shows the fallacies of his arguments.

[15] *PCIJ*, Series A/1, p. 25: "The Court declines to see in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act, an abandonment of its sovereignty. No doubt any convention creating any obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty."

these treaties not on account of a customary rule of international law which forces them to do so but due to political considerations like good neighbourliness, humanitarian feelings or international comity. To the extent that the freedom of action of the upper riparian State has been limited by these treaties, the sovereignty of the State is affected. But this limitation is not caused by the impotency of the Harmon doctrine. It is the product of the voluntary action of the sovereign State. This should not delude us into thinking that the original rule stands redundant. The States are entitled by customary international law to accept limitations on their freedom of action.[16]

It is instructive to note that in some of the most important treaties dealing with the problem, even recognition of the interest of the lower riparian States in the waters of the river, have not deprived the upper riparian States of their sovereign rights guaranteed by customary international law. In the US-Mexican treaty of 1906, the Boundary Waters treaty of 1909 between Great Britain and the United States and the Indo-Pakistan treaty of 1948 dealing with some of the most controversial disputes, the upper riparian States have not only reiterated and reserved rights guaranteed under the Harmon doctrine, but have more or less helped in codifying the doctrine which hitherto was considered as *de lege ferenda*. In other words, through the treaties a declaration regarding the customary rule of international law on the subject has been made. Far from undermining the foundations of the claims to sovereignty, these treaties serve as a prop to the doctrine.[17]

[16] *Ibid.* ; for similar interpretations see Chief Justice Taney : "The comity thus extended . . . to other nations is no impeachment of sovereignty ; it is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it as a part of the voluntary law of nations." *Bank of Augusta* V *Earle,* 13 Pet. 519, p. 589 ; Oppenheim, *op. cit.*, pp. 33-5 : "In their intercourse with one another states observe not only legally binding rules and such rules as have the character of usages, but also rules of politeness, convenience and good-will. Such rules of international conduct are not rules of law, but of Comity."

[17] In a memorandum dated December 1907 in which Mr. Anderson discussed the Clinton-Gibbons draft treaty he referred to the Harmon doctrine. Quoted by Scott, *op. cit.*, p. 544, 89. Mr. Scott's comments are worth reproducing : "If the Harmon doctrine was accepted in 1909 as stating the quality of unrestricted territorial supremacy, to which there was common consent among nations, the doctrine might be held to be a rule of international law. One

In the case of the Rio Grande river, after a good deal of mutual negotiations, a treaty was signed at Washington in May 1906 which incorporated the Harmon doctrine. Articles IV and V make it quite explicit that the treaty was intended to protect the American claim of absolute rights for the territorial sovereign as stated by Mr. Harmon in the course of the diplomatic discussion.[18] The importance of the reservation lies in the fact that the United States held herself free to reassert the doctrine whenever it may suit her interest to do so.[19]

could then argue fairly that 'exclusive jurisdiction and control' is merely declaratory of the same rule and the phrase would have the same all-embracing effect for all acts done within territorial boundaries as when the doctrine was stated negatively." *Ibid.*, p. 544. Also, F.J. Berber, "The Indus Water Dispute", *Indian Yearbook of International Affairs*, Vol. VI (1957), p. 60; Abraham H. Hirsch, " Utilization of Rivers in the Middle East ", *American Journal of International Law,* Vol. 50 (1956), p. 83.

A similar practice has also been recognized by C. G. Fenwick, *International Law* (New York, 1948), p. 391 : "It is doubtful whether international law can be said to have recognized any servitude corresponding to that existing in civil and common law in the form of a right to the uninterrupted flow of streams and rivers. Conscious of the possession of the traditional rights of sovereignty, states in possession of the upper waters of a river have not recognized any general obligation to refrain from diverting its waters and thereby denying to the states in possession of the lower waters the benefit of its full flow. Such restrictions as have been recognized have been in every case the result of treaty stipulations."

[18] Article IV : "The delivery of the water as herein provided is not to be construed as a recognition by the United States of any claim on the part of Mexico to the said waters; and it is agreed that in consideration of such delivery of water, Mexico waives all claims to the waters of the Rio Grande for any purpose whatever between the head of the present Mexican Canal and Fort Quitman, Texas, and also declares fully settled and disposed of, and hereby waives, all claims heretofore asserted or existing, or that may hereafter arise, or be asserted, against the United States on account of any damages alleged to have been sustained by the owners of land in Mexico, by reason of the diversion by citizens of the United States of waters from the Rio Grande." Article V : "The United States, in entering into this treaty, does not thereby concede, expressly or by implication, any legal basis for any claims heretofore asserted or which may hereafter be asserted by reason of any losses incurred by the owners of land in Mexico due or alleged to be due to the diversion of the waters of the Rio Grande within the United States ; nor does the United States in any way concede the establishment of any general principle or precedent by the concluding of this treaty. The understanding of both parties is that the arrangement contemplated by this treaty extends only to the portion of the Rio Grande which forms the international boundary, from the head of the Mexican Canal down to Fort Quitman, Texas, and in no other case ." *U.S. Treaty Series*, No. 455, 34 Stat. 2953.

[19] Jacob Austin, "Canadian-United States Practice and Theory respecting the International Law of International Rivers : A Study of the History and

A similar intention is present even in the US-Mexican treaty of 1944.[20]

In the dispute over the Columbia river water basin the two countries (Canada and the United States) decided to settle it through an International Joint Commission provided for in the Boundary Waters treaty of 1909. Article II of this treaty provided that : "each of the High Contracting Parties reserves to itself...the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters. . . ."[21] This provision is undoubtedly based on the Harmon doctrine. As pointed out by Professor Charles E. Martin " the stark language of the treaty clearly and unmistakably gives Canada the right to divert the water" from any point within her borders.[22] This interpretation has also received support from many other distinguished commentators.[23]

Influence of the Harmon Doctrine ", *The Canadian Bar Review*, Vol. XXXVII (1959), p. 410 ; Smith, *op. cit.*, p.42.

[20] *U.S. Treaty Series*, No. 994, 59 Stat. 1219. With regards to this treaty, US Secretary of State, Mr. Stettinius had said that it (treaty) was based on international comity. This shows that America has not repudiated the Harmon doctrine. Austin, *op. cit.*, pp. 430-31.

[21] See the text of the treaty in *American Journal of International Law*, Vol. 44 (1910), p. 239.

[22] Charles E. Martin, " The Diversion of Columbia River Waters ", *Proceedings of the American Society of International Law*, April 25-27, 1957, p. 5.

[23] Also for the same C.E. Bourne, *International Law and the Diversion of the Columbia River in Canada*, Publ. Univ. British Columbia Lecture Ser. No. 27 (1956), pp. 17-25; Ladner, *Ibid.*, pp. 1-15 ; General A.G.L. McNaughton, *Problems of Development Of International Rivers on the Pacific Watershed of Canada and the United States*, 5th World Power Conference (Vienna, 1956), Section O, Paper 182 0/4 ; Letter of Sir Wilfried Laurier in Gibbon's Papers, C., Vol. 1 ; Sir Wilfried Laurier, *Debates*, House of Commons (10 December 1910), Cols. 911-12. For a very scholarly article on this problem see Scott, *op. cit.*, pp. 511-47. The learned author has used the primary sources citing the intention of Chandler, Root, Jordan and other members of the US Congress and their counterparts in the Dominion legislature. He has concluded with the following words : "...testimony is almost conclusive as to both sides" understanding of the treaty. The negative statement of the Harmon doctrine was urged by the United States and Canada acquiesced. Although the treaty does not expressly mention proprietary diversions by the nation, it would appear, on the basis of the foregoing reasoning, that national proprietary diversions are among the acts to which, under the treaty, no liability attaches. It would follow, therefore, that article II provides absolute privilege to both nations and their sovereign body politic and that any complaint with respect to diversions by government agencies can have only political significance." pp. 545-6.

The Harmon doctrine has been applied even with more vigour in the Indo-Pakistan treaty of May 1948.[24] This treaty incorporated the contention of the East Punjab (India) Government that she has proprietary rights over the waters of the rivers flowing through her territory. India's claim to stop the supply of water to Pakistan on a gradual basis pending the latter country's making alternative arrangements was also accepted. Pakistan had also agreed to deposit with the Reserve Bank of India seignorage charges for the water to be supplied in the interim period. All these provisions strengthen the Indian argument of the " exclusive jurisdiction and claim " of water in her own parts of the rivers. "The Government of India merely agreed to delay the exercise of its legal rights (which had been accepted by Pakistan) so as to enable Pakistan to make alternative arrangements ".[25] All these examples help to support our basic argument that even in treaties the sanctity of domestic supremacy has been maintained. One may then argue fairly that the Harmon doctrine is merely declaratory of the existing rule.[26]

Some writers have laid too much stress on " the general principles of law " as a source in justifying opposition to the Harmon doctrine.[27] Evidently they have been forced to resort to this vague and indeterminable source in order to rope in arguments from municipal law and help resolve a conflict by appealing to metaphysical concepts. It is submitted that custom and treaties are the only real sources of international law and in themselves are sufficient to take care of every situation.[28] Those who feel the necessity of falling back upon " general principles of law " believe that there are *gaps* in international law.[29] It is not possible to accept this proposition. If a plaintiff State is not able to support its case by reference to a specific rule of customary or conventional international law, the plaintiff has no case in international law and the

[24] *U.S. Treaty Series* 54 (1950), 45.

[25] K.K.R., " The Problem of the Indus and Its Tributaries : An Alternative View ", *The World Today*, Vol. 14 (June 1958), p. 271.

[26] Scott, *op. cit.*, p. 544.

[27] For example, Mr. Laylin has very vigorously developed the argument on the basis of this premise. Inter-American Bar Association Meeting, *op. cit.*, pp. 7, 22-9.

[28] See Kelsen, *op, cit.*, pp. 393-4 for a discussion of Article 38 of the Statute of the International Court of Justice on the basis of which this argument has been advanced by many.

[29] For an illuminating discussion of this concept see, Torsten Gihl, "Lacunes du droit international ", *Nordisk Tidsskrift for International Ret*, Vol. III (1932), pp. 37-64.

matter belongs to the domestic jurisdiction of the defendant State. *Ce qui n'est pas defendu est permis.*[30] The Harmon doctrine is a principle of customary international law and hence there is no need to fall back upon the general principles of law. If the Harmon doctrine is abhorrent to any legal system[31] the correct way is to change the rule through recognized procedures. But so long as the rule exists, it must be considered as valid no matter that its effectuation would do injury to a party.[32]

Some writers have put too much reliance on the decisions of the United States Supreme Court and other national judicial tribunals as evidence of existing law regarding diversion of international waters.[33] Such an approach is the outcome of the idea that municipal law practices approximate to corresponding international principles and hence must be accepted whenever desired. As is true of the " general principles of law " the decisions of national tribunals deciding national controversies cannot help towards locating the rules of international law. The Indian branch of the International Law Association in one of its papers has very clearly laid bare the fallacy of this argument.[34] We do not know of a single case decided by the American courts where the rules of international law may have been applied. Rather a case may be made that through *obiter dicta* the US courts have given the stamp of approval to the Harmon doctrine.[35] As the cases in the American realm concerned the States as members of the federation, these decisions have relevancy only from the standpoint of municipal jurisprudence. As international law is the pro-

[30] "That there is no rule referring to a case can only mean that there is no rule imposing upon a state. . .the obligation to behave in this case in a certain way. He who assumes that in such a case the existing law cannot be applied ignores the fundamental principle that what is not legally forbidden to the subject of law is legally permitted to them. . . ." Hans Kelsen, *Principles of International Law*, p. 306.

[31] Mr. Laylin in Inter-American Bar Association Meeting, *op. cit.*, p. 7.

[32] Hans Kelsen, *Peace Through Law* (Chapel Hill, 1944), pp. 23-32, also his *Principles of International Law*, p. 305.

[33] Those who have relied on the analogies have used the decisions in cases like, *Kansas* V *Colorado* ; *Wyoming* V *Colorado* ; *Connecticut* V *Massachusetts* ; *New Jersey* V *New York* and many other cases in similar jurisdictions. See Hackworth, *op. cit.*, Vol. I, pp. 580-84.

[34] *Consideration of the Question of Diversion of Waters in International Rivers by the International Law Association* (Indian Branch of the International Law Association), 23 pp.

[35] Robert D. Scott, " Kansas V Colorado Revisited ", *American Journal of International Law*, Vol. 52 (1958), pp. 452, 453.

duct of the sovereign States, the rules of law dealing with the disputes among semi-sovereign States or provinces cannot be accepted as the rules of international law. The Supreme Court has applied an inter-state common law within the framework of the US Constitution.[36] The same is true of the cases decided in other national jurisdictions.[37]

References have been made by some to the Indus (Rau) Commission Report arguing that the Commission has also deprecated the sovereignty principle and has supported the equitable apportionment principle.[38] It must be pointed out that the Rau Commission had to deal with a problem similar to the one in American jurisdiction. The various provinces and the states in the northwest of the Indian sub-continent did not have independent personalities. Sovereignty in that area was exercised by the British government through the Indian government in New Delhi. That is why the Commission's arguments cannot be applicable to disputes arising between independent entities.[39] Even in this case the Commission recommended a right of estoppel saying that Punjab should not divert water before a period of three years had elapsed.[40] In other words, the recommendations allowed an interim relief to the complainants on the assumption that Punjab would be allowed

[36] *Ibid.*, pp. 433, 442, 444.

[37] The decisions in cases like *Wurttemberg and Prussia* V *Baden*; *Aargau* V *Zurich*; *The Meuse River* and many others show the same. Simsarian, *op. cit.*, pp. 128-33, 91-2, 103-4.

[38] *Proceedings of the American Society of International Law*, April 25-27, 1957, pp. 21-8.

[39] It was very clearly mentioned by the Commission that the dispute was covered by the Act of 1935 rather than by any concrete rule of international law: "Under the Government of India Act 1935 . . . water supplies, irrigation and canals, is a subject falling in the Provincial Legislative List. If there were no limiting provisions in the Act, each Province would, by virtue of this entry and section 49(2), be entitled to do what it liked with all water supplies within its own boundaries. There are, however, sections 130 to 132 of the Act which impose certain restrictions on the provinces in this matter. If any action is taken or proposed to be taken by any one Province or any of its inhabitants, the Government of the latter Province may complain to the Governor General under section 130. Thereupon, after appointing a Commission of investigation, the Governor General . . . may make such orders as he may deem proper in the matters; and under section 131(6) of the Act, the orders so made are binding on the Province thereby affected. The Act therefore recognizes the principle that no province can be given an entirely free hand in respect of a common source of water such as an inter-provincial river." *Report of the Indus Commission* (Simla, 1942), Vol. I, p. 21.

[40] *Ibid.*, p. 60.

to assert her rights as soon as alternative arrangements were made by the lower riparian State. In the dispute between India and Pakistan, the former had given ample time to the latter in order to tap alternative resources. To that extent the approach of the Indian government coincides with the basic recommendations of the Commission. In the present view it is not an accepted principle of international law to apply the analogies of private law to the field of international law. Even Professor Lauterpacht who was an outstanding supporter of the application of private law analogies recognized that inferences drawn by way of analogies " assume rather prematurely, the existence of a legal regulation, where, in fact, no regulation yet existed ".[41]

We may conclude, therefore, that it is a customary rule of international law that a State has the exclusive jurisdiction and control over waters of international rivers which pass through its territory. Due to political, economic, strategic, humanitarian and many other considerations, however, the upper riparian States have not rigidly adhered to this rule. Keeping in view their own national self-interest, they have voluntarily conferred benefits on the lower riparian States by signing bilateral or multilateral treaties. The existing rights and duties regarding the waters of a particular international river, must therefore, be determined on the basis of existing treaties.[42]

THE ROLE OF THE WORLD BANK

This survey of the theory and practice of the law on the point reveals very clearly that India had not violated any rules of international law by using the waters of the Indus river system in order to irrigate her own desert lands. This was essential in order to make up for the loss of fertile lands suffered as a consequence of partition. But Indian leaders, it seems, have not been carried away by legal subtleties and rigid juristic thinking. True to Indian traditions they have viewed the problem of water as a human problem capable of being solved on the basis of humanitarian con-

[41] H. Lauterpacht, *Private Law Sources and Analogies of International Law* (London, 1927), p. 86; also see H. A. Smith, " Diversion of International Waters. " *British Yearbook of International Law*, Vol. XI (1930), p. 195 where he says that " private-law analogies are apt to be misleading ".

[42] See my article in *The Indian Journal of International Law*, Vol. I (1960), p. 46 ; Also J. S. Bains, "Equitable Solution for Water Disputes", *The Hindu*, 16 September 1961, pp. 6, 22.

siderations. That is why it has been felt that with the help of modern engineering devices both India and Pakistan could use the existing supply of water successfully for material prosperity which otherwise would go waste by flowing into the Arabian Sea.[43]

An opportunity for such a solution was provided by Mr. David Lilienthal, formerly head of the Tennessee Valley Authority, who after visiting the canal areas in India and Pakistan in 1951 observed that the Indo-Pakistan water dispute was not a religious or political dispute but a feasible engineering and business problem which should be settled on the engineering basis with the help of the World Bank. Noting the vast quantities of water wasted to the sea especially from the western rivers he concluded that water in the Indus rivers could be found not only for ensuring Pakistan's existing uses but also at the same time for the most needed irrigation in India's undeveloped areas.[44]

This idea was taken up by Mr. Eugene Black, Chairman of the World Bank at whose insistence a working party studied the problem by collecting a large mass of engineering data after an extensive tour of the Indus basin. The Bank first tried to reconcile the proposals of the two sides for sharing the water, and after years of effort decided that this was impossible. Finally on the basis of its own study the World Bank in February 1954 put forward a basic plan of its own.[45] It proposed that the entire flow of the western rivers, the Indus, the Jhelum and the Chenab, should be available for the exclusive use of Pakistan excepting some insignificant flow

[43] K.K.R, *op. cit.*, p. 268-9 ; Khosla, *op. cit.*, pp. 233-53. Eugene P. Black, "The Indus Project: Background of the Indian-Pakistani Agreement", *The New York Times* (International Edn.) 11 December 1960.

[44] "I suggest that this unnecessary controversy can be solved by common-sense and engineering to the benefit of the people who live by the waters of the Indus river. The urgent problem is how to store up now wasted waters, so that they can be fed down and distributed by engineering works and canals, and used by both countries, rather than permitted to flow to sea unused. This is not a religious or a political problem, but a feasible engineering and business problem for which there is plenty of precedent and relevant experience . . . the river pays no attention to partition . . . she just keeps rolling along." *Colliers*, 4 August 1951 quoted in *The Indus Basin Irrigation Water Dispute* (New Delhi, 1953), pp. 32-7.

[45] For the various communications of the Bank officials suggesting the solution of the problem on the basis of Lilienthal's article see, *ibid.*, pp. 38-47; also Shri Jawaharlal Nehru in the Lok Sabha, *Lok Sabha Debates*, 12th Session, Second Series, Vol. XLVIII-No. 13 (30 November 1960), Cols. 3217-19.

in Jammu and Kashmir. The entire flow of the eastern rivers, the Sutlej, the Beas and the Ravi, should be available for the exclusive use of India " except that for a specified transitional period India would continue to supply from these rivers in accordance with an agreed schedule the historic withdrawals from these rivers in Pakistan ". In addition India should bear the cost, in proportion to the benefits to be received by her, of cerain link canals in Pakistan required " to replace from the western rivers the supplies now received by some Pakistan canals from the eastern rivers."[46] Under this plan India would have received 20 percent of the total flow of the Indus basin rivers for its 26 million acres while Pakistan would have received 80 percent for its 39 million acres.[47]

The proposals of the World Bank which have been substantially based on the 4 May 1948 agreement recognizing India's right of progressively reducing supply to Pakistan in order to give reasonable time to Pakistan to tap alternative resources, was accepted by the Indian government even if it meant giving up rights on certain vital supplies flowing through India and bearing considerable expenses in order to build link canals.[48] The Pakistan government, however, was quite adamant and wanted that India should agree to meet the existing requirements from the eastern rivers besides paying for the building of the link canals. That is why she did not categorically accept the Bank's proposals but instead prolonged the deadlock over the issue by putting forward such reservations, modifications and " understandings " as to constitute not acceptance but non-acceptance. Moreover, without committing herself to the basic recommendations of the Bank she demanded India must pay for the link canals already built in Pakistan.[49]

The Indian government was willing to pay for the link canals if

[46] For a summary of the World Bank's proposals see, *Indian Yearbook of International Affairs* (1957), pp. 59-60.

[47] Regarding the total flow for each State under the Bank Proposals see the statement of Mr. S. K. Patil to the Lok Sabha, *The Tribune* (Ambala), 27 March 1958.

[48] " It was in a spirit of good neighbourliness that we accepted the bank's proposals, although it meant giving up our rights on certain vital supplies flowing through our territory ". Mr. S. K. Patil quoted in *The Tribune*, 26 July 1957.

[49] See the statement of Mr. Hafiz Mohammed Ibrahim, Union Minister for Irrigation and Power, *The Hindustan Times*, 2 September 1958 ; In reply to the critics of the 1960 Treaty. Mr. Ibrahim has said that Pakistan's original estimate of India's expenses for the link canals was over 300 crores of rupees. *Lok Sabha Debates* (30 November 1960), Col. 3235.

the arrangement was to lead to an overall settlement.[50] Pakistan, however, stalled the matters and failed to pay for the water she had used on an interim arrangement basis.[51] That is why, in order that her own development plans may not suffer India served notice on Pakistan that she would divert all the waters of the Punjab rivers by 1962 in case Pakistan failed to come to an understanding with her.[52]

The World Bank through its Vice President Mr. Iliff continued its efforts to bridge the gulf separating the two parties and through her good offices tried to influence them towards a satisfactory solution of the problem on the basis of its own proposals. Besides, she, with the help of some other States, offered a large sum in order that India may not be unnecessarily burdened and that Pakistan may be encouraged in accepting the proposals. Finally after persistent efforts of Mr. Iliff extending over six years the two countries were brought together to accept a draft treaty dealing with the whole problem of the Indus waters. This treaty was signed on 19 September 1960 at Rawalpindi by the Indian Prime Minister and the Pakistan President, and has been duly ratified.[53]

THE INDUS WATERS TREATY 1960

(*A*) *Division of Water*

The Indus Waters Treaty 1960, as it is called, follows the pattern of the World Bank proposals according to which, with certain exceptions, the waters of the eastern and western rivers have been exclusively allotted to India and Pakistan respectively as a final settlement of the problem. India would be entitled to the unrestricted use of the waters of the eastern rivers subject to the follow-

[50] See the statement of Mr. S. K. Patil, Union Minister for Irrigation and Power in reply to the statement of Mr. Muzaffar Ali Quzilbash, Pakistan's Industrial Minister. *The Times of India*, 1 January 1958.

[51] See the statement of Mr. Hafiz Mohammad Ibrahim, Indian Minister of Irrigation and Power, made in the Lok Sabha on 16 February 1959. *The Hindu*, 17 February 1959.

[52] For notice of stoppage of water by 1962 see the statement of Mr. S. K. Patil in the Lok Sabha. *The Times of India*, 13 February 1958.

[53] The treaty came into force with the exchange of instruments of ratification in a brief and simple ceremony held in New Delhi on 12 January 1961. Mr. N. D. Gulati Additional Secretary in the Union Ministry for Irrigation and Power represented India at the function while Pakistan was represented by Mr. G. Mueenuddin, Secretary, Ministry of National Resources. Sir K. Guinness, a World Bank official was also present. *The Times of India*, 13 January 1961.

ing limitations in favour of Pakistan.[54] In the first place, out of these rivers Pakistan would be entitled to use some water for domestic or other non-consumptive purposes.[55] Secondly, she may withdraw from the Basanter tributary of the Ravi such waters as may be available and necessary for the irrigation of not more than 100 acres annually.[56] She may also withdraw for the areas cultivated on *Sailab* from the Ravi tributaries named Basanter, Bein, Tarnah and Ujh for maximum annual cultivation acreage in the amount of 14,000, 26,600, 1,800 and 2,000 respectively.[57] Thirdly, all the waters, while flowing through Pakistan, of any tributary which, in its natural course, joins the Sutlej main or the Ravi main, after these rivers have finally crossed into Pakistan shall be available for the unrestricted use of Pakistan. And if Pakistan should deliver any of the waters of any of such tributary into a reach of the Ravi main upstream of its crossing into Pakistan, India would not make use of these waters.[58]

Finally, during the transition period which may extend up to a maximum of 31 March 1973, India is required to limit its withdrawals for agricultural use and abstraction for storage in favour

[54] Article II, paragraph 1, p. 4 (The text of the treaty used here is the one supplied to the author by the Government of India and printed at the Photo Litho Wing, Government of India Press, New Delhi-1).

[55] Article II, paragraph 2, p. 4

The term " Domestic Use " means the use of water for:

(*a*) drinking, washing, bathing, recreation, sanitation (including the conveyance and dilution of sewage and of industrial and other wastes), stock and poultry, and other like purposes;

(*b*) household and municipal purposes (including use for household gardens and public recreational gardens); and

(*c*) industrial purposes (including mining, milling and other like purposes); but the term does not include Agricultural Use or use for the generation of hydro-electric power. *Ibid.*, Article I, paragraph 10, p. 3.

The term " Non-Consumptive Use " means any control or use of water for navigation, floating of timber or other property, flood protection or flood control, fishing or fish culture, wild life or other like beneficial purposes, provided that, exclusive of seepage and evaporation of water incidental to the control or use, the water (undiminished in volume within the practical range of measurement) remains in, or is returned to, the same river or its Tributaries; but the term does not include Agricultural Use or use for the generation of hydro-electric power. *Ibid.*, Article I, paragraph 11, p. 3.

[56] Article II, paragraph 3 as per Annexure B dealing with Agricultural Use by Pakistan from certain Tributaries of the Ravi. Annexure B. paragraph 2.

[57] *Ibid.*, paragraph 3.

[58] Article II, paragraph 4, p. 5.

of deliveries to Pakistan from the eastern rivers.[59] From the Ravi, India has agreed to continue the supply of water to Central Bari Doab channels for *Rabi* and at specific times for *Kharif* according to indents to be placed by Pakistan up to a specific maximum quantity from specific channels.[60] Pakistan has also been given the option to request India to discontinue the deliveries to CBDC at the points specified and to release instead equal supplies into the Ravi main below Madhopur.[61] From the Sutlej and the Beas, India has agreed to limit its withdrawals in *Kharif* at Bhakra, Nangal, Rupar, Harike and Ferozepore in specific quantity[62] which delivery may be reduced from the latter place as soon as the Rasul-Qadriabad and the Qadriabad Ballocki links are ready to operate Pakistan's Sutlej Valley canals.[63] For the *Rabi* also, India has agreed to deliver water at Ferozepore for use through the same canals according to a specific demand.[64]

It is clear that during the transition period Pakistan shall be entitled to receive unrestricted use of the substantial waters of the eastern rivers even if her link canals system may have finally been completed and may be capable of replacement from western rivers. Hence India will have to view its requirements for developmental purposes within the framework of her international commitments. Naturally her development plans will suffer.[65] Moreover, India

[59] *Ibid.*, paragraph 5.

[60] Annexure H entitled *Transitional Arrangements*, paragraph 6. These supplies have to be made through *Rabi* and during April 1-10 and September 21-30 in *Kharif* at the points noted in Table A. For Table A, see Annexure H, p.3.

[61] *Ibid.*, paragraph 20, p. 8 : " Pakistan shall have the option to request India to discontinue the deliveries to CBDC at the points specified in Table A and to release instead equal supplies (that is, those due under the provisions of Paragraphs 7 to 11) into the Ravi main below Madhopur. This option may be exercised, effective 1 April in any year, by written notification delivered to India before 30 September preceding. On receipt of such notification, India shall comply with Pakistan's request and thereupon India shall have no obligation to make deliveries to CBDC at the points specified in Table A during the remaining part of the Transition Period, but will use its best endeavours to ensure that no abstraction is made by India below Madhopur from the supplies so released. "

[62] *Ibid.*, paragraph 21.

[63] *Ibid.*, paragraph 30.

[64] *Ibid.*, paragraphs, 34, 35, 36, 37, 38, 39, 40.

[65] It would mean that water for the Rajasthan Canal will not be available. The loss to the people can be imagined by the vastness of the canal. The main canal will be 425 miles long with 400 miles of branch canals and 2,000 miles of distribution channels. Besides navigation over 200 to 300 miles of the canal, it will colonize 1,000,000 people and produce millions of tons of food. *The*

will be required to meet the maximum Pakistan demands in the transition period even in very lean years when the flow of water in the rivers may not be enough due to natural reasons. As the treaty does not cover such situations, in abnormal years the two States may blame each other for evading the obligations as was being done four years ago.[66]

Pakistan on her part is entitled to receive all the waters of the western rivers for unrestricted use and India is not permitted to interfere with these waters except as specifically allowed.[67] This may include the use of water for domestic and other non-consumptive purposes and agricultural use.[68] According to the latter heading India will be entitled to withdraw from the Chenab main such waters as she may need for agricultural use from Ranbir Canal and Partap Canal limited to the maximum withdrawals noted in the treaty.[69] India will also continue to irrigate from the western rivers those areas which were so irrigated as on the effective date (1 April 1960)[70] and also make withdrawals subject to certain provisions to the extent she may consider necessary to meet the irrigation needs of certain areas in these river basins.[71] Moreover, within the limits of the maximum irrigated cropped areas,

Hindustan Times, 27 March 1958; also *Ibid.*, 20 May 1959. The canal was supposed to carry 18,500 cusecs. On account of the treaty it would carry the irrigation water upto 1,200 cusecs in 1961, 2,100 cusecs in the following year and 3,000 cusecs in 1963. The government accordingly will not rush the completion of the canal system because of the lack of water. *The Times of India*, 2 September 1960.

The Indian government, however, has taken the stand that enough water will be available for the existing use of the Rajasthan canals. And because it is not possible to use that water because it will take some time before the canals are ready, the treaty does not adversely affect the interests of Rajasthan. See the statement of Mr. Hafiz Mohammad Ibrahim in the Lok Sabha, *Lok Sabha Debates* (30 November 1960), col. 3240.

66 Such a situation had arisen in 1957 and 1958 when Pakistan accused India of unilaterally choking off water supply. Actually the supply was abnormally low in the rivers and to that extent use had to be curtailed. See the press note of the Union Ministry of Irrigation and Power, *The Hindustan Times*, 14 June 1958; Also the statement of Mr. Jaisukhlal Hathi, Deputy Minister of Irrigation and Power laid on the table of the Lok Sabha. *The Hindu*, 2 September 1958.

67 Article III, paragraph 1.

68 *Ibid.*, paragraph 2 (a, b, c).

69 Annexure C entitled *Agricultural Use by India from the Western Rivers*, paragraph 3 for full details.

70 *Ibid.*, paragraph 4.

71 *Ibid.*, paragraph 5.

there shall be no restriction on the development of such of these areas as may be irrigated from the general storage.[72] The releases, the general storage and the conservation storage shall be made in accordance with a schedule to be determined by the Commission which shall keep in view, the effect, if any, on agricultural use by Pakistan consequent on the reduction in supplies available to Pakistan as a result of the withdrawals made by India and the requirements, if any, of hydro-electric power to be developed by India from these releases.[73] Moreover, on the tributaries of the Jhelum, on which there is any agricultural use or hydro-electric use by Pakistan, any new agricultural use by India shall not be so made as to affect adversely the existing use by Pakistan.[74]

Besides the above, India has been allowed the use of the waters of the western rivers for the generation of hydro-electric power, and the design, construction and operation of new electric plants shall be governed by specific provisions.[75] Those hydro-electric plants which were in operation on 1 April 1960 like the ones at Pahalgam, Bandipur, Dechhigam, Ranbir Canal, Udhampur and Poonch will not be affected by the treaty.[76] In the case of certain plants which have not been completed in accordance with the design adopted prior to the effective date but which are actually under consideration, there shall be no restriction on their being completed by India.[77] Regarding the new plants, India will have to conform to certain requirements.[78] Moreover, there shall be no restriction on the construction and operation by India of new hydro-electric plants on any irrigation channel taking off from the western rivers provided the works incorporate no storage other than pondage and the dead storage incidental to the diversion structure and no additional supplies are run in the irrigation channel for the purpose of generating hydro-electric power.[79]

Furthermore, India will also be entitled to operate those storage works on the western rivers which were in operation on the effective date and there shall be no restriction on the construction and opera-

[72] *Ibid.*, paragraph 6.

[73] *Ibid.*, paragraph 8.

[74] *Ibid.*, paragraph 9.

[75] Annexure D entitled *Generation of Hydro-Electric Power by India on the Western Rivers*, paragraph 1.

[76] *Ibid.*, paragraph 3. The details about the capacity of each plant are found in this paragraph.

[77] For the names of plants and their capacity see *ibid.*, paragraph 4.

[78] *Ibid.*, paragraph 8(a-g).

[79] *Ibid.*, paragraph 24.

tion of small tanks.[80] The single-purpose and multi-purpose reservoirs which may be constructed by India after the effective date may have the aggregate storage capacity not exceeding certain quantities specified in the treaty.[81] Moreover, India will be entitled to construct on the Jhelum main such works as were under construction on the effective date.[82] Any storage work to be constructed on a tributary of the Jhelum on which Pakistan has any agricultural use or hydro-electric use shall be so designed and operated as not to adversely affect the then existing agricultural use or hydro-electric use on that tributary.[83] The design of the storage works shall also conform to a certain pattern.[84]

Besides the division of waters from these rivers, the two States are required to use these facilities in the normal manner without doing any material damage to the other party. For example, the non-consumptive use of the water should not be so made as to materially change the flow in any channel to the prejudice of the uses on that channel by the other party.[85] The measures for flood protection or flood control, schemes of drainage, river training, conservation of soil against erosion and dredging, removal of stones, gravel, or sand from the beds of the rivers, the increase of the catchment area and the operation of the storage dams, barrages, and irrigation canals should be accomplished as far as practicable without any material damage to the other party.[86] Moreover, the parties must prevent undue pollution of the waters and take all reasonable measures to ensure any sewage or industrial waste having been treated before it is allowed to flow into the river.[87] All water used for industrial purposes must be returned to the same river.[88] Above all, Pakistan should use its best endeavours to construct and bring into operation, with due regard to expedition and economy, that part of a system of works which will accomplish the replacement, from the western rivers and other sources, of water supplies for irrigation canals in Pakistan which, on 15

[80] Annexure E entitled *Storage of Waters by India on the Western Rivers*, paragraph 3.

[81] For the details see *ibid.*, paragraph 7.

[82] *Ibid.*, paragraph 9.

[83] *Ibid.*, paragraph 10.

[84] For the details of the design see *Ibid.*, paragraph 11.

[85] Article IV, paragraph 2 of the Treaty.

[86] *Ibid.*, paragraphs 3-9.

[87] *Ibid.*, paragraph 10.

[88] Article IV, paragraph 13 of the Treaty.

August 1947, were dependent on supplies from the eastern rivers.[89]

(*B*) *Financial Provisions*

The World Bank Proposals of 1954 were not accepted by Pakistan for many years time because she wanted that India should not only pay for the building of link canals but also meet her developmental needs. The Indian government was quite reluctant in the beginning to bear such large expenses but in the interest of international comity and on the assurance of the World Bank that the latter would bear considerable portion of the cost to meet Pakistan's expenses agreed to compromise on the issue. That is why the original estimates were toned down to meet India's objections.[90]

Under the final settlement of the water dispute, India has agreed to make a contribution of £ 62,060,000 sterling towards the cost of the replacement works for feeding the Pakistan canals.[91] This lump sum which will remain unchanged in spite of any change in the par value of the currency shall be paid by India in ten equal instalments on the first of November of each year to the Bank for the credit of the Indus Basin Development Fund in Pounds Sterling or any other currency or currencies as may from time to time be agreed between India and the Bank.[92] These payments will not be subject to any set-off on account of any financial claims of India on Pakistan arising otherwise than under the provisions of this Treaty.[93]

In order that Pakistan may not too readily ask for the extension of the transition period which she is entitled to for a maximum period of three years, she would be required to compensate India for the use of the waters during this period. In this case the Bank will pay to India out of the Indus Basin Development Fund[94] a total of £3,125,000, £6,406,250 or £9,850,000 depending on whether

[89] *Ibid.*, paragraph 1.

[90] For the details see the statement of Mr. S. K. Patil, Union Minister for Irrigation and Power. *The Times of India*, 1 January 1958.

[91] Article V, paragraph 1.

[92] *Ibid.*, paragraphs 1-3.

[93] *Ibid.*, paragraph 4.

[94] The Indus Basin Development Fund is established by the Indus Basin Development Fund agreement which became effective on the ratification of the Indus Waters Treaty. The agreement provides the fund with the following resources of foreign exchange:

Treaty Contributions by India	£ 62,060,000
Grants from the Governments of:	

the transition period has been extended for one or two or three years.[95]

Although in the same section it is very clearly mentioned that except for these "payments as are specifically provided for in this Treaty, neither Party shall be entitled to claim any payment for observance of the provisions of this Treaty, or to make any charge for water received from it by the other Party",[96] it is found that in Annexure H some additional provisions for financial payment are incorporated.[97] According to Sections 48 and 50 of this Annexure in case Pakistan has not exercised the option under Paragraph 20,[98] she will have to pay to India the proportionate working expenses for the Madhopur Headworks and the carrier channels, the amount to be calculated according to a certain formula.[99] Similarly, regarding the delivery of water into the Dipalpur canal pending the discontinuance according to section 64, Pakistan will pay the proportionate working expenses incurred on the Ferozepore Headworks including the part of the Dipalpur canals

Australia	£A 6,965,000
Canada	$C 22,100,000
Federal Republic of Germany	DM 126,000,000
New Zealand	£NZ 1,000,000
United Kingdom	£ 20,860,000
United States	$ 177,000,000
Proceeds of United States Government loan to Pakistan	$ 70,000,000
Proceeds of an International Bank loan to Pakistan	$ 80,000,000
Contribution by Pakistan	£ 440,000

All these contributions will be freely usable or convertible for purchases in member countries of the International Bank and in New Zealand and Switzerland.

In addition the Fund will be provided with the following resources of Pakistan rupees to finance expenditure in Pakistan currency:

A contribution by the United States in Pakistan rupees equivalent to $ 235,000,000

(This contribution will be in the form of grants or loans or both, to Pakistan as agreed between the United States and Pakistan.)

A contribution by Pakistan in Pakistan rupees equivalent to £9,850,000

The total resources of the Fund in foreign exchange and in Pakistan rupees will be of the order of the equivalent of $894 million (about £320 million). The Fund will be administered by the International Bank. *Commonwealth Survey*, Vol. 6. No. 20 (27 September 1960), pp. 921-2.

[95] Article V, paragraph 5 of the Treaty.

[96] *Ibid.*, paragraph 7.

[97] Annexure H is entitled *Transitional Arrangement.*

[98] *Ibid.*, paragraph 20.

[99] For this formula see Appendix III to Annexure H.

in India.[100] The working expenses will consist of expenditures under account heads like maintenance and repairs, extension and improvements and tools and plant and pro-rata establishment charges on account of divisional and circle offices and chief engineer's direction charges.[101] Pakistan is required to pay fixed overhead charges of £60,000 and £1,10,000 sterling respectively per year in both the cases.[102] The final adjustment will be made after proper audited expenditures have been fixed.[103]

These provisions show that India will be compensated for the use of present facilities by Pakistan in the interim period. It is understood that the total in both the cases per year will come to approximately £1,70,000. This amount, however, will cover the cost of working expenses, not the payment for the use of water by Pakistan in the interim period which in terms of money must be a substantial sum.[104] Moreover, it is very possible that even this sum may be paid for Pakistan out of the Indus Basin Development Fund. In other words, according to these arrangements besides the large Indian contribution for the benefit of Pakistan, India will have to spend money for the development of the eastern rivers amounting to millions of rupees while Pakistan will obtain all these facilities virtually free of cost.[105]

[100] See paragraphs 48 and 49 of Annexure H. Paragraph 64 reads as follows: " Pakistan shall have the option to request India to discontinue the deliveries into the Dipalpur Canal. This option may be exercised effective 1st April in any year by written notification delivered to India before 30th September preceding. On receipt of such notification, India will cease to have any obligation to make deliveries into the Dipalpur Canal during the remaining part of the Transition Period."

[101] Appendix III to Annexure H (2-i, ii) and Appendix IV(2).

[102] *Ibid.*, Appendix III (i-c) and Appendix IV (i-c).

[103] Annexure H, paragraph 50.

[104] Mr. Harish Chandra Mathur, M. P., has estimated that India would lose Rs. 100 crores every year because of the giving away of water in the Transitional Period. *Lok Sabha Debates* (30 November 1960), cols. 3182-3. For the amount still due with Pakistan for using the water through Central Doab and Bari Canals see *The Hindu*, 20 July 1958. Upto 19 February 1959, the Government of Pakistan had paid a sum of Rs. 3,11,60,874 for the period ending 30 September 1957 and discontinued payment thereafter. As such a sum of Rs. 25, 97, 931 was still due from Pakistan for the period upto 31 March 1959. *The Hindu*, 17 February 1959.

[105] *The Times of India*, 2 March 1960; also Mr. A. C. Guha, M.P. *Lok Sabha Debates* (30 November 1960), col. 3192, or 3194, 94. The Indus settlement also envisages the construction of a large earth-fill dam on the Beas River in India. This dam will create a reservoir with a live capacity of 5.5 million acre-feet, and a hydro-electric potential for generating 200,000

(C) Permanent Indus Commission

In order to deal with problems arising out of the Treaty, it has been decided that a Permanent Indus Commission composed of a Commissioner each from the two States should be appointed. This Commission composed of high ranking engineers competent in the field of hydrology and water-use will serve as the regular channel of communication between the two governments on all matters relating to the implementation of this Treaty, to promote co-operation between the parties, development of the waters of the rivers and also exchange information and data.[106] It shall meet regularly at least once a year in November or such other month as may be agreed upon.[107] In order that the commissioners may be able to function independently, the two governments have agreed to accord to the Commissioner of the other State the same privileges and immunities as are accorded to the representatives of Member States to the principal and subsidiary organs of the United Nations under Convention on the Privileges and Immunities of the United Nations.[108] The Commissioners may be accompanied by two advisers or assistants. The Commission shall submit to the two governments an annual report on its working for the year. Each government will bear the expenses of its Commissioner and his staff.

All disputes between the parties arising out of the Treaty shall first be examined by the Commission which will attempt to resolve them by agreement.[109] If, however, it is unable to do so, at the request of either of the Commissioners, the differences falling within the category of matters mentioned in Part 1 of Annexure F shall be dealt with by a Neutral Expert[110] in accordance with the pro-

kilowatts of power. Together with the Bhakra reservoir on the Sutlej River and with the newly constructed Rajasthan canal system, it will serve as the basis for irrigating large areas in Punjab and in the Rajasthan desert. But the Beas project will not be financed from the Indus Basin Development Fund. The foreign exchange cost will be met by a loan of $ 33 million from the United States government and a loan of $ 23 million from the International Bank. The rupee expenditure will be borne by the Government of India. *Commonwealth Survey*, Vol. 6. No. 20 (September 1960), p. 921.

106 Article VIII, paragraph 4 of the Treaty. Mr. H. C. Kalra, Engineering Consultant in the Ministry of Irrigation and Power, Government of India, and Mr. M.A. Hamid, Chief Engineer of Pakistan Water and Power Development Authority have been named as their representatives on the proposed Indus Basin Commission. *The Hindustan Times*, 7 January 1961.

107 Article VIII, paragraph 5 of the Treaty.

108 *Ibid.*, paragraph 6.

109 Article IX, paragraph 1 of the Treaty.

110 *Ibid.*, paragraph 2(a).

visions of Part 2 of Annexure F.[111] If, however, the difference does not fall in this category or if the neutral expert considered such a difference to be a dispute, each government may invite the other to settle the dispute by agreement.[112] The services of negotiators or even mediators may be enlisted for the purpose. A Court of Arbitration may also be appointed by a special agreement.[113] It shall consist of seven arbitrators appointed according to a special procedure. This Court shall decide all questions relating to its competence and procedure. All such decisions shall be made by a majority of those present and voting, each arbitrator having one vote. The Court will be entitled to apply the law of the Treaty, and whenever necessary for its application and interpretation, international conventions establishing rules which are expressly recognized by the Parties and also customary international law. The award of the Court must be signed by at least four members which would be final and binding on the parties with respect to the dispute.[114]

(*D*) *Future Co-operation*

While the Treaty apportions water on a permanent basis, it has been provided that in future in order to bring the optimum development of the rivers the Parties will co-operate to the fullest extent possible. For this purpose each party will install such hydrologic observation stations within the drainage basins and also meteorological observation stations in order to obtain the necessary data requested by the other party to be used to determine the feasibility of such a joint enterprise. They will also co-operate, on payment by the respective parties, regarding undertaking of drainage and engineering works. These works, however, will be formally arranged between the parties.[115]

(*E*) *Emergency Provisions*

The transition period during which Pakistan is supposed to make alternative arrangements for the replacement of water extends

[111] *Ibid.*, paragraph 2(b).

[112] *Ibid.*, paragraph 4. Annexure G entitled *Court of Arbitration* provides for the composition and functions of the Court.

[113] *Ibid.*, paragraph 5.

[114] Annexure G. esp. paragraphs 4, 11, 16, 23, 25, 27 and 29.

[115] Article VII of the Treaty.

over a duration of ten years and will come to an end on 31 March 1970.[116] This period, however, can be extended under the Treaty for a maximum of three more years and in any case shall come to an end not later than 31 March 1973.[117] The Treaty is not very clear as to whether it is within the discretion of India to grant such extension or not. One of the provisions says that if " Pakistan is of the opinion " that the replacement works cannot be completed unless the transition period is extended, the period *may* be extended at the request of Pakistan.[118] The use of the word " may " gives the presumption that India will have the final discretion in the matter. Another provision, however, mentions that on a request for the same, duly made to India, " the Transition Period shall be extended up to the date requested by Pakistan ".[119] This shows that Pakistan is entitled to get the extension and India is obliged to accede to the request. These two interpretations which are possible on the basis of the wording of the Treaty may bring about confusion and even deadlock in the smooth operation of the Treaty.

But it is clear that in order to seek extension Pakistan must give at least twelve months' notice to India before the due date for the expiration of the transition period. If this is not done, the transition period will come to an end on the due date.[120] The only other possibility is that if within the twelve months prior to such date, heavy flood damage have made it difficult for Pakistan to complete the system of works as planned, she will be entitled to request extension not later than five months before the due date for expiration of the transition period. If this formality is duly fulfilled, India must extend the period.[121]

It is clear, therefore, that in certain cases the extension of the transition period from ten to thirteen years is possible under the Treaty. Although it is very clearly mentioned that " whether or not the replacement...has been accomplished, the transition period shall end not later that 31 March 1973 ",[122] another provision in the Treaty may be used for prolonging the transition period still further. It is provided that if " at any time prior to 31 March 1965 Pakistan shall represent to the Bank that because of the out-

[116] Article II, paragraph 6 of the Treaty.

[117] *Ibid.*

[118] Annexure H, paragraph 52.

[119] *Ibid.*, paragraph 53.

[120] *Ibid.*, paragraph 54.

[121] *Ibid.*

[122] Article II, paragraph 6 of the Treaty.

break of large-scale international hostilities arising out of causes beyond the control of Pakistan, it is unable to obtain from abroad the materials and equipment ", the two parties through the good offices of the Bank may reach mutual agreement regarding modifications of the terms of the Treaty.[123] Although it is not mandatory that India must agree to the extension of the transition period claimed on the basis of abnormal conditions, there is ample room to negotiate for the same under the Treaty. But such a possibility must exist prior to 31 March 1965, before which it is anticipated that Pakistan must have bought all the material and equipment. Moreover, this provision may be used only in case of an international conflict and is, therefore, not applicable if on account of a civil war or some other national calamities, Pakistan is not able to buy the goods.

(*F*) *Miscellaneous Provisions*

The Treaty has some other interesting aspects also. Annexure A deals with exchange of notes between the two governments communicating to each other that on the ratification of the Indus Waters Treaty 1960, the Inter-Dominion Agreement on the Canal Waters Dispute signed at New Delhi on 4 May 1948 and the rights and obligations claimed or arising out of that Agreement shall be

[123] Article X. The Bank has to be satisfied about the genuineness of the case:

...and if, after consideration of this representation in consultation with India, the Bank is of the opinion that

(*a*) these hostilities are on a scale of which the consequence is that Pakistan is unable to obtain in time such materials and equipment as must be procured from abroad for the completion, by 31st March 1973, of the replacement element, and

(*b*) since the Effective Date, Pakistan has taken all reasonable steps to obtain the said materials and equipment and, with such resources of materials and equipment as have been available to Pakistan both from within Pakistan and from abroad, has carried forward the construction of the replacement element with due diligence and all reasonable expedition

the Bank shall immediately notify each of the Parties accordingly. The Parties undertake, without prejudice to the provisions of Article XII (3) and (4), that, on being so notified, they will forthwith consult together and enlist the good offices of the Bank in their consultation, with a view to reaching mutual agreement as to whether or not, in the light of all the circumstances then prevailing, any modifications of the provisions of this Treaty, are appropriate and advisable and, if so, the nature and the extent of the modification.

without effect as from 1 April 1960.[124] It would mean that Pakistan will not be obliged to pay for the use of water and other working facilities during the last twelve years some of which is still due.[125] Although the Treaty clearly mentions that the payments to be made by India for the Indus Fund "shall be made without deduction or set off on account of any financial claims of India on Pakistan arising otherwise than under the provisions of this Treaty" and that " this provision shall in no way absolve Pakistan from the necessity of paying in other ways debts to India which may be outstanding against Pakistan ",[126] the provisions of Annexure A lead to the assumption that the debt owed by Pakistan on account of the use of water facilities under the 1948 agreement will be considered as cancelled. If this assumption is accepted, it would mean that India has come out of the new treaty arrangements economically weakened and perhaps legally hoodwinked.

But in another sense the Treaty is favourable to India because even Pakistan has by implication recognized that the 1948 treaty was effective between the two States till 31 March 1960. This is contrary to the position taken by Pakistan a few years back when she formally denounced this agreement arguing that it was concluded under duress and had, therefore, no validity.[127]

In case the Indus Waters Treaty 1960 is cancelled due to some unforeseen developments, it may be argued that the relations between the two States will then revert to the arrangements of the May 1948 Agreement. If, however, this agreement may not be revived under any circumstances, having been by the latest treaty formally cancelled, in that case the position of India regarding the waters of the Indus Rivers would be guided by the Harmon doctrine which, in the absence of a treaty, is the only yardstick recognized by international law to measure the rights and duties of the interested parties.[128]

Another point also deserves to be mentioned. It is clearly provided in the Treaty that if, after the end of the transition period, India has continued to release her surplus water from the eastern

[124] Annexure A. entitled *Exchange of Notes between Government of India and Government of Pakistan*. Both these notes are dated 19 September 1960.

[125] For a report on this amount see *The Hindu*, 2 September 1958.

[126] Article V, paragraph 4. Mr. Asoka Mehta, M.P., has also indirectly referred to this point. *Lok Sabha Debates* (30 November, 1960), col. 3186.

[127] *United Nations Treaty Series*, Vol. 128 (1952), p. 300; and *The Statesman*, 5 September 1958.

[128] See *supra*, f. n. 11.

rivers to Pakistan, the latter shall not acquire any right whatever by prescription or otherwise, to a continuance of such releases. India's right in all the waters of the eastern rivers will remain intact, and Pakistan cannot make claims on an "historic" basis simply because India had been releasing her surplus water. This is applicable to both the parties[129] and is in consonance with the rules of customary international law as interpreted earlier.[130]

The Treaty contains another important principle which is consistent with the interpretation put forward earlier. It is that "nothing in this Treaty shall be construed by the Parties as in any way establishing any general principle of law or any precedent".[131] This provision would certainly take the wind off the sails of those who have argued that general principles of law should be used in settling such controversies and that these principles have become a part of international jurisprudence. The Treaty clearly mentions that nothing herein "shall be construed as constituting a recognition or waiver of any rights or claims whatsoever of either of the Parties other than those rights or claims which are expressly recognized or waived in this Treaty".[132] In other words the effect of the rules established by this Treaty have validity only within the context of this Treaty and only for the parties.

A final point may also be mentioned. The Treaty shall come into force retrospectively from 1 April 1960 after the ratifications have been exchanged at New Delhi.[133] It "shall continue to be in force till terminated by a duly ratified treaty concluded for that purpose between the two Governments."[134] The incorporation of this provision lends weight to the proposition that a treaty cannot be terminated unilaterally even if a State may be entitled to denounce it according to customary rules of international law. It is submitted that this provision by incorporating a strait-jacket in a legal document may do violence to universally recognized rules of international law regarding voidance, cancellation and denunciation of treaties. Moreover, it would be interesting to study the effect of war between the parties regarding the validity of such undertakings.[135]

129 Article II, paragraph 9 and Article IV, paragraph 14.

130 See the section on customary international law.

131 Article XI, paragraphs 2, 3.

132 *Ibid.*, paragraph 1(b).

133 Article XII, paragraph 2.

134 *Ibid.*, paragraph 4.

135 It is clear that a belligerent State has the right to terminate or regard as

CONCLUSIONS

The exchange of ratification of the Indus Waters Treaty has brought to an end a dismal chapter of relations between India and Pakistan. The Indo-Pakistan water dispute had given a stimulus to unfriendly feelings and it had stood in the way of fruitful co-operation between the two neighbours. Whatever may be the views of the Pakistani people,[136] the credit for the successful conclusion of this treaty should go to India which has agreed to accommodate the interests and wishes of Pakistan even at the expense of her own vital interests. The actions of the World Bank are also commendable. It is clear from the contents of the Treaty that it is India rather than Pakistan which in the interest of good neighbourliness and peace has climbed down from a position legally unassailable and economically beneficial. She has agreed to Pakistan using virtually the whole of the water of the western rivers and also a substantial flow from the eastern rivers for the duration of the transition period. This is a substantial concession when viewed in terms of the vital and immediate needs of her own desert areas and parched lands in Punjab and Rajasthan. The use of this water for irrigation would certainly help her in meeting the problem of wheat shortage which has become a perennial problem of Indian agriculture. Over and above this, she has agreed to pay a large sum of money for the Indus Basin Development Fund in order to help Pakistan build the replacement works. This sum will also to a certain extent affect her already depleted foreign exchange and have an adverse strain on her financial condition. These concessions together with the possibility that Pakistan may even attempt to get the transition period extended after the maximum time limit of thirteen years allowed under the Treaty, makes this bargain overwhelmingly favourable to Pakistan. Even on an equitable basis, India would have

terminated or to suspend or regard as suspended, certain treaties with an opposing belligerent as incompatible with a state of war. To stop the supply of water by one of the belligerents might be compatible with a state of war and hence the treaty in such circumstances may be terminated by the interested party. For the various opinions on the matter, see Harvard Research, *op. cit.*, pp. 1183-1204; McNair, *op. cit.*, pp. 530-51 ; Hackworth V., *op. cit.*, pp. 377-90 ; Hyde II, *op. cit.*, pp. 1546-58 ; Sir Cecil Hurst, " The Effect of War on Treaties ", *British Year Book of International Law* (1921-22), pp. 37-47 ; G. Scelle, " De l'influence de l'etat de guerre sur le Droit Conventional ", *Journal du Droit International Prive*, Vol. 77(1950), pp. 26-87.

[136] For a summary of the views of Pakistan nationals see, Sisir Gupta, " The Indus Waters Treaty ", *Foreign Affairs Reports*, Vol. IX, No. 12 (December 1960), pp. 160-61.

been allotted more water.[137] Keeping these facts in view, one may wonder how far the conclusion of this treaty on the part of India may be considered as an act of statesmanship. India can have one consolation that true to her idealism and spiritual heritage she has agreed to help a State, which at times has even threatened to wage war in order to achieve her objectives.[138]

[137] Some Indian public men have also criticized the Indian government for the conclusion of this treaty. A. C. Guha : "This deal has been quite unfair to India and has been over-generous to Pakistan." Mr. Mahanty has called it a "Treaty of Surrender". *Lok Sabha Debates* (30 November 1960), cols. 3191, 3214.

[138] For example, see the statement of Mr. Patil saying that they (India) were not under any obligation to pay any money to Pakistan to build up her link canals. But then they might ask why the Indian government agreed to pay. He observed: "It is because there is nothing wrong in being good to any one." *The Hindu Weekly Review*, 5 August 1957.

3

THE JAMMU AND KASHMIR QUESTION

ONE of the hurdles which stood in the way of cordial and friendly relations between India and Pakistan has been cleared with the coming into effect of the Indus Water Treaty of 1960. It was felt that this event would be a portent for fruitful negotiation on other outstanding disputes. Recent statements of Field Marshal Ayub Khan, President of Pakistan have, however, served notice on India that the Pakistan government will not extend the hand of friendship unless the Kashmir issue is decided in her favour. It is believed in Pakistan political circles that the Kashmir issue is the real bone of contention between the two neighbours and that if this problem is satisfactorily solved, the other differences may easily be ironed out.[1] That is why the Government of Pakistan occasionally engages itself in whipping up public discontent and frenzy over the issue and we hear of a *jehad* or holy war to settle the issue. It is of interest to note that while passions have clouded the real issues, making it somewhat difficult to look at the problem objectively, the deliberations of the Security Council, far from tackling the problem squarely have confused the issues.[2] It may, therefore, be useful to make a systematic study of the problem, discussing it in its proper context and seeking to apply relevant principles of international law in order to determine the rights and duties of the two parties. Of course, the dispute is entangled with strategic, political, economic and religious considerations[3] but the respective

[1] See the statement of President Ayub Khan made at Dacca on 22 March 1961. *The Pakistan Times,* 23 March 1961 ; *The Dawn,* 23 March 1961. Also see "Pakistan : End of the Water Dispute", *The Round Table,* No. 201 (December 1960), pp. 72-5.

[2] Mr. Menon : "In this context so many trees have grown, and a very considerable amount of undergrowth, that it is impossible to see the wood properly . . . . " *UN* S/PV. 762 (23 October 1957), para 16.

[3] V.P. Menon, *The Story of the Integration of the Indian States* (Bombay, 1956), p. 413 ; also J. Korbel, *Danger in Kashmir* (New Jersey, 1954), p. 25, who believes that it is primarily a religious issue.

rights of the parties may still be debated on the basis of legal rules. The conflict of interests has to be viewed in the context of established legal rights and duties. Although international law is not fully developed, its procedural and substantive rules are sufficiently recognized to cope with any problem. The contrary view would seek perpetuation of the law of the jungle and an anarchic society.[4]

The following questions seem to be involved in any analysis of the legal issues :

(*i*) What was the status of the former princely states before the Indian Independence Act of 1947 came into effect ?

(*ii*) Did the princely states become sovereign as a consequence of the said Act, and if so, what rights and duties accrued, and to whom, under international law ?

(*iii*) Was the Ruler of Jammu and Kashmir entitled to accede to India after the withdrawal of British Paramountcy ?

(*iv*) If so, was the accession valid ?

(*v*) If the answer is in the affirmative, what rights and duties accrued to the Indian government as regards Jammu and Kashmir territory ?

(*vi*) Is India obliged to hold a plebiscite, and if so, is she responsible for the delay ?

HISTORICAL BACKGROUND

As a separate entity, the state of Jammu and Kashmir came into existence in 1846. Historically this area has been ruled by Buddhist, Hindu, Moghul, Pathan and Sikh rulers, each having left his imprint on the social, cultural and political life of the region. From 1819 when it was first conquered by Maharaja Ranjit Singh till 1846 when it was ceded to the British, this area formed a part of the Sikh empire. In 1820, on account of his distinguished services to the Lahore (Sikh) government, Gulab Singh was rewarded by Ranjit Singh with the grant to him and his successors of the principality of Jammu with the hereditary title of Rajah.[5]

After Ranjit Singh's death dissension arose in the Sikh ruling heirarchy. Gulab Singh who was a very able and ambitious ruler

[4] H. Lauterpacht, *The Function of Law in the International Community* (Oxford, 1933), p. 438 ; also Hans Kelsen, *Law and Peace in International Relations* (Cambridge, 1948), p. 170. This point, however, is disputable. See, Julius Stone, *Legal Controls of International Conflict* (London, 1954), pp. 153-64.

[5] For a biographical sketch, see K.M. Panikkar, *The Founding of the Kashmir State* (London, 1953).

played an important part in the struggle for power and in the extension of his own dominion. During the first Sikh war, although still theoretically a vassal of the Sikh Darbar, he " appeared on the scene as a mediator between the English and the Lahore Darbar " and contributed in no small measure to the military collapse of the Sikhs.[6] As a result of the defeat, the Sikhs were called upon to pay an indemnity to the East India Company of Rupees one crore in addition to a large portion of the territory in the Punjab. As the indemnity was beyond the means of the Sikh Darbar, it, by the Lahore Treaty of 9 March 1846, ceded to the Company all the hilly territories from the Beas to the Indus including Jammu and Kashmir.[7] By a separate treaty concluded at Amritsar, the British government, in consideration of the sum of Rupees 75 lakhs, sold all the hilly and mountainous regions situated to the east of the river Indus and west of the river Ravi including Kashmir, Ladakh, Gilgit and Chamba to Gulab Singh and his heirs. Under Article 10 of the treaty, Gulab Singh acknowledged the supremacy of the British and in token of such supremacy agreed to present annually to the British government "one horse, twelve shawl goats of approved breed (six male and six female) and three pairs of Cashmere shawls."[8] Later the British government appointed a "Resident" in Kashmir who represented the Crown and served as a liaison officer with regard to political affairs of the state. In the following years, the British government through additional treaties, *sanads*, and engagements gained more concessions for the state in the realm of succession to the throne, commerce, civil and criminal jurisdiction, construction of railways, telephone and telegraph lines.[9] The administrative structure of the state of Jammu and Kashmir, though in some respects different from the other princely states, on the whole followed the same pattern so that the sovereignty of the Crown was well established. This position and status came to an end in 1947 when the British government gave independence to India.

[6] Menon, *op. cit.*, p. 391.

[7] For the text of the Treaty of Lahore see, C.U. Aitchison, *A Collection of Treaties, Engagements and Sanads Relating to India and Neighbouring Countries* (Calcutta, 1892), Vol. IX, pp. 39-43. Article 12 of this treaty provided that Gulab Singh would be recognized as independent ruler over these areas which would be given to him by a separate treaty.

[8] *Ibid.*, pp. 353-5.

[9] For other treaties which imposed restrictions on the sovereignty of the state see, *ibid.*, pp. 339-72.

ACCESSION

The relations of the princely states with the British Crown were regulated on the basis of treaties, *sanads* and engagements which made the Crown the Paramount power. These states, however, reserved a large sector of autonomy in their internal affairs. As a consequence of the treaties, the princely states lost their powei of negotiation, legation, war and peace and were deprived of any "international life".[10] Any semblance of authority in foreign affairs to which they seemingly adhered was conceded to them by the British government as a mark of courtesy. It was only the British government which had the competence to give effect to international commitments relating to the princely states. This point was made very clear in a letter from Lord Reading to the Nizam of Hyderabad in 1926:

> The sovereignty of the British Crown is supreme in India and therefore no Ruler of an Indian state can justifiably claim to negotiate with the British Government on an equal footing. Its supremacy is not based only upon treaties and engagements but exists independently of them and quite apart from its prerogative in matters relating to foreign powers and policies, it is the right and duty of the British Government to preserve peace and good order throughout India....[11]

Similarly the Indian Statutory Commission observed:

> The external relations of the States [were]...entirely in the hands of the Crown. For international purposes, therefore, the territory of Indian States [was] in the same position as the territory of British India, and their subjects in the same position as British subjects. An Indian State [could] not hold diplomatic or other official intercourse with any foreign power.[12]

Both in theory and practice the Crown acted as the sovereign

[10] *White Paper on Indian States* (New Delhi, 1948), p. 6. For a discussion of some of the problems facing the princely states see C. Joseph Chacko, "India's Contribution to the Field of International Law Concepts", *Recueil des Cours* (1958), pp. 181-203; Julian Palmer, *Sovereignty and Paramountcy in India* (London, 1930); K.R.R. Sastry, *Indian States* (Allahabad, 1941).

[11] Maurice Gwyer and A. Appadorai, *Speeches and Documents of the Indian Constitution 1921-47* (Bombay, 1957), pp. 711-12.

[12] *Indian Statutory Commission* (London, 1930), Vol. I, pp. 85-7.

and the states had never even tried to assert their position in international affairs.[13]

The Indian Independence Act of 1947 created India and Pakistan as independent sovereign States. Besides, the Act made the Princely states fully independent and absolved them of all obligations towards the British Crown.[14] In this way all "the rights surrendered by the States to the paramount power returned to the States,"[15] and the whole power in those states devolved upon their Rulers. The Indian Independence Act makes this point very clear:

> Section 7(*b*)—As from the appointed day (15 August 1947) the suzerainty of His Majesty over the Indian States lapses, and with it, all treaties and agreements in force at the date of the passing of this Act between His Majesty and the Rulers of Indian States, all functions exercisable by His Majesty at that date with respect to Indian States, all obligations of His Majesty existing at that date towards Indian States or the Rulers thereof, and all powers, rights, authority or jurisdiction exercisable by His Majesty at that date in or in relation to Indian States by treaty grant, usage, sufferance or otherwise.[16]

It is quite evident from this paragraph that the Act released the states from all obligation to the Crown and in consequence the Indian states became separate independent entities. Whatever doubt there might be regarding other princely states, Jammu and Kashmir reverted to the sovereign status of 1846 which was recognized in the Lahore and Amritsar treaties.[17] As pointed out by Professor

[13] The British Courts as is quite evident from the decision in *Mighell* v *Sultan of Johore* (1894), I.Q.B. 149 gave a facade of sovereignty to such rulers. In *Statham* V *Statham and H.H. The Gaekwad of Baroda* (1912) Probate D. 92 the Court said that the Gaekwad being an "independent reigning sovereign" could not by the rules of international law be made against his will a party to proceedings before English courts. It is crystal clear, however, that from the international law standpoint, such a status cannot be given to the princes because they never enjoyed external sovereignty.

[14] *White Paper on Indian States*, pp. 48-52.

[15] Memorandum on States Treaties and Paramountcy presented by the Cabinet Mission to His Highness, the Chancellor of the Chamber of Princes on 12 May 1946. Quoted in *ibid.*, pp. 44.

[16] *Ibid.*, p. 46.

[17] It has been argued by Dr. Chacko that all the States may not have attained sovereignty. "In cases of other Indian States like Hyderabad, Mysore and Baroda, the lapse of British suzerainty did not mean a reversion to a status of full independence and sovereignty; it did mean, however, that such States as

Chacko " such a restoration of Jammu-Kashmir to full statehood appears to have been all the more conclusive by virtue of the legal title to the entire territory of that State which had already been vested in the Maharaja through the act of purchase of those territories by his ancestor".[18]

This does not mean that these states automatically became subjects of international law. Such a status would have been realized only if the area had acquired all the essential attributes of statehood and recognition had been granted by the members of the world community. To a certain extent such an international status was present in the case of the state of Jammu and Kashmir whose government had entered into a Standstill Agreement with Pakistan and was negotiating for the same with India, both states being members of the world community.[19] The attitude of the neighbouring states may serve as a sufficient warrant for the proposition that, in international law, the state of Jammu and Kashmir had the necessary capacity to conclude treaties and thus exercise her rights of sovereignty.[20]

It is recognized on all hands that as a result of the Independence Act, the various princely states reverted to their sovereign status. In practice there was doubt as to whether these states would be able to maintain their status keeping in view their geographical position and the economic and administrative dislocation which would have resulted had they decided to stay independent.[21] That is why most of the states very quickly offered to merge themselves with the neighbouring states.[22]

these were automatically restored to a status of quasi-independence and quasi-sovereignty, which was all that they had prior to their entry into treaties with the agents of the British Crown....On the other hand, in the case of the ruler of Jammu and Kashmir, the lapse of British Paramountcy served as an unavoidable and immediate reversion to his full sovereignty devoid of all legal and political trammels....In other words, the unilateral abrogation by the British Government...left the Maharaja of Jammu and Kashmir a fully independent and fully sovereign ruler under international law." Chacko, *op. cit.*, pp. 206-7.

18 *Ibid.*, p. 207. Also see Atlee's statement in the House of Commons : House of Commons, *Debates,* Vol. 439 (1946-47), p. 2452.

19 *Defending Kashmir* (New Delhi, 1949), p. 163 ; also Michael Brecher, *The Struggle for Kashmir* (New York, 1953), p. 23.

20 *Ibid.*, p. 19.

21 *White Paper on Indian States,* p. 49.

22 For a first hand information see, V.P. Menon, *The Story of the Integration of the Indian States* (Bombay, 1956).

International law authorizes a sovereign State to conclude treaties.[23] In the exercise of its sovereignty, a State may cede a part of its territory or even merge voluntarily into another thus losing its own personality. In the *Wimbledon* Case, the Permanent Court of International Justice had made it quite clear that such a right flows from the sovereign character of the State.[24] The state of Jammu and Kashmir had every right, either to stay independent or to accede to India or Pakistan or to any other State she thought desirable.[25] So long as she did not violate any duty owed to a third State, the exercise of the right to accede was in conformity with current practice of international law.[26]

The right to enter into treaties is exercised by some organ of the State. Whether a treaty has been concluded in conformity with the Constitution depends upon the interpretation of the Constitution; and it is within the competence of the government to interpret, in its relations to other States, its own Constitution.[27] As a consequence of the Independence Act, the whole governmental authority fell to the lot of the Maharaja of the state of Jammu and Kashmir who exercised the functions of government and served as its head.[28] In law, the Independence Act had invested him with full authority

[23] L. Oppenheim, *International Law* (London, 1955), Vol. I, 8th Ed. by H. Lauterpacht, p. 882.

[24] *PCIJ*, Series A/1.p. 25 : "The Court declines to see in the conclusion of any treaty by which a state undertakes to perform or refrain from performing a particular act, an abandonment of its sovereignty. No doubt any convention creating any obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty".

[25] Brecher, *op. cit.*, p. 19.

[26] Oppenheim, *op. cit.*, p. 550.

[27] Hans Kelsen, *Principles of International Law* (New York, 1952), p. 324.

[28] In the princely states the Maharajas have held the totality of powers. After the lapse of treaties with the Crown they symbolized the *plenitudo potestatis* and hence were the real authority to dispense with the state affairs. This was all the more true in the case of the Maharaja of Jammu and Kashmir because of the legal title to the entire territory vested in him through the act of purchase by his ancestors. Chacko, *op. cit.*, pp. 206-7. Mr. V.K. Krishna Menon has also referred to this position in the United Nations. "The Ruler is the repository of power. Whether morally speaking, he is democratic or not is another matter. In an Indian State, however, all power flows from the Ruler... in some cases, this is true only in theory, in many cases, before independence, this was also true in form. There was, therefore, no one else who could have offered the accession". S/PV. 763 (23 January 1957), para. 127 ; also *Ibid.*, 800 (11 November 1957), para. 9.

in the state and he was competent to enter into negotiations with other countries for accession purposes. The Maharaja, being the sole governmental authority in his state, had legal powers both under the municipal law of his own state and under international law to make a decision regarding accession of his state to India.[29]

Ordinarily the accession is made in the form of a treaty.[30] In this case the Government of Jammu and Kashmir offered to accede to India with regard to defence, foreign affairs and communications reserving for herself freedom of conduct in her internal affairs. It is submitted that the legal consequence of the acceptance of the offer of accession by the Indian government was that Jammu and Kashmir became a part and parcel of Indian territory and lost her international personality.[31] As the exercise of all rights of sovereignty in the international sphere falls within the jurisdiction

[29] Sir Conrad Corfield, "The Problem of Kashmir", *The Listener*, Vol. LVIII (3 October 1957), p. 498; also Chacko, *op. cit.*, pp. 210-11. In this connection a decision of the Kashmir High Court rendered in 1953 may be helpful. In *Magher Singh* v *Principal Secretary, Jammu and Kashmir*, AIR (1953), J. & K. 25, it held: " Previous to the partition of British India into two Dominions of Pakistan and India there was no doubt that the Ruler of Jammu and Kashmir was under the suzerainty of the British Crown inasmuch as foreign relations were under the exclusive control of the Crown Representative. But insofar as the internal sovereignty of the ruler was concerned it was absolutely unlimited and there were no fetters on it. In this connection it would be relevant to reproduce sections 4 and 5 of the Jammu and Kashmir Constitution Act...as they stood amended in November, 1951.

" Section 4 : The territories for the time being vested in H. H. are governed by and in the name of H. H. and all rights, authorities and jurisdiction which appertain or are incidental to the government of such territories are exercisable by H.H.

Section 5 : Notwithstanding anything contained in this or any other Act, all powers, legislative, executive and judicial in relation to the state and its government are hereby declared to be and to have always been inherent in and possessed and retained by His Highness and nothing contained in this or any other Act shall affect or be deemed to have affected the right, or prerogative of His Highness to make laws, and issue proclamations, orders and ordinances by virtue of his inherent authority. "

[30] There are no rules prescribing a special form of treaty. A treaty is concluded as soon as the mutual consent of the parties becomes apparent. A treaty in the form of an offer and acceptance is, therefore, valid. Oppenheim, *op. cit.*, pp. 897-902. An Indian court has held in 1954 in the *D.D. Cement Co.* V *The Cammissioner of Income Tax*, AIR, PEPSU (1955) 3, that "the Instrument of Accession...is generally known as a treaty and recognized as an act of State".

[31] Brecher, *op. cit.*, p. 38. For the text of the Instrument of Accession prescribed for the princely states see, *White Paper on Jammu and Kashmir* (New Delhi, 1948), pp. 17-18.

of the Union government, the Indian government by accepting the offer of accession, became, for all legal and practical purposes, the custodian of the interests of Jammu and Kashmir. Unless, Jammu and Kashmir or India were incapacitated by a treaty or customary international law from entering into this arrangement, the offer and acceptance of the Instrument of Accession was a legally valid act. Although the Government of Jammu and Kashmir had already concluded a standstill agreement with Pakistan, this agreement by its very nature was a transitory measure and did not impose any restrictions regarding accession.[32] As pointed out by Sir Mohammad Zafrullah Khan, the conclusion of the standstill agreement on account of the special circumstances, was very essential. He said :

> It is necessary to explain what a "standstill agreement" is. India, being one political entity before the division on 15 August 1947, had a common system of defence, of railways, post offices, telegraphs, telephones and a host of other matters. If on 15 August, when at least a nominal division took place between these two Dominions—in some places, the actual division also took place on that date—all these matters had had to be adjusted, the situation would have been impossible. A new currency could not be started merely by a stroke of the pen, communications could not be divided up, defence could not be sorted out, and so on. Therefore, standstill agreements were arrived at by Pakistan and India, providing that these matters should continue to run undisturbed on the old basis for a period of time, and different dates were fixed for different matters.[33]

The telegram from the Prime Minister of Jammu and Kashmir to the Government of Pakistan regarding these agreements also clearly shows that it was not a final arrangement :

> Jammu and Kashmir would welcome standstill arrangements with Pakistan on all matters on which there exist at present moment with outgoing British Indian Government. It is suggested that existing arrangements should continue pending settlement of details and formal execution of fresh agreements.[34]

[32] Mr. Menon (India) : *UN* S/PV. 797 (8 February 1957), para. 80.

[33] Quoted by Mr. Menon : *Ibid.*, 762 (23 January 1957), para. 56.

[34] *Ibid.*, 762 (23 January 1957), para. 61. A similar letter was written to the Indian government for the conclusion of the standstill agreement. The Govern-

If Jammu and Kashmir was not incapacitated from behaving as she did, she had every right to accede to India. The third States cannot veto the act of accession or cession unless it is based on some legally binding treaty.[35]

Pakistan has charged that accession was brought about by coercion and that since treaties concluded under duress are invalid, the Instrument of Accession must also be considered as void.[36] The argument of Pakistan is not well taken. The Maharaja of Jammu and Kashmir was very anxious to keep his state fully independent and sovereign and there is sufficient evidence to show that he would have done so, had the state not become a base for power politics.[37] In international law the argument of duress may be sustained only if coercion may have been exercised against the agent negotiating the treaty. In order to sustain Pakistan's argument it must be proved beyond reasonable doubt that India had coerced the negotiator to sign the Instrument of Accession. It was Pakistan not India which resorted to methods of coercion in order to force the Maharaja to accede to Pakistan. And she tried to attain the desired goal by fair and foul means.[38] As far as India was concerned her attitude was that of disinterestedness. The offer of accession by the Maharaja was made voluntarily although he may have been driven to make

ment of India telegraphed back : "Government of India would be glad if you or some Minister duly authorized in this behalf could fly Delhi for negotiating standstill agreement between Kashmir Government and Indian Dominion. Early action desirable to maintain intact existing agreements and administrative arrangements". *Ibid.*, para. 62.

[35] Oppenheim, *op. cit.*, p. 548. Although Pakistan has taken the stand that by signing the standstill agreement with Pakistan on 15 August 1947, the state of Jammu and Kashmir debarred itself from entering into any kind of negotiations or agreements with any other country (See the letter dated 1 October 1949 of Minister for Kashmir Affairs, Pakistan, to Chairman, United Nations Commission for India and Pakistan, *UNCIP*, Report S/1430/Add. 1, Annex. 42, para. 5), the India government has validly refuted this position. The standstill agreement dealt with matters like customs, communications, posts, telegraphs, civil supplies and the like and not with defence and foreign affairs. Moreover, since it was also of a transitional nature, no right in favour of Pakistan could have been created. Moreover, the Government of the state of Jammu and Kashmir had asked for similar arrangements with India also. See the letter dated 21 November 1949 of Secretary General of the Ministry of External Affairs, Government of India to Chairman of the Commission. *UNCIP*, Report S/1430/Add. 1, Annex. 43, paras. 4 and 5.

[36] Mr. Khan (Pakistan) : *UN* S/PV. 236 (28 January 1948), p. 274.

[37] For authoritative information regarding those crucial days see, Mehar Chand Mahajan, "Kashmir Problem in Perspective", *The Tribune*, 28 May 1957.

[38] *Ibid.*, V.P. Menon, *op. cit.*, pp. 395-410.

it on account of Pakistan's intervention. In any case, however, it was not India but Pakistan who tried to coerce the state authorities. In the words of Mr. V. K. Krishna Menon " we used no force. The only force we used was to repel the invader—and I believe that that is a force which we were entitled to use and indeed are enjoined to use, under the Charter of the United Nations ".[39]

While the charges of accession under duress from India must fall to the ground, Pakistan's assertion that accession as it took place was conditional and subject to a plebiscite [40] requires further consideration. In this connection the Pakistan government has referred to the stipulation of Lord Mountbatten in accepting the offer of accession, which it is alleged " in unmistakable terms made it quite clear to the Maharaja that the accession was provisional and that the people of Kashmir would themselves decide the future of their state by a plebiscite ".[41]

The relevant part of Lord Mountbatten's letter accepting the accession reads as follows :

> ....In the special circumstances mentioned by your Highness, my Government have decided to accept the accession of Kashmir State to the Dominion of India. In consistence with their policy that in the case of any State where the issue of accession has been the subject of dispute, the question of accession should be decided in accordance with the wishes of the people of the State, it is my Government's wish that, as soon as law and order have been restored in Kashmir and its soil cleared of the invader, the question of the State's accession should be settled by a reference to the people .[42]

There is no denying the fact that reference to the will of the people was made. But the Governor General's letter did not say anything about a plebiscite. The Indian government, in accordance with the obligations which she has assumed, sought to promote the

[39] S/PV. 763 (23 January 1957), para 120.
Also Mr. Ayyangar (India). *Ibid.*, 227 (15 January 1948), pp. 14-16 ; Mr. Setalvad (India), *Ibid.*, 232 (23 January 1948), pp. 176-217, and 234 (23 January 1948), pp. 217-18.

[40] See the remarks of Sir Feroze Khan Noon in an interview to *The Times* (London), 5 March 1957, p. 9.

[41] Sir Mohd. Zafrulla Khan (Pakistan), S/PV. 236 (28 January 1948), pp. 265-6 ; also for a similar interpretation, Mr. Jawad (Iraq), *Ibid.*, 769 (15 February 1957), para. 14.

[42] *White Paper on Kashmir*, pp. 47-8.

national development of Kashmir by granting its people the right of self-determination and by taking the necessary steps to ensure the free expression of their will in the manner most appropriate to the circumstances which have arisen. The USSR delegate has expressed that:

> ....in September 1951 the first general election was held in Kashmir for the purpose of establishing a Constituent Assembly. In February 1954 that Assembly unanimously ratified the accession of Kashmir to India and in November 1956 it adopted a State Constitution formalizing the status of Kashmir as a self-governing State within the Republic of India. In March 1957, the population of Kashmir, together with all the peoples of India, participated in elections to the Indian Parliament and also elected a legislative assembly of their own State...By now it should be clear to everyone that the people of Kashmir have decided their own destiny once and for all, that they regard Kashmir as an inalienable part of the Republic of India and that they do not want any interference in their affairs by any self-appointed guardians.[43]

The point which is of importance in the present controversy is not the stipulation of the Indian government regarding eventual reference to the people of Kashmir, but whether the Instrument of Accession, as accepted by the two parties, India and Kashmir state, created certain rights in favour of the latter state or of a third party, and if so, what are the corresponding duties of the Indian government. Pakistan's arguments can be seriously considered only if she is able to show that the offer and acceptance of accession, as it took place, obliged the Indian government to arrange a plebiscite before finally incorporating the territory and that her failure to do so would amount to a violation of an international legal duty towards Pakistan or even towards Kashmir state.

If we examine the Instrument of Accession closely, we find that the Maharaja applied for an unconditional merger. In his offer of accession, which was accepted by the Indian government, he never mentioned the necessity of referring the matter to the people. As soon as the offer was accepted, Jammu and Kashmir ceased to be an independent entity. Her capacity to head international rights and duties was extinguished.[44] In case of any difference of opinion

[43] Mr. Sobolev (USSR) S/PV. 799 (5 November 1957), para. 12.

[44] "If...a state confers upon another state its whole competence in international affairs, then it disappears completely from the sphere of international

between Jammu and Kashmir, as a part of Indian territory on the one hand, and the Indian government on the other, the controversy would become a matter of Indian constitutional law to be appropriately dealt with by the Supreme Court of India. Such a matter, it is submitted, would be within the domestic jurisdiction of India.[45] In fact, the so-called conditional acceptance was made as a matter of internal Indian policy. But even if it was not, the conditional acceptance shall not create any international right in favour of Kashmir because that state lost her international personality by the acceptance and ceased to be a subject of international law. Hence obligations having international implications did not come into existence. If India is not obliged under international law to "refer to the people" as envisaged in the Instrument of Accession, she will not be committing an international delinquency by failing to do so. Since it is a domestic matter, for her own purposes, the decision of the Jammu and Kashmir Constituent Assembly is sufficient evidence of popular approval and of the fulfilment of the condition. It is significant to note that the government of Jammu and Kashmir has not so far questioned the right of India to consider the area as part and parcel of Indian territory.

This position may also be substantiated from another angle. The letter of Lord Mountbatten makes no guarantees. It expresses the " wish " of the government of India—not as part of the law but as part of a political policy. The expression of a wish is far less than what may be called an international obligation. As pointed out by Mr. Menon " we have no international commitment. We have a moral commitment to the peoples over there. Moreover, that commitment was given because India wanted that it must be tested by the will of the people which has already been done by the Constituent Assembly ".[46]

relations and cannot be considered as a subject of international law". Kelsen, *Principles of International Law,* p. 162.

[45] Mr. Menon (India), S/PV. 763 (23 January 1957), paras. 104-7 ; *Ibid.,* 800 (11 November 1957), para. 18. Even the American government recognized this position. See Mr. Austin (USA), *Ibid.,* 240 (4 February 1948), pp. 371-2.

[46] *Ibid.,* 763 (23 January 1957), para. 110. Mr. Menon (India) : "It is something between the people of Kashmir and ourselves. It is a pledge to them and to nobody else". *Ibid.,* para. 107. Mr. Menon has relied on the use of the word "wish" in order to prove that the word does not impose any obligations on India. Addressing the President of the Security Council, he said : "Suppose that you, Mr. President, with all the wealth you possess make a testamentary disposition to your children willing them your property and saying that you give so much money for this and so much for that, and that at the end of

If Jammu and Kashmir is not entitled to question the action of the Indian government, what ground does Pakistan have to term the Instrument of Accession as "frivolous, invalid and conditional?"[47] We have already shown that according to principles of international law, Jammu and Kashmir had every right to accede to India and that by so doing she did not violate a duty owed to a third party. The converse is true of the Indian government. The so-called condition in the acceptance of the accession could not in any case create rights in favour of Pakistan or other members of the world community. Pakistan was not a party to the transaction. Hence she cannot have a *locus standi* in the case.[48] As the matter rested on her internal policy, India did not violate any principle of international law by accepting the accession. Accordingly, any suggestion that the accession is provisional or temporary is contrary to true legal position.[49]

it you say to your eldest son : 'It is my wish that out of the money you should build a library', or something of that character. That has no force in law ; it is the expression of a wish. All that binds the young man is what you have said. The expression of a wish is not binding in any equitable relations. It may be respected. We try to respect it". *Ibid.*, para. 152. Even with regard to the statement of Lord Mountbatten, it has been pointed out by Mr. Menon that there are four conditions which must be met before India may be obliged. They are, (1) commitment to the people of Kashmir only, (2) should be in consonance with the policy of the Indian government which the government can always change, (3) soil must be cleared of the invaders, and (4) peaceful conditions must be restored. *Ibid.*, para. 151. Dr. Chacko has also emphasized the use of the word "wish" and has argued that the incorporation of a wish for a plebiscite attaches no legal responsibility on India in any way. Chacko, *op. cit.*, p. 218.

[47] Sir Feroze Khan Noon in *The Times*, 5 March, 1957 ; also see the Pakistan Memorandum submitted to the United Nations. *UN* S/646 (1948).

[48] For example Mr. Urrutia (Columbia) pointed out that the action of the Commission amounted to accepting the sovereignty of India over Jammu and Kashmir ; secondly, it never recognized the legality of the presence of Pakistan's troops in Kashmir...Moreover, it was also recognized by it that Pakistan had no right to take part in drawing up the rules and regulations for the plebiscite. S/PV. 768 (15 February 1957), para. 65.

[49] Mr. Ayyangar (India) : "The Instrument of Accession is a document complete in itself. To the best of my memory, the instrument, in the case of Kashmir, does not contain any condition. It does not state that the accession is provisional. The commitment which the Government of India made for themselves on the question of ascertaining the wishes of the people was contained in a letter accompanying the accepted Instrument of Accession. The Government of India is certainly bound by its commitment, but it would be wrong to call the accession itself as a provisional accession". "With regard to this accession, we

It is, therefore, the present view that the Instrument of Accession made the Indian government sovereign over Jammu and Kashmir and that the conditional stipulation, being a domestic matter, does not have any legal consequences in international law. In so far as this territory became part and parcel of Indian territory, any violation of India's sovereignty by foreign troops must be considered as an act of aggression.[50] The tribal people had used Pakistan territory as a base for hostile operations against India. In spite of India's warning that Pakistan should not let these raiders pass through her territory, the Pakistan government not only refused to accede to this demand, but showed sympathy with the operations. Later, it was found that Pakistani regulars were also engaged in hostilities and that they formed the spearhead.[51] This was a clear case of aggression and a violation of the United Nations Charter.[52]

should remember that it became complete and operative on 26 October 1947. The effect of the Government of India's commitment in regard to the plebiscite was that if, on the plebiscite being taken the vote went against accession to India, it would release Kashmir from the accession. Upon such release, the accession, which up to that point must be considered to be valid and effective, would, as it were, cease". *Ibid.,* 242 (6 February 1948), p. 31. Similarly at some other place Mr. Ayyangar has termed the accession as complete. *Ibid.,* 227 (15 January 1948), p. 29. Mr. Menon has also very emphatically denied the provisional character of accession : "Therefore, the Government of India, out of considerations of security, out of considerations of international law and the law of India, and the law that has been given to it by the British Parliament cannot ever accept the idea that the accession is anything but an indissoluble bond. When Kashmir acceded, that matter was finished. Therefore, there is no such thing as going out... Accordingly any suggestion that the accession is provisional or temporary is very wrong". *Ibid.,* 763 (23 January 1957), para. 104. It is well established, therefore, that accession cannot be considered as provisional even if the Indian government may have agreed to have a plebiscite on the issue. This interpretation has also been accepted by an American authority : "This accession was accepted, but at the same time the Indian Government through Prime Minister Nehru, declared that this accession would have to be confirmed, not to say tested, by a plebiscite...Once made, and noted by Pakistan and other countries, it has become more or less binding". Pitman B. Potter, "The Principal Legal and Political Problems involved in the Kashmir Case", *American Journal of International Law,* Vol. 44 (1950), p. 361.

[50] Mr. Menon (India), S/PV 799 (5 November 1957), para. 28.

[51] *White Paper on Kashmir,* pp. 20-30.

[52] Sir Owen Dixon, one of the mediators had this to say : "...I was prepared to adopt the view that when the frontier of the State of Jammu and Kashmir was crossed, on, I believe, 20 October 1947, by hostile elements, it was contrary to international law and that when, in May 1948, as I believe, units of the regular Pakistan forces moved into the territory of the State, that too was inconsistent with international law". *U.N* Doc. S/1791, para. 21.

In these circumstances, India was driven to exercise her right of self defence ; and she also approached the United Nations to help quell aggression. As the invaders were advancing successfully towards Srinagar, leaving in their wake death and destruction, the Indian government sent its army to meet the onslaught. In about two month's time she was able to drive away the invaders and recapture a major part of the state territory. At the same time she requested the Security Council to call on the Government of Pakistan to prevent her personnel, military and civil, from participating or assisting in the invasion of the state of Jammu and Kashmir ; to call upon her nationals to desist from taking any part in the fighting in the state and to deny to the invaders, military and other supplies, and all other kinds of aid which might tend to prolong the struggle and the use of her territory for operations against Kashmir.[53]

The Security Council passed a resolution providing for a commission for India and Pakistan which was deputed to arrange for a ceasefire order and truce agreements. It was also authorized to "exercise any mediatorial influence likely to smooth away the difficulties". The commission adopted resolutions on 13 August 1948 and on 5 January 1949 dealing with ceasefire, truce, demilitarization and plebiscite in order that the dispute may be settled finally.[54]

It goes to the credit of the Indian government that she agreed to the ceasefire in spite of the fact that the Security Council had not literally taken action on her application and a part of her territory was still under Pakistan's occupation. Under international law India may well have been entitled to invade Pakistan territory in order to check the incursions of the tribal raiders and Pakistani armed forces from the very source. There is ample authority both in theory and practice to support such action in analogous circumstances.[55]

[53] *Defending Kashmir*, Appendix. II, pp. 169-70 ; *U.N.* Doc. S/628 (1 January 1948).

[54] *U.N.* Doc. S/1100 (13 August 1948) ; *ibid.*, S/1196 (5 January 1949). The Security Council has passed many other resolutions but for the purpose of the discussion only these two are relevant.

[55] "If Pakistan does not do so [stop the tribal raiders from passing through her territory], the Government of India may be compelled in self-defence to enter Pakistan territory, in order to take military action against the invaders...It is a universally accepted principle of International law that for one nation to arm or otherwise assist rebellious forces against another Government is a hostile

PLEBISCITE

While it is believed that no international legal duty arose from the Mountbatten statement of 1947, it may still be necessary to enquire whether such a duty may have arisen by virtue of any other rule of international law. General international law does not oblige a State to hold a plebiscite when it receives cession or merger of part or whole of another independent State.[56] The demand for plebiscite is based on the political claim to self-determination which has not yet, at the present stage of world politics, attained the position of a legally sanctioned demand nor do the provisions of the United Nations Charter referring to this concept do more than emphasize the desirability *de lege ferenda* of incorporating such a rule in the jurisprudence of the United Nations.[57] Although Grotius favoured the acceptance of such a rule, Oppenheim correctly observed that it is doubtful if the law of nations will ever make it a condition of every cession that it must be ratified by a plebiscite.[58]

In the present case India has time and again declared that she would be willing to ascertain the will of the people by holding a plebiscite. Both in the United Nations and outside, duly authorized representatives of the Indian government have made it known that as soon as aggression is withdrawn, and peaceful conditions are restored, India will hold a plebiscite in order to decide the final status of the territory.[59] Moreover, she has repeatedly mentioned that she stood bound by the commission's resolutions of 13 August

and aggressive act...". *U.N.* Doc. S/628, pp. 1, 9 ; Pandit Nehru's statement at Allahabad quoted by Menon : S/PV. 767 (8 February 1957), para. 137 ; Menon, S/PV. 762 (23 January 1957), para 12. Also Oppenheim, *op. cit.*, pp. 297—304.

[56] Oppenheim, *op. cit.*, p. 551.

[57] Hans Kelsen, *Law of the United Nations* (London, 1951), pp. 52-3. But for a contrary view see Mr. Tsiang (China) : S/PV. 765 (24 January 1957), p. 14.

[58] Oppenheim, *op. cit.*, pp. 551—2. Such a procedure may, of course, be provided for by the terms of the treaty of cession. As a matter of fact, all plebiscites held after the First World War were required under the terms of the Treaty of Versailles, ; Article 34 (Eupen and Malmedy) ; Article 49 (Saar Basin) ; Article 88 (Part of Upper Silesia) ; Article 94 (part of East Prussia) and Article 109 (part of Schleswig). *Ibid.*, note. 2. Mr. Menon has also referred to all these cases : *Ibid.*, 767 (8 February 1957), paras. 186-191.

[59] See Mr. Ayyangar's speech in which he has quite often repeated that India has accepted the principle of a plebiscite. S/PV. 227 (15 January 48), p. 20. Also Indian delegate's letter to the Secretary General of the United Nations. *The Hindu*, 27 October 1958.

1948 and 5 January 1949 dealing with demilitarization and plebiscite.[60] The cumulative legal result of these pronouncements would be that India has voluntarily accepted certain obligations, but not necessarily legal ones, to hold a plebiscite within the context of the UN resolutions.[61]

It has been argued by some that it is questionable whether the Indian government has the competence to conclude agreements regarding a subject the consequence of which may be the dismemberment of Indian territory. In their view only a constitutional amendment would entitle the Indian government to assume such obligations.[62] Mr. V. K. Krishna Menon very emphatically argued that the Indian Constitution does not allow the right of secession which may have to be put into effect in case the plebiscite may go against India. He said :

> We are a federation ; we are not a confederation, and the units that accede to federation stay in once they have acceded. There is no provision in our Constitution, there is no contemplation in our Constitution for the secession... once that accession has taken place there is no provision in this to go out. The only provision there is, is in regard to variation .[63]

He added :

> Now I freely admit that when the municipal constitutional procedures... are against well known principles of international law... international law prevails. But in this particular matter the Constitution of India is presumed to be known to the United

60 Mr. Menon, S/PV. 763 (23 January 1957), para 77.

61 Besides these pronouncements, it may be possible to argue that membership of the United Nations involves obligations of Article 25 which says : "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter". See, L. M. Goodrich and Hambro (Ed.) *Charter of the United Nations : Commentary and Documents* (London, 1949), pp. 208-9. Kelsen, *Law of the United Nations*, pp. 293-5.

62 This question has become very important because of the advisory opinion of the Supreme Court regarding the Berubari Union in which it was said that the Indian government cannot cede its territory under any provision of the Constitution and that she must amend the Constitution in order to do so. This has been done by the Ninth Amendment to the Indian Constitution. See The Constitution (Ninth Amendment) Act, 1960.

63 S/PV. 763 (23 January 1957), para. 92.

Nations when it was admitted as a Member. These provisions were there even before we were independent. Also it is well known to international law that in a federation of our kind there is no right of secession.[64]

Similarly Mr. M. C. Mahajan, ex-Chief Justice of India has argued that India is not entitled to hold a plebiscite because that would amount to infringing the competence of the Ruler of Jammu and Kashmir. In his view, the Ruler of Jammu and Kashmir acceded to India only with regard to foreign affairs, defence and communication and thus reserved the state's autonomy with regard to all the other subjects including the holding of a plebiscite. Hence the state's consent is essential before India may agree to an arrangement which may conflict with the domestic competence of the state.[65]

In spite of strong legal opinion supporting this position, it must be pointed out that India is fully entitled as a sovereign State to assume such obligations. As the state of Jammu and Kashmir had lost its international personality, she thereby was deprived of any competence to stand in the way of India (of which she is part and parcel) disposing of her territory according to validly assumed international commitments. The Indian Government can exercise this right because it follows from the very nature of sovereignty. As she has repeatedly declared that she is committed to the commission's resolutions regarding demilitarization and plebiscite, she is obliged by international law to abide by those provisions. The argument of constitutional barriers though a formidable one, especially after the advisory opinion of the Supreme Court in the *Berubari Union Case* she must make good her obligations or be answerable to the other parties.[66] To the extent that the resolutions of 13 August

[64] *Ibid.*, para. 92.

[65] "The three subjects on which the State of Kashmir acceded to India do not include the power of making the Act of Accession dependent on the plebiscite of the people of Kashmir by ignoring the ruler. The resolution of the Security Council is not binding on India as it is outside the constitutional and legal power of those who entered into that agreement and the State of Jammu and Kashmir can certainly repudiate it with clear conscience....Even the Directive Principles of the Indian Constitution confer no such authority. The resolution of the Security Council is thus void and inoperative, it being outside the constitutional powers of all participants in it and having been made behind the back of the ruler of the State who alone was competent to decide the question". *The Tribune*, 29 May 1957.

[66] For the controversy whether the validity of treaties is determined by

1948 and 5 January 1949 impose obligations on India, she must abide by them.

India had voluntarily accepted the foregoing resolutions. But at the same time she has made it known that the plebiscite cannot be held unless certain prerequisites are met. In the first place, she has pointed out that the obligation to hold the plebiscite arises only when " law and order have been restored in Kashmir and her soil cleared of the invaders ".[67] This must mean that unless and until the Pakistan-occupied territory is returned to the Ruler of the state or vacated in favour of India pending the plebiscite, the basic condition would stand unfulfilled and the Indian commitment will not mature. Moreover, the resolution dealing with demilitarization will have to be implemented before the one dealing with the plebiscite becomes mandatory.[68]

The demilitarization will take place in stages. The resolution is quite clear that before India begins to withdraw the bulk of her forces, the tribal invaders and Pakistani troops must vacate the territory. It is debatable to say, as the Indian government does, that all Pakistani troops must leave before India may " begin to withdraw the bulk of her forces from the State ".[69] The resolution says that " when the Commission shall have notified the Government of India that...Pakistan forces are being withdrawn from the State of Jammu and Kashmir ", the Indian obligation to withdraw the bulk of her forces comes into existence.[70]

international law or the municipal law of the State concerned see *Harvard Research, Draft Convention on the Law of Treaties* (1935), pp. 992-1009.

[67] Mr. Menon's statement, *The Times of India*, 26 December 1957 ; also *Defending Kashmir*, p. 192.

[68] "Pakistan has violated the cease-fire agreement by the introduction of military personnel and materials into the area and by the annexation of territory. And therefore, when the first part of the agreement stands violated, the consideration of the second part becomes very, very, very subsequent". Mr. Menon (India). S/PV. 769 (15 February 1957), paras. 73, 78.

[69] See the Indian Government's stand, *Defending Kashmir*, pp. 192, 181-9; also Sir Benegal Rau (India) : S/PV. 466 (10 February 1950), p. 5.

[70] A lot of controversy has arisen about the interpretation of the UNCIP Resolution of 13 August 1948. The relevant parts of the resolution read as follows :

PART II

Truce Agreement

Simultaneously with the acceptance of the proposal for the immediate cessation of hostilities as outlined in Part I, both Governments accept the following proposals as a basis for the formulation of a truce agreement,

The Indian argument, holding that all Pakistan troops must first withdraw, cannot actually be found in the resolution although such a stand would be consonant with the basic Indian demand that aggression must first be vacated. In any case, India's obligation to take certain steps in conformity with the UN resolution comes into existence only when Pakistan has fulfilled certain conditions. For India, the resolutions create only conditional obligations. The representative of India referred to this point in the following words :

> If the Council will recall to mind the various "wheres" and "afters" and "ifs" that were in that resolution, it will appreciate that there can be no shadow of a doubt in any rational mind that what was conceived was a plan conditional upon a contingency. These are two levels of conditions, and those conditions have not been performed.[71]

Referring to Part 2 of the resolution which deals with the truce agreement he added :

details of which shall be worked out in discussion between their representatives and the Commission.

A 1. As the presence of troops of Pakistan in the territory of the State of Jammu and Kashmir constitutes a material change in the situation since it was represented by the Government of Pakistan before the Security Council, the Government of Pakistan agrees to withdraw its troops from that State.

2. The Government of Pakistan will use its best endeavour to secure the withdrawal from the State of Jammu and Kashmir of tribesmen and Pakistani nationals not normally resident therein who have entered the State for the purpose of fighting.

3. Pending a final solution, the territory evacuated by the Pakistani troops will be administered by the local authorities under the surveillance of the Commission.

B 1. When the Commission shall have notified the Government of India that the tribesmen and Pakistani nationals referred to in...A-2 here have withdrawn, thereby terminating the situation which was represented by the Government of India to the Security Council as having occasioned the presence of Indian forces in the State of Jammu and Kashmir, and further that the Pakistani forces are being withdrawn from the State of Jammu and Kashmir, the Government of India agrees to begin to withdraw the bulk of their forces from that State in stages to be agreed upon with the Commission.

Defending Kashmir, pp. 179-80. For Pakistan Government's reply to UNCIP Resolution of 13 August 1948 see, *UNCIP*, Report, S/1100 (6 September 1948), pp. 41-5 ; Indian position, *Ibid.*, S/1196 (21 December 1948), pp. 23-6, 27-9.

[71] Mr. Menon (India) : S/PV. 763 (23 January 1957), para 173.

> Our commitment is contingent upon the performance of part II and even then even if part II is performed—what is the promise we have made? The promise we have made is to confer with the other side. But conferring with the other side does not necessarily mean that we have to do what anybody else says—That is all the commitment in part III of the resolution of 13 August 1948—Therefore, there are no commitments that can be laid at the door of India with regard to the carrying out of a plebiscite.[72]

The further question then arises how long a party must stand bound by a conditional international commitment when the conditions, though within the control of the other party, are not fulfilled by that party. As no definite time was set in the resolution, it may be assumed in accordance with rules of statutory interpretation, that the conditions should be met within a reasonable time. It may well be asked whether already the lapse of 14 years is not more than such a reasonable time; yet Pakistan has not manifested any intention of meeting these requirements. According to the 1948 resolution Pakistan must at least be the first to start withdrawing her troops before India may be asked to do the same. It is clear that Pakistan has insisted on simultaneous withdrawal of the forces of both the parties; this in itself seems to negative her intention to fulfil her obligations under the resolution. Insofar, therefore, as the Indian government is within her legal rights in regarding her own commitments as conditional, and the conditions unfulfilled within a reasonable time, the second resolution dealing with plebiscite may be considered as having lapsed.[73]

[72] *Ibid.*, para. 178. "First of all, there is no truce agreement. Therefore, if number two does not happen, number three is out of court. Number one, cease-fire, we have performed. Number two is the truce agreement. . . .Therefore, number three means that it is only when number two has been accomplished that number three comes into the picture at all". *Ibid.*, para. 47.

[73] "The resolution of 5 January 1949 is an implementing resolution. It provides the mechanism, provided the decision is made. But our commitments for a plebiscite in this matter, are, first of all, conditioned by the withdrawal of Pakistan forces and nationals, by the large-scale disbandment and disarmament of the "Azad" Kashmir army, by the restoration of the unity of the country, by the return of the refugees, by the restoration of law and order and by conditions of security". *Ibid.*, para. 172. Mr. Menon has also argued that the use of the words "local authorities" in the resolution means the authorities of the state government and hence even the area now occupied by Azad Kashmir authorities must revert to the state government. This would amount to withdrawing the aggression. *Ibid.*, 767 (8 February 1957), paras. 124, 127. He has also pointed

While by not withdrawing her troops India has not violated any international obligation, she may view the problem from another angle also. Ever since the resolutions of 1948 and 1949 were passed, the situation in the Indian sub-continent has considerably changed. There has resulted a vital change of circumstances in favour of one of the parties. During this time Pakistan has put India in a disadvantageous position through her policies and actions. The acceptance by Pakistan of US military aid, her membership in the SEATO, Baghdad and CENTO pacts, her defence agreement with the United States and her refusal to demilitarize the area may entitle India to view the problem in new conditions. It is submitted that there exists such a vital change in circumstances entitling India to reconsider her obligations under the resolutions. The Jarring Report has recognized this fact very conclusively in the following words:

> In dealing with the problem under discussion as extensively as I have during the period just ended, I could not fail to take note of the concern expressed in connection with the changing political, economic and strategic factors surrounding the whole of the Kashmir question, together with the changing pattern of power relations in West and South Asia.[74]

On the basis of this new change in power relations, Jarring recommended to the Security Council to approach the problem in the context of the difficulties involved. He said:

> The Council will furthermore, be aware of the fact that the implementation of international agreements of an "ad hoc" character, which has not been achieved fairly speedily, may become progressively more difficult because the situation with which they were to cope has tended to change.[75]

The recognition of the fact of vital change in circumstances by an organ of the Security Council would certainly entitle India to

out that according to the resolution, the Indian government is obliged *to enter into consultation* for arranging a plebiscite which is very different from doing something. He recognized that India's commitment is only for the acceptance of the truce agreement. *Ibid.*, 763 (23 January 1957), para 46. Referring to clause 1 of the 1949 resolution Mr. Menon said: As everybody will notice, it says "will be decided"—a single futurity. It does not say "shall. . .". It means that India is not bound by any present commitment. *Ibid.*, para. 70

[74] *UN* Doc. S/3821 (29 April 1957), para. 20.

[75] *Ibid.*, para. 21

invoke the doctrine of "*rebus sic stantibus*". In 1957 the representative of India without mentioning the doctrine referred to the material change and argued that India would be justified in considering these developments in the context of obligations assumed. In support of his argument he quoted the views of McNair, Hall, Oppenheim, President Roosevelt, Anthony Eden, John Foster Dulles, Bidault and Molotov, and further added that although India may not like to use the doctrine, " the substance of it is important politically ".[76] Similarly many other delegates referred to the new conditions.[77] The Russian delegate expressed the representative view when he said that :

> ...during the ten years which have elapsed since the Kashmir problem was first referred to the Security Council, fundamental changes have taken place not only in Kashmir itself, in the life of the people of Kashmir, but also in the political situation in that part of Asia. Considering these circumstances it would, of course, be unrealistic to be guided by recommendations and proposals put forward so many years ago.[78]

The failure of Pakistan to abide by her international commitments together with the change in circumstances around which the resolutions of 1948 and 1949 were formulated, would lend weight to the Indian argument that the conditions for a plebiscite no longer exist.[79]

CONCLUSIONS

Since the accession of the state of Jammu and Kashmir to the Indian Union was perfectly valid, the state became part and parcel of Indian territory. Any invasion of Indian territory by a foreign power must be considered as an act of aggression and a violation of international law. India has every right to demand that her legal claims be respected and that Pakistan withdraw aggression.

[76] Mr. Menon (India) S/PV. 764 (24 January 1957), paras. 26, 28, 31 ; *Ibid.*, 767 (8 February 1957), paras. 167-77.

[77] Mr. Urrutia (Columbia) *Ibid.*, 768 (15 February 1957), para. 85.

[78] *Ibid.*, 799 (5 November 1957), para. 6.

[79] "In essence the problem of withdrawals lies in the fact that, the sequence for the demilitarisation of the State, as contained in the Commission's resolution of 13 August 1948 and 5 January 1949, is not adequate to solve the present situation. The situation in the State has changed ; the resolutions remain unchanged". *U.N.* Doc. S/1430, para. 249.

She would have been within her rights not to accept the proposals of plebiscite but since she has already done so by accepting the two resolutions of 1948 and 1949, to that extent she must conform to obligations arising out of them. But these obligations come into existence only after Pakistan has fulfilled certain conditions. The failure of Pakistan to fulfil her obligations under these resolutions together with a material change in power relations in South Asia entitles India to view the problem in a new light. If the Indian contention of Pakistan's aggression be accepted, as has been done by Sir Owen Dixon, it means that Pakistan must first withdraw aggression and vacate Indian territory. In this case the resolution of 13 August 1948 will lose all meaning. And if this resolution loses all validity, the resolution of 5 January 1949 will be absolutely void. Hence the two resolutions on the basis of which the settlement is being sought, will not have any binding force. There seems to be a contradiction in the Indian government's argument which simultaneously insists that Pakistan must withdraw aggression and at the same time recognizes that she (India) felt bound by the two resolutions.

As far as Pakistan is concerned, although she has occupied a part of Indian territory by force, she may be entitled to the possession of this area only on the basis of the doctrine of efficacy. She has already established an effective government which has been functioning for the last 14 years. The scheme to build the Mangla Dam is based on the assumption that the area now belongs to her. But this will be tantamount to accepting conquest as a means of territorial change which is contrary to new international law being developed within the framework of the United Nations Charter.

4

PROBLEM OF PERSONS OF INDIAN ORIGIN IN CEYLON

EVER since India's independence the problem of persons of Indian origin in Ceylon has engaged the attention of the two governments. In 1947-8 and 1953-4 serious discussions had taken place between the Prime Ministers of the two countries regarding the future of such persons and in the latter year an agreement was signed providing for procedures to settle this vexed issue. Occasionally, in the Indian Parliament, however, the government has informed the members that she has not been satisfied with the implementation of the agreement by Ceylon. On the other hand, at times, political figures in Ceylon have charged that the Indian High Commissioner in Ceylon and other Indian officers have not given full co-operation to the Colombo government as required under the Nehru-Kotlewala agreement. This shows that both the governments have not been satisfied with the working of the agreement. Although in the last year or two they have taken a more realistic view of the matter and have promised full co-operation, because of the lack of any concrete progress in the solution of the matter, an impasse is bound to develop which may be even more serious than the one in September and October of 1954. It must be recalled that in 1954 under similar circumstances public figures in Ceylon had threatened to scrap the agreement and take the case to the United Nations in case no satisfactory solution was found.[1] It is important, therefore, to interpret the various provisions of the agreement and determine the positions of the two parties on the issue so as to find out who is responsible in the event of a show-down.

[1] See the motion tabled by Mr Dudley Senanayke in the Government Party meeting primarily provoked by the interpretations put forward by Mr. C. C. Desai, Indian High Commissioner in his negotiations with the Ceylon Government regarding the implementation of the agreement. *The Hindu*, 23 September 1954.

HISTORICAL ASPECTS

The persons of Indian origin in Çeylon belong primarily to three categories. There are a large number of Tamils who have been Ceylon nationals for hundreds of years and who belong to that country in the same way as other nationals of Ceylon. They form an integral part of the population of Ceylon and live chiefly in the Northern and Eastern provinces. Then there are Indian nationals who have gone to Ceylon for professional and business reasons and remain there only for the duration of the visas given to them by the Government of Ceylon. The third category is composed of plantation workers of Indian origin whose ancestors migrated to Ceylon to work primarily as estate labourers in the tea, rubber, and coffee plantations. These persons and a large number of illicit immigrants have been the subject of controversy between the two governments.[2]

In the early nineteenth century a large number of Indians, mostly South Indian Tamils, migrated to Ceylon as indentured labour on the assurance that those who wanted to stay on after the expiration of their contract, would be given adequate facilities to settle there on equal terms with members of the indigenous population.[3] For a hundred years or so emigration was allowed in a haphazard fashion and their number has tended to ebb and flow according to the economic position of the planters.[4] In 1922, however, the Government of India controlled the traffic by the Indian Emigration Act of the same year. This Act provided that "emigration for the purpose of unskilled work shall not be lawful except to such countries and on such terms and conditions as the Governor-General in Council by notification in the Gazette of India may specify".[5] On the

[2] Statement of Mrs. Laxmi Menon, Deputy Minister of Foreign Affairs. *Lok Sabha Debates*, Second Series, Vol. 22 (25 November 1958), col. 1446; also *Report of the Commission on Constitutional Reform* (London, 1945), Cmd. 6677, p. 60.

[3] S. L. Poplai (Ed.) *Select Documents on Asian Affairs : India 1947-1955* (London, 1959), II, External Affairs, p. 97.

[4] Cmd. 6677, *op. cit.*, p. 39

[5] *Ibid.*, p. 60. Mr. Nehru in one of his letters to the Ceylon Prime Minister wrote as follows : "I shall be failing in my duty if I did not make it clear that any suggestion that Indian labour proceeded to Ceylon solely for temporary employment on plantations in that country would be contrary to the facts of history. One of the conditions of emigration to other countries to which the Government of India have always attached the utmost importance from the very beginning of Indian emigration has been that an emigrant labourer should be given facilities to settle in that country to which he emigrates on equal terms with members of the indigenous population. The so called 'special' privileges

assurance of the Ceylon government that the Indians will also be entitled to the same legal and political rights as the other British subjects, emigration under this Act was allowed till the autumn of 1939 when the Ceylon government began a policy of discontinuance of non-Ceylonese labour employed in government departments.[6] As a reaction against the attitude of the Ceylon government, the Indian government on 1 August, 1939 placed a ban on the emigration of all unskilled labour from India to Ceylon whether employed by the government or by private employers.[7] According to the figures compiled by the Controller of Labour such population on the estates at the end of 1936 was approximately 6,59,000.[8] In 1953 there were 9,90,000 individuals of Indian origin in Ceylon.[9]

In 1940 a conference, held at Delhi between the representatives of the two governments to settle outstanding differences in connection with the franchise, domicile and status of Indians in Ceylon and other related matters, broke down on the question of the status of these immigrants[10] A satisfactory agreement, however, was reached in September 1941 but it did not come into effect on account of the war and also due to some unacceptable provisions and contradictory interpretations put forward by the respective parties.[11] After the war serious negotiations took place between the two governments in 1947-1948[12] and 1953[13] when an agreement was finally signed

sanctioned by the Government of Ceylon were benefits considered necessary to attract immigrant labour and to ensure that assistance in returning to their homes in India would be available to those migrants who did not want to settle down in the country of immigration." Poplai, *op. cit.*, p. 97. Also see Krishna P. Mukerji, "Indo-Ceylon Relations", *Indian Journal of Political Science*, Vol. XVIII (Jan-March 1957), pp. 45-6.

[6] Cmd. 6677, *op. cit.*, pp. 60-61.

[7] *Ibid.*, p. 61. [8] *Ibid.*, p. 39.

[9] *Statistical Abstract* (Colombo : Department of Census and Statistics, 1956) Table. 15.

[10] *Indo-Ceylon Relations : Exploratory Conference* (New Delhi, December 1940), p. 97.

[11] H. Howard Wriggins, *Ceylon : Dilemmas of a New Nation* (New Jersey, 1960), p. 227 ; Cmd. 6677, *op. cit.*, p. 61.

[12] *Correspondence Relating to the Citizenship Status of Indians in Ceylon* (Sessional Paper XXII, 1948) ; also for a summary of the correspondence in 1947-1948 see Poplai, *op. cit.*, pp. 92-3.

[13] The following points constituted the basis of the discussion between the two Prime Ministers in 1953 :

(*a*) Four hundred thousand Indians now resident in Ceylon were expected to be registered as Ceylon citizens. This figure was not a guaranteed figure but an estimate, the actual figure depending on the results of the impartial

in January 1954. This agreement, which was soon ratified thereafter, is the latest arrangement dealing with the future of the persons of Indian origin.

NATIONALITY IN INTERNATIONAL LAW

International law makes no provision regarding the conferment or deprivation of nationality. Rather its rule is that it is within the domestic jurisdiction of every sovereign State to legislate about its immigration policies. As pointed out by Prof. Lauterpacht "matters of nationality are left to its municipal law. A State may not only lay down rules concerning the acquisition of nationality, it may also deprive its subjects of their nationality in a variety of ways."[14] It means that it is within the unfettered discretion of the modern State to permit immigration and deal with problems relating thereto. There are, however, exceptions to this rule. If a State enters into a treaty, bilateral or multilateral, with respect to

administration of the Citizenship Act;

(*b*) The number of citizens registered under the Act plus the number of persons granted Permanent Residence Permits should be 6,50,000. This was not to be a minimum figure but a maximum;

(*c*) Persons granted Permanent Residence Permits would have their future status determined at the end of ten years, during which period if any of them desired to go back to India and take up citizenship of that country the Government of India was not to object to their proposal;

(*d*) The balance of Indian residents in Ceylon, approximately 3,00,000 or more, were to be accepted as Indian citizens by the Government of India, and to be compulsorily repatriated, the operation being phased over a definite period of years;

(*e*) All these steps were to be a part of a single scheme of settlement of the Indo-Ceylon problem. There was to be no question of settling any one point without at the same time coming to an arrangement with regard to the others. See Sir John Kotlewala, *An Asian Prime Minister's Story* (London, 1956), p. 105.

As the agreement of 1954 is the latest arrangement between the two countries, it supplants any previous understanding or commitment on the matter. It is, therefore, not relevant to talk about commitments which Ceylon may have assumed as a part of the British Empire. The German Reichsgericht had held in *S. E.* v. *G. and Gen.* that such consent might be implied from the attitude of the parties and the substitution of a later conflicting treaty between the same parties terminates by implication prior treaties"; also see Article 22 of the Harvard Draft Research on the Law of Treaties, *op. cit.*, pp. 1009-29.

[14] H. Lauterpacht, *The Function of Law in the International Community* (Oxford, 1933), p. 300; Oppenheim, *International Law*, Vol. I (7th Edition), p. 586. Also Article 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws. *League of Nations, Treaty Series*, Vol. 179, p. 89.

its immigration, the subject becomes a matter of international concern in so far as it pertains to rights and duties. It means that liberty of conduct is circumscribed to that extent.[15] The modern State is fully entitled to accept limitations on its sovereignty as was clearly pronounced by the Permanent Court of International Justice in the *Wimbledon Case*.[16] Consequently the declaration of Sir John Kotlewala that " the sovereign rights of Ceylon are not affected by the Agreement "[17] is based on unsound reasoning. India and Ceylon are obliged to settle the problem of persons of Indian origin within the context of the agreement or according to a mutually agreed alternative procedure. Any party favouring unilateral denunciation of the treaty will commit an international delinquency and subject itself to reprisals.[18]

ILLICIT IMMIGRATION

The agreement provides for the suppression of illicit immigration on a collective basis.[19] This will take two forms—the institution of preventive measures against future illicit entry and determination of the illicit status of the ones already found in the Island. The first category includes provisions relating to the setting up of joint air and sea patrol to detect the movement of illicit immigrants and take adequate preventive action. It also includes periodical meetings between high law-enforcement agencies on either side of the Palk Straits and exchange of information.[20]

[15] In Nationality Decrees in the Tunis and Morocco Case the Permanent Court of International Justice pointed out that "the right of a State to use its discretion is. . .restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law." *PCIJ*, Series B, No.4, pp. 31-2; also *Acquisition of Polish Nationality Case*, *ibid.*, No. 7, p. 16: " Though generally speaking it is true that a sovereign State has the right to decide what persons shall be regarded as its nationals, it is no less true that this principle is applicable only subject to the Treaty obligations . . . ." Dr. P. Weis, however, is of the view that besides limitations of treaties, customary international law also imposes restrictions. See his, *Nationality and Statelessness* (London, 1956), pp. 90, 92-4.

[16] *PCIJ* Series A, No. 1, p. 25.

[17] Sir John Kotlewala while answering PTI correspondents in Colombo. *The Hindu*, 31 March 1954.

[18] See the statement of Mr. C. C. Desai, the Indian High Commissioner to Ceylon in an exclusive interview to the correspondent of *The Hindu* where he has supported this interpretation. *The Hindu*, 29 June 1954.

[19] Article 1 of the Agreement.

[20] *Ibid.*

The measures contemplated in this regard are more a matter of detail and can very seldom evoke any serious controversy. In this regard the Government of India has doubled the police staff patrolling the coast in Tanjore, Ramanathapuram and Tiruneluch districts.[21] The results have been highly encouraging for the number deported by the Ceylon government Immigration Control Organisation had dropped sharply from 87 in March to a paltry 8 in April 1956.[22]

In Ceylon, on the other hand, the government and other prominent public figures have not been satisfied with this arrangement. That is why there is a move to deploy soldiers all along the northwest coast and to place the whole area under the joint control of the Navy, the Army and the Air Force.[23] In order to make " sly " entry more risky some members of the United National Party have advocated that such immigrants must be shot at sight so that it may serve as a warning to hundreds of others who may try to come into Ceylon through these methods. Mr. R. G. Senanayake, a former

[21] Mr R. G. Senanayake, Minister for Trade, Commerce and Fisheries said that the Indian police was wholeheartedly co-operating in checking illicit immigration but there was as yet no sufficient co-ordination in arrangements made by the Ceylon police. *The Hindustan Times*, 26 March 1954. Even in November 1953 it was generally believed that a sharp decline in illicit migration to Ceylon was due to the vigilance of the Indian government. For the official figures available for the years 1952 and 1953, see *ibid.*, 12 November 1953. Mrs. Sirimavo Bandarnaike had also recently told the Senate that her government was satisfied with the measures taken by India to prevent illegal immigration to Ceylon. *The Times of India*, 18 November 1960. Also Ajoy K. Gupta, " The Ceylon Citizenship Question and the Indian Problem ", *The Modern Review*, Vol. C (July 1956) p. 63.

[22] *The Hindustan Times*, 23 May 1954.

[23] It has been reported from Colombo that the Ceylon government has decided to undertake military operations to combat illicit immigration from India. These operations will engage 1,000 soldiers, 300 policemen and units of the Navy and Air Force. The soldiers will be deployed along the northwest coast. The northern sector, including Jaffna, will be placed under the joint control of the Navy and the police. Big naval vessels will patrol the sea while fast patrol boats and small craft will operate in shallow waters. The Air Force will carry out day patrols. The Navy will deploy two frigates, two mine-sweepers, one seaward defence boat, one salvage tug and six patrol boats. This task force will be divided into two groups—one operating from the naval base at Trincomalee to the north of Mannar Island, and the other from Colombo to the south of the Island. *The Sunday Statesman*, 12 March 1961. It is also proposed to impose sentences of imprisonment on people who help illicit entrants to gain access to the country and those who give them employment. Statement of Mr. F. D. Bandarnaike, Ceylon's Finance Minister in the House of Representatives. *The Sunday Standard*, 2 October 1960.

Commerce Minister, has advocated that armed units be posted along Ceylon's northern and western coasts so that illicit immigrants seeking to elude guards can be shot down.[24] Another prominent figure, Mr.T.B. Ilangaratne, Labour Minister, at the Sixth Annual Session of the Sri Lanka Freedom Party urged the government to treat the offence of aiding illicit immigration as treason.[25]

The government has, however, not considered the situation as so grave and such extreme steps have not been viewed favourably because of moral and humane consideration.[26] India has no reason to complain on this basis. The only objection raised by the Indian government was with regard to Ceylon's patrol boats pursuing the illicit immigrants into the territorial waters of India.[27] This is a genuine objection because the territorial waters are considered to be the natural boundaries of the State concerned and no self-respecting State can tolerate any foreign interference on its territory.

It was provided for in the agreement that the detection of illicit immigrants already found in the Island will be made by preparing a register of all adult residents whose names are not found on the electoral register. Persons whose names fail to appear on the register after a certain lapse of time will be presumed to be illicit immigrants provided their mother tongue is an Indian language.[28] Such persons will be liable to be deported and the Indian High Commissioner is obliged to give all facilities in this direction. This provision has been supplemented by another which permits Ceylon to proceed with the enactment of legislation " which throws on the accused the onus of proof that he is not an illicit immigrant ".[29]

[24] *The Tribune* (Ambala), 4 August 1954; also Mr E. W. Mathews : " We may have to make special laws even to shoot these Indians if we cannot stop them from coming illicitly."

[25] See the remarks of the Labour Minister, Mr T. B. Ilangaratne, sponsoring a resolution urging the government to seek early solution of the Indo-Ceylon problem at the sixth annual session of Sri Lanka Freedom Party held in Kelaniya. *The Hindu*, 4 March 1958. Also Mr. D. B. Monnekulama, Parliamentary Secretary to Mr. Bandarnaike, Ceylon's Prime Minister, who has termed the illegal immigration as of " immense magnitude " and has advocated that "it must be brought to an end without any further delay if our own people are to derive full benefit from the sources of employment, the housing and living conditions and other social amenities ". *The Hindustan Times*, 7 September 1959.

[26] See the speech of Sri Bandarnaike at the annual conference of the Sri Lanka Freedom Party at Kelaniya on 3 March 1958. *The Hindustan Times*, 4 March 1958.

[27] See Indian government's note to Ceylon. *The Hindu*, 26 June 1954.

[28] Article 2. [29] Article 3.

These two provisions, it must be pointed out, are against all canons of democratic justice. In a democratic society a person is presumed to be innocent unless proven guilty. This is to protect the citizen from undue police harassment and oppression.[30] Although such a case has to be a *prima facie* case, satisfactory to the Indian High Commissioner, the final decision in this regard lies with the Government of Ceylon.[31] This provision can be subjected to abuse and mischief.

Although in the beginning large batches of deportees left Ceylon in fulfilment of these provisions, there has developed serious controversy between the two governments regarding their interpretation. The Ceylon Government has not so far prepared the register as required under the agreement arguing that the registration of non-nationals was not obligatory on her part, and that it was a device proposed to facilitate detection of future illicit immigrants.[32] Therefore she has favoured a scheme for the issuance of identity cards to stateless persons because, in its view, once identity cards are issued it will become easier to detect illicit immigrants.[33] Secondly, in the opinion of the Ceylon government, while the Indian High Commissioner will be given an opportunity to satisfy himself that a *prima facie* case exists before a prosecution is launched under the new law, decision of the government (Ceylon) to proceed with the case will be final and if the accused finds himself unable to discharge the onus or, in other words, if he is convicted by the court, it will be incumbent on the Indian High Commissioner to extend facilities for his deportation to India.[34]

[30] A similar view has also been expressed by the Special Correspondent of *The Hindustan Times*. "Problem of Indians in Ceylon" appearing under the caption "South Indian Review", *The Hindusthan Times*, 11 April 1955.

[31] Article 3. For clarification on many other such questions arising out of the agreement see the resolution of the Working Committee of the Ceylon Indian Congress passed on 24 January 1954 at Colombo. *The Hindustan Times*, 25 January 1954.

[32] See the Ceylon government's note to the Indian government as a clarification of the various clauses of the Indo-Ceylonese agreement. *The Tribune*, 7 July 1955 ; also *The Hindustan Times*, 31 March 1954.

[33] See Mr. Bandarnaike's intervention in the debate in the House of Representatives on demand for grants for the Ministry of Defence and External Affairs. *The Hindu*, 18 August 1958.

[34] The Ceylon government's view is that "unless court's verdict in prosecutions became binding on the High Commissioner, the working of law would lead to Ceylon's jails being filled with convicted illicit immigrants. This would defeat the purpose of the new immigrants' law. Therefore . . . Ceylon considered

The Indian government has rightly questioned these interpretations. The agreement is quite explicit on the point that before a person may be presumed to be an illicit immigrant, the Ceylon governmet must complete the registration because this is a precondition for the fulfilment of later legal processes. The illegal status of these persons can be known only on the basis of the proposed registration and hence, without the preparation of the register, none of the persons can be proceeded against. In this sense the refusal of Ceylon to compile the register is derogatory to the express wording of the agreement. Moreover, the proposals to issue identity cards have legitimately led to a wave of unrest and opposition on the part of the Ceylon Workers Congress.[35] This is so because the government's decision to issue these cards only to Ceylon citizens will result in leaving stateless people exposed to the dangers of b eing hauled up in court on charge of illicit immigration despite the fact that they have been residents. The Indian argument, that the register should include non-nationals, who are resident in Ceylon atthe time of its preparation, is in conformity with the wording of the agreement which says that the Government of Ceylon should " undertake the preparation of a register of all adult residents who are not already on the electoral register."[36] To that extent, therefore, the Ceylon government's argument cannot be accepted.

Secondly, according to the Indian High Commissioner, automatic deportation facilities will be available only to those who are neither on the electoral register, nor are registered as applicants for citizenship of Ceylon. The Indian High Commissioner will be obliged to issue deportation orders only in those cases where he has agreed to prosecutions.[37] It must be pointed out that this position of the Indian government cannot be supported on the basis of the agreement where it is mentioned that those who fail to register (if their mother tongue is an Indian language) will be presumed to be illicit immigrants and the High Commissioner is obliged to extend facilities for implementation of such deportation.[38] The agreement refers

that accord on interpretation of these clauses was essential to work the pact." *The Tribune*, 24 June 1955 ; also *ibid.*, 7 July 1955.

[35] The idea for the identity cards was given by Mr. C.A.S. Manikar, Minister of Posts and Information. See the opposition expressed against the proposal by the Ceylon Workers' Congress. *The Hindu*, 18 August 1958.

[36] Article 2.

[37] C. C. Desai, "The Stateless in Ceylon", *The Hindustan Times*, 31 August 1959, p. 7.

[38] Article 2.

only to the completion of the registration process and nothing is mentioned about their registration as applicant citizens of Ceylon. The latter is a process which will come into existence only after the illicit character of immigrants is determined. Moreover, although the Indian High Commissioner is given an opportunity to satisfy himself that a *prima facie* case exists against the person to be prosecuted, in the words of the agreement " the final decision is that of the Government of Ceylon ".[39] This categorical statement about the final discretion of the Ceylon government should set at rest the Indian argument that no deportation proceedings can be instituted unless the High Commissioner gives permission. The Indian High Commissioner is given only " an opportunity . . . to satisfy himself that a *prima facie* case exists for such prosecution ". This subjective determination, however, is controlled by the final authorization of discretionary power to the Ceylon government. The Indian government's argument can stand only if it can be established that deportation and other similar processes are to be put into practice only after the registration is complete. And since Ceylon has not so far prepared the register, according to this argument, the latter obligation cannot be considered to have matured.

CITIZENSHIP

In order to expedite matters, the two governments have decided to accept a considerable number of such immigrants within their own personal jurisdiction and thus give them a definite legal status. Ceylon on her part has agreed to consider their applications for citizenship under the *Indian and Pakistani Residents (Citizenship) Act* of 1949.[40] It means that a considerable number of persons of Indian origin will become naturalized citizens of Ceylon and thus help reduce the area of tension.

According to the *Indian and Pakistani Residents (Citizenship) Act,* a person who applies for registration as citizen must fulfil the following requirements, in order to be admitted to citizenship.[41]

[39] Article 3. [40] Article 4.

[41] For the various details regarding the working of this Act, I am indebted to Mr. Shetty for his very brilliant article. K. P. Krishna Shetty, "The Law of Citizenship for Indian and Pakistani Residents in Ceylon", *Indian Yearbook of International Affairs*, Vol. VII (1958), pp. 165-85. For a summary of discussions between the Prime Ministers of India and Ceylon at New Delhi on 28-30 December 1947 and the points on which agreement was reached regarding qualifications for Ceylon citizenship, see Poplai, *op. cit.*, pp. 92-4.

(*i*) the applicant must possess a minimum qualification of *uninterrupted* residence as defined in section 3 ;

(*ii*) his wife (if he is married) and his minor dependent children (if any) must also possess certain residential qualifications as in section 6(2) (*ii*) in its amended form;

(*iii*) he must establish a reasonable degree of financial stability as in section 6(2) (*i*);

(*iv*) he must be free from any disability or incapacity of the kind referred to in section 6(2) (*iii*) ; and

(*v*) he must " clearly understand " the statutory consequences of registration as in section 6(2) (*iv*).

(*i*) *Residential Qualification*

The Act stipulates that the minimum period of " uninterrupted residence " required shall be ten years for an unmarried person and seven for a married person. But since this period should be completed immediately prior to 1 January 1946 and continuity of residence should not cease till the date of application, it virtually amounts to a minimum period of 10 and 13 years for married and unmarried persons respectively, which is " far in excess of the period stipulated for registration in Citizenship Acts in any country of the world ".[42]

Moreover, the benefits of the Act are extended only to those candidates who emigrated to Ceylon with the definite *intention* of settling there. In other words the applicant must prove what his intention was at the time of his departure from India. This inten. tion must also be coupled with having *permanently settled* in Ceylon- The administrative authorities have construed the expression *permanently settled* in a strictly literal sense and have asked that the fact of continuous residence be coupled with the proof of intention to that effect. In *Doraiswamy's Case* the Commissioner for Registration had rejected the application on this basis[43] though later the Supreme Court of Ceylon over-ruled this interpretation by saying that the applicants should be asked to satisfy the objective test expressly laid down in the Act and nothing more.[44] In the *Kodakan Pillai* V *Mudanayake Case* the Privy Council remarked that " if there was a legislative plan, the plan must be looked as a whole, and when so looked it is evident, in their Lordships' opinion, that the legislature did not intend to prevent Indian

[42] Shetty, *op., cit.* p. 166.

[43] *Ibid.*, p. 168.

[44] *Ibid.*, pp. 168, 169.

Tamils from attaining citizenship provided they were sufficiently connected with the Island."[45]

Furthermore, a great deal of administrative discretion vests in the commissioners to determine as to what is meant by the words "uninterrupted residence".[46] The Act itself allows a margin of not more than twelve months' absence at any time from Ceylon. In the *Palaniyandi Case* the Commissioner rejected the application on the ground that the applicant could not prove, except by oral or corroborative evidence, his continued residence during the period between 1936 and 1939 to the Commissioner's satisfaction.[47] The Supreme Court, however, held that the concept of " benevolent construction of inference " should be resorted to in such cases.[48] This has been supplemented by the acceptance of the " flexible rule of proof " or the " balance of probability rule of proof " enunciated in *Palamasivan* V *The Commissioner*.[49] In this case, Mr Justice Gratiaen criticized the attitude of the Deputy Commissioner as "premeditated" and the proceedings as a " farce " and pointed out that " the Act nowhere imposes artificial restrictions of any kind either as to the nature of the evidence which would suffice to prove the fact in issue or as to the kind of witness who should be regarded as reliable. All these are matters which must obviously be left to the commonsense of the tribunal whose duty is to assess the evidence conscientiously, dispassionately, judicially and without bias ".[50] The Supreme Court and the Privy Council have made it clear that when an applicant has satisfied all the onerous statutory conditions he should not be disqualified simply because he has incorrectly entered his residence in Ceylon as " temporary " in order to facilitate the forwarding of the usual subsistence allowances to his relatives abroad.[51]

There is, however, one statutory exception to the rule of " uninterrupted residence " when, if having become, while in Ceylon, a member or an employee of any of His Majesty's forces, he was during that period on service in any other country as such a member

[45] 54 N.L.R. 433 at 439 (1953).
[46] 56 N.L.R. 313 at 316 (1955).
[47] *Ibid.*, p. 375.
[48] Shetty, *op. cit.*, pp. 171-2.
[49] 56 N.L.R. 514 (1955).
[50] Shetty, *op. cit.*, pp. 172, 173.
[51] For example see the *Doraiswamy Case*, 56 N.L.R. 313 at 321 (1955); also for the Privy Council's decision, see *The Hindu*, 24 July 1958.

or employee.[52] In the *Billomoria Case* involving the point whether this benefit should be extended to a person who travelled to Bombay where he joined His Majesty's forces, the judge held that " while in Ceylon " meant actual physical presence in Ceylon.[53] Such a decision, it is submitted, would create much hardship as so many Indian residents travelled freely in the British Empire and got recruited in the army at the place in which they found themselves temporarily during that emergency.[54]

(*ii*) *Requirements for the Family*

Section 6(2)(*ii*) of the Act makes provision for the residential qualification of the applicant's wife and children. In their case also the Commissioners of Registration have frequently interpreted the clause very literally in order to put obstructions in the approval of applications. The Supreme Court has, however, disproved such an attitude.[55]

(*iii*) *Adequate Means of Livelihood*

According to Section 6(2)(*i*) of the Act, the applicant must prove that he possesses " an assured income of a reasonable amount or has some suitable business or employment or other lawful means of livelihood to support the applicant and the applicant's dependents if any. The words " assured income of a reasonable amount " are sufficiently vague to admit executive discretion to any length of arbitrariness. The " assured income " may be any amount provided it is sufficient for his living.[56] That is why the prescription of a uniform standard of living for the purpose of this section is hardly warranted under the provision. Such income could be ascertained by circumstantial evidence without much need for " documentary proof " as insisted upon by the Supreme Court in disproving the commissioner's contention to the contrary.[57]

[52] Section 2 of the Act as amended by the Indian and Pakistani (Amendment) Act No. 37 of 1950.

[53] 56 N.L.R. 156 (1955).

[54] Shetty, *op. cit.*, p. 175.

[55] For a discussion of some of the relevant cases decided by the courts, see *ibid.*, pp. 175-80 , also *The Hindu*, 15 July 1957.

[56] Shetty, *op. cit.*, p. 180.

[57] *Abdul Cader* V *The Commissioner for Registration*, 56 N.L.R. 572 (1955).

(*iv*) *Freedom from Disability*

This qualification based on section 6(2)(*iii*) of the Act requires that the applicant should be free from any disability or incapacity which may render it difficult or impossible for him to live in Ceylon according to the laws of the country. This was aimed at those who had already contracted more than one marriage in accordance with Hindu law. While this seems to be a reasonable provision because Ceylon law permits only monogamous marriages, it would be unreasonable to allow the custom of ploygamous marriage to stand in the way of those applicants who have already had more than one wife.[58]

The last qualification as laid down in section 6(2)(*iv*) stipulates that the applicant should " clearly understand " that in the event of his being registered as a citizen of Ceylon he will be declared in law to have renounced the rights and political status he had enjoyed before sending his application for registration.[59] This is a justifiable provision so that people may not claim dual nationality and seek to evade the obligations owed to Ceylon.

We have discussed the provisions of the Citizenship Act in detail because on it depends the number of people who will be absorbed as Ceylon citizens and who will swell the ranks of the " stateless " ones. In actual practice progress in the direction of conferring Ceylon citizenship has been very slow and unsatisfactory and has naturally aroused the fears of the Indian government as to the genuine intentions of Ceylon to abide by the agreement. It has been alleged that if the applications are considered at such a slow pace, it will take as many as ten years to dispose them all. It has also been charged that a great majority of applications are being rejected on very minor, flimsy and technical grounds like wrong spelling of names, failure to mention oneself as a "resident (permanent)" on the Exchange Control Form and having sworn before a Justice of the Peace for application purposes who had not yet taken the oath of allegiance.[60]

It must be pointed out that the commissioners have, wherever it has suited the government, interpreted the wording of the Act

[58] Shetty, *op. cit.*, p. 181.

[59] *Ibid.*, p. 181. See the statement or Mr. C. C. Desai, India's High Commisioner. *The Hindu*, 3 April 1954.

[60] Desai's Article in *The Hindustan Times*, 31 August 1959; also see the presidential address of Mr. K. S. Vaidyanathan, President, Indian Mercantile Chamber. *The Hindu*, 1 October 1958.

too literally to reject the applications and instances are not lacking where administrative discretion has been used to the detriment of the applicant.[61] Though the judiciary has appeared as a factor correcting in many cases the errors of the administration and applied the law in accordance with principles of natural justice, it is clear that all rejected applicants do not have the necessary finances to seek the help of the highest judicial organ in the country.[62] There is no dearth of cases submitted to the Supreme Court and the Privy Council in which the judicial tribunals have referred to the fact that men who administered the Citizenship Act had misdirected themselves on question of fact and law in various ways and on many questions.[63] That is why some members of the Opposition have termed the handling of these matters by the department as " scandalous ", " uniformly unfair " and a " travesty of justice ".[64]

It is of interest to note that from September 1954 to January 1955 while the total rejected applicants were 36,250, only 21 were registered as citizens. Again from December 1953 to September 1954 while the total number of persons who registered as Ceylon citizens was 7,505, the number of rejected applications swelled to 45,236.[65]

61 Wriggins, *op. cit.*, p. 225 ; See the criticism by the members of the Opposition, of the Department of Registration of Indian and Pakistani Residents. *The Tribune,* 6 August 1955 ; also Mr. S. Thondaman, President of the Ceylon Workers' Congress, *The Hindu,* 29 October 1958; I. D. S. Weerawardena "The General Election in Ceylon, 1952," *Ceylon Historical Journal,* Vol. II (1952), p. 112.

62 Such a possibility was pointed out by Prime Minister Nehru as early as 1948. See his letter to Mr. Senanayake, Poplai, *op. cit.*, pp. 100-101; also *Administration Report for Registration of Indian and Pakistan Residents in Ceylon* (1952), p. 3. It has been alleged that the Commissioner of Registration has issued circulars to his subordinate officers with a view to holding down registration of citizens. This question was raised in the House of Representatives and Mr. Nalliah, Parliamentary Secretary to the Prime Minister had said "that these circulars were issued not necessarily with the past knowledge of the Prime Minister or the Permanent Secretary in the Ministry of External Affairs". He even tried to justify the issuance of such circulars. *The Hindustan Times,* 4 November 1954.

63 See an article by Mr. Hari Hara Iyer a Ceylonese lawyer who has appeared in many cases including a number of the Privy Council Cases. *The Hindu,* 5 April 1954.

64 *The Tribune,* 6 August 1955.

65 In reply to Mr. Tangamaini and Mr. M.N.R. Muniswamy, Mr. Sadath Ali Khan, Parliamentary Secretary to the Ministry of External Affairs said in the Lok Sabha on 25 September 1958 that between October 1954 and the end of June 1958 the number of expatriates who had come to India from Ceylon was 63,850, out of these 44,971 had settled down in Madras. *The Hindu,* 27 September 1958.

According to the latest statistics available, out of a total of 2,37,034 applications, covering an estimated 8,29,619 persons, filed by persons of Indian origin for Ceylon citizenship, only 24,559 applications covering 96,923 persons had been accepted until the end of August 1958. 1,96,063 applications covering 6,96,252 persons had been rejected. 7,397 applications are reported to have been withdrawn and 9,020 applications are still pending disposal.[66]

There is no doubt that slow progress on these issues has justified Indian protests. But from a purely legal standpoint, the objections of the Indian government do not seem to be well taken. The two-year period of registration and disposal of applications extended up to 18 January 1956; if the period is computed from the October 1954 conference, as suggested by Sir John Kotlewala, it would have extended up to 9 October 1956. In 1956 the slow progress in registration would have entitled India to take exception to Ceylon's attitude but during the last six years there seems to be an implicit understanding between the two countries that the restriction of the time limit should not be pressed. It is clear that they have a virtual agreement on foregoing the time limit clause. Moreover, the agreement fails to disclose that a certain number of applicants must be accepted as Ceylon citizens. They can be accepted as such only if they are able to fulfil the relevant requirements of the Citizenship Act. Only if a definite commitment had been made, would Ceylon have been bound to accommodate itself to India's wishes.[67]

While the agreement conceived a number of persons becoming Ceylonese citizens, a similar provision was also made for those anxious to become Indian citizens. Paragraph 7 of the agreement provides that those who are not registered as Ceylon citizens, have the option to become nationals of India in case they are entitled to become so under Article 8 of the Indian Constitution. Accordingly " any person who or either of whose parents or any of his

[66] Mrs. Laxmi Menon's statement,*op. cit.*, col. 1447. The most recent figures given by the Indian government are as follows : Till the end of 1960, 35,411 of these applicants had been given Indian citizenship and 1,90,294 Ceylonese citizenship. India had rejected 1,0,491 applications till the end of 1960 and Ceylon 6,91,975 till August 1960. Statement by Mr. Sadath Ali Khan in the Lok Sabha. *The Times of India*, 8 August 1960.

[67] The understanding that a certain number must be admitted to Ceylon citizenship was probably arrived at in London in a meeting between Mr. Nehru and Mr. Senanayake. *The Hindustan Times*, 25 June 1954. But India's argument cannot be accepted because this understanding is not a part of the agreement and hence cannot be enforced. Also see Kotlewala, *op. cit.*, p. 105.

grandparents was born in India "[68] could become an Indian citizen by getting himself registered with the Indian High Commissioner. A provision for the same has been made by the Citizenship Act of 1955.[69] Significantly, under the agreement it is up to the person concerned whether to apply for Indian citizenship or not. The agreement makes it quite explicit by mentioning it twice in paragraph 7 that " it would be open to them to register themselves as Indian citizens, if they so choose. . . ." This provision lays emphasis on the voluntary nature of registration so that the persons concerned may not be coerced into becoming so.

In order that more and more persons may volunteer for registration as Indian citizens, the Ceylon government proposed to offer special inducements.[70] Inducement presupposes certain special material benefit attractive to the persons induced.[71] It may include for the persons of Indian origin free return trips to India, pensions, special bonuses, income-tax exemption and other monetary attractions, help in the disposal of property, exchange facilities for earnings and accumulated capital gratuity or lump sum payments, benefits of National Provident Fund Scheme, giving of resident visas enabling those opting for Indian nationality to continue in employment up to a certain age and many similar facilities which may induce the would-be registrant to become a citizen of India. Quite to the contrary, the measures announced by Ceylon from time to time are harsh and coercive and cannot by any stretch of imagination be included in the said category.[72] The refusal to extend ration books,[73] denial of employment or dismissal from the same

[68] For the various interpretations of this article, see Durga Das Basu, *Commentary on the Constitution of India* (Calcutta, 1955), 3rd Edition, Vol. I, pp. 67-8.

[69] Citizenship by registration may be acquired according to Article 5 of the Indian Citizenship Act, 1955. *The Citizenship Act of 1955*, No. 57 of 1955, pp. 3-4. See also A. N. Sinha, "Law of Citizenship and Aliens in India", *India Quarterly*, Vol. XIV (1958), pp. 257-8.

[70] Article 7.

[71] Referring to a question about inducements, Sir John Kotlewala while speaking to correspondents said : "If a man is told that we are going to pay him pension and give him free travel to take his family to India, that is an inducement." *The Hindustan Times*, 20 January 1954.

[72] See the editorial entitled "Ceylon Premier's Apologia", in *The Hindu*, 1 June 1954.

[73] Report of the Sub-Committee of the Ceylon Cabinet in paras 10 and 14. *The Hindu*, 12 February 1959. Also the latest report that the Ceylon Government's Food Department has stayed the issue of ration books to several hundred tateless persons of Indian origin. *The Times of India*, 22 March 1961.

on account of failure to provide nationality certificates within a prescribed time,[74] refusal to extend temporary resident permits and identity cards,[75] withholding accumulation under the National Provident Scheme,[76] denial of the right to join trade unions,[77] reservation of at least 50 per cent of the future vacancies on the plantations for indigenous labour,[78] advocating measures against

But the Indian government has called this report as giving "erroneous impressions". Mr. Sadath Ali Khan, Parliamentary Secretary to the Prime Minister told the Lok Sabha that the government had made enquiries and that no special interpretation need be read into them. *The Times of India*, 6 April 1961.

[74] See the statement of Mr. Anil K. Chanda, Deputy Minister for External Affairs, in the Lok Sabha saying that the Government of Ceylon had recently announced a new definition of the term "Ceylonese" for the purpose of employment in public services. Soon after the announcement, the new definition was wrongly interpreted by a minor officer of the P. W. D. who asked about 70 workers of Ratmalana airport to produce documentary proof of their nationality, if they wanted to retain their jobs. *The Hindustan Times*, 22 April 1954; also *The Hindu*, 17 February 1959.

[75] "The question of not renewing temporary resident permits and withdrawing identity certificates is not merely one of local concern ; it affects the people of Indian origin, especially Indian estate labour. The unilateral action of the Ceylon government, without consultation with the Government of India is a gross violation of the Indo-Ceylon agreement. The decision was a coercive measure to squeeze out Indians from Ceylon. It is not in keeping with the spirit and letter of the agreement." Mr. C. C. Desai, Indian High Commissoner, in a statement in Colombo. *The Hindustan Times*, 3 April 1954. Also the remarks of Mr. C. Chandraseva. *The Hindu*, 4 March 1958.

[76] *The Hindu*, 29 November 1958. But see the statement of Mr. F. D. Bandarnaike, Ceylon's Financial Minister and Secretary of the ruling Sri Lanka Freedom Party, saying that "the Government of Late Mr. Solomon Bandarnaike had paved the way for a practical and realistic solution of the problem by starting an employees' provident fund, the benefit of which were thrown open to plantation workers of Indian origin also." *The Times of India*, 28 July 1960.

[77] *The Hindu*, 4 March 1958.

[78] See the communique issued by the Minister of Labour, Mr. T. B. Ilangaratne : "It is a well-known fact that the bringing of cheap labour from India by the British during the colonial days deprived the local population of the right to share these employment opportunities and to-day the descendants of these immigrants demand the right to monopolise all employment in a particular sector of the country's economy. As the Indian estate population increases, all available work on the estates is given to their children, generally on the ground that this is a moral obligation on the part of the employers. Consequently on the one hand the local labour are denied the chances of obtaining employment on estates although there is no longer any prejudice on their part for this type of work, while on the other they are without any other means of subsistence —without houses to live and without any room for expansion or cultivation—

Ceylon Indian leaders such as immediate "decitizenising" of Messrs Thondaman, Aziz and others and expropriating their property, freezing their bank balances and organizing a campaign to boycott all Indian establishments, big and small,[79] and many similar measures are meant to squeeze them out in clear violation of the letter and spirit of the agreement.[80] As pointed out by one of the labour leaders "instead of offering inducements the Ceylon government was offering them kicks.... While the Kotlewala Government had offered facilities for Americans to take their dividends and profits from Ceylon, Indian residents were prevented from taking away their meagre earnings."[81] Moreover, some of the estate superintendents were wilfully preventing a large number of Indian labourers from registering themselves by not passing the documents to them.[82] These measures can be enforced on the Indians on pain of starvation.[83] Hence the Indian High Commissioner

because the lands of their ancestors had been expropriated during colonial days for plantation purposes. It cannot, therefore, be conscientiously said that there is anything morally unfair in the present proposal of the Minister which is merely aimed at ensuring that all labour, both "imported" and indigenous, will have more equitable employment opportunities in the plantations without racial discrimination. It must be emphasized that this is really not a national plan for solving the problem of unemployment. This is merely an attempt to rectify an unfair labour practice which has been going on for a long time, and although it has escaped the attention of previous Governments, it cannot any longer be allowed to continue." *The Hindu*, 21 January 1959.

[79] See the article by Stanley Morrison, official columnist of the U.N.R.—official organ of the United National Party. *The Hindu*, 13 June 1954.

[80] "... the measures, in the opinion of the Government of India, are coercive, intended to compel Stateless persons to seek Indian nationality on pain of losing their means of livelihood in Ceylon...a step not in keeping with the spirit and letter of the Delhi Agreement." See Indian government's views on Ceylon government's proposals. *The Hindu*, 24 June 1954.

[81] Mr. W. Dahanyake, *The Tribune*, 2 August 1954 ; also the views of the Indian Prime Minister, *The Hindustan Times*, 7 January 1954.

[82] *The Hindu*, 5 April 1954.

[83] An editorial entitled "Listening to Reason", although too strong in language, may be considered to represent the views of the Indian people : Nor can the Indian Government be indifferent to the way Ceylon treats the so called "Stateless" persons of Indian origin. The adoption of such crude and inhuman methods. . .reminiscent of what the Nazis did in France to break the spirit of the people. . .as denial of ration cards and removal from jobs to force the "Stateless" persons to seek registration as Indian nationals is opposed to all canons of decent conduct and is hardly calculated to promote friendship and good relations between India and Ceylon. . . .No concern for national sovereignty or respect for the principle of non-interference in the internal affairs of another State will warrant the Indian Government remaining silent while the Ceylon Government treat

is entitled to be satisfied that the applicants for Indian citizenship are doing so by their own free will and are not the victims of coercion. Even the Ceylon Prime Minister, Mr Bandarnaike had admitted (regarding these inducements) that " India had all along stressed that if there was any coercive element in the registration of persons as Indian citizens in terms of Article 8 of the Indian Constitution, India would take it that applications for citizenship had been made under some kind of direct or indirect force....If Indians are excluded from the provisions of the Provident Fund Bill, it would be interpreted as a coercive measure ".[84]

Hence the charges of the Ceylon Government that the Indian High Commissioner has been very slow in registering such persons should not be considered very seriously. The High Commissioner has to be satisfied that the applicants are not being coerced and that they fulfil the requirements laid in Article 8 of the Indian Constitution. It has been reported that the Indian government has considerably increased its staff at Colombo in order to cope with the increased work. In 1954 she registered 5,618 (applicants) persons as Indian citizens out of a total of 8,163 applicants and it should be considered as satisfactory progress.[85]

The other allegation that the Indian High Commissioner has not cooperated in the matter in giving information about those holding Indian passports may be valid to a certain extent.[86] It is said that the Indian government has names of 1,50,000 Indian residents in Ceylon on its register. Some of them, it is said, have torn up their passports on the expiry of their visas and merged with the stateless people as otherwise they would have been asked to leave the Island for good under the government's scheme of repatriating expired visa holders.[87] Although the agreement does

lakhs of people as so many chattel to be thrown on the scrapheap or bundled out of the country at their sweet will and pleasure. . .*The Hindu*, 24 June 1954.

[84] *The Hindu*, 7 March 1958.

[85] Also Kotlewala, *op. cit.*, p. 107.

[86] *The Hindustan Times*, 3 April 1954.

[87] Mr. Dudley Senanayake's accusation, *The Tribune*, 4 August 1955; also Mr. T.B. Ilangaratne before the Cabinet Sub-Committee. *The Hindu*, 12 February 59. But Mr. C. C. Desai, former Indian High Commissioner, has argued as follows : "The Ceylon Government could not deprive every Indian travel document holder on this ground (that Indian travel document holders were Indian nationals) because while the possession of an Indian passport might be a presumptive evidence, it was not conclusive evidence. India would take back only those persons who fulfilled the requirements of the Indian Constitution for Indian citizenship." *The Hindustan Times*, 13 April 1954. This argument cannot be accepted.

not provide anything concrete in this direction and the information sought is outside the scope of the Nehru-Kotlewala agreement, the Indian government should not flout the wishes of the Ceylon government on this point. Ceylon must know the names of such persons so that the passport holders, Indian citizens as they are, m ay not attempt to gain Ceylonese citizenship. The government can of course secure such information from the records of its own departments of Immigration, Exchange Control and Rationing but in order to quicken the tempo of work, the Indian government should not bypass the spirit of goodwill and co-operation in which the agreement was conceived.

The Indian government on its part has regarded with suspicion some of the activities of Ceylon authorities regarding giving inducements to those who opt for Indian citizenship. Mr C. C. Desai, former Indian High Commissioner in Ceylon, has pointed out that the " assurance that those who accept Indian nationality will not be forced to leave Ceylon and will be allowed to work until retirement can have little practical value as it can be set at naught in various devious ways ". Alternatively he had proposed that " if the Ceylon Government is genuine in its desire to settle the problem in a fair and humane way, it should offer two alternatives to the stateless and should give them a period of, say, a year to make up their minds. All those who wish to accept Ceylonese nationality should be allowed to settle down permanently and given full citizenship rights. Others should have the option of becoming Indian citizens but on condition that their employment is uninterrupted and that they are free to visit India or to send remittances there. If such a choice is offered there will be no complaint against the Government of Ceylon while the Government of India too will not hesitate to register as Indians those who prefer Indian nationality to Ceylonese while continuing to work in Ceylon. As to those who opt for Ceylonese citizenship they must be given full rights without delay and thereafter treated without distinction or discrimination."[88]

It must be pointed out that these proposals of the Indian government cannot be justified within the context of the agreement. If Ceylon must allow these persons of Indian origin who accept Indian

[88] Desai's article in *The Hindustan Times*, 31 August 1959. This kind of an assurance is perhaps based on a previous similar promise given by the Ceylon government. For example, Mr. D. S. Senanayake had informed the Indian Prime Minister that those, who do not acquire Ceylon 'citizenship, would still continue to be allowed to remain in the Island as Indian citizens, and to pursue their lawful avocations without interference, Kotlewala, *op. cit.*, p. 104.

citizenship, to stay in Ceylon till they retire, it will amount to Ceylon bearing the brunt of the domicile of all persons of Indian origin. While those who register as Ceylon citizens will lawfully stay in the Island, even those who attain Indian nationality may also, according to the Indian government's formula, stay on till the age of retirement. It will result in the Ceylon government accepting the *status quo* which she has been trying all these years to change in her favour. Moreover, what purpose can be served by their leaving for India after the age of retirement where they may have to settle for the rest of their lives in an entirely new environment with much physical discomforts at that old age. India can ask for reasonable inducements for such persons but not the kind, the consequence of which may be that even Indian citizens will stay in Ceylon till they reach the age of retirement. If India has proposed such conditions, it may be considered as contrary to the wording of the agreement.

STATELESSNESS

A natural consequence of the citizenship provisions of the agreement will be to render a great many persons stateless. It is quite possible that a considerable number of applicants will not be able to qualify for citizenship of either of the countries precisely because they may not fulfil the various consitutional or statutory requirements.[89] Consequently, the declaration of Sir John that " statelessness would be self-inflicted "[90] is not consistent with the recognized legal position.

The agreement fails to make any provision in this respect. The October 1954 declaration postponed the solution of this problem

[89] Mrs. Menon's statement, *op. cit.*, cols. 1447-8. Also see the observations of Sir Cecil Hurst in *Annuaire de l'Institut de Droit International*, Vol. I (1927), p. 52 ; Herbert Briggs, "The right of each State, subject to the limitations of international law, to determine who are its nationals unavoidably permits the existence of statelessness for certain persons until such time as by international agreements, States eliminate that possibility." *The Law of Nations* (New York, 1952), p. 465.

[90] Sir John Kotlewala while answering a question of P.T.I. correspondents in Colombo on 30 March 1954, *The Hindu*, 31 March 1954. Also Mr. R. G. Senanayake, Minister for Commerce and Trade who gave a similar answer to a question : "Statelessness is not a situation created by any act of the Ceylon Government. It is voluntarily created by the individuals. They prefer being 'Stateless'. The Ceylon Government never accepted that there are 'Stateless' people in Ceylon. . . ." *Ibid.*, 29 November 1958.

until after the two years when most of the applications would have been disposed of and when fresh negotiations for the purpose would take place.[91] Although the time limit has expired long ago, the future of such persons is held in abeyance till the two governments are able to negotiate some other arrangement. It can, however, be inferred from the January 1954 agreement that the prime responsibility for such persons rests with Ceylon. For if it be argued, as the Ceylon government does, that those who fail to qualify as Ceylon citizens automatically become Indian citizens, it would be tantamount to ignoring altogether paragraph 7 of the agreement. If such were the intention no provision was needed for registration under Article 8 of the Indian Constitution and it would have been said so. On the other hand, the offer of special inducements suggests that Ceylon wanted that the bulk of such persons should become Indian citizens so that she may have a smaller number to cope with. It is only under paragraphs 2 and 3 that Ceylon may be able to make a case. But as these paragraphs deal with prevention of illicit immigration and not with citizenship, it would be inappropriate to argue on that basis. Whatever the Ceylon authorities may say now, the government was in the know of this third category of persons who may not qualify for citizenship of either of the countries. In February 1959, Ceylon's Labour Minister Mr T. B. Ilangaratne had said :

> It was necessary for Ceylon to get clear upon this question as to who, among persons of Indian origin, are Indian citizens, because, obviously, a third category would ultimately emerge, that is those, who are neither the one nor the other, who would some day raise a problem for Ceylon. They would cause no concern to India but they would to us because they would be physically present with us.[92]

As the so-called stateless persons would be on Ceylon territory,

[91] Article 9 of the October 1954 statement.

[92] *The Hindu*, 12 February 1959. Also Mr. Kotlewala : "The trouble with the Indo-Ceylon question had always been that the disease was on Ceylon's chest, so to speak, and India need do nothing to help the patient. The Indians were with us, and could be securely left with us by India's merely refusing to allow them re-entry into their homeland." Kotlewala, *op. cit.*, pp. 106-7. Mr. Aluvihare, M.P. said in a signed article that the Indian attitude that these workers were "stateless" was not only unconstitutional but contrary to international law. *The Hindu*, 5 June 1954. He has not given any concrete argument to support his conclusions.

it would be her responsibility to look after them until they are deported to some host country or some alternative agreement is reached with India. In the words of Mr. Shetty :

> The problem is predominantly one for Ceylon, for these workers-immigrants who made a significant contribution to the development of Ceylon are tied to its economy, and their children are in fact part and parcel of the community of Ceylon. Even if for purposes of Public International Law they are still stateless, for purposes of Private International Law, their domicile is Ceylon and the legal regime which is applicable to them is that of Ceylon. According to principles of Private International Law as known in the Common Law World, the test of domicile is decisive for determining a man's civil status and domicile is acquired by settling in a country with the intention to make it his permanent home.[93]

REPRESENTATION

The agreement also envisages separate representation for those who may become Ceylon citizens.[94] Their names will appear on a separate register except in constituencies where their number will not exceed 250. In the latter case, they will be put on the national register. They will be entitled to elect a certain number of members to the House of Representatives, the number to be determined after consultation with the Indian Prime Minister. Arrangements for the same were to be complete before the dissolution of Parliament in 1957. Such representation was to last only for a period of ten years.[95]

Some of the details about separate representation were formulated by the Ceylon government in 1954.[96] However, objections against it were repeatedly made by the Indian government and by the leaders of the Ceylon Indian Congress. It was alleged that the proposed constitutional amendment dealing with representation of registered citizens of Indian origin would prolong the existence of such

[93] Shetty, *op. cit.*, p. 185 ; also Mrs. Menon, *op. cit.*, col. 1448. On statelessness in general and efforts towards its elimination through international efforts, see, Weis, *op. cit.*, pp. 165-72, 252-60.

[94] Article 5. [95] Article 6.

[96] This was done by amending section 29 of the Ceylon Constitution and by amending Order-in-Council fixing the number of members of the House of Representatives. *The Hindustan Times*, 31 May 1954. It was also reported that the Ceylon government had decided to set up 13 polling stations throughout the Island to return four representatives of registered citizens of Indian origin to the Lower House of Parliament. *The Tribune*, 14 July 1954.

arrangement to as far as 1972 in case the provisions of the agreement were made effective in 1957 after the dissolution of Parliament. This, it was charged, was contrary to the ten-year provision of the agreement. The decision to allow four representatives in place of six had also been questioned. It was also charged that no arrangements towards the holding of interim elections had been made.[97]

The agreement does not mention that the start of the ten-year period should be made simultaneously with the coming into force of the constitutional amendment. The only understanding seems to be that arrangements in this direction should be complete before the dissolution of Parliament in 1957. Moreover, if there were any understanding that the number of representatives would be seven or more, as demanded by some,[98] the agreement fails to disclose it. The final decision in this regard, as the agreement says, rests with the Ceylon government although she is obliged to consult the Indian Prime Minister before making such decision.[99] Ceylon can be accused of violating the agreement only if she failed to consult the Indian Prime Minister. Moreover, the agreement does not envisage interim elections to return representatives of registered citizens of Indian origin as demanded by the Indian government.[100]

This part of the agreement, however, is only of academic interest now. Recently the Ceylon House of Representatives passed the Constitutional Amendment Bill seeking, among other things, the abolition of the system of separate electoral list and representation for registered Ceylonese citizens of Indian origin.[101] Since the Indian government has implicitly given its consent to this Bill, this part of the agreement may be considered as good as scrapped.[102] As pointed out by Mr. Bandarnaike " India is least

[97] Mr. Thondaman, *The Hindu*, 15 March 1959; Mr. C. C. Desai, *The Hindustan Times*, 30 June 1954.

[98] Apparently for more representatives India has referred to an understanding between Mr. Nehru and Mr. D. Senanayake in London in 1953. *The Hindustan Times*, 22 June 1954.

[99] Article 6.

[100] *The Tribune*, 19 September 1954.

[101] *The Hindu*, 9 January 1959. The bill authorizes the creation of a constituency for every 75,000 of population and an additional seat by way of weightage for every one thousand square mile of territory. The redelimitation, according to lobby circles, is expected to raise the strength of the 101 member House to over 150.

[102] See Mr. Nehru's statement in the Lok Sabha on 6 March 1959. *The Indian Express*, 7 March 1959.

likely to be offended by the proposal. It was a concession reluctantly wrung from the Prime Minister of India by the Ceylon delegation in January 1954. There was, therefore, no question of Ceylon revoking any agreement. I presume the abolition of separate electorates is not looked upon as an unjustifiable breach of the agreement."[103]

The reason why this step was considered necessary would appear to be the desire to avoid any kind of segregation of a section of the population and assimilate that section into the body-politic of the country. The separate electorates were first conceived for fear that the new citizens might influence elections to the estates to a degree that might effectively undermine the political interests of the Sinhalese people resident there. With the disposal of citizenship applications nearing completion, (at least, in the Ceylon government's point of view) there are not very large numbers of registered citizens eligible to be put on a separate list. Since they are scattered all over the Island, their absorption in the common lot, it is presumed, will not prejudice any sectional interests.[104]

CONCLUSIONS

While charges and counter-charges have swung back and forth between New Delhi and Colombo covering various points of disagreement, it must be pointed out that the main controversy arises out of the naturalization provisions of the agreement and the consequent problem of statelessness. The two countries have been resorting to evasion and subterfuge to force the other to accommodate a larger number of applicants as citizens.

The problem is very intimately related to the future of those who will become stateless after all the applications have been disposed of by the two governments. As pointed out earlier, Ceylon stands on very thin ice on this particular issue. To say that those who do not qualify for Ceylon citizenship will automatically become the wards of the Indian government is to say something for which there is no basis in the agreement. As a matter of fact, to stick to this position by using coercion will be considered a violation of the agreement and Ceylon will have to bear full responsibility for the act.

Any casual reader of the agreement can clearly see the respective positions of the two governments on the issue of statelessness. It may be wondered as to how the treaty experts accompanying the

103 *The Hindu*, 9 January 1959.
101 *Ibid.*, 7 December 1959.

Ceylon Prime Minister at the time of negotiations in New Delhi were not able to see the actual position under the agreement and advise accordingly.[105] Perhaps Sir John was quite lax in selecting his advisers. This is quite clear from the October 1954 conference when Ceylon could not "salvage" anything in spite of the high expectations to the contrary.[106] Rather she willingly assumed more obligations not provided for in the January 1954 agreement. She agreed to permit registered Indian citizens to continue their employment in Ceylon upto the retiring age of 55.[107] If this provision is enforced, the bulk of the persons of Indian origin will staty in Ceylon for a long time to come and Ceylon may hardly claim to have progressed towards driving them out.

[105] In January 1954 Mr. Kotlewala was accompanied by the following: Mr. M. D. Banda, Minister of Education; Mr. E. B. Wichramanayake, Minister of Justice; Sir Oliver Goonetilleke, Finance Minister; Senator Sir Ukwatte Jayasundere, Q. C; and Mr. D. B. Ellepola. In October 1954 he was accompanied by Mr. S.W.R.D. Bandarnaike, Leader of the Opposition and Mr. Dudley Senanayake, former Prime Minister, Kotlewala, *op. cit.*, pp. 107-08, 110.

[106] Mr. Solomon Bandarnaike has criticized Sir John Kotlewala for the "ill-conceived agreement" of January 1954. He said that he had gone later to New Delhi with Sir John to "salvage" anything possible out of the agreement and to obtain certain clarifications. *The Hindu*, 7 March 1958.

[107] Article 10 of the Joint Statement.

5

THE TIBETAN IMBROGLIO

THE developments in Tibet in the last three years have brought to the surface certain facets of Communist China's policies whose proper understanding may be vital for people in Asia. These developments have brought repercussions in Sino-Indian relations which in turn may have their impact on public opinion in other neighbouring states also.[1] There are people who believe that the differences over the Himalayan borders have been created by the Chinese Government on account of India's taking keen interest in Tibetan developments and by her giving asylum to the Dalai Lama and other Tibetans.[2] There are other who read in these developments a positive assessment by the Chinese communist regime that India is more firmly wedded to Western democratic ideals and hence she may some day come into conflict with her Northern neighbour whose Government professes a different philosophy and values.[3] Leaving political considerations aside, the problem is of importance from a legal standpoint because of the accusations of the Chinese Government that India has violated rules of international law by interfering in the Tibetan region of China and by giving asylum to the Dalai Lama and his party, some of whom have been using Indian territory for hostile purposes against China. It is pro-

[1] For a study of the policies of the various countries in this area, see Warner Levi, *Modern China's Foreign Policy* (Minneapolis, 1953); A. D. Barnett, *Communist China and Asia* (New York, 1960); also a series of nine articles by Mr. Prem Bhatia entitled "South East Asia's China Problem" in *The Times of India*, December 1959 and January 1960 dealing with China's interests in Malaya, Singapore, Indonesia, Japan, Formosa, Thailand, Burma and Indo-China states. For the story of the Tibetan revolt, George N. Patterson, *Tibet in Revolt* (London, 1960).

[2] Mr. Nehru has also stated that the border dispute may have been caused on account of the asylum given to the Dalai Lama. *The Times of India*, 11 September 1959.

[3] For varied reactions see Subbash Chandra Sarkar, "Indian Reaction to Developments in Tibet", *India Quarterly*, Vol. XV (1959), pp. 229-61.

posed to discuss the problem of Tibet and the Dalai Lama in order to examine how far the accusations of the Chinese Government are legally justifiable.

STATUS OF TIBET

For centuries the status of Tibet has remained undetermined.[4] The controversy which has raged over this point has not finally supported either the contention of China that Tibet has been a part of China and hence a vassal State in the sense of international law, or the claims of Tibet to a sovereign status untrammelled by any obligations towards her neighbour.[5] But this much is clear that for short periods, the Tibetans have successfully withheld any extension of Chinese dominion in their territory and have exercised the rights of sovereignty to the exclusion of any external authority.[6] This was due to the geographical isolation and the lack of means of communication. The religious structure of society was also a contributing factor. That is why there was minimum of intercourse with foreign States, and Tibet's contacts were limited to her neighbours for religious and commercial purposes. On account of these special reasons, even the Chinese have more or less been satisfied with a formal tribute from Tibet and the latter have considered such a technical limitation as not interfering in any way with the exercise of her limited functions and protection of her interests.[7]

It is instructive to note that in the first half of the twentieth century, Tibet has enjoyed virtually a sovereign status. Whatever loose control the Chinese may have exercised, the bond was cut

[4] A study of the various documents reveals that no clear-cut case can be made in suport of either of the propositions. See, Chanakya Sen (Ed.), *Tibet Disappears : A Documentary History of Tibet's International Status, the Great Rebellion and its Aftermath* (Bombay, 1960).

[5] C. H. Alexandrowicz, "The Legal Position of Tibet", *American Journal of International Law*, Vol. 48 (1954), pp. 265-74; Tieh-Tseng Li, "The Legal Position of Tibet", *ibid.*, Vol. 50 (1956), pp. 394-404; D.K. Sen, "China, Tibet and India", *India Quarterly*, Vol. VII (1951), pp. 112-32.

[6] See A. Appadorai and Associates, "Bases of India's Title on the North-East Frontier", *International Studies*, Vol. I (April 1960), pp. 363-4, 368.

[7] The Whole history of Sino-Tibetan relation is a testimony on the point that China has been satisfied so far as Tibet has accepted Chinese suzerainty. That is why she did not bother too much to bring it under effective administration as an integral part of China.

off when the Manchus were overthrown in 1911.[8] Any attempt by the Government of the Republic of China to re-establish sovereign position was foiled.[9] This *de facto* independence became legally valid and effective when in 1912, the 13th Dalai Lama issued a proclamation declaring the complete independence of Tibet and denounced the Chinese claims to suzerainty.[10] Even the claim to limited recognition of suzerainty over Tibet which was incorporated in the Simla convention of 1914 cannot be considered to be effective because the convention was not signed by China and in the words of an authority "the bargain was off and Tibet was henceforth not only *de facto* but *de jure* independent".[11]

The sovereign status of Tibet during this period finds conclusive evidence in the fact that the Government of Tibet signed as many as five international agreements immediately before and during these years. The treaties of 1684 and 1842 which she had signed with Ladakh and Kashmir were effective even upto the present time.[12] The Nepal-Tibet treaty of 1856 which granted extra-territorial rights to Nepal was in operation for a full century until abrogated by the Sino-Nepalese treaty of 1956.[13] The Anglo-Chinese conventions of 1890 and the trade regulations of 1893 could only be implemented after they had been renegotiated with Tibet in 1904.[14] The Tibetan-Outer Mongolian treaty of 1913 specifically acknowledged the sovereign status of both the parties[15] and the same was true of the status of Tibet at the Simla conference in 1913.[16]

During the second world war, Tibet had insisted on maintaining her neutrality. In spite of the combined pressure exercised by the

[8] Charles Bell, *Tibet : Past and Present* (London, 1924), pp. 304-5; Also see "The Challenge of Tibet", *The Round Table*, No. 195 (June 1959), pp. 218-19.

[9] The Republic was not able to re-establish her authority. Statement of the representative of El Salvador. *UN Doc.* A/1549 (24 November 1950).

[10] "... it is our considered opinion that this declaration had the same effect in international law as the declaration made by Bulgaria in 1908, terminating the rights of sovereignty vested in the Government of Turkey ... " Dalai Lama, "The International Status of Tibet", *India Quarterly*, Vol. XV (1959), p. 216.

[11] *The Round Table* (June 1959), p. 220 ; also D. K. Sen, *op. cit.*, p. 123.

[12] *Report of the Officials of the Governments of India and the People's Republic of China on the Boundary Question* (New Delhi, 1961), p. 113 (hereafter to be referred to as *Officials' Report*).

[13] *Ibid.*, p. 131. [14] *Ibid.*, p. 132.

[15] Bell, *op. cit.*, pp. 304-5.

[16] See the paper on the Sino-Indian border dispute, pp. 136-64.

Governments of Britain, China and the United States, she allowed the transport of only non-military goods from India to China through her territory.[17] "The neutrality of Tibet in the face of this combined pressure was further conclusive proof that during this period Tibet was in control of her own affairs, even in respect of her external relations."[18] India herself had concluded agreements with Tibet before attaining independence in 1947 and it had never been suggested by China that these international obligations were not valid.[19] In 1948, a Tibetan trade delegation visited India, France, Italy, the United Kingdom and the United States travelling on the passports issued by the Tibetan Government.[20] All these factors make it very clear that a Tibetan Government under the headship of the Dalai Lama have always been in control of the administration of Tibet and for long periods, has also conducted external relations. In the words of an authority "whatever the *de jure* position, Tibet enjoyed a factual independence, greater than autonomy, from 1912 until the Chinese communist invasion of 1950. During this time there was no Chinese representative at all in Lhasa, and there were no Chinese troops, escort or other".[21]

But it is now a moot point as to who was sovereign before the Chinese armies invaded Tibet. For purposes of the present controversy, the status of Tibet must be determined on the basis of the treaty of 1951 which for the last eleven years has regulated the

[17] See the Dalai Lama's cable to the Secretary General of the United Nations. *The Times of India*, 11 September 1959.

[18] *Officials' Report*, p. 132.

[19] *Ibid*., p. 133.

[20] Dalai Lama, *op. cit*., p. 219.

[21] *The Round Table* (June 1959), p. 220. Also Mr. Urquia (El Salvador), *UN* A/PV. 833 (31 January 1959), para 16: "The fact remains that before the invasion and military occupation of 1950 the political and legal status of Tibet was entirely that of a semi-sovereign State and consequently these were acts of aggression, totally unprovoked by the people and Government of Tibet . . ."; also Mr. Bisba (Cuba), *ibid*., A/PV. 831 (20 October 1959), para 118. In March-April 1947, when the Asian Conference was held in New Delhi, Tibet participated as an independent country. Her national flag was flown at the conference which goes to show that she was accepted on the basis of equality. Statement of the Dalai Lama to the Legal Enquiry Committee of the Commission of Jurists at Missourie on 14 November 1959: Tibet and the *Chinese People's Republic* (Geneva, 1960), p. 308. In 1950 when the matter was brought to the United Nations, the El Salvadorean delegate had proceeded on the basis of aggression arguing that Tibet was sovereign. Mr. Castro (El Salvador), *ibid*., A/BUR/SR. 73 (24 November 1950), paras 5-6, 10, 17.

mutual relations of Tibet and China.[22] The Seventeen Point Agreement is perhaps the only legal document which deals with the present status of Tibet.[23]

The various clauses of the 1951 agreement deal with two main aspects. In the first place, Tibet agreed to become a part of the Chinese territory: "the Tibetan people returned to the big family of the Motherland—the People's Republic of China".[24] It was also provided that defence and foreign affairs would be conducted by the Central People's Government and that the Tibetan troops would be reorganized step by step into the People's Liberation Army to form a part of the national defence forces.[25] On its part, the Chinese Government agreed to recognize the regional autonomy of Tibet and promised not to alter its existing political system. The status, functions and powers of the Dalai Lama were also not to be altered. It was further agreed that the religious beliefs, customs and habits of the Tibetan people shall be respected and Lama monasteries shall be protected.[26] Another provision stated that "in matters related to various reforms in Tibet, there will be no compulsion on the part of the central authorities."[27]

If the validity of this agreement is accepted, its consequences would be that in 1951 Tibet became part and parcel of Chinese territory and lost her personality which before 1951 existed in fact. For purposes of international law, the loss of defence and external affairs is enough evidence of the non-existence of the international personality of a State.[28] Hence it may be argued that after the treaty came into effect, any dispute or question relating to Tibet must be considered as an internal affair of China. The Chinese Government has quite frequently used this interpretation in her correspondence with India.[29] Some members of the United Nations

[22] For the text of the agreement see, *The Question of Tibet and the Rule of Law* (Geneva, 1959), pp. 139-44.

[23] See fn. 88 below which goes to suggest that the various States still think that the agreement is valid and that Tibet is an integral part of China.

[24] Article 1.

[25] Articles 7, 8, 14.

[26] Article 7.

[27] Article 11.

[28] Hans Kelsen, *Principles of International Law*, pp. 112-13.

[29] Statement made by the Chinese Ambassador to the Foreign Secretary, 16 May 1959. *White Paper I*, p. 73 : "The Tibet Region is an inalienable part of China's territory. The quelling of the rebellion in the Tibet Region of the Chinese Government and following that, the conducting by it of democratic reforms which the Tibetan people have longed for, are entirely China's

have also done the same while discussing the problem of Tibet in the General Assembly of the United Nations.[30]

But it may also be argued that the agreement as such did not fully do away with the personality of Tibet. The various provisions show that a major part of the internal jurisdiction was retained by the Local Tibetan Government and as such Tibet was to enjoy an autonomous status. The treaty reserves substantial competence for the exercise of the Tibetan Government. Even the Chinese Government has recognized that the status of Tibet was to be quite different from that of any other province of China.[31]

This obligation does not follow from the contents of the 1951 agreement alone which is binding only between Tibet and China. The People's Government of China at different times have also given verbal assurances to India that the provisions regarding Tibetan autonomy will be respected. In 1956 when the Dalai Lama visited India, he brought to the notice of the Indian Prime Minister the anomalous position of Tibet and the serious violation of the agreement by the Chinese authorities. The Indian Prime Minister on whose advice the Dalai Lama returned to Tibet, was assured by Mr. Chou-en-Lai that the Chinese Government had no desire to push or impose communism on Tibet and that "Tibet's autonomy would be respected".[32] Such a verbal promise must, according to

internal affairs, in which no foreign country has any right to interfere under whatever pretext or in whatever form."

[30] The Russian delegate and those from the Soviet Bloc have called it a "blatant attempt at intervention in the domestic affairs of the People's Republic of China . . . and a violation of one of the basic principles of the UN Charter". *UN* A/PV. 831 (20 October 1959), para 76. Even in 1950 the Russian delegate took the same position. *Ibid.*, A/BUR/SR. 73 (24 November 1950), paras 28-30.

[31] Mr. Chou-en-Lai to Pandit Nehru when the former was in India in 1956. *The Hindustan Times*, 28 April 1959.

[32] Indian note of 31 October 1950 in *The Question of Tibet and the Rule of Law*, p. 135. The following statement of Pandit Nehru indirectly supports the third party argument. "We still hope that the authorities of China in their wisdom will not use their great strength against the Tibetans, but will win them to friendly cooperation in accordance with the assurances they have themselves given about the autonomy of Tibet region." *Lok Sabha Debates*, Vol. 8 (June 1959), p. 79. Also Jai Prakash Narain : "It seems clear to me that as soon as that Agreement was signed it became property of the whole world and the nations separately and jointly, became charged with the moral obligation to see that the Agreement was honoured in practice by both sides. If this was not so, what was the value of that Agreement between a powerful and big nation and a weak and small one ? What was also the value of any country's recognition of the respective rights and powers of both sides of the Agreement . . . I

the decision of the world court in the Eastern Greenland Case,[33] have the same effect as a formal treaty and accordingly, the agreement of 1951 especially its provisions dealing with autonomy, must be considered as matters of international concern.

The agreement guarantees the structure and form of indigenous Tibetan political institutions. This provision in clear terms perpetuates the order of the Dalai Lama. Although according to the relevant principles of international law, the form of Government is an internal affair of a State, in case one of the parties to the treaty feels that the very basis of the treaty is being disregarded by the other party, she has very right to denounce the treaty.[34] It would have been a fruitless job for the Dalai Lama to seek justice at the hands of the Government in Peking because the latter had wilfully violated the agreement. There was, therefore, no ground for him to seek the local remedies (assuming that the agreement made Tibet an internal affair of China). The only other alternative available to him and his Government was to rebel against the Chinese authorities and by denouncing the agreement to revert to the status of sovereignty which he and his Government enjoyed prior to 1951.[35]

It may be relevant to discuss the validity of the agreement in the light of the allegations by the Dalai Lama that the treaty was "thrust upon its people and Government by the threat of arms" and that "the consent of the Government was secured under duress and at the point of the bayonet".[36] In international law not all

believe that after that Agreement no matter what China did in contravention of it remained an internal affair of China with which no one had any right to interfere." *Foreign Affairs Reports,* Vol. VIII (June 1959), p. 79. Also Jam Saheb of Nawanagar (India) in 1950. *UN* A/BUR/SR. 73 (24 November 1950), paras 24-25.

[33] The verbal assurance may have the same effect as a formal treaty. See the decision in the Eastern Greenland Case : *PCIJ*, Series A/B, No. 53 (1933), p. 71.

[34] Arnold D. McNair, *The Law of Treaties* (Oxford, 1938), p. 515. There is considerable support for the view that the injured party may by its unilateral act terminate a treaty as between itself and a State which it regards as having violated such a treaty. Hackworth, *op. cit.,* Vol. V, p. 346 ; Hyde, *op. cit.,* Vol. II, pp. 1541-46. Also *Ware* V *Hilton*, 3 Dallas 199, 261 (1796).

[35] This is the main argument of the Dalai Lama. See his statement in *The Tribune*, 21 June 1959. But see Mr. Bisbe (Cuba) who believes that China is obliged to abide by the agreement. *UN* A/PV. 831 (20 October 1959), para 122.

[36] Dalai Lama's Missourie statement : *The Tribune,* 22 June 1959 ; also the statement of Mr. Lukhwangwa, former Premier of Tibet, *The Indian Express,* 30 March 1959. For a similar interpretation see the Indian Note of 26 October 1950 to the Chinese Government. *The Question of Tibet and the Rule of Law,* pp. 132-3.

treaties concluded under duress can be considered as void. A large number of treaties are concluded as peace treaties after the culmination of the state of war. Treaties which are forced on the defeated States, are valid according to the rules of international law.[37] Barring these exceptions, however, there must be a meeting of the minds and the parties must conclude the treaty voluntarily. The requirement of ratification is an additional guarantee that the Governments concerned have voluntarily agreed to all the commitments after sober deliberations and also after ensuring that the representatives did not exceed their competence or were not coerced.[38]

The events of 1950-51 indicate that the Dalai Lama and his Government had no alternative but to accept the terms of the agreement. The Chinese military forces had already crossed the Dre Chu river which had for long been the boundary of Tibetan territory. In quick succession they occupied the strategic places. The Tibetan Government was forced to bow to the Chinese demands.[39] It is clear, therefore, that the treaty was concluded under duress. But as pointed out earlier, such a procedure in spite of the United Nations Charter, is still recognized as valid under international law and only a very far-fetched interpretation may view it otherwise.[40]

But the Chinese authorities have declared that the agreement was concluded voluntarily by the Tibetan Government.[41] This position, however, cannot be supported. The events of 1950-51

[37] Hans Kelsen, *op. cit.*, p. 326 ; W. E. Hall, *A Treatise on International Law*, (8th edn.), (Oxford, 1924), p. 382. The Harvard Research on the Law of Treaties (1935) says that though "the employment of force or coercion by one State against another State for the purpose of compelling the acceptance of a treaty, has not been regarded as unlawful, or as entailing the nullity of such a treaty, there is general agreement that freedom of consent as an essential condition of a binding treaty precludes the use of physical or mental coercion directed against the individuals signing or ratifying a treaty". pp. 1148-52. For an analysis of theoretical literature on this point see, E. Vitta, *La Validite des Trates Internaux* (1940), pp. 140-58.

[38] Oppenheim, I., *op. cit.*, pp. 812-24 ; J. L. Brierly, *Report on the Law of Treaties*, *UN* A/CN. 4/23 (19 February 1950), pp. 32 ff.

[39] The Dalai Lama's Missourie statement, *The Tribune*, 22 June 1959 ; Mr. Urquia (El Salvador) : *UN* A/PV. 833 (21 October 1959), para 3.

[40] Article 2(4) of the UN Charter forbids the threat or use of force against the territorial integrity or political independence of any State. This clause, therefore, is interpreted by some as invalidating any arrangement which may have come into existence as a consequence of such force. For the various interpretations of this article see L. Goodrich and E. Hambro, *Charter of the United Nations : Commentary and Documents* (London, 1949), pp. 102-7.

[41] They refer to the Preamble of the Seventeen Point agreement, *The Question of Tibet and the Rule of Law*, pp. 139-40.

show very clearly that Tibet would have been the last party to submit to foreign sovereignty. Her representatives, who were sent to Peking to negotiate the agreement, purposely delayed their departure from India onwards, anticipating that something should happen so that Tibet may be saved from this humiliation and she may remain the master of her territory.[42] The Dalai Lama has even questioned the authenticity of the document. In his Missourie statement he said : "Even the seal which was affixed to the agreement was not the seal of my representative but a seal copied and fabricated by the Chinese authorities in Peking and kept in their possession ever since."[43]

It is quite clear, therefore, that the 1951 agreement was concluded under threat of the use of force against Tibet. The reason why the treaty was made to come into effect immediately after signature by the parties without going through the process of ratification,[44] was presumably prompted on account of the Chinese fears that it (the agreement) may not be accepted by the Tibetan Government. There is, therefore, a clear evidence that the treaty was not only forced on the Government of Tibet but even the Tibetan representatives were coerced into accepting the arrangement.

It may be mentioned, however, that a treaty concluded under such extraordinary circumstances cannot be considered as void. At the most it would have been voidable if the interested party had used her discretion within a reasonable time.[45] Once the Tibetan Government started to put the treaty into effect, the option which was hers, was lost and the agreement became a valid document. It is true that during the last ten years the Dalai Lama and his Government have shown dissatisfaction with the working of the agreement. When the Dalai Lama visited India in 1956 he had informed the Indian Government of his dissatisfaction. But he had not denounced the agreement. These facts show that the Tibetan Government had waived its option to reject the treaty which would have been invalid on account of the original dis-

[42] *The Times of India*, 15 November 1959.

[43] *The Tribune*, 22 June 1959.

[44] Article 17.

[45] There is sufficient evidence to show that although the treaties invoked might be voidable because of violation or discrepancy, if the injured parties had failed to exercise their rights to terminate the treaties, they must be regarded as remaining in force. See the decisions of the various tribunals : *Ware* V *Hylton*, 3 Dallas 199, 261 (1796) ; *Inre Thomas*, 23 Fed. Cas. 927 (1894) ; *Charlton* V *Kelly*, 229 U.S. 447, 473 (1913) ; *The Blonde*, 1.A.C. 313 (1922).

crepancy. It is, therefore, not possible to accept the argument of the Dalai Lama that after the Chinese had failed to live up to the provisions of the agreement, the original discrepancy should be considered sufficient to declare the treaty invalid.[46]

It seems, the Dalai Lama hoped that the Chinese would abide by the letter and spirit of the agreement and that mutual relations would work out satisfactorily. For that we must give him credit. But one thing is clear: the argument of duress as advanced by the Dalai Lama cannot be applicable in this case. The denunciation may more properly be justified on account of the failure of the Chinese Government to abide by the basic provisions of the agreement which discrepancy entitled Tibet to use the opportunity to wriggle out of the international commitment. If this argument is accepted, it would mean that, the act of repudiation had brought Tibet to the status of independence and sovereignty.[47]

ASYLUM

On account of the non-fulfilment of the agreement by the Chinese Government, the Dalai Lama and his Government were entitled to

[46] In an interview given to the Legal Enquiry Committee on 29 August 1959 at Missourie, the Dalai Lama was asked :

> *Q*. Your statement at Missourie mentions that the 1951 agreement was signed under coercion. Was there any public repudiation of this agreement ?
>
> *A*. Upto March 10, 1959, the Chinese were in complete control of Tibet and there was no public repudiation. On March 10, there was public repudiation and this was done by the General Assembly consisting of the officials and the public. . . .

Appendix II in *Tibet and the Chinese People's Republic*, p. 290. This argument cannot be accepted. The Dalai Lama had ample opportunities earlier to repudiate the agreement but because he did not do so, it means that he accepted the contents of the agreement in spite of the defect of coercion.

[47] For repudiation of treaties on account of the violation of a basic condition see Hall, *op. cit.*, p. 409. Mr. Nehru, while addressing a press conference, has said that both the parties acknowledged that the 1951 agreement had broken down. If this is the situation, then the parties may be considered to have reverted to the pre-1951 status. For his statement, see *The Hindustan Times*, 6 April 1959 : "What has happened in Tibet is related to an agreement between Tibet and the Chinese authorities in 1950. Both sides have stated that, that agreement has ended or broken up. There is no doubt about that as both sides say so and events also indicate that. That is an important fact. The agreement was based on two factors, the recognition of the sovereignty of China over Tibet and the autonomy of Tibet. It is obvious that since the uprising there is no autonomy in Tibet." *Ibid.*

reconsider the whole relationship with China and act accordingly to secure the autonomy and independence of Tibet. One of the alternatives available was to rebel against the Chinese authority and establish her own Government. The reports show that ever since 1955, revolution in one form or the other has broken out in different parts of Tibet.[48] In spite of the overwhelming superiority of the Chinese military forces, the Khampas and other rebels have kept the Chinese forces engaged. These hostilities had reached such a pitch that the Chinese were forced to shell the Norbulingka Palace. Accordingly the Dalai Lama's Government issued a proclamation on 11 March 1959 declaring Tibet as an independent country.[49] This proclamation, in the words of the Dalai Lama, was "the product of the strong resolve of the Tibetan people to wage a war for national liberation".[50] The activities of the Khampas and other national elements must be viewed in the context of this struggle. As pointed out by the Dalai Lama "the people of Tibet are still fighting the powerful forces of occupation and recognize only the Dalai Lama as the head of the State".[51]

The flight of the Dalai Lama from Lhasa was the culmination of the discontent and frustration which had come into existence ever since the Seventeen Point agreement was signed. According to Tibetan authorities, his flight and the taking of refuge by him and his party in India, have made the agreement non-existent.[52]

For Indian purposes, the asylum is important because it is believed in some circles that the crisis over the border with China is caused as a reaction against the asylum given by the Indian Government.[53] In international law a sovereign State is fully entitled to give asylum to any person. This right is based on the principle of the exclusive jurisdiction of the territorial State.[54] Mr. Jawaharlal Nehru in one of his recent statements in the Lok Sabha said:

[48] See the Tezpur Statement of the Dalai Lama, *ibid.*, 19 April 1959.

[49] Statement of the Dalai Lama issued to commemorate the first anniversary of the Tibetan Declaration of Independence, on 10 March 1959. *The Times of India*, 10 March 1960.

[50] *The Hindustan Times*, 31 August 1959. "Even Pandit Nehru has recognized that the revolt in Tibet is of considerable magnitude and that its basis must have been a strong feeling of nationalism which affects not only the upper class people but others also." *Ibid.*, 28 April 1959.

[51] *The Times of India*, 5 July 1960.

[52] By August 1959, 12,396 refugees had already entered India. *The Hindustan Times*, 12 August 1959.

[53] *Ibid.*, 11 September 1959.

[54] Felice Morgenstern, "The Right of Asylum", *British Year Book of International Law* (1949), pp. 326, 327.

> The general position under International Law is that a State is free to admit or not to admit a foreigner into its territory. This applies to giving asylum also. It is thus a matter entirely in the discretion of the Government concerned. It is the sovereign right of the State to give asylum when it chooses but no individual can insist on obtaining such asylum. Individual cases have to be considered on merit whenever occasion for this arises.[55]

In international law India was perfectly entitled to grant refuse to the Dalai Lama and other Tibetans. Apart from legal considerations, humanitarian reasons also dictated that such an action be taken.[56] The Indian Government have legitimate interests in Tibetan developments. As a matter of fact this impasse in Sino-Tibetan relations would have come about much earlier, had not the Indian Government used its good offices with the Dalai Lama and impressed upon him the desirability of further giving the agreement a try, at least for a few more years. That is why India was fully justified in giving asylum to the Dalai Lama who also happens to be the spiritual leader of the Buddhists all over the world.[57]

In order that these refugees may not use Indian territory for hostile operations against China and thus put the Indian Government in an embarrassing position, all the refugees were disarmed as soon as they stepped into Indian territory.[58] Moreover, India had made it "clear to the people who came across the borders from Tibet, that while they were welcomed to come to India, the Government of India would not like Indian soil to be used for subversive activities or aggressive propaganda against a friendly Government".[59] The Indian Government had made this point

[55] *Lok Sabha Debates*, Vol. 28 (30 March 1959), Col. 8462.

[56] *Ibid.* When the news of these unhappy developments came to India, there was immediately a strong and widespread reaction. The Government did not bring about this reaction. Nor was this reaction essentially political. It was largely one of sympathy based on sentiment and humanitarian reasons. Also on a certain feeling of kinship with the Tibetan people derived from long established religious and cultural contacts. It was an instinctive reaction. Probably this reaction is shared in the other Buddhist countries of Asia.

[57] Statement made by the Foreign Secretary to the Chinese Ambassador, 26 April 1959. *White Paper I*, p. 69.

[58] Note given by the Ambassador of India to the Ministry of Foreign Affairs of China, 10 September 1959. *Ibid.*, II, p. 10.

[59] *Lok Sabha Debates*, Vol. 28 (30 March 1959), Col. 8524. Also : "The charge that India has been shielding armed Tibetan rebels in the frontier areas in the north east is wholly unfounded and we firmly reject it. On the contrary, our personal

quite clear in the following words :

> The Government of India while giving refuge to these people in accordance with accepted international usage, made it clear to them that they could not use Indian territory for hostile action against China. The refugees were disarmed as soon as they entered Indian territory and those who wished to stay in India were moved south away from the frontier. The Government of India have scrupulously enforced these measures and there could be no question of their encouraging, far less acting in collusion with the refugees in violating Chinese territory.[60]

Professor Oppenheim is of the opinion that "it is the duty of every State to prevent individuals living on its territory from endangering the safety of another State by organizing hostile expeditions or by preparing common crimes against its Head, members of its Government or its property".[61] In his view, if a State granted asylum to a persecuted alien, such a duty became all the more important.[62] It is understandable that the refugees should not be allowed to collect arms and use the host country as a base for warlike operations against the country of their origin. But normal political activities like free discussion, propaganda and collection of money for the same, should not be considered as contrary to international practice. During our own struggle for national emancipation, Indians living in the USA, Canada and many European and Far Eastern countries were allowed to convass support for their cause by the governments of those countries.[63] Raja Mahendra Pratap, an ex-revolutionary and now an MP

disarmed the Tibetan rebels as soon as they crossed the frontier into Indian territory and insisted on their moving well away from the frontier areas. The few who showed disinclination to do so were told that they would not get asylum in India and made to leave our territory finally." Letter from the Prime Minister of India to the Prime Minister of China, 26 September 1959, *White Paper II*, p. 43.

[60] Note of the Government of India, 26 June 1959, *Ibid.*, I, p. 35.

[61] Oppenheim, *op. cit.*, p. 618 : "Such fugitive alien enjoys the hospitality of the State which grants him asylum ; but it might be necessary to place him under surveillance, or even to intern him at some place, in the interest of the State which is seeking to prosecute him. For it is the duty of every State to prevent individuals living on its territory from endangering the safety of another State by organizing hostile expeditions or by 'preparing common crimes against its Head, members of its Government or its property'."

[62] *Ibid.*

[63] See my article "Activities of the Indian Ghadhar Party : A Golden Chapter of India's National Movement" ; *The Spokesman*, 9 February 1955, pp. 5, 7.

brought this fact to the notice of the Indian Prime Minister and added that he was given ample freedom to solicit support for India's cause in foreign countries[64]. The views of Dr. H. N. Kunzru that political refugees should be allowed to conduct normal political propaganda and not to collect arms and make war-like propaganda is more according to current practice of nations.[65]

It seems the Indian Government has conceived a rather narrow view of the scope of these activities, presumably in order to counter the allegation of China that India has allowed "Kalimpong to be used as a command centre of the Tibetan revolt".[66] Actually India cannot subvert the normal activities of these refugees because of the freedom of expression and civil liberties guaranteed by the Indian Constitution. Similarly the law in India does not forbid the activities of newspapermen who according to the Chinese Government "are carrying on reactionary propaganda against Tibet", and "spread vicious rumours and slanders against the Chinese Government, Communist Party and the Chinese Liberation Army" from Kalimpong and other places.[67]

The normal activities in which the Tibetans may be allowed to engage should, however, be singled out from their activities as a

[64] *Lok Sabha Debates*, Vol. 28 (30 March 1959), Cols. 8463-9.

[65] In answer to Dr. Kunzru's question whether in England, the refugees have been allowed to carry on normal political propaganda and not to collect arms or to make war-like propaganda against the country to which they belong. Pandit Nehru said : "It is rather difficult to draw a line. Certainly to some extent it is premitted and to some extent it may not be permitted. It is difficult for me to lay down hard and fast rules." *Rajya Sabha Debates*, Vol. 25 (20 April 1959), Col. 49. *Dr. Kunzru* : "Does the Government of India ask these people to refrain from collecting arms for being sent to Tibet or doing any other thing which will amount to a war-like act against China, or even prevent the Tibetan refugees from giving expression to their views with regard to the future of Tibet or stating matters of fact when they feel that it is necessary to do so to clear up the position in Tibet?" *Mr. Nehru* : "We have given a fairly large measure of freedom of expression of views to these people and the Dalai Lama himself has made a statement as he felt like making it. We have not come in the way of his statement. As for what we expect people to do that depends on many things. The rule of law is that the country has the right to limit it. To what extent it does so and in what manner, is always a matter of circumstances and the situation." *Ibid.*, Col. 50.

[66] See M. V. K. Krishna Menon's remarks regarding the basis of Indian attitude in his appearance at the national television programme in New York about incidents on the Sino-Indian border and the Chinese action in Tibet. *The Times of India*, 22 September 1959; also *UN* A/PV. 834 (21 October 1959), para 97.

[67] Note sent by the Ministry of External Affairs to the Embassy of China in India, 2 August 1958. *White Paper I*, pp. 63-5 ; also Statement made by Foreign Secretary to the Chinese Ambassador, 23 May 1959, *ibid.*, pp. 778.

group. Co-ordinated movement which may ultimately end in the use of violence against a friendly State would be a violation of the privileges which an asylee enjoys.[68] Even more serious is the operation of Governmental authority from the land of its refuge. India, of course, cannot allow such activities to take place without having second thoughts regarding its relations with China. She has all along considered Tibet as an integral part of China and hence to allow the Dalai Lama to function as the head of a Government in exile will amount to an intervention in the latter's internal affairs. Before the Dalai Lama left Tibet, his status was not that of a sovereign ruler and under no circumstances, except by risking a breach of diplomatic relations with China could India take such an action.[69]

It is argued by some that the Missourie statement of the Dalai Lama that "wherever I am accompanied by my Ministers, the Tibetan people recognize us as the Government of Tibet" was in a sense a plea for emigre Government status.[70] But it would be more true to say that the statement was meant to disown the puppet Government headed by the Panchen Lama which had been forced on the Tibetan people by the Chinese military authorities. This interpretation finds its support in the statement of the Dalai Lama that the

[68] See Nagendra Singh and M. K. Nawz, "The Contemporary Practice of India in the Field of International Law", *International Studies*, Vol. I (1959-1960), p. 291 : "It may be true that *International law* prescribes no comprehensive rules relating to the activities of political refugee. The absence of rules, however, is no licence for a refugee to engage in any activities he likes ; nor can a State granting asylum escape from the responsibility for the activities of a refugee. Its international responsibility springs from the fact that the activities of a refugee originate on its territory. State's responsibility for the acts of refugees in this regard would be the same as is the case of its nationals. Consequently, States granting asylum to political refugees must see that the refugees by their actions do not involve the State of asylum in any kind of international responsibility."

[69] This is the relevant part of the statement made by the official spokesman of the External Affairs Ministry on 30 June 1959 : "The Government of India do not take responsibility for any of these various statements regarding the refugee status of the Government. So far as the Dalai Lama is concerned, the Prime Minister has made it clear on more than one occasion that, while the Government of India are glad to give asylum to the Dalai Lama and show him respect due to his high position, they have no reason to believe that he will do anything which is contrary to international usage and embarrassing to the host country. The Government of India want to make it clear that they do not recognize any separate Government of Tibet and there is, therefore, no question of a Tibetan Government under the Dalai Lama functioning in India." *The Hindustan Times*, 1 July 1959.

[70] See, *The Question of Tibet and the Rule of Law*, pp. 200-03.

"Panchen Lama had no *locus standi* and his government was a deceptive one".[71] If such a status were to be given to the Dalai Lama, then the Indian government would have to give diplomatic immunities and extra-territorial rights to Tibetans who engage in governmental activities. The Indian government, however, has made it clear that "they do not recognize any separate Government of Tibet and, therefore, there is no question of a Tibetan Government under the Dalai Lama functioning in India",[72] nor of the grant of extra-territorial rights to it.[73]

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

The Dalai Lama and his many compatriots have also charged that the Chinese government have violated human rights and fundamental freedoms by dispossessing them of their property and every source of livelihood and by subjecting them to forced labour, sterilization and brutal massacre. The Chinese have also, according to these allegations, destroyed their religion and culture by razing to the ground thousands of monasteries and by giving the facilities to a large number of Chinese to settle in Tibet in order to counter the local population.[74] Similarly both in and outside the United Nations, people have considered the activities of the Chinese government a violation of the various provisions of the UN Charter and also the Universal Declaration of Human Rights.

In the General Assembly of the United Nations, a heated debate took place over the resolution sponsored by Malaya and Ireland. The Malayan representative deplored the acts of repression in Tibet and stated that any problem which involved a violation of the principles enshrined in the Charter cannot be regarded as exclusively an internal matter. In his view a *prima facie* evidence of an attempt to destroy the distinctive religious and cultural heritage and autonomy of the Tibetan people was well established and he added that the systematic violation of the human rights and fundamental freedoms might have the effect of increasing international tension and embittering relations among peoples. Pointing out that

[71] *The Hindustan Times*, 5 July 1959.

[72] Statement of the Ministry of External Affairs, *ibid.*, 1 July 1959.

[73] Nehru in reply to the question of Dr. A. N. Bose whether it was proposed to extend diplomatic immunities and extraterritorial rights to the Dalai Lama and his party. *Rajya Sabha Debates*, Vol. 25 (20 April 1959), Col. 50.

[74] *Tibet and the Chinese People's Republic*, pp. 14-63.

China herself has subscribed to these principles at the Bandung Conference he said :

> The flagrant violation of human rights in Tibet by the People's Republic of China must, therefore, be a matter for the moral consideration of Asian and African peoples who subscribe to the spirit of the Bandung Declaration. The question of Tibet, however, does not concern Asia and Africa alone. It is a problem of far-reaching implication—one that touches the conscience of mankind.[75]

Similarly the Irish representative called for the respect for human rights which, in his view, was vital for all people in the nuclear age. He also argued that " when a flagrant violation of the human rights occurs, it is our duty. . .to speak out in defence of the principles to which we are all pledged, irrespective of whether the Government responsible for such a violation is a member of the Organization or bound by the principles of the Charter ".[76] The Chinese delegate also deprecated the policies of the Chinese communist regime and added that even in the absence of the Universal Declaration of Human Rights, " the United Nations owes it to human decency and to the rudiments of civilization to raise its voice against the atrocities which the Chinese Communists have committed in Tibet ".[77] The Venezuelan representative voiced the sentiments of the House when he said :

> Respect for the dignity of man and for fundamental freedoms is so essential in any civilized society that without it there can be no peace or justice in the world. In seeking respect for the fundamental freedoms and human rights of the people of Tibet, we are proclaiming the necessity for observing the fundamental principles of the Charter so that there may be peace and justice

[75] Mr. Dato Kamil (Malaya) : *U. N.* A/PV. 831 (20 October 1959), paras 5,7, 13, 14 ; Also Mr Shanahan (New Zealand), *ibid.*, 832 (20 October 1959), para 16.

[76] Mr. Aiken (Ireland), *ibid.*, paras 35, 45-6.

[77] Mr. Tsiang (China), *ibid.*, 833 (21 October 1959), para 67. Similarly Mr. Bisba (Cuba) added : "Whether it is a Chinese province, an autonomous form of Government or independent, Tibet is entitled under the United Nations Charter and the Universal Declaration of Human Rights, to recognition of the human rights and the fundamental freedoms of its inhabitants, and to the assurance that those rights and freedoms will not be taken away or impaired for reasons of race, sex, language or religion." *Ibid.*, 831 (20 October 1959), para 119.

in the world. In so doing, we are fulfilling a duty, in this case a minimum duty, of strict human solidarity.[78]

The discussion and the voting which took place on the Malayan-Irish resolution[79] conclusively showed that a large number of members of the United Nations have considered the violation of human rights and fundamental freedoms in Tibet as a matter of international concern in which the United Nations have a legitimate and justifiable interest.[80] Even those members who objected to the discussion of the matter on the plea of domestic jurisdiction were moved more by selfish considerations rather than by the

[78] Mr. Rodriguez (Venezuela), *ibid.*, 834 (21 October 1959), paras 148,150.

[79] The following is the text of the Resolution (A/L. 264):

"The General Assembly

Recalling the principles regarding fundamental human rights and freedoms set out in the Charter of the United Nations and in the Universal Declaration of Human Rights adopted by the General Assembly on December 10, 1948.

Considering that the fundamental human rights and freedoms to which the Tibetan people, like all others, are entitled include the right to civil and religious liberty for all without distinction.

Mindful also of the distinctive cultural and religious heritage of the people of Tibet and of the autonomy which they have traditonally enjoyed.

Gravely concerned at reports, including the official statements of His Holiness the Dalai Lama, to the effect that the fundamental human rights and freedoms of the people of Tibet have been forcibly denied them.

Deploring the effect of these events in increasing international tensions and embittering the relations between peoples at a time when earnest and positive efforts are being made by responsible leaders to reduce tension and improve international relations,

1. Affirms the belief that respect for the principles of the Charter and of the Universal Declaration of Human Rights is essential for the evolution of a peaceful world order based on the rule of law,

2. Calls for respect for the fundamental human rights of the Tibetan people and for their distinctive cultural and religious life."

[80] The resolution was adopted by 45 to 9 with 26 abstentions. The names of the states who voted for the resolution are as follows: Argentina, Australia, Austria, Bolivia, Brazil, Canada, Chile, China, Columbia, Cuba, Denmark, Ecuador, El Salvador, Malaya, Greece, Guatemala, Haiti, Honduras, Iceland, Iran, Italy, Japan, Jordan, Laos, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, the Phillipines, Sweden, Thailand, Tunisia, Turkey, the U.S., Uruguay, Venezuela. *Against*: Albania, Bulgaria, Byelo-Russia, Czechoslovakia, Hungary, Poland, Rumania, Ukraine, Soviet Union. *Abstention*: Afghanistan, Belgium, Britain, Burma, Cambodia, Ceylon, Dominican Republic, Ethiopia, Finland, France, Ghana, India, Indonesia, Iraq, Lebanon, Lybia, Morocco, Nepal, Portugal, Saudi Arabia, Spain, Sudan, South Africa, the United Arab Republic, Yemen, Yugoslavia. *Absent*: Guinea, Costa Rica: *U.N.* A/PV. 834 (21 October 1959), para 166.

objective criteria because they were already involved in similar disputes.[81]

As shown earlier,[82] controversy exists on the question whether human rights and fundamental freedoms have been guaranteed by the UN Charter or not. The practice of the United Nations, however, is quite clear that the General Assembly is entitled to make recommendations to the party concerned and such an action is not a violation of any provision of the Charter.[83] In many other cases, where the suppression of human rights was not so severe and vindictive, the United Nations have passed resolutions calling upon the parties to change their policies in conformity with the obligations of the Charter.[84] In this case, however, the charges levelled against China are very serious. The destruction of Budhist monasteries, wanton killing of Lamas, kidnapping of thousands of children to China and incarceration of the Tibetan people, present a grim spectacle unmatched in the whole history of the United Nations.[85] There is no doubt that the measures of sterilization of Tibetan men and women are taken in furtherance of a calculated plan to exterminate the Tibetan race and to deprive it of its cultural, religious and philosophic heritage and supplant it with an atmosphere in which communist philosophy may easily take roots and flourish. It is, therefore, submitted that there is a *prima facie* case of violation of human rights and fundamental freedoms.[86] It is very

[81] Besides the delegates from the Soviet Bloc, see the following: Mr. Loridan (Belgium), *ibid.*, 832 (20 October 1959), paras 43-4; Mr. Berard (France), *ibid.*, para 119; Mr. De Lequerica (Spain), *ibid.*, 833 (21 October 1959), paras 93-7.

[82] See the chapter on the treatment of the people of Indian origin in the Union of Africa, *supra*, pp. 1-28.

[83] Mr. Cabot Lodge (USA), *ibid.*, 831 (20 October 1959), para 84: "As to the adoption by the General Assembly of resolutions, the Charter in Articles 10 and 55, has conferred a clear and well-articulated authority upon the General Assembly which it has exercised on several occasions in the past. Charges of very serious violations of human rights and fundamental freedoms in Tibet have been presented to this Assembly. In the context of the Charter and of the precedents, the General Assembly is surely competent to express itself concerning such action and to appeal for the observance of liberty. . . ."

[84] *Repertory of United Nations Practice*, Vol. I, pp. 145-6.

[85] For substantial evidence on these happenings, see *Tibet and the Chinese People's Republic*, esp, Chs. I & II; also the cable of the Dalai Lama to the Secretary General of the United Nations, *The Times of India*, 11 September 1959.

[86] Mr. Schurmann (Netherlands), *U.N.* A/PV. 833 (21 October 1959), para 28; also see the resolution adopted by the Afro-Asian Convention on Tibet charging China of the crime of genocide in Tibet, *The Times of India*, 11 April 1960.

clear again, that there is an organized conspiracy on the part of the Chinese government to cut at the very roots of centuries-old Tibetan customs, traditions and institutions, in order to deprive the Tibetans of their special racial background. Hence it would be within the jurisdiction of the United Nations to examine how far the Chinese may be held responsible for the alleged crime of genocide. The United Nations, therefore, besides the competence which she derives from the UN Charter, is also entitled on account of humanitarian considerations to rouse the conscience of the world against this brutal conspiracy.

CONCLUSIONS

The whole course of Tibetan developments leads to some fundamental conclusions which are of interest to students of international law. Ever since 1951, when the Seventeen Point agreement was signed, in spite of the disturbing developments like the flight of the Dalai Lama, the Sino-Indian border dispute and the discussion of the Tibetan question in the United Nations, no country has even attempted to give a belligerent status to the Dalai Lama's government, much less a recognition of the sovereign character of the hilly kingdom. It goes to show that those States which have diplomatic relations with the People's Republic of China, have accepted and favoured the *status quo*, even if tacitly—that is, that Tibet is no longer an international person in the sense of international law, even if she were one before 1951.[87] This is equally true of those States which do not have any diplomatic relations with the Peking regime. In the General Assembly where the matter was discussed, none of the States even suggested that such a step be taken. The discussion had centered around the main allegation of suppression of human rights and fundamental freedoms rather than on the act of aggression against the *sovereign* State of Tibet.[88]

[87] Pandit Nehru at a press conference in New Delhi said that because Tibet had not been recognized by any country as an independent State, the question of giving such a status did not arise, *The Times of India,* 12 September 1959.

[88] Mr. Kamil (Malaya) *U.N.* A/PV. 831 (20 October 1959), paras 3, 7; Mr. Upadhyaya (Nepal), *ibid.*, para 59; Mr. De Lequerica (Spain), *ibid.*, 833 (21 October 1959), paras 91-2; Mr. Rodriguez (Venezuela), *ibid.*, 834 (21 October 1959), para 147. The Indian delegate was quite emphatic on this point : "Then the question arises as to whether the presence of the Dalai Lama and his entourage in India does not create a difference in political relationships. I have already indicated our position on this matter—that we stand by the agreement of 1954. What is more, in regard to the 17-Point Agreement. . .it is the view of the Government that that

This fact is very important because an acceptance of the *status quo* would amount to dismissing all arguments regarding the invalidity of the 1951 agreement, especially the argument of duress and the subsequent denunciation of it by the Dalai Lama. Perhaps no country has as much interest in the matter as India and it is possible to argue that she had a third party interest in the agreement and its effectuation. If the initiative for the recognition of Tibetan sovereignty especially after the denunciation of the agreement, had come from the Indian government, there is reason to believe that many other States would have followed suit and the discussion in the United Nations would then have centered around the basic contention of sovereignty. But the Indian government has considered it politic not to take such a step because this would have involved a further vitiation of mutual relations with the Peking government which are already serious and complicated on account of the border dispute.[89] Anticipating such repercussions, the Indian government has been cautious in its approach to the problem. But this much is clear that she has not violated any rules of international law by giving asylum to the Dalai Lama and his party. India's action may be bad politics from the standpoint of the Chinese government but it is in conformity with the relevant rules of international law governing asylum.[90]

It must be pointed out, however, that her negative attitude to a question which is certainly more grave and serious than the problem of persons of Indian origin in the Union of South Africa, may

Agreement still stands. It is quite true that some of its provisions have been broken but that unfortunately will be found to be the case in regard to many international treaties. If certain conditions are broken, either party or others conerned take whatever action is necessary or possible in regard to them." *Ibid.*, 834 (21 October 1959), para 87.

[89] Mr. Menon (India): "Our abstention, however, will be in no sense. . .I repeat, in no sense. . .a lack of concern or a lack of feeling in regard to the Tibetan people or any reflection upon our relations with China. It merely arises from the posture and policy which I have placed before the Assembly." *U.N.*, A/PV. 834 (21 October 1959), para 95. Even regarding human rights, the Indian delegate used caution: ". . . so far as human rights are concerned, we state without any reservation whatsoever that we do not have any standard different from what we have advocated from this platform and in a small measure have tried to practice in our political and other relations." *Ibid.*, A/PV. 834 (21 October 1959), para 71.

[90] Mr. Nehru has mentioned in this context that India's foreign policy was governed by three factors: (1) the preservation of the security and integrity of India, (2) our desire to maintain friendly relations with China, and (3) our dee sympathy for the people of Tibet. *The Hindustan Times*, 28 April 1959.

have considerably lowered the Indian government even in the eyes of those who have been her constant admirers. In the latter case, for more than a decade, India has worked incessantly to see that the Union government is held responsible for violating the human rights and fundamental freedoms of the persons of Indian origin. The activities of the Union of South Africa regarding her apartheid goals will pale into insignificance when compared with Chinese atrocities in Tibet. In the case of Tibet there is a deliberate conspiracy on the part of the Chinese government to do away with the religious and racial integrity of a people against whom it committed an act of aggression in 1951 and later made a mockery of the agreement which was imposed at the point of the bayonet. Certainly, the Tibetan people deserved a more positive response from the Indian government, at least, in keeping to the gravity of the situation. If the Indian government had protested against the ruthless activities of the Chinese armed forces, far from being a violation of international law, it would have been the recognition of a healthy practice which in due course of time may become binding on all the members of the world community. Such a trend will help in the establishment and maintenance of the rule of law in the world.[91]

[91] For such a plea see chapter entitled "Rights of Man in World Community" in Myres S. McDougal and Associates, *Studies in World Public Order*, pp. 335-403.

6

SINO-INDIAN BORDER DISPUTE

THE year 1959 will go down in Indian history as a very crucial year because of the new turn in Sino-Indian relations engendered by the border dispute. This development may have very serious repercussions not only on Asian politics but even on the policies of the Big Powers. It is of interest to note that during the last two thousand years or more, relations between the two countries have been very cordial and based on mutual respect and good neighbourliness. From India, currents of philosophy, religion and culture have flowed into the other side of the Himalayas forming a part of the Chinese heritage.[1] These old ties may have influenced Indian policy makers to hail the birth of new China under the leadership of the Chinese Communist Party. Nehru and other Indian leaders were appreciative of the new social and political forces which had been unleashed in Asia in the post-war period.[2] These factors must have served as the corner-stone on which Indian foreign policy was built. Guided by the slogans of "peaceful co-existence", and the " Bandung spirit " the two neighbouring States set a standard for many other Asian countries. It was in this spirit that India signed the Sino-Indian Agreement of 1954 regarding Tibet, voluntarily giving up all her rights and assets located in that country.[3]

The mutual recriminations, which have continued for the last two years, have, however, shaken the Indian government and people out of their illusions. The claims of China to large chunks of Indian territory all along the 3,000 miles frontier, the attempts to take over Indian posts by force and the virtual massacre of a

[1] Jawaharlal Nehru, *The Discovery of India* (London, 1956), pp. 184-92.

[2] *Jawharlal Nehru's Speeches* (New Delhi: Publications Division, 1957), pp. 138, 147-8.

[3] For the Agreement and the Notes exchanged regarding it, see: *Notes, Memoranda and Letters Exchanged and Agreements Signed Between the Governments of India and China 1954-1959* (New Delhi: Ministry of External Affairs, 1959), pp. 98-110 (Hereafter to be cited as *White Paper I*).

team of Indian policemen in the Ladakh area of India have swept a wave of unrest and anger among the Indian people. Critics of Nehru's policy of peaceful co-existence have seized this opportunity to challenge the wisdom of putting too much faith in the bonafides of the Chinese communists. They are advocating that India should conclude a joint defence pact with Pakistan for the protection of her northern frontiers and seek military and economic aid from the West.[4]

Apart from the wider political and strategic implications of this dispute, both India and China have put forward claims which are mutually exclusive. Both the countries have tried to justify their contentions by reference to long established usage and custom, treaties, water-shed argument, ethnic and racial composition of the people living on either side of the border and to effective jurisdiction. It should, therefore, be of interest to examine the whole problem of the Indo-Chinese border dispute in the light of the claims of the two parties from the point of view of relevant principles of international law.

NATURE OF THE PROBLEM

The Sino-Indian border issue came into existence after the Chinese communists invaded Tibet. The integration of Tibet, accomplished as a result of the Seventeen Point Agreement,[5] brought China to the borders of India, thus bringing into prominence after ages, the much vexed border question. The matter was first raised, it seems, in 1951 when the Indian government brought to the notice of the Peking government some Chinese maps which showed traditional Indian territory as a part of China.[6] At that time and also later Premier Chou-en Lai assured the Indian Prime Minister that these were old maps produced by the previous regime in China and that as soon as the government felt relieved of

[4] Even Pandit Nehru mentioned this fact to the Chinese Premier. See Letter from the Prime Minister of India to the Prime Minister of China, 26 September 1959 in *White Paper II*, p. 34.

[5] See this Agreement in *The Question of Tibet and the Rule of Law* (Geneva : International Commission of Jurists, 1959), pp. 139-42.

[6] It seems the Chinese government after its successful invasion of Tibet in 1950 might have given thought to the border issue with India by publishing the maps in order to know the reaction of the Indian government. Especially the two notes of India regarding the Chinese invasion of Tibet must have brought home to China the interest of its neighbour in the matter. The Indian Government, however, has not published the earlier correspondence in the matter.

more pressing problems, necessary correction of the maps would be made after mutual consultation.[7] This state of affairs continued till 1959, India representing to the Chinese government what, in her view, amounted to *cartographic aggression* of her territory, and the latter putting off consideration on the plea that these were old maps. Such an approach does not appear to have been seriously resented by the Indian government.[8]

The matter, however, came to a head in 1959 when the Dalai Lama and his party being pursued by the Chinese forces fled from Tibet and took asylum in India.[9] To ensure that the Khampas and other Tibetan rebels do not use the territory around the border as a base for guerilla activities against the Chinese authorities, the Peking government concentrated a large army on India's northern frontiers.[10] Already peevish and angry with India for her interest in Tibetan developments, the advancing Chinese armed forces continued to infiltrate into the areas, traditionally belonging to India, and which for the last so many years had been shown by the Chinese maps as their own territory. This was followed by a declaration that all these areas belonged to China and had illegally been occupied by India.[11] This was bound to have a violent reaction in India because she had many times previously protested against this cartographic aggression the consequence of which would be the dismemberment of a large part of Indian territory. Moreover, when the Chinese government had on a number of occasions recognized that these were old maps and needed revision in consultation with the Indian government, her claims on Indian territory created a crisis of confidence and faith.[12]

[7] Memorandum given by the Foreign Office of China to the Counsellor of India, 3 November 1958, *White Paper I*, p. 47.

[8] Note given by the Ministry of External Affairs to the Counsellor of China, 21 August 1958, *ibid.*, p. 46.

[9] For this story see Noel Barber, *The Flight of the Dalai Lama* (London, 1609).

[10] "I can assure Your Excellency that it is merely for the purpose of preventing remnant armed Tibetan rebels from crossing the border back and forth to carry out harassing activities that the Chinese Government has in recent months dispatched guard units to be stationed in the south eastern part of the Tibet Region of China. This is obviously in the interest of ensuring the tranquillity of the border and will in no way constitute a threat to India." Letter from the Prime Minister of China to the Prime Minister of India, 8 September 1959, *White Paper II*, p. 32.

[11] Letter from the Prime Minister of China to the Prime Minister of India, 23 January 1959, *White Paper I*, p. 53

[12] See the remarks of Pandit Nehru replying to the two-day debate on this

If the Chinese claims based on old maps were accepted, it would have meant that in the north-west along a boundary of 710 miles (MacMahon Line) 32,000 square miles of territory south of this line belonged to China. This includes the whole of the Kameng Frontier Division, the whole of Subansiri Frontier Division, the whole of the Siang Division and three-fourth of the Lohit Division of the North East Frontier Agency. It would also include a part of Assam territory in the Darang Division. In the north, the border between Tibet and Bhutan being 250 miles long, the area claimed by China would approximate 200 square miles. The old maps could also embolden the Chinese to incorporate nearly 2,000 square miles of Bhutan territory mostly in the east adjoining the NEFA and a small portion in the north-west. In Uttar Pradesh, the border with Tibet is about 220 miles long and the Chinese claim about 2.5 square miles at Bara Hoti and about 50 square miles in the Nilang area, west of the Niti Pass. In the area adjoining the Himachal-Tibet border which is about 90 miles, the Chinese lay claims on a small piece of territory in the vicinity of the *Shipki* Pass. The Chinese also claim a small village in the Punjab whose border with Tibet runs for 70 miles. In the West, the Ladakh-Tibet border is about 1,000 miles long. Here in the north-west area of Kashmir, now accupied by Pakistan, the frontier runs to 300 miles and the area shaded by the Chinese maps as belonging to them covers roughly 5,000 to 6,000 square miles. In the north-east part of Kashmir, Chinese maps show as Chinese territory the greater part of Aksai Chin area claiming Changmo Valley, Pagong Tso and Spanggar Tso and Changla area of north-east Ladakh and a strip of about 2,000 square miles down the entire length of eastern Ladakh. In all, the Chinese maps incorporate about 40,000 square miles of an area which, in the view of India belongs to her, through custom, usage, treaty, geographical configurations, and racial affinities. The Chinese, on the other hand, argue that nowhere has the boundary been formally delimited by treaty and that by usage, custom and effective jurisdiction, the area belongs to China.[13]

very issue in the Lok Sabha. *The Times of India,* 28 November, 1959; also Note given by the Ministry of External Affairs to the Counsellor of China in India, 21 August 1958, *White Paper* I, p. 46.

[13] Letter from the Prime Minister of China to the Prime Minister of India, 23 January 1959, *White Paper I*, pp. 52-3 ; *Report of the Officials of the Governments of India and the People's Republic of China on the Boundary Question* (New Delhi : Ministry of External Affairs, 1961) pp. C.R. 186-7. (Hereafter to be

NORTH EASTERN BOUNDARY

The largest chunk of territory which has become the subject of Chinese cartographic aggression is the area where the borders of India, China and Tibet meet. The line which separates Indian territory from that of her northern neighbour is the MacMahon Line which runs from north-east Burma at 27 degrees 40 minutes to the eastern tip of Bhutan.[14] This line is 710 miles long from the eastern terminus of the Bhutanese frontier to Talu Pass near the Burma frontier, following for the most part the natural watershed of the Brahmaputra along the crest of the Himalayan ranges. At one place only, this line departs from the watershed, namely, near Migyitun and two Tibetan pilgrimage places—Tstokaro and Tsari Sarpa. The watersheds of Lohit, Dihang, Subansiri and Nanjang rivulets are also covered by it.[15]

The MacMahon Line which has been so much in the news during the last two years was drawn as a consequence of the deliberations of the Simla conference of 1913-14. In the latter part of the 19th and early 20th century, the British government had tried to extend its influence in China and Tibet. This was essential to check foreign infiltration into Tibet which might serve as a threat to the security of India. It was with this idea in mind that a convention was called and an agreement was signed with China in 1890 and the Younghusband expedition was sent to Tibet in 1904. But the Chinese penetration into Tibet continued in-as-much as in the early years of this century they attacked Lhasa and their

referred as *Officials' Report*); Note given by the Ministry of Foreign Affairs of China to the Embassy of India in China, 26 December 1959, *White Paper III*, pp. 60-82; the latest note makes it very clear that the boundary line runs along the southern part of the Himalayas, *ibid.*, V, p. 26.

[14] See the *Atlas of the Northern Frontier of India* (New Delhi: Ministry of External Affairs, 1960). The line is exactly similar to the one given in the map attached to the Simla convention in 1914.

[15] In exchange of notes between the British and the Tibetan Plenipotentiaries under dates of 24 March 1914 and 25 March 1914 signed by H. H. MacMahon and Lonchen Shatra, the line is accepted subject to the following two conditions:

(*a*) The Tibetan ownership in private estates on the British side of the frontier will not be disturbed.

(*b*) If the sacred places of Tso Karpo and Tsari Sarpa fall within a day's march of the British side of the frontier, they will be included in Tibetan territory and the frontier modified accordingly.

C. U. Aitchison, *A Collection of Treaties, Engagements and Sanads* (Calcutta: Govt. of India Central Publ. Bn, 1929), Vol. XIV p. 34-5.

troops even crossed into Mishmi territory which has never been part of Tibet. This naturally caused concern in India and the government came to recognize the necessity of defining and defending the Indo-Tibetan frontier.[16]

The government proceeded with this task in a systematic manner. Exploration parties surveyed the area from 1911-13 to determine the exact southern limits of Tibetan jurisdiction. Simultaneously steps were taken to bring the tribal area under firm Indian administration. The old Sadiya and Balipara areas were constituted into political tracts under two political officers who were responsible to the Assam Governor. When the exact southern limits of Tibet's jurisdiction had been determined, the Government of India moved to convene a tripartite conference to settle this and allied issues.[17]

The main issue at the Simla conference was the determination of the relation of Tibet with China. This was of primary importance because of the fear of Russian expansion in this area. Moreover, in 1912 after the overthrow of the Manchu dynasty, the 13th Dalai Lama had repudiated the Chinese claims over Tibet and had proclaimed Tibet's independence. These considerations were responsible for the convening of this conference to resolve all outstanding disputes.[18]

At the conference table, the Tibetan and Chinese plenipotentiaries, who had equal status, took up opposing positions. Lonchen Shatra (Tibet) demanded the right of independence, denounced the Anglo-Chinese convention of 1906 and insisted on the return to Tibet of all territories upto Tachienlu. The Chinese envoy on the other hand pleaded that Tibet be recognized as an integral part of China and that Tibet's boundaries with China be fixed at Giamda. As a compromise the British government suggested the division of Tibet into Inner and Outer Tibet, each of the regions to have a different degree of relationship with China. While the basic idea of division was acceptable to all the parties, the demarcation of the boundary proved infructuous. Later, a draft treaty suggested by the British government, was initialled by the three delegates. This draft contained a map which showed Tibet's boundaries in red and which was signed by the British and Tibetan plenipotentiaries and letters regarding the same were duly exchanged between the

[16] Sir Francis Younghusband, *India and Tibet* (London: John Murray, 1910), pp. 420-21; also A. Appadorai and Associates, "Bases of India's Title on the North-East Frontier", *International Studies*, Vol. I (April, 1960), p. 357.

[17] Sir Charles Bell, *Tibet: Past and Present*, pp. 107-108.

[18] *Ibid.*, p. 151.

two governments. The Chinese delegate, however, refused to sign it because his government would not agree to the demarcation of the boundary between Inner and Outer Tibet at specific points.[19]

The details of the deliberations of the conference are useful in understanding the position of China because she has refused to accept the validity of the treaty of 1914. In a recent note to the Indian government, Premier Chou-en Lai has pointed out that the Indo-Tibetan border issue was not on the agenda of the Simla conference, nor was the matter discussed by it and that the exchange of letters regarding this line between the British and Tibetan delegates was secretly done and that " the so called MacMahon Line was a product of the British policy of aggression against the Tibetan Region of China and has never been recognized by any Chinese Central government and is, therefore, decidedly illegal. "[20]

Notwithstanding the Chinese contentions, it must be pointed out that the validity of this treaty for purposes of the MacMahon Line can be proved from different sources. In the first place, it cannot be questioned that the main point of discussion at the Simla conference was the relation of Tibet with China and in this respect it was tentatively agreed that Tibet should be divided between Inner and Outer Tibet with different jurisdictions in each region. To make the area of jurisdiction clear, it was imperative that the territorial sphere of each be properly demarcated. That is why, the marking of the border in red was not only desirable but essential. Article 9 of the Simla convention stipulates that "for the purpose of the present convention the borders of Tibet and the boundary between Outer and Inner Tibet shall be as shown in red and blue respectively in the map attached thereto."[21] This red

[19] See the letter of Mr. H. E. Richardson, the last of the British Indian representatives in Lhasa in *The Times* (London), 4 September 1959, giving the details of the deliberations of the Simla conference.

[20] Letter from the Prime Minister of China to the Prime Minister of India, 8 September 1959, *White Paper II*, p. 29. India, however, did not accept this change. "It is a travesty of history for the Chinese government to assert that the traditional Indian boundary, which has been well-known and recognised for centuries, is a product of British imperialism. In fact, it is the Chinese government who have, during the last few years, shown aggressive designs and imperialist ambitions by unauthorizedly occupying large areas of Indian territory in violation of the solemnly agreed Panch Sheel principle of respect for each other's territorial integrity. It is this aggression by China on Indian territory that is the cause of differences between India and China". Note given by the Ministry of External Affairs, New Delhi, to the Embassy of China in India, 19 September 1961, *White Paper V*, p. 37.

[21] Aitchison, *op. cit.*, p. 37. The Indian government has argued that the

line ringed Tibet around, showing not only its frontiers with China but also those with India. Hence the Chinese argument that this demarcation was not discussed and was not relevant, does not hold much water.

Secondly, the refusal to sign and ratify this treaty by the Chinese government was not provoked on account of the demarcation of the boundary line in the southern border of Tibet but because she was not satisfied with the demarcation of the border separating Outer Tibet from Inner Tibet. If the Chinese government were dissatisfied with the delimiting of the southern border, she would have said so at that time. Since no objection was made, it may be presumed that there was a tacit acceptance of the validity of the MacMahon Line in the southern area. As Mr. Caroe says " The MacMahon Line was shown in the map initialled by the Chinese representative in Simla in June 1914 which clearly indicates that the then Chinese government was fully aware of it. It is thus quite inconceivable that the Chinese negotiator or his government could really have remained in ignorance of this part of the red line, as Peking now pretends '".[22] Hence it may be argued that the refusal by the Chinese government to put their signature on the decisions of the Simla convention had no bearing on the formalization of the Indo-Tibetan boundary line as their reasons for not signing the convention were unrelated to the recognition of the MacMahon Line.[23]

Thirdly, even if the treaty had been signed and ratified by the Chinese government, the MacMahon Line would still have fallen within the jurisdiction of the Lhasa government and the latter would have been anyhow the appropriate authority to deal with the matter. Since it was ratified by the Tibetan government and notifications exchanged soon thereafter, the recognition of this frontier became effective for all purposes and China's refusal to sign it, could not materially change the position accepted by the Lhasa government. Moreover, Tibet was invited to the conference in her own right as an independent country. Even the then-government of China had agreed to the attendance of Tibet as a party enjoying equal status. In reply to the British note, the Foreign Minister of China wrote on 7 August 1913 that the Chinese pleni-

conference was called to settle problems with China and other countries also. This, it is argued, can be clear from the credentials of the various delegates to the conference. *Officials' Report*, pp. 110-12.

[22] *The Times of India*, 15 February, 1960, quoted from an article in *The Manchester Guardian*, 13 February, 1960.

[23] *Officials' Report*, p. 135.

potentiary would proceed to India " to open negotiations for a treaty jointly with the Tibetan and British representatives."[24] Tibet was thus recognized by China at that time as an independent entity empowered to take part in international negotiations. At no stage did the Chinese government object to the full status of the Tibetan representatives. The three plenipotentiaries exchanged copies of their credentials at the first session of the conference on 13 October 1913. The credentials of the Tibetan representative issued by the Dalai Lama made it clear that Tibet was attending the conference in her own right and had the power " to decide all matters that may be beneficial to Tibet " and the Chinese representative accepted the credentials of the Tibetan representative, as being in order. The credentials of the British Indian representative confirmed that all the three delegates enjoyed equal status, and that the conference was meeting " to regulate the relations between the several Governments ".[25] The real position at the time was that China was not in factual control of Tibet and hence could not be interested in the Tibetan-Indian frontier. Hence Chinese refusal to sign the treaty did not in any way make the Tibetan acceptance of the MacMohan Line invalid. Tibet was in *de facto* control of the border area and the only interested parties could have been India and Tibet.[26]

There is some substance in the view expressed by the Dalai Lama that the validity of the MacMahon Line is associated with the acceptance of the sovereignty of Tibet.[27] One may not wholly

[24] Quoted in Letter from the Prime Minister of India to the Prime Minister of China, 26 September 1959, *White Paper II*, p. 38. In fact this was not the first time that Tibet concluded an agreement with other countries. In 1856 Tibet concluded an agreement on its own with Nepal. The convention signed by Britain and Tibet in 1904 was negotiated by the British and Tibetan representatives without the assistance of the Chinese Amban in Tibet. *Ibid.*

[25] Note of the Government of India to the Chinese Government, 12 February 1960, *White Paper III*, pp. 94-5. The Preamble of the Simla convention states: "His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, His Excellency the President of the Republic of China, and His Holiness the Dalai Lama of Tibet, being sincerely desirous to settle by mutual agreement various questions concerning the interests of their several Governments, have resolved to conclude a Convention on this subject." Aitchison, *op. cit.*, p. 35.

[26] *Officials' Report*, pp. 113, 114-15, 129, 130; Note given by the Ministry of External Affairs, New Delhi, to the Embassy of China in India, 16 June 1916, *White Paper V*, pp. 31-34.

[27] See his statement in *The Times of India*, 8 September 1959: "The MacMahon Line as the Indo-Tibetan frontier was agreed upon at the Simla Conference of

agree with the Dalai Lama's view but the conditions of 1913-14 lend weight to the proposition that Tibet was virtually sovereign and hence was entitled to conclude treaties regarding her frontiers. Moreover when the Chinese did not accept the decisions of the convention, the arrangement regarding the acceptance of limited Chinese jurisdiction in Outer Tibet had fallen through and Tibet was henceforth not only *de facto* but *de jure* independent. This position can be supported by the fact that Chinese sovereignty over Tibet came to an end with the overthrow of the Manchus. As Tibet had also formally declared her independence, she did not owe any obligations to the new Chinese Republic. This view becomes all the more convincing when we find that the authority given to the British plenipotentiary to negotiate the treaty stated that events had rendered previous agreements null and void— in other words that the 1913-14 negotiations were concluded on an altogether fresh basis.[28] It means that Tibet was legally competent to conclude treaties and assume obligations in the international sphere.[29]

The validity of this treaty also finds its support in the fact that neither China nor Tibet questioned the authenticity of the boundary for a large number of years.[30] It is a rule of international law that if an objection is not made within a reasonable time, the State concerned has implicitly agreed to abide by the relevant obligations.[31] The Chinese Foreign Office in a memorandum dated 25 April 1914 had listed a number of objections to the proposed convention without raising any *caveat* to the boundary between India and Tibet as shown in the map attached to the Tripartite Simla convention.[32] Thereafter, on 27 April, the Chinese representative initialled both the conventions and the map without any objection.[33] Subsequently also, in their memorandum dated 13

1914 and this convention was valid and binding as between Tibet and the British Government. If Tibet did not enjoy international status at the time of the conclusion of the convention, she had no authority to enter into such an agreement. Therefore, it is abundantly clear that if you deny sovereign status to Tibet you deny the validity of the Simla Convention, and, therefore, you deny the validty of the MacMahon Line."

[28] *Officials' Report*, pp. 110-11.

[29] Note of the Government of India to the Chinese Government, 12 February 1960, *White Paper III*, p. 94.

[30] Letter from the Prime Minister of India to the Prime Minister of China, 26 September 1959, *White Paper II*, p. 35.

[31] *Officials' Report*, p. 97.

[32] *White Paper II*, p. 38. [33] *Ibid.*

June 1914 no mention was made of the non-acceptance of the Line.[34] Later, on 30 May 1919 she again suggested some modifications of the Simla convention with a view to reaching a final solution of the vexed problem. These modifications related only to the demarcation of Inner and Outer Tibet and no reference at all was made to the boundary between Tibet and India.[35] The provisions of this convention were published in the 1929 edition of Aitchison's Treaties and the MacMahon Line as existing today was shown even in the official maps published from 1937 onwards. These maps were circulated widely but neither at that time nor subsequently was any objection raised by the Chinese government. It is, therefore, reasonable to conclude that the Chinese government had tacitly accepted the validity of the MacMahon Line. If despite many occasions and opportunities, the Chinese had not till 1959 disputed this boundary arrangement, they should be stopped from doing so now.[36] The same is true of Tibet. "At the time of acceptance of delineation of this frontier, Lonchen Shatra, the Tibetan Plenipotentiary, in letters exchanged, stated explicitly that he had received orders from Lhasa to agree to the boundary as marked in the map appended to the convention. The line was drawn after full discussion and was confirmed subsequently by a formal exchange of letters and there is nothing to indicate that the Tibetan authorities were in any way dissatisfied with the agreed boundary".[37] Moreover, after the Simla conference she did not question the arrangement for over four decades. The objections raised in 1947 cannot, therefore, disturb the long-established frontier because they were time-barred, in view of international practice. The MacMahon Line is, therefore, the product of a treaty which was valid in 1914 and has remained so ever since. Even the change in the status of Tibet on account of the Seventeen Point Agreement cannot in any way give cause for its cancellation. A treaty whose object is to establish a permanent state of things cannot be questioned even after an interested party has become extinct.[38]

The Indian government rightly proceeded on the assumption that the MacMahon Line was a validly established frontier and

[34] *Officials' Report*, p. 135.

[35] *White Paper II*, pp. 38-9.

[36] *Officials' Report*, p. 99.

[37] Letter from the Prime Minister of India to the Prime Minister of China, 22 March 1959, *White Paper I*, p. 56.

[38] A. D. McNair, *The Law of Treaties* (Oxford, 1938), pp. 538, 539, 542.

that Tibet or China would never have second thoughts on the matter. In 1954 when a Sino-Indian agreement was negotiated regarding Tibet, no border question was raised and India was genuinely under the " impression that there were no border disputes between the respective countries ".[39] Later, when in October 1954 Pandit Nehru visited China, he told Chou-en Lai, referring to some maps published in China, that as far as India was concerned " we were not worried about the matter because our boundaries were quite clear and were not a matter of argument ".[40] In 1956, when Chou-en Lai visited India, he was supposed, while discussing the question of maps with the Indian Prime Minister, to have accepted the validity of the MacMahon Line.[41]

This Line as traced in the convention follows the crest of the

[39] Note given by the Ministry of External Affairs, New Delhi to the Embassy of China in India, 4 November 1959, *White Paper II*, p. 20; Letter from the Prime Minister of India to the Prime Minister of China, 14 December 1958, *White Paper I*, p. 48. But see the Chinese Prime Minister's reply as to why the Indian contention is not valid. Letter from the Prime Minister of China to the Prime Minister of India, 23 January 1959, *White Paper I*, p. 53.

[40] "...In the course of our talks I briefly mentioned to you that I had seen some maps recently published in China which gave a wrong border line between the two countries. I presumed that this was by error and told you at the time that so far as India was concerned we were not much worried about the matter because our boundaries were quite clear and were not a matter of argument. You were good enough to reply to me that these maps were really reproductions of old pre-liberation maps and that you had had no time to revise them. In view of the many and heavy pre-occupations of your Government, I could understand that this revision had not taken place till then. I expressed the hope that the borderline would be corrected before long", Letter from the Prime Minister of India to the Prime Minister of China, 14 December 1958, *White Paper I*, p. 49.

[41] *Ibid.*, pp. 49-50: "You told me then that you had accepted this MacMahon Line border with Burma and, whatever might have happened long ago, in view of the friendly relations which existed between China and India, you proposed to recognize this border with India also. . . .Immediately after our talks, I had written a minute so that we might have a record of this talk for our personal and confidential use. I am giving below a quotation from this minute: 'Premier Chou referred to the MacMahon Line and again said that he had never heard of this before though of course the then Chinese Government had dealt with this matter and not accepted that line. He had gone into this matter in connection with the border dispute with Burma. Although he thought that this line, established by British Imperialists, was not fair, nevertheless, because it was an accomplished fact and because of the friendly relations which existed between China and the countries concerned, namely, India and Burma, the Chinese Government were of the opinion that they should give recognition to the MacMahon Line. They had, however, not consulted the Tibetan authorities about it yet. They purposed to do so'. "

highest Himalayan peaks. From the Indo-Tibetan-Burmese border junction it moves in a bulge along the crest of the Himalayas to the west towards Bhutan. This Line is consistent with the watershed principle which the Chinese government has accepted in its treaties with Burma and Nepal.[42] It is a continuation of the Burmese border towards the west. The principle of the watershed which is ordinarily followed in demarcating frontiers in such mountainous regions coincides by and large with the geographical features in the area around the MacMahon Line.[43] The MacMahon Line departs from this well-recognized geographical feature only at two places near Tsari. These are the pilgrimage routes of Tsari Nyingpa and the village of Migyitun which are used quite frequently

[42] *Officials' Report*, pp. 283-4: "In both the cases, the boundary was acknowledged to run along the watershed formed by the same continuing mountain system which, as the Indian side have shown, provides the natural division between the Indian subcontinent and the Tibet region of China. An analysis of the Sino-Burmese Agreement of Januray 1960, confirmed by the treaty of October 1960, is particularly instructive in its implications. From this Agreement it becomes clear:

(*i*) that there was a 'traditional' boundary between China and Burma in the northern sector—running along the Himalayan watershed from the tri-junction to the high conical peak;

(*ii*) That there was an exact coincidence between this boundary, now confirmed by the recent Agreements, and that delineated in the 'MacMahon Line' Agreement of 1914". For the Indian government's view regarding the Burmese-Chinese Boundary Treaty of 1 October 1960, especially with regarding to the tri-junction see the correspondence with the Chinese government, *White Paper V*, pp. 20-38.

[43] The Officials' Report has said further: "The analysis of this agreement has a bearing in principle on the Sino-Indian boundary, and in particular for the contiguous Eastern Sector of India. This agreement proves that the traditional boundary lay along the Himalayan watershed and that it was precise long before the recent treaties of formal delimitation. If there was for Northern Burma such a precise traditional boundary along the watershed as has now been confirmed, it could not possibly be suggested that the traditional boundary for the Eastern Sector of India did not run along the same watershed but much to the south along the foothills; and if it is now accepted, as it must be, that the 'MacMahon Line' adhered to the traditional boundary of northern Burma, it could not be something else in the Indo-Tibetan sector. It should also be obvious that Chinese official maps which were grossly erroneous in departing from the watershed in Burma to include vast areas of Burma in China, are equally erroneous when showing the boundary in the Eastern Sector along the foothills of the Himalayas and that the 'MacMahon Line' represents the true traditional boundary along the Himalayan watershed, as much for India as for Burma". p. 283. For the Burma-China Border Agreement, see *The Statesman*, 1 February 1960; for Chinese agreement with Nepal, see *The Times of India*, 25 March 1960.

by the Tibetans and have a religious importance for them.[44]

The geographical features of a particular area, however, cannot be the sole consideration, although the principle of the watershed serves as a convenient method of dividing the territory where high mountains intervene.[45] It is true that international law has not formally accepted the watershed principle as a universally recognized norm.[46] A more important principle which is traditionally accepted as a part of international jurisprudence and which may be considered as a guiding rule, with or without treaties, is that of efficacy, that is, the exercise of effective jurisdiction over such territory.[47] The extent to which the disputed territory belongs either to India or China must be determined on the basis of the actual jurisdiction which may have been exercised by either of the parties.

Ever since the Simla conference, the British government had gradually extended its sway over the whole of the area south of the MacMahon Line. It is understandable, however, that because of very high altitudes, bitter and biting cold and otherwise unfriendly topography, such jurisdiction could not have been as effective as in the plains. Moreover, consistent with its policy of leaving the border tribes to administer their own affairs as in the North West Frontier region of undivided India, the British government drew a distinction between political control and administrative control. These tribes owed political allegiance to the British government and the latter gave them the freedom to administer their own affairs.[48]

[44] Aitchison, *op. cit.*, pp. 34-5.

[45] "...a watershed is the best of all possible natural boundaries. It is liable to no change and is readily recognizable. Where there are a series of mountain ranges, it is the watershed range rather than any other that becomes the traditional boundary, because the people on both sides tend to settle up to the sources of rivers but not beyond. That the alignment of the northern boundary of India throughout follows the major watershed supports the fact that this becomes the boundary through custom and tradition". Note of the Government of India to the Chinese Government, 12 February 1960, *White-Paper III*, p. 89. Also a reference to other countries using the same principle, *Officials' Report*, pp. 38-9.

[46] For the variations of this rule see, Stephen B. Jones, *Boundary Making* (Washington, 1945), pp. 101-04; also C.V. Adami, *National Frontiers in Relation to International Law* (London, 1927); S. W. Boggs, *International Boundaries: A Study of Boundary Functions and Problems* (New York, 1940).

[47] For a discussion of this principle see, Robert W. Tucker, "The Principle of Effectiveness in International Law", in George A. Lipsky (Ed.), *Law and Politics in the World Community* (Berkeley, 1953), pp. 31-48; Hans Kelsen, *General Theory of Law and State* (Cambridge, 1945), p. 215.

[48] Letter from the Prime Minister of India to the Prime Minister of China,

The area immediately south of the MacMahon Line is inhabited by the tribal people known as Monbas, Akas, Dalflas, Miris, Abors and Mishmis. Agreements were concluded with them between 1844 and 1888 extending the authority of the Government of India over them.[49] No administrative control, however, was established, though the areas further south were gradually explored and placed under effective administrative control. After India became free, the area south of the line was divided into Kameng Frontier Division, Subansiri Frontier Division, Siang Division, North East Frontier Agency and Drang Division in the Assam Province for administrative purposes and the Indian Government, through the Governor of Assam, has been treating it as a centrally administered territory. The Tibetan rule had never been extended to the tribes inhabiting the area between the Himalayan apex and the so-called foothills line and, therefore, there could have never been any question of Chinese jurisdiction of any sort in this region. The Chinese argument that until recently the Tibetan region of China exercised jurisdiction over this area is contrary to facts and true position.[50] It is likely that during the 16th and 17th centuries the Tibetan government may have exercised some control over the people living in this region but with the coming of the British, Tibetan jurisdiction became a dead letter. The Tibetans were, however, allowed to lease some pasture lands around the frontier and to collect taxes from others who used those pastures.[51] But this arrangement did not effect the validity of the Indian jurisdiction. For the last so many decades, the Indian government has had sufficient possession of the area consistent with the nature of the terrain and the weather conditions. Moreover, since there was no danger of actual or potential aggression from the North, the Indian government had rather been careless and slow in extending its effective jurisdiction over the area. That is why it continued to be manned by the police rather than the military forces.

26 September 1959, *White Paper II*, p. 42; also Note of the Government of India to the Chinese Government, 12 February 1960, *White Paper III*, pp. 92-3.

[49] Letter from the Prime Minister of India to the Prime Minister of China, 26 September 1959, *White Paper II*, p. 40.

[50] The Indian government has argued that "it is significant that the tribes mentioned above have not been affected in the slightest degree by any Tibetan influence, cultural, political or other and this can only be due to the fact that the Tibetan authorities have not exercised jurisdiction at any time in this area". *Ibid.*, p. 40.

[51] Note of the Government of India to the Chinese Government, 12 February 1960, *White Paper III*, p. 93.

The efficacy of this jurisdiction is quite evident from the fact that the Chinese armed probes and reconnaissance activities all along the frontier have not been allowed to make further headway into Indian territory, unlike in the western side of the boundary. The places where the Chinese government has used force to dislodge Indian jurisdiction—Khinzemane, Kechilang, Longju and Tamadan—are located in the area around the MacMahon Line. In one or two cases, the two parties are not sure whether these points are located south or north of the Line. All these facts show that contrary to Chinese contentions, the Indian government, for almost a hundred years, has maintained effective jurisdiction over the area south of the MacMahon Line.

Another plea which has been made both by India and China, not very relevant from the stand-point of international law, is the claim to this territory on the basis of proximity of ethnic stock of people inhabiting this area. The Indian government has argued that the tribes living in the area south of the Line " are of the same ethnic stock as the other hill tribes of Assam and have no kinship with the Tibetans ".[52] " Since they have not been affected in the slightest degree by any Tibetan influence—cultural, political or other—this can only be due to the fact that the Tibetan authorities have not exercised any jurisdiction at any time in this area ".[53] The Chinese government, on the other hand, have reiterated that the people living in the foothills on the Indian side of the border belong to the same racial stock as those living in Tibet which goes to show that Tibetan writ ran large in this area, and hence the MacMahon Line should be considered as an arbitrary line dividing people who otherwise would live in one homogenous ethnic region, under a single government.[54] Whatever the merits of these claims, it must be pointed out that international law does not require that persons belonging to the same racial stock must be confined to the same territory and be under the jurisdiction of a single government.[55] There is no dearth of cases of people belong-

[52] Letter from the Prime Minister of India to the Prime Minister of China, 26 September 1959, *White Paper II*, p. 40.

[53] *Ibid.*

[54] Note given by the Ministry of Foreign Affairs of China to the Embassy of India in China, 26 December 1959, *White Paper III*, p. 70.

[55] It has to be appreciated that boundaries between any two countries are not determined by ethnic affiliations of people living in frontier regions. It is also possible that people of the same racial stock live on either side of the border. See the Brochure issued by the Ministry of External Affairs quoted in *The Times of India*, 13 January 1960. For a general treatment of claims to terrritory arising

ing to varied racial stock living in the same State. What matters is that people belonging to any racial stock or ethnic origin must be subordinated to an effective legal control. The claims of the parties must, therefore, be determined on the basis of the efficacy of the law of a particular State rather than on the ethnic composition of the people living there. In the area south of the MacMahon Line, the law of India has been effective both politically and administratively. Since this area has been under Indian jurisdiction, the arguments of the watershed and ethnic origin may be used only to fortify the already existing legally valid claims. It is not, therefore, possible to accept the Chinese claims that the MacMahon Line is not a valid line and that the whole area in the north-east of India bordering Tibet is still undelimited and that the Chinese territory extends down to the foothills of the Himalayas on the Indian side.

CENTRAL OR MIDDLE BOUNDARY

The central boundary adjoins the area from Bhutan through Sikkim, Uttar Pradesh, Punjab and Himachal Pradesh. In the case of Bhutan and Sikkim the Chinese have not engaged in any serious controversy except that in the last few months they have refused to discuss this alignment with India, thus attempting to isolate these areas from India. But as these areas enjoy the status of protectorates, their defence being India's responsibility, a study of their frontiers is also relevant. The Bhutan-Tibet boundary was also explicitly demarcated in the Simla treaty map and the treaty is still valid. This boundary also follows the customary principle of the watershed to the crest of the Himalayan range including the Chomolhari mountain. Moreover, Bhutanese administration has extended to all the area south of the Line. Both these facts are sufficient to prove the validity of the existing boundaries in this region established over a long period of history.[56]

out of strategic, geographic, historic, economic, ethnic and legal and non-legal reasons see, Norman Hill, *Claims to Territory in International Law and Relations* (London, 1945).

[56] For the various earlier treaties with Bhutan see Aitchison. *op. cit.*, pp. 89-103; for the text of the Indo-Bhutanese treaty see *Indian Year Book of International Affairs* (1953), pp. 295-8. Also see the Note given to the Foreign Office of China, 19 August 1959, *White Paper I*, p. 96, regarding eight villages over which Bhutan had been exercising jurisdiction and where the Bhutanese officials were deprived of all arms, ammunition and ponies by the Chinese authorities.

The same is true in the case of Sikkim whose frontier with Tibet extends to about 140 miles. This was demarcated and approved by the convention between Britain and China signed in Calcutta on 17 March 1890. Article 1 reads:

> The boundary of Sikkim and Tibet shall be the crest of the mountain range separating the water flowing into the Sikkim Teesta and its affluents from the waters flowing into the Tibet Mochu and northwards into other rivers in Tibet. The line commences at Mount Gipmochi on the Bhutan frontier and follows the above-mentioned water-parting to the point where it meets Nepal territory.[57]

Though the border is manned by the Sikkim state police, the ultimate responsibility for its defence rests with the Indian government. The Indo-Sikkim treaty of 1950 gives India the right to station troops in Sikkim and " take such measures as it considers necessary for the defence of Sikkim, of the security of India, whether preparatory or otherwise and whether within or outside Sikkim ".[58] The border in this area is clearly marked. Although isolated cases of intrusion have been reported near the Jalepla Pass, the border administrative personnel have detected such activities and forced the intruders to withdraw.[59]

The Chinese have also claimed certain areas bordering on the Indian states of Uttar Pradesh, Punjab and Himachal Pradesh.[60] The boundary of Uttar Pradesh and Himachal Pradesh with Tibet runs to about 320 miles. It is also a traditional frontier and follows the watershed of the Sutlej, the Kali, the Alakhananda and the Bhagirathi. In this sector, border disputes have arisen, especially

[57] *Officials' Report*, p. 101. Also Letter from the Prime Minister of India to the Prime Minister of China, 22 March 1959, *White Paper I*, p. 55.

[58] *Foreign Policy of India 1947-58 Documents* (New Delhi, 1958), p. 27. According to this treaty India is the sole arbiter of Sikkim's external relations, political, economic or financial, the exclusive owner of the post, telegraph and wireless systems, the guardian of her territorial integrity and the supplier of all her needs. Even the Seven Year Plan 1954-61 drawn up after Mr. Nehru's visit to Sikkim in 1952, is being financed in its entirety by grants from the Government of India. Report by P. Dasgupta from Gangtok. *The Times of India*, 14 October 1959.

[59] Memorandum of the Government of India to the Government of China, 27 September 1960, *White Paper IV*, p. 4.

[60] Note given by the Ministry of Foreign Affairs of China to the Embassy of India in China, 26 December 1959, *White Paper III*, pp. 62-3, 69-70.

regarding the Ari area of Tibet. The Chinese have declared that Bara Hoti (Wu Je) and Nilang belong to Tibet and that the latter government has been exercising civil jurisdiction over the area. They have also argued that the area of Sang and Tsungsha south-west of Tsaparang Dzong in Tibet some thirty to forty years back was gradually invaded and occupied by the British and hence must be returned to proper legal authorities.[61]

It must be pointed out that Bara Hoti, which is located in the State of Uttar Pradesh (India), lies between the main watershed of the Sutlej and the Alakhananda. Since it is situated south of the watershed, the area falls within the traditionally governed Indian territory. This arrangement was confirmed by the two governments of Tibet and British India in 1890 and 1914.[62] Besides, Bara Hoti has been administered by officials of the Garhwal district for centuries and a Patwari has always been posted there by the district authorities. Similarly, two other places whose ownership is contested—Sancha or Sangcha Malla and Lapthal—are situated in the Almora district in Uttar Pradesh on the Indian side of the Balcha Dhura Pass. This pass is itself located on the water-parting. Effective Indian administration has persisted here and the Chinese or Tibetans have never previously laid claims to it.[63] As far as Nilang is concerned, from the 17th century onwards, it has been administered by Tehri Durbar which came under the administrative

[61] Note given by the Foreign Office of China to the Counsellor of India, 26 July 1956, *White paper I*, pp. 15-16.

[62] *Officials' Report* p. 97. ". . . In 1889-1890 and in 1914 the traditional alignment in this region was specifically defined by accredited Indian officials to officials of the Tibetan Government....The Indian side provided photostat copies of the relevant documents. It was, therefore, beyond all doubt that under international law the fact that the Tibetan Government did not object to the alignment as described by an Indian official in 1889-1890 and both described and shown on a map by an Indian official in 1914 constituted formal acceptance of the Indian alignment. Acquiescence is a well-known principle in international law. A formal description of the alignment communicated by one Government to another is not a unilateral claim; for the other Government had occasion and opportunity to challenge this description but, in fact, accepted it and thereby recognized the description of the boundary as correct.

[63] Note handed to the Chinese Counsellor in India by the Ministry of External Affairs, New Delhi, 10 December 1958, *White Paper I*, p. 32. The Indian Government has argued that due to climatic conditions the Indian policemen from these checkposts retire south at the end of the summer months and the Chinese military personnel have tried to take advantage of this situation by entering Indian territory and establishing checkposts. The Indian police, however, have been able to keep effective occupation. *Ibid.*

control of the government of Uttar Pradesh after the merger of the Tehri state in 1948. In the case of all these places, effective jurisdiction is evidenced by the realisation of land revenue and other taxes, exercise of civil, criminal and police jurisdiction, tours of officials, orders to local officials, census operations, forest administration, maintenance of schools, construction of roads, establishment of checkposts and conducting of official surveys.[64] Moreover all these places are located to the south of the Niti Pass and other five such passes which were mentioned in Article IV of the Sino-Indian agreement of 1954. The southern ends of these passes have continuously been controlled by the Indian government.[65]

In the Spiti area located near the Punjab-Tibetan border, the Chinese have shown about 30 square miles of area as their territory. This area, however, is traditionally Indian territory and the frontier here is the major watershed between the Para Chu and the Spiti systems. The Punjab government has maintained effective control of this valley.[66]

It is obvious, therefore, that in the whole of the central sector, the boundary is the extension of the MacMahon Line and follows the watershed principle as in the east. Moreover, the Indian government has, on the whole, maintained effective jurisdiction in the Indian side along the entire boundary.[67] Such recognition was clearly implied in the Chinese mention of six passes as border passes.[68] Some of the points where minor skirmishes have taken

[64] *Officials' Report*, p. 165.

[65] *White Paper II*, p. 37. Also *Officials' Report*, p. 87: "It was clear that the Agreement of 1954 recognized that the six passes were border passes, that during the negotiations the Chinese made no reservations regarding this point, and that by accepting the Five Principles without any qualifications the Chinese Government had accepted that there was no dispute regarding the traditional and well-recognized Indian boundary alignment. It might be added that as the Chinese Government did not raise this issue when they had a clear opportunity and occasion to do so, under international law they were now estopped from raising such claims."

[66] Annexure to letter from the Prime Minister of India to the Prime Minister of China, 26 September 1959, *White Paper II*, p. 48 ; *Officials' Report*, pp. 88-90.

[67] *Ibid.*, p. 198. But for isolated cases of Chinese intrusion see *White Paper V*, pp. 1, 7, 11.

[68] Note of the Government of India to the Chinese Government, 12 February 1960, *White Paper III*, pp. 90-2 ; *Ibid.*, *II*, p. 37. Also the *Officials' Report*, p. 98 : " Article 4 of the Agreement stated that traders and pilgrims of both countries may travel" by the passes. This meant that the Governments of India and China agreed that both Indian and Chinese travellers could use these passes. If these

place are located very near the border and the survey parties can easily locate the exact boundary by following the watershed principle and by examining whether these places are located in the south or north of the boundary line. The Indian government is all the same not averse to negotiating and discussing minor changes which may be made along the border, though her claim of political and administrative control over the areas, in international law, is unassailable.[69]

WESTERN SECTOR

Next to the MacMahon Line, the territory which has engendered friction and ill-feeling comprises about 12,000 square miles adjoining the Kashmir-Tibet frontier running to about 1,100 miles. The Chinese maps claim this territory as theirs. The boundary line here, according to Indian contentions, is well established by usage and custom and has also the sanction of treaties. This boundary, according to the maps published by the Survey of India, proceeds north-west from the Karakoram Pass via the Quara Tagh Pass and then follows the Kuen Lun Range from a point 15 miles north of Hajit Langer to the Peak 21,250 which lies east of Longitude 80° East. This line constitutes the watershed between the Indus system in India and the Khotan system in China. From point 21,250, the boundary runs south down to Lanak La along the western watershed of streams flowing into lakes in the Chinese territory. The boundary further south from Lanak La follows the eastern and southern watershed of Chang Chenmo and the southern watershed of Chumesang and thence the southern bank of Chumesang and the eastern bank of Chunglung Lungpa. Skirting the western extremity of the eastern half of Pangong Tso (which is called Yaerhmu in Chinese maps), the boundary then follows the Ang watershed and cutting across Spanggur Tso, runs along the north-eastern and northern water-

passes, however, had been within China, there was no reason why the agreement of the Indian Government should have been necessary for Chinese travellers using what would have been Chinese passes. The fact that it was necessary for the two governments jointly to give permisson for the use of certain passes placed it beyond doubt that these passes were border passes. This became even clearer when read with Article 5(2) of the agreement, which provided for inhabitants of "border districts" travelling to and fro across the border.

[69] In the case of Sikkim, for example, a detachment of the 7th Punjab has already been stationed in Gangtok besides the Sikkim state police. This has been reinforced and well-equipped soldiers protect the entire border. *The Times of India*, 16 October 1959.

shed of the Indus.[70]

This boundary which follows the watershed is also based on treaties of 1665, 1684 and that of 1842. According to the treaty of 1665 between Ladakh and Tibet, the border between these two regions was fixed at Lahiri Hill, separating the modern Indian border village of Demchok in south-east Ladakh and Toshigong, a Tibetan border town. This treaty has been quoted by Hashmatullah Khan in his *History of Ladakh* written during the Mughal Emperor Aurangzeb's time. Some Italian missionaries who visited the area in the early 18th century have also confirmed this arrangement.[71] Similarly in 1684, after the Ladakhis defeated a mixed force of Mongols and Tibetans the treaty between the King of Ladakh Delegs Namgyal and the Tibetan Plenipotentiary Mopham Wangpo provided that " the boundary shall be fixed at the Lha-ni stream at Bdo-mchog ".[72]

The Ladakh-Tibet border thus established and recognized by the parties for more than a hundred years received the seal of approval at the hands of Maharaja Gulab Singh when he conquered Ladakh in 1840. The area of the Indo-Chinese boundary between Ladakh and Sinkiang at the Karakoram Pass (18,290 ft.) has all along been part of Ladakhi territory having been conquered by General Zorawar Singh during the campaign of 1834-41. Zorawar Singh advanced up the Indus and captured Rudok and Caro in western Tibet. His troops reached Taklakot north of the Lipu Pass (17,890 ft.) near the Nepal border where he stationed a garrison under Col. Baste Ram. The Tibetans launched an attack and in the following battle Zorawar Singh died. The Jammu Ruler, in whose name Zorawar Singh undertook this campaign, sent another expedition under Dewan Hari Chand and Wazir Ratna. The battle at Drangtzu in 1841 gave the troops of Raja Gulab Singh a resounding victory. The government at Lhasa sought peace. A treaty dated 15 August 1842 was signed between Dewan Hari Chand and Wazir Ratna on behalf of Raja Gulab Singh and the Lhasa representatives Kalon Sukpanwala and Bakshi Sapju, commander of the forces of the Empire of China which said: " that friend-

[70] Note given by the Ministry of External Affairs, New Delhi, to the Embassy of China in India, 4 November 1959, *White Paper II*, p. 21.

[71] See an article of Mr. J. L. Kilam, retired Judge of the Jammu and Kashmir High Court, in *The Martand*, a local daily in Srinagar. Quoted in *The Times of India*, 29 December 1959.

[72] *Officials' Report*, p. 42. Also see, Zahiruddin Ahmed, "The Ancient Frontier of Ladakh", *The World Today*, Vol. 16 (July 1960), pp. 313-18.

ship between Raja Gulab Singh and the Lama Guru Sahib of Lhasa will be kept and observed till eternity".[73] The Tibetan version of the treaty says further that "peace has been restored and there will be no cause for enmity in future in the two nations regarding their respective frontiers." [74]

Since this treaty was concluded between the Jammu Ruler and the Lhasa government only, another treaty was drawn up the same day between the Emperor of China and the Sikh King of Lahore who were overlords of Tibet and Jammu Durbar respectively. The authoritative translation from the Tibetan of that treaty in the government archives says :

> Now that in the presence of God, the ill-feeling created by the war which had intervened, has been fully removed from the hearts, and no complaints now remain (on either side), there will never be on any account in future, till the world lasts, any deviation even by the hair's breadth and any breech in the alliance, friendship and unity between the King of the world Siri Khalsaji Sahib and Siri Maharaj Sahib Raja-i-Rajagan (Raja of Rajas) Raja Sahib Bahadur, and the *Khagan* (Emperor) of China and the Lama Guru Sahib of Lhasa. We shall remain in possession of the limits of the boundaries of Ladakh and the neighbourhood subordinate to it, in accordance with the old custom, and there shall be no transgression and no interference (in the country) beyond the old established frontiers. We shall hold to our own respective frontiers .[75]

These treaties refer to established frontiers but unlike the MacMahon Line, the frontiers have never been formally traced in a particular document. As certain parts of the Ladakh border had not been actually demarcated, Indian maps were prepared on the basis of actual usage and convention. The *Ladakhi Chronicle* of the 17th century and the reports of Cunningham and others, however, point out that the eastern boundary of Ladakh "is well defined by piles of stones, which were set up after the last expulsion of the Sopko or Mongol hordes in 1687 A. D. when the Ladakhis received considerable assistance from Kashmir ".[76] It can be argued

[73] K. M. Pannikkar, *The Founding of the Kashmir State* (London, 1953), p. 86. [74] *Ibid.*

[75] Note of the Government of India to the Chinese Government, 12 February 1960, *White Paper III*, pp. 86-7. For the Chinese position on this point see Letter

that the treaty of 1842 must have been based on nothing less than what had been shown in the Ladakhi Chronicle precisely because this treaty was forced on the Tibetans as a result of the war.

After 1842 various attempts at formally demarcating the boundary between Kashmir and Tibet were made by the British government.[77] The Chinese Government, however, seemed to be satisfied with the existing arrangements. In reply to the British proposal, the Chinese Commissioner stated on 13 January 1847 that:

> I beg to observe that the borders of these territories have been sufficiently and distinctly fixed so it would be best to adhere to this ancient arrangement, and it will prove far more convenient to abstain from any additional measures for fixing them.[78]

The Indian government as late as 1899 had communicated to the Chinese government the frontier as established in their maps with no dissenting note from the Chinese side.[79] Since there has been a constant flow of trade and exchange of goods and presents between India and Tibet across these frontiers, it is in itself proof enough of the unanimity of opinion as to where the boundary lay. But since the boundary in this sector has never been formally delimited, the Indian government has shown willingness to settle the matter through conference and negotiation.[80] In such cases

from the Prime Minister of China to the Prime Minister of India, 8 September 1959, *White Paper II*, pp. 28-9.

[76] Letter from the Prime Minister of India to the Prime Minister of China, 26 September 1959, *White paper II*, p. 36.

[77] Detailed surveys of the area were undertaken from 1867 onwards by Hayward, Shaw and Caylay in 1868, Bower in 1891, Littledale in 1895, Welby and Malcolm in 1896, Deasy and Pike in 1896 and Aurel Stein in 1900. Drew, who was Governor of Ladakh under the Maharaja of Kashmir, officially inspected the area upto its northern border in 1871 and the maps appended to his book, *Jammoo and Kashmir Territories* (1875) as also the maps attached to the Gazetteers of Kashmir published from 1890 onwards and the Imperial Gazetteer of India of 1908, show the boundary more or less similar to the frontier shown in official Indian maps today. *White Paper II*, pp. 36-7.

[78] *Ibid.*, p. 36.

[79] In 1899 the proposals were made regarding the northern frontier of Ladakh and Kashmir with Sinkiang not regarding the eastern frontier of Ladakh with Tibet. It was stated in that context that the northern boundary ran along the Kuen Lun range to a point east of 80 east longitude, where it met the eastern boundary of Ladakh. This signified beyond doubt that the whole of Aksai Chin area lay in Indian territory. The Government of China did not object to this proposal. *Ibid.*

[80] "Further evidence of Chinese acceptance of the 1842 treaty is provided

the parties will have to take into consideration usage, custom, geographical location and jurisdiction, to determine the extent of their respective claims.

Moreover, these treaties were concluded as a result of war in which the Indian forces had come out victorious. Since the Tibetan government sued for peace, the treaty of peace legalized the extent of Indian frontiers as shown in the Indian maps.

In international law, however, the title to territory remains inchoate unless the law of the State concerned is made effective after formally taking over the area. The contents of a treaty or the acts of cartography must be put into effect in order that legal title may vest in the State concerned. The efficacy of law on a certain piece of territory is a continuous process and any delay or neglect for large periods may deprive the original owner of the legal title.[81] Compared to the MacMahon Line where the Indian governments' jurisdiction has been effective, both politically and militarily, in the western sector, in spite of the relevant treaties, the fact remains that the Indian government seems to be unaware of the exact extent of its frontier and has rather been lax in enforcing its jurisdiction. No Indian posts were set up along the border except perhaps in Demchok in the south-east tip of Ladakh and at Chushul, south of Pangong Lake, and they are anywhere from 20 to 80 miles inside the Indian border. A small scattered defence force was provided but since the Leh-Kargil road to connect the frontier districts was never completed, these posts could not be used effectively in

by the fact that the other provisions of the treaty regarding exchange of goods and presents were in operation right up to 1946 without any hindrance from the Chinese Government." *Ibid.* Also *The Hindustan Times*, 1 September 1959.

[81] International law does not recognize abstract title which is devoid of concrete manifestation. It is at the most an inchoate title which must be completed within a reasonable time by effectively occupying the territory. The degree of effectiveness would, of course, depend on the particular terrain. For a discussion of these well-established rules see the decisions in *The Island of Palmas (Miangas) Arbitration; Clipperton Island Arbitration* in Herbert Briggs, *The Law of Nations* (New York, 1952), pp. 239-50; *Legal Status of Eastern Greenland, PCIJ* (1933), Series, A/B. No. 53; Ecrehos Case, *I.C.J. Reports* (*1953*), pp. 47-109.

Effective occupation as generally required does not imply its extension to every nook and corner. It is sufficient to dispose at some places within the territory of such a strong force that its power can be extended over the whole region in order to guarantee a certain minimum of legal order and legal protection within the boundaries and to exclude any interferences from a third State. G. H. Hackworth, *A Digest of International Law* (Washington, 1943), Vol. I, p. 405, n. 117.

case of emergency.[82] On the other hand, the Chinese government, by a series of steps along the whole border, particularly in the disputed territory (which by treaties belong to India) have effectively asserted its jurisdiction. The Chinese are now in full possession of practically the entire area claimed by them in Ladakh except for a small strip of territory in the Demchok region. In order to have effective jurisdiction they have built the famous Sinkiang-Tibetan highway which passes through the Aksaichen area of India. This highway which is 750 miles long was completed by the Chinese three years ago. It starts from Yencheng (Qarghaliq) about 30 miles south of Yarkund in southern Sinkiang and runs south and south-east, till it enters Indian territory near Haji Langar, north of the Aksaichin plateau. In order to ensure the safety of this road against " infiltration " by any Indian party, the Chinese have deployed at least two brigades to guard the highway from Haji Langar in the south-west and this they could only do by occupying a large area of Ladakh on the western flank of the road. They have also set up a net-work of motorable branch tracks from the main road in order to ensure supplies and reinforcement to their " forward " positions on the Ladakh border.[83]

Evidently, the Chinese had been preparing their positions in Ladakh for quite some time. All these activities in the allegedly Indian territories must have continued at least for the last half a dozen years. It is not possible to cut roads and build bases overnight in a terrain where, in the words of the Indian Prime Minister, hardly a blade of grass grows, and where it is frightfully cold and only animals may be able to live.[84] Moreover, it is at an average altitude of 16,000 to 17,000 feet. It seems that the Indian patrol seldom visited these areas even continuously for years. Otherwise it is hard to explain the ignorance of the Indian government regarding the building of a highway across its territory which fact came to her notice only after the Chinese had completed the road

[82] See a despatch by the Srinagar Correspondent of the *Statesman*. *The Sunday Statesman*, 1 November 1959. As to why India did not build these posts see, *Officials' Report*, p. 258 ; *White Paper II*, p. 22.

[83] *The Sunday Statesman*, 1 November 1959. In its note of 25 October 1959, the Chinese government has maintained the position that ever " since the liberation of Sinkiang and Tibet, frontier guards of the Chinese People's liberation army have all along been stationed and have been carrying out routine patrol in this area up to the Kongka Pass", which goes to show that they have maintained effective occupation of the area. *White Paper II*, p. 16.

[84] Letter from the Prime Minister of India to the Prime Minister of China, 16 November 1959, *White Paper III*, p. 50.

and made a declaration for the information of the Indian government. In the words of the latest Chinese note "the Indian Government has so far failed to give any explanation for the extraordinary thing that the Indian government which claims to have exercised jurisdiction and been sending out personnel to carry out regular patrol in this area, should have for a long time been totally unaware of the fact that since 1950 Chinese personnel and supplies have been busily travelling between Sinkiang and Tibet through this area, and a road has been built across it".[85] On 8 March 1960 Pandit Nehru assured the Lok Sabha that there was no further illegal occupation of Indian territory by the Chinese during the last seven or eight months "as far as we know" but earlier the Parliamentary Secretary to the Prime Minister had informed the House that it was difficult to "give the precise area of Indian territory under Chinese occupation".[86] This is sufficient proof that the Indian government has not known the extent of its territory in the western sector, otherwise her jurisdiction would have been effective. Hence it would be difficult to disprove the Chinese claims which have come to be made by prescriptive acquisition. India may have valid claims on the basis of treaties but she did not show continuous and effective interest in the territory and hence the area may be considered to have reverted even to the status of a "no man's land". That is why the Chinese government may be entitled, under international law, to consider the area as belonging to them. To the extent to which the Chinese have brought about effective occupation of the area, they have a better case.[87] The dispute over

[85] Note given by the Ministry of Foreign Affairs, Peking, to the Embassy of India in China, 3 April 1960, *White Paper IV*, p. 11; *Officials' Report*, p. CR. 82.

[86] Mr. Nehru's reply was in answer to a query by Mr. P. K. Deo in opposition to an adjournment motion by Mr. Hem Barua, on the establishment of Chinese check-posts around the Chanthan Salt mines, *The Times of India*, 10 March 1960.

[87] The remarks of Judge Anzilotti in his dissenting opinion in the Eastern Greenland Case are instructive: "A legal act is only non-existent if it lacks certain elements which are essential to its existence. Such would be the occupation belonging to another State, because the status of a *terra nullius* is an essential factor to enable the occupation to serve as a means of acquiring territorial sovereignty. But this does not hold good in the case of the occupation of a *terra nullius* by a foreign State in conformity with international law, merely because the occupying State had undertaken not to occupy it. *PCIJ*, Series A/B. No. 53, p. 95. The Indian government probably had a similar idea in mind when it said: "The sovereignty of a country does not change because somebody comes and sits in a corner of it. It is obvious it can't. No country has an army spread out all along its borders to protect it from people coming in. Anybody can come in,

the Khurnok Fort, Kechilang, Kong Ka Pass and the Chang Chenmo Valley must be viewed in this context. Wherever, on the other hand, the Chinese have by physical violence dislodged the Indian forces, the action must be considered an act of aggression. The Chinese cannot claim Indian territory, merely on the strength of forcible occupation.[88]

CONCLUSIONS

In this controversy, arguments based on treaties, usage, custom, watershed, geography, race and effective jurisdiction have been advanced by the parties in order to vindicate their claims to large chunks of territory all along the 3,000 miles of frontier in the north of India. As already mentioned, in the North-East, the Indian claims have been primarily based on treaties which had been expressly or tacitly accepted by China and Tibet. These treaties have been based on the watershed principle which is the accepted criterion of delimitation of boundaries in such mountainous areas.[89] But international law does not make it obligatory that in such a terrain the parties must follow the principle of the watershed—the parting of water along the highest crest of the mountain. The principle is helpful in demarcating the boundaries which can be conveniently administered by the parties concerned from their side of the frontier. It is popular because it has the merit of convenience. But the intention of the parties should be the guiding principle. The parties by mutual agreement may draw the line which may pass through very unnatural and difficult topography. In such cases it is not possible to resort to the watershed principle. But in the absence of express delimitation through a particular geographical location, the watershed principle should invariably be used.

In case, neither the treaty nor the watershed principle provides any clue to the problem, the control of the area would depend on the extent of effective jurisdiction. As a matter of law, even if the treaties or other international understandings refer to a particular

but the sovereignty of that country remains over that country, even though some people may sit on a little part of it." Pandit Nehru in *Lok Sabha Debates*, 37 (1959), Col. 6725.

[88] The Indian government, however, has said that she had continued to show interest and intent to exercise sovereignty and that "no government has any justification in violating such boundaries and seeking to use occupation to confer legitimacy on tresspass". *Officials' Report*, pp. 258-9.

[89] *Ibid.*, p. 236.

line, unless it is effectively maintained through proper administrative steps, an adverse possession by usage and custom by the other party may divest the former of the claim which otherwise may be valid on account of that treaty. The ethnic composition and affinities of a people living on either side of the border are not relevant from the standpoint of international law, however politically desirable it may be. In the present controversy, in the North-East, the area south of the MacMahon Line as shown in the Indian maps prepared at Simla has been under the effective jurisdiction of India. This is quite evident because Indian defence forces successfully withstood Chinese attempts to infiltrate into this area. Taking into consideration the topography, this was the kind of effective administration that could be possible. But the same is not true in the case of Ladakh region of India where there seems to be a disparity between the border based on treaties, usage and custom and the extent of actual effective jurisdiction.[1] In the final analysis, international law recognizes the validity of those boundaries which whether based on treaties or usage or watershed principle or some other criterion, are also effectively maintained by the parties concerned. In this case, therefore, while India is rightfully holding its own in the area south of the traditional boundary in the Eastern and Central sectors, the *status quo* in the Western sector is more favourable to China. Whether this is due to negligence or inefficiency of the Indian government or its blind faith in the peaceful intentions of the People's Government of China, is beside the point.

7

CASE CONCERNING RIGHT OF PASSAGE OVER INDIAN TERRITORY

THE right of passage case, ever since it was first brought before the International Court of Justice, has stimulated considerable interest among international lawyers. Besides the specific issues immediately concerning Portugal and India on which the Court was requested to give its verdict, it was expected in some quarters that the Court might, even if in the form of an *obiter dicta*, also express its views on the right of passage for enclaves in general. There were others, however, for whom the dispute was nothing but a problem of colonialism and they were anxious to know whether the highest court in the world would apply traditional rules of international law which are the product of imperialist Europe and thus justify Portuguese colonialism in India, or whether it would view the rules in a new light and cater to the changed conditons and needs of the newly independent States. While the decision has substantially vindicated the stand of the Indian government and has by implication given the stamp of approval to the new factual status which came into existence after the insurrection in Dadra and Nagar-Aveli, when the pleadings of the parties are published, the research scholar may have ample material for further investigation. Meanwhile, a study of the whole issue as decided by the Court can be helpful in assessing the positon of India as a law abiding nation and in viewing the historic facts in proper perspective.

HISTORICAL BACKGROUND

On 20 May 1498 Vasco Da Gama cast anchor off the city of Calicut on the Malabar coast after nearly two years' arduous journey from Lisbon round the Cape of Good Hope. This was an important event because the Western people who had been lured by the wealth of the fabulous East followed the trails blazed by the Portuguese. The Portuguese who were actuated by economic gains which they

reaped for about a century on account of the monopoly of Indian trade also took a keen interest in the propagation of the Catholic faith.[1]

The situation in the Indian sub-continent at the time of the landing of Vasco Da Gama was quite propitious for the realization of their goals. The Moghul Empire had not yet come into being and the Kingdom of Delhi was in the last stages of disintegration. Moreover, the two great powers of Southern India—the Mulsim Bahamani Kingdom and Hindu Vijayanagar—were involved in a serious feud. The Portuguese left no stone unturned to take advantage of this rift between the two powers who mattered. They intervened in local disputes, playing one against the other by concluding alliances.[2]

The Portuguese took advantage of this state of affairs and under the leadership of Albuquerque conquered Goa from the Sultan of Bijapur in 1510. Similarly Diu was acquired from the Sultan of Gujerat in 1535 by a treaty of peace and commerce which was the price paid by the Sultan for Portuguese assistance against Humayun. In 1780 by a treaty with the Peshwas, they consolidated themselves in Daman and Nagar-Aveli.[3]

The Portuguese did not make much headway in the creation of a bigger empire in India because her position in the East had always depended on her command of the seas which became impossible after the defeat of Spain and the rise of protestant maritime powers. Moreover, religious fanaticism and corruption, in which the Portuguese indulged extensively in India, undermined their strength. That is why with the coming of the French and the British their position eclipsed.[4]

The British who succeeded the Moghuls in India, did not disturb the Portuguese in their possessions. The total area which the Portuguese administered was about 1,300 square miles with a population of 630,000. Their presence in these territories did not endanger British interests. As the territories were scattered and in some cases enclaved by Indian territory, it was easily possible to control their activites.[5]

[1] V. Chirol, *India* (London, 1930), p. 43.

[2] Sir Percival Griffiths, *The Political Impact on India* (London, 1952), pp. 43,54,

[3] K. N. Menon, *Portuguese Pockets in India* (New Delhi, 1953), pp. 5-15.

[4] Griffiths, *op. cit.*, p. 45

[5] For a discussion of rivalry among European powers in the Indian peninsula see Sir George Dunbar, *India and the Passing of Empire* (London, 1951), Chap. VI.

The growth of the nationalist movement in British India had its impact on people living in Portuguese India also. In 1895 and again in 1912 organized revolts assuming essentially violent forms had taken place against Portuguese imperialism. The objective of the nationalists was not only the overthrow of the Portuguese regime but also the reunion of Goa with India. In 1928 the Goa National Congress came into existence under the leadership of Dr. T. B. Cunha and adopted non-violence as the guiding principle of its struggle.[6]

This movement was given a stimulus when the stage was set for independence. As a precautionary measure, the Portuguese government indulged in repression. Between 1947 and 1953 they increased their armed forces fourfold. As pointed out by the Attorney General of India the " circumstances leading to the withdrawal of the British and (the) French from India had been a thorn in the flesh of Portugal " and they had been afraid that the " infection of independence would spread to their own colonies ".[7] As a reaction against this repression the Goan leaders went underground and by 1953 they had stealthily spread themselves into every village and town in Goa. The Portuguese government also imposed restrictions on traffic with the rest of India and engaged in a policy of " unfriendliness and hostility ".

In furtherance of its policy of negotiation with the Western powers for the peaceful transfer of areas held as colonies, on 27 February 1950 the Government of India approached the Portuguese government proposing talks on the transfer of these territories to India. The Portuguese government in a memorandum dated 15 June 1950 rejected the Indian proposal. On 14 January 1953, the Indian government addressed a further note on the same subject, suggesting that the principle of direct transfer should be accepted first and that this should be followed by a *de facto* transfer of administration. As the Portuguese declined the invitation to negotiate a settlement, the Indian government closed its legation in Lisbon on 11 June 1953. In October 1953 she imposed restrictions on travel from and into the Portuguese enclaves.[8]

[6] T.B. Cunha, *Goa's Freedom Struggle* (Bombay, 1961); also Francis Menezes, "Contemporary Struggle in Goa", *United Asia,* Vol. 9 (1959), pp. 327-8 ; Pundlik Gaitonde, "The Goa Problem", *Foreign Affairs Reports,* Vol. IV (1955) pp. 152-4.

[7] As reported in *The Times of India,* 12 October 1959. Gaitonde, *op. cit.,* p. 159.

For the various notes exchanged between the two governments see the

In the enclaves of Dadra and Nagar-Aveli, the movement against Portuguese rule took a different turn. Goan nationalists planned the liberation of these two enclaves in collaboration with the people of these areas. In July 1954, leading members of the United Front of Goans sought the physical liberation of the enclave of Dadra. On the night of 21 July, after a short conflict between the Portuguese police and the nationalists, Dadra was liberated. The news of the "fall" of Dadra created panic among the police of Nagar-Aveli which was liberated a week later. On 2 August 1954, the liberation of the two enclaves of Dadra and Nagar-Aveli was complete and immediately thereafter, an independent administration was set up by the inhabitants of the areas with the help of the individual Goan nationalists.[9] After the insurrection in Dadra, the Indian government ceased to grant visas to Portuguese Europeans or to native subjects in the service of the Portuguese government who wished to go to Dadra and Nagar-Aveli. Further the passage of all Portuguese civil officials or employees to either of the enclaves was banned and all communication with the enclaves was stopped.[10]

PORTUGAL'S COMPLAINT TO THE WORLD COURT

Portugal became a member of the United Nations in 1955. On 22 December 1955 she filed an application with the International Court of Justice stating that the territory of Portugal in the Indian peninsula comprised the three districts of Goa, Daman and Diu, and that the district of Daman, in addition to its littoral territory was also composed of two parcels of land known as the enclaves of Dadra and Nagar-Aveli which are surrounded by the territory of India. The application stated that in July 1954, contrary to the practice hitherto followed, the Indian government, in pursuance of "the open campaign which it has been carrying on since 1950 for the annexation of Portuguese territories", prevented Portugal from exercising the right of passage in order to quell insurrection which had taken place in the enclaves. And accordingly on account

Dissent of Judge Percy Spender in "Case Concerning Right of Passage over Indian Territory" (Merits), *I.C.J. Reports 1960*, pp. 110-14; also Judge Fernandez, *ibid.*, pp. 141-2.

[9] See, *Goa and the Charter of the United Nations* (New Delhi, Government of India Press, 1960), pp. 19-20.

[10] See the arguments of Professor Bourquin before the International Court of Justice at the Hague as reported in *The Times of India*, 31 October 1959.

of the Indian denials, the enclaves of Dadra and Nagar-Aveli have been completely cut off from the rest of Portuguese India. As a result of this action, the application added, the Portuguese authorities have been placed in a position in which it became impossible for them to exercise Portugal's rights of sovereignty there. Portugal, therefore, requested the Court as follows:

> (*a*) To recognize and declare that Portugal *is* the holder or beneficiary of a right of passage between its territory of Damao (littoral Damao) and its enclaved territories of Dadra and Nagar-Aveli, and between each of the latter, and that this right comprises the faculty of transit for persons and goods, including armed forces or other upholders of law and order, without restrictions or difficulties and in the manner and to the extent required by the effective exercise of Portuguese sovereignty in the said territories.
>
> (*b*) To recognize and declare that India *has* prevented and continues to prevent the exercise of the right in question thus committing an offence to the detriment of Portuguese sovereignty over the enclaves of Dadra and Nagar-Aveli and violating its international obligations deriving from the above-mentioned sources and from any others, particularly treaties, which may be applicable.
>
> (*c*) To adjudge that India *should put an immediate end* to this *de facto* situation by allowing Portugal to exercise the above-mentioned right of passage in the conditions herein set out.[11]

The Indian government denied all these charges and filed six preliminary objections questioning the jurisdiction of the Court to entertain the application of Portugal.[12] In its First Preliminary Objection, India pointed out that the Portuguese Declaration of Acceptance of the jurisdiction of the Court of 19 December 1955[13]

11 "Case Concerning Right of Passage" (Preliminary Objections), Judgement of November 26th, 1957, *I.C.J. Reports 1957*, pp. 128-9. (Emphasis mine)

12 Sittings were held from 23 September to 11 October 1957 in the course of which the Court heard oral arguments. *Ibid.*, p. 128; for the objections of the government see, *ibid.*, pp. 132-4.

13 The following is the text of the Declaration of Portugal of December 19, 1955 : "Under Article 36, paragraph 2, of the Statute of the International Court of Justice, I declare on behalf of the Portuguese Government that Portugal recognizes the jurisdiction of this Court as compulsory *ipso facto* and without

was invalid because it was incompatible with the object and purpose of the Optional Clause. This incompatibility arose because through the Third Condition of this Declaration, Portugal reserved the right to withdraw from the jurisdiction of the Court at any time during its validity a dispute " with effect from the moment of notification ". This condition " is invalid inasmuch as it contemplates an effect which is contrary to the Statute ". Moreover, it has introduced into the Declaration a degree of uncertainty as to reciprocal rights and obligations which deprives the acceptance of the complusory jurisdiction of the Court of all practical value. And finally it offended the basic principle of reciprocity underlying the Optional Clause inasmuch as it claimed for Portugal a right which in effect is denied to other Signatories who have such a Declaration without appending any such conditions.[14]

The Court disagreed with India's arguments[15] and interpreted the words " with effect from the moment of such notification " as applying only to those disputes which may be brought before it after the date of the notification. The court took note of the decision in the *Nottebohm Case*, and said that " it is a rule of law generally accepted that once the Court has been validly seized of a dispute, unilateral action by the respondent State in terminating its Declaration, in part or in whole, cannot divest the Court of jurisdiction ". Referring to the alleged uncertainty, the Court pointed out that when a case is submitted " it is always possible to ascertain what are, at that moment, the reciprocal obligations of the Parties in accordance with the respective Declarations ". Finally it did not accept the argument of reciprocity because in its words "any

special agreement, as provided for in the said paragraph 2 of Article 36 under the following conditions :

(1) The present declaration covers disputes arising out of events both prior and subsequent to the declarations of acceptance of the 'optional clause' which Portugal made on December 16, 1960, as a party to the Statute of the Permanent Court of International Justice.

(2) The present declaration enters into force at the moment it is deposited with the Secretary-General of the United Nations; it shall be valid for a period of one year, and thereafter until notice of its denunciation is given to the said Secretary-General.

(3) *The Portuguese Government reserves the right to exclude from the scope of the present declaration at any time during its validity, any given category or categories of disputes, by notifying the Secretary-General of the United Nations and with effect from the moment of such notification.*"

I.C.J. Reports 1957, p. 141. (Emphasis mine)

[14] *Ibid.*, p. 132.

[15] For Portugal's answers to this Objection see, *ibid.*, p. 134.

reservation notified by Portugal in pursuance of its Third Condition becomes automatically operative against it in relations to other signatories of the Optional Clause ".[16]

The Second Preliminary Objection was based on the allegation that the Portuguese Application of 22 December 1955 was filed before the lapse of such brief period as in the normal course of events would have enabled the Secretary General of the United Nations, in compliance with Article 36(4) of the Statute of the Court, to transmit copies of the Portuguese Declaration of Acceptance of 19 December 1955, to the other parties to the Statute. The filing of the Application, therefore, violated the equality, mutuality and reciprocity to which India was entitled under the Optional Clause and under the express condition of reciprocity contained in its Declaration of 28 February 1940. As the conditions necessary to entitle the Government of Portugal to invoke the Optional Clause against India did not exist when that Application was filed, it added, the Court has no jurisdiction to entertain the Application.[17] In the words of Judge Chagla " the haste with which Portugal filed this Application

[16] *Ibid.*, pp. 141-4.

[17] *Ibid.*, p. 132; also the Dissenting Opinion of Justice Chagla, *ibid.*, p. 172. The following is the text of the Indian Declaration of February 28, 1940 : "On behalf of the Government of India, I now declare that they accept as compulsory *ipso facto* and without special convention, on condition of reciprocity, the jurisdiction of the Court, in comformity with paragraph 2 of Article 36 of the Statute of the Court for a period of 5 years from to-day's date, and thereafter until such time as notice may be given to terminate the acceptance, over all disputes arising after February 5th, 1930, with regard to situations or facts subsequent to the same date, other than: disputes in regard to which the Parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement; disputes with the government of any other Member of the League which is a Member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the Parties have agreed or shall agree; disputes with regard to questions which by international law fall exclusively within the jurisdiction of India; and disputes arising out of events occuring at a time when the Government of India were involved in hostilities; and subject to the condition that the Government of India reserve the right to require that proceedings in the Court shall be suspended in respect of any dispute which has been submitted to and is under consideration by the Council of the League of Nations, provided that notice to suspend is given after the dispute has been submitted to the Council and is given within 10 days of the notification of the initiation of the proceedings in the Court, and provided also that such suspension shall be limited to a period of 12 months or such long period as may be agreed to by the Parties to the dispute or determined by a decision of all the Members of the Council other than the Parties to the dispute." *Ibid.*, pp. 140-41.

has resulted in an abuse of the Optional Clause and also an abuse of the processes of the Court, and therefore, the Court should refuse to entertain Portugal's Application."[18]

The Court quite correctly did not find any difficulty to dispose of this Objection. It pointed out that as far as Portugal was concerned, she was required only to deposit the Declaration of Acceptance which on that date brought the consensual bond into existence between the States concerned. The legal effect of a Declaration, it added, did not depend upon subsequent action or inaction of the Secretary General. The Court, therefore, found that the manner of filing the Application was neither contrary to Article 36 of the Statute nor in violation of any right of India under the Statute or under the Declaration of Acceptance.[19]

In the Fourth Preliminary Objection which was taken up before the Third, the Indian contention that since it had no knowledge of the Portuguese Declaration before Portugal filed its Application against India and hence was unable to avail itself, on the basis of reciprocity, of the Third Portuguese Condition, and to exclude from the jurisdiction of the Court the dispute which was the subject-matter of the Portuguese Application,[20] was considered not well founded by the Court. It pointed out that similar considerations apply as in the case of the Second Preliminary Objection and added that "the Statute does not prescribe any interval between the deposit by a State of its Declaration of Acceptance and the filing of an Application by that State, and that the principle of reciprocity is not affected by any delay in the receipt of the copies of the Declara-

[18] *Ibid.*, p. 172.

[19] *Ibid.*, pp. 145-7. But for the view that the Second Preliminary Objection should have been sustained see the Dissenting Opinion of Vice-President Badawi : "But whichever. . .is the State which offers and that which accepts, it is essential in each case that the offer should be accepted by the State to which it is addressed. This acceptance, even though it be regarded as delimited by reciprocity, it is none the less indispensable. It must exist, for it is the basis of the resulting obligation upon these States to submit to the jurisdiction of the Court. It matters little whether the acceptance be actual or constructive, on the basis of a legal interpretation that communication is equivalent to acceptance, it must always be recognised as the only foundation for the jurisdiction of the Court." *Ibid.*, p. 155. He added: "Since the declaration was deposited with the Secretary-General on the eve of the Application, it would have been impossible to suppose that it would be transmitted to the other States within 24 hours. The position, therefore, is the same as if the Declaration had not been made." *Ibid.*, p. 156.

[20] *Ibid.*, p. 132.

tion by the Parties to the Statute."[21]

In the Third Preliminary Objection, the Government of India had contended that, "as the Portuguese Application of 22 December 1955 was filed before the Portuguese claim was effectively made the subject of diplomatic negotiations, the subject matter of the claim had not yet been determined, and there was, therefore, as yet, no legal and justiciable dispute between the Parties which could be referred to the Court under the Optional Clause. Unless negotiations had taken place, India added, which had resulted in a definition of the dispute between the Parties as a legal dispute, there was no dispute in the sense of Article 36(2) of the Statute, the existence of which had been established in the Application and with respect to which the Court could exercise jurisdiction ". Therefore, it submitted that the Court had no jurisdiction to entertain the Application.[22]

The Court did not agree with the reasoning of India and arrived at the conclusion that the Government of Portugal had complied with the condition of the Court's jurisdiction as laid down in Article 36(2) of the Statute. After examining the negotiations which, prior to the filing of the Application had taken place between India and Portugal on the question of access to the enclaves, it said :

> A survey of the correspondence and Notes laid before the Court reveals that the alleged denial of the facilities of transit to the enclaves provided the subject-matter of repeated complaints on the part of Portugal; that these complaints constituted one of the principal objects of such exchanges of views as took place; that although the exchanges between the Parties had not assumed the character of a controversy as to the nature and extent of the legal right of passage, Portugal described the denial of passage requested by it as being inconsistent not only with requirements of good neighbourly relations but also with established custom and international law in general; and that these complaints were unsuccessful.

[21] *Ibid.*, pp. 147-8.

[22] *Ibid.*, p. 132 ; also Judge Chagla's Dissenting Opinion, *ibid.*, p. 172 : "It was urged by India that the jurisdiction of the Court is confined to deciding legal disputes, and before there can be a dispute, it must be clear that the controversy cannot be settled by negotiation. It was also pointed out that before a State is brought before the bar of the International Court, every attempt should first be made to see whether the controversy in question could not be amicably settled.

The Court added that as the negotiations had been deadlocked, Portugal had complied with the condition of Article 36(2) to the extent provided by the circumstances of the case.[23]

The Court was not in a position to pass upon the Fifth and Sixth Preliminary Objections dealing with the domestic jurisdiction principle and of the reservation *ratione temporis* because this would have involved a discussion of the substance of the dispute. That is why these Objections were joined to the merits. In the Fifth Preliminary Objection, India had relied on the reservation of its 1940 Declaration which excluded from the jurisdiction of the Court, " disputes with regard to questions which by international law fall exclusively within the jurisdiction of India ". She had argued that " the Portuguese claim to a right of transit cannot be regarded as reasonably arguable cause of action under international law unless it is based on the express grant or specific consent of the territorial sovereign ". It added that the facts presented to the Court in the Pleadings of the Parties show no such express grant or specific consent as could place a limitation on the exercise of India's jurisdiction; that none of the grounds put forward by the Government of Portugal can be regarded on the facts and the law as reasonably arguable under international law; that the question of transit between Daman and the enclaves has always been dealt with both by Portugal and the territorial sovereign on the basis that it is a question within the exclusive competence of the territorial sovereign and hence this dispute is not a legal dispute which may be decided

[23] *Ibid.*, pp. 148-9. The Portuguese Government had answered the Third Objection as follows : "Whereas international law does not make the institution of proceedings by means of a unilateral Application dependent on the prior exhaustion of diplomatic negotiations, in the absence of a treaty-provision stipulating such a condition; Whereas no provision of this kind exists in the present case, and whereas the Portuguese Government was therefore under no obligation to pursue diplomatic negotiations with the Government of India up to the point at which they became futile; Whereas it is, in any event, for the Government of India to prove the insufficiency of these negotiations, and whereas it not only has failed to adduce such proof but proof to the contrary is contained in the documents; Whereas these negotiations make clear beyond question the existence of the dispute between the Parties; Whereas it is incorrect to assert that these negotiations were not carried on upon the legal plane, since the Portuguese Government constantly protested against the violation by the Government of India of the rights which it is claiming in the present proceedings, and since it drew attention to the responsibility which the Government of India thereby incurred; For these reasons, May it please the Court to dismiss the Third Preliminary Objection of the Government of India." *Ibid.*, p. 135.

by the Court under Article 38(1) of the Statute.[24]

The Court pointed out that the elucidation of facts and their legal consequences involved an examination of the actual practice of the British, Indian and Portuguese governments in the matter of the right of passage and also a discussion of the relevant treaties. That is why it found itself unable to pronounce upon this objecttion and joined it to the merits.[25]

In the Sixth Preliminary Objection which again was joined to the merits, India had contended that her Declaration of 28 February 1940 accepting the compulsory jurisdiction of the Court was limited to disputes arising after 5 February 1930 with regard to situations of fact subsequent to the same date and that the dispute submitted to the Court by Portugal was a dispute which did not arise after 5 February 1930 and that it was a dispute with regard to situations and facts prior to that date.[26] The Court after listening to the arguments of Portugal on the matter decided that it was "not in a position to determine at this stage the date on which the dispute arose or whether or not the dispute constituted an extension of a prior dispute". Any evaluation of these facts, the Court added, may also entail the risk of prejudging some of the issues which are clearly connected with the merits.[27]

[24] *Ibid.*, pp. 130-31, 133.

[25] *Ibid.*, pp. 149-50; also see the Dissenting Opinion of Judge Kalestad arguing that the matter concerned rules of international law and hence the Objection of India should be rejected. *Ibid.*, pp. 164-5.

[26] *Ibid.*, p. 134 ; also the amended Objection, *ibid.*, pp. 138-9. For example Judge Chagla in his Dissent said : "It is clear from the jurisprudence of the Court that the only facts and situations which can be considered for the purpose of this Objection are those facts or situations which are the source or cause of the dispute. It is clear to my mind that the source of the dispute is the divergence of opinion between India and Portugal as to the legal implications of what transpired from 1812 onwards. The divergence is not only as to what happened in 1954. The divergence is as to the whole concatenation of facts and situations relied on by Portugal for asserting her rights." *Ibid.*, p. 179.

[27] *Ibid.*, pp. 151-2. Judge Badawi, however, very strongly felt that this Objection should have been sustained. After referring to the jurisprudence of the Court regarding the Phosphates Case and Electricity Company of Sophia Case, which were quoted by both the parties, he said: "It should be said that one cannot avoid the conclusion that Portugal is confusing the dispute and the situation. The fact that there is a culminating point in the dispute, namely, 1954, does not mean that it does not consist of more than one phase. . . .To include within the words 'facts and situations' the developments of the dispute would be to distort the meaning of those words. The dispute had already begun in 1950 and since it is both a political and legal dispute, it took various forms and passed through several stages." *Ibid.*, p. 160. He added : "In view

The Court's decision on jurisdiction, which was overwhelmingly favourable to the answers of Portugal,[28] is a pointer to the rather weak arguments advanced by the Indian team. With due respects to the legal luminaries appearing on behalf of India,[29] it may be said without any doubt that most of the preliminary objections were too far-fetched. The practice of the Court regarding the invalidity of these objections is a matter of common knowledge and is so firmly established that it is known even to an average student of international law. For example two of the Objections (2 and 4) dealing with the temporal validity of the filing of the Declaration of the Acceptance of the compulsory jurisdiction of the Court and the Application by Portugal, were in the nature of an attempt to seek help from arguments wherever available and even if they may have very little potency. Similarly the Third Objection which was based on the plea that enough diplomatic negotiations had not taken place to show the existence of a justiciable and legal dispute, was also, on the face of it, unacceptable. Even the First Preliminary Objection which is based on a subtle point of doctrinal controversy engaged in elsewhere,[30] and in which India had some

of all these considerations, I am of the opinion that the source of all the dispute is the ambiguous and equivocal situation resulting from a system of individual authorizations depending upon the discretion of the authority granting them, which was understood in different ways by the two Parties. This situation was determined or influenced by political considerations. The dispute arose when as a result of changed circumstances, India decided to refuse to continue these authorizations. This situation having existed since the beginning of the last century, I consider the objection to be justified and the Court to be without jurisdiction to deal with the dispute." *Ibid.*, p. 163.

[28] The Court, by fourteen votes to three, rejected the First Preliminary Objection ; by fourteen to three, rejected the Second Preliminary Objection; by sixteen to one, rejected the Third Preliminary Objection; by fifteen to two rejected the Fourth Preliminary Objection; by thirteen to four, joined the Fifth Preliminary Objection to the merits and by fifteen to two joined the Sixth Preliminary Objection to the merits. *Ibid.*, p. 152.

[29] India was represented, besides the Indian lawyers, by Prof. C.H.M. Waldock of the University of Oxford ; M. Paul Guggenheim of the University of Geneva and Mr. J. G. Le Quesne, Member of the English Bar. *Ibid.*, pp. 126-7.

[30] Judge Lauterpacht's Dissent in Norwegian Loan's Case quoted by Judge Chagla in his Dissent dealing with the "Connolly" reservation regarding matters of domestic jurisdiction. *Ibid.*, pp. 167-8. J.H.W. Verzijl "The International Court of Justice in 1957 and 1958", *Nederlands Tijdschrift Voor International Recht*, Vol. VI (July 1959), (Spec. Issue in honour of Prof. J.F.A. Prancois), pp. 363-82. For example, the learned author says the following regarding the Second and Fourth Preliminary Objections: "India's complaint was nothing more than a reproach to Portugal for launching a successful 'surprise attack'

element of validity, was also disposed of by the Court by referring to traditional arguments and practices. Similarly the Fifth and the Sixth Objections which were joined to the merits and later over-ruled by the Court were also not formidable enough. Keeping this in mind, one feels inclined to agree with the view of a competent writer who says that " the refusal of the Court to recognize any of the six preliminary objections raised by the Indian Government as effective to oust its jurisdiction may occasion some reconsideration of their position by those experts in forensic tactics who believe that in the absence of a single compelling point in their favour it is a good policy to press a large number of arguments on the ground that the Court will be reluctant to reject them all ".[31]

DECISION ON THE MERITS

After the decision on jurisdiction, the Court ordered the resumption of proceedings on the merits of the case. Enough time was given to the parties to file Memorial, Counter-Memorial, Reply and Rejoinder. Public hearings were held from 21 September to 6 November 1959 when oral arguments and replies were heard. The Judgement of the Court was given on 12 April 1960.[32]

Before considering a decision on the merits, the Court adjudicated the Fifth and Sixth Preliminary Objections of the Indian government which had been joined to the merits. Regarding the Objection

of which it had not been itself aware in time. It is perhaps true that this was not quite an elegant manoeuvre on the part of Portugal as a forthcoming plaintiff before the Court, but then some of the escape manoeuvres of the defendant were —and of defendants in general are—equally lacking in elegance. One could not help feeling slightly amused in observing States in disputes thus endeavouring to steal a march on each other, were it not for the undignified spectacle offered by their continuous attempts to evade impartial judgement of their actions by the Court." *Ibid.*, p. 370. Similarly, he called the Fifth Preliminary Objection "riddle of that Sphinx 'domestic jurisdiction'." *Ibid.*, p. 373.

[31] E. L. "Case Concerning Right of Passage Over Indian Territory", *International and Comparative Law Quarterly*, Vol. 7 (1958), p. 593.

[32] "Case Concerning Right of Passage over Indian Territory" (Merits), *I.C.J. Reports 1960*, p. 9. India had contended in its Submissions of 21 October 1959 that : "If its examinations of the merits should lead the Court to a finding that Portugal has not established the existence of the titles which she has invoked and that these titles must accordingly be regarded as non-existent, it must follow that the question of the grant or refusal of the passage claimed over Indian territory falls exclusively within the domestic jurisdiction of India." *Ibid.*, p. 21. Prof. Verzjil has called it "an obvious mock-argument" and was happy that it was duly rejected. "The International Court of Justice, 1960", *Nederlands Tijdschrift Voor International Recht*, Vol. VII (1960), p. 221.

based on the plea of domestic jurisdiction, the Court pointed out that both the parties in the course of the proceedings had relied upon the principles of international law and that " to decide upon the validity of these principles, upon the existence of such a right of Portugal as against India, upon such obligations of India towards Portugal and upon the alleged failure to fulfil that obligation, does not fall exclusively within the jurisdiction of India ". Moreover, the Court added that it could arrive at the findings of the alleged titles invoked by Portugal only after establishing its competence to examine the validity of these titles. The Objection was, therefore, over-ruled.[33]

As to the Sixth Preliminary Objection relating to India's acceptance of the jurisdiction of the Court subject to the first condition of its Declaration of 28 February 1940, it found that the dispute dealing with this three-fold subject could not have originated until 1954. It said that before 1954, passage was affected in a way recognized as acceptable to both parties and the conflict of legal views had not yet arisen. In any case, the Court said, this situation, whatever may have been the earlier origins of one of its parts, came into existence only after 5 February 1930 and hence the condition of the Indian Declaration regarding the date after which such a dispute should have originated had been complied with. The Court drew support for this view from the decision in the case of *Electricty Company of Sofia and Bulgaria* and held that it " had jurisdiction to deal with the present case ".[34]

[33] *I.C.J. Reports 1960*, pp. 32-3.

[34] The jurisprudence of the Court on this point may be found in *Phosphates in Morocco* (Preliminary Objections), PCIJ, Series A/B. No. 74; *The Electricity Company of Sofia and Bulgaria* (Preliminary Objections), PCIJ, Series A/B. No. 77; *Interhandel Case* (Preliminary Jurisdiction), *I.C.J. Reports 1959*, p. 6. The Court in the present case said : "Up to 1954 the situation of those territories may have given rise to a few minor incidents, but passage had been effected without any controversy as to the title under which it was effected. It was only in 1954 that such a controversy arose and the dispute relates both to the existence of a right of passage to go into the enclaved territories and to India's failure to comply with obligations which, according to Portugal, were binding upon it in this connection. It was from all of this that the dispute referred to the Court arose; it is with regard to all of this that the dispute exists. This whole, whatever may have been the earlier origin of one of its parts, came into existence only after 5 February 1930. The time condition: which the acceptance of the jurisdiction of the Court was made subject by the Declaration of India is therefore complied with." *Ibid.*, p. 35. But for contrary view see the Dissent of Judges Winiarski and Badawi, *ibid.* pp. 69-75.

On the merits, the decision of the Court is favourable to India. In the words of Judge Chagla " the Judgement has in the main vindicated the attitude taken by India in the controversy between herself and Portugal over the question of the right of passage ".[35] The Court has totally rejected Portugal's claim that she is or was ever entitled to take armed forces, armed police and arms and ammunition across Indian territory between Daman and Dadra and Nagar-Aveli. As regards the passage of private persons, civil officials and goods in general, it held that prior to the liberation of Dadra and Nagar-Aveli in 1954, Portugal had enjoyed a limited right of passage subject to the regulation and control of India and that India had always respected that limited right and acted within her international obligations with regard to that right. The Judgement reads as follows :

> Portugal had in 1954 a right of passage over intervening Indian territory between the enclaves of Dadra and Nagar-Aveli and the coastal district of Daman and between these enclaves, to the extent necessary for the exercise of Portuguese sovereignty over the enclaves and subject to the regulation and control of India, in respect of private persons, civil officials and goods in general; Portugal did not have in 1954 such a right of passage in respect of armed forces, armed police, and arms and ammunition ; India has not acted contrary to its obligations resulting from Portugal's right of passage in respect of private persons, civil officials and goods in general.[36]

The Court declined to consider whether this limited right of passage exists in the circumstances that obtain in the enclaves today and whether such a right had survived " the overthrow of Portuguese authority ". It was stated that as regards the present and the future India holds that even this limited right has been extinguished by the liberation of Dadra and Nagar-Aveli. In its search for a date with reference to which it must ascertain whether the right invoked by Portugal existed or not, the Court observed:

> If the date selected is the eve of the events of 1954 which brought about a new situation, which has since prevented the exercise by Portugal of its authority in the enclaves without, however, hav-

[35] See the Dissent of Judge Chagla, *ibid.*, p. 118.
[36] *Ibid.*, pp. 45-6.

ing substituted therefor that of India, the factors relevant for the guidance of the Court in its decision will be those existing on the eve of those events. If, on the other hand, the issue is viewed as it stands at the date of the present Judgement, it will be necessary to take into account—whatever may be their weight—the arguments of India designed to establish that the right of passage, assuming it have existed previously, came to an end as a result of the events of 1954 and has lapsed in the present circumstances....

That question was put to the Court in respect of the dispute which has arisen between India and Portugal with regard to obstacles placed by India in the way of passage. Portugal—and this was the immediate purpose of the Application—sought a finding as to the character, in its opinion unlawful, of these obstacles. It was in support of this contention that it invoked its right of passage and asked the Court to declare the existence of that right. This being so, it is the eve of the creation of these obstacles that must be selected as the standpoint from which to ascertain whether or not Portugal possessed such a right.

This will leave open the arguments of India regarding the subsequent lapse of the right of passage and of the correlative obligation. It is in connection with what may have to be decided, not as to the past, but as to the present and the future, that these arguments may, if such questions arise, be taken into consideration....[37]

The Court rightly did not pass judgement on the present position because she would have in that case digressed from the relevant situation which was the eve of the revolutionary movement of July 1954. But the judgement is sufficiently revealing, even if by implication, regarding the present situation because if India did not violate any international obligation in 1954, the question of its violation in the present does not arise. There can, therefore, be no question of India being obliged to permit passage of any kind in the present circumstances.[38]

In the second place, Portugal had asked the Court to declare

[37] *Ibid.*, pp. 28-9.

[38] For a contrary view see Verzjil, *op. cit.*, p. 217: "It must have been a bitter disappointment to Portugal that, by means of a combination of isolated legal answers to an inter-connected set of demands and clearly diametrically contrary to the purposes she had in mind in her Application, she was thus fobbed off with fair words and so pinned down to the legal situation deemed to have existed on the eve of revolutionary movement of July 1954."

that by denying passage before as well as after the liberation of Dadra and Nagar-Aveli in 1954, India had acted in contravention of her international obligations. In this connection Portugal had made fantastic charges against India of aggression and of complicity in the liberation of the enclaves. It charged that " the object of the (action successive restrictions) was the deliberate isolation of the enclaves in order to make it easier to withdraw them from Portuguese authority ". It was also alleged that on the day preceding the " attack " on the enclaves of Dadra and Nagar-Aveli, communications were completely cut and India thus allowed the " threat to Nagar-Aveli to be transformed into aggression ". Portugal also accused India of failure to fulfil its international obligations by tolerating on its territory enterprises directed against Portuguese authorities at Dadra, and later at Nagar-Aveli.[39]

The Government of India had denounced these accusations and adduced proof of its correct conduct throughout—before, during and after the liberation of enclaves. The indigenous and spontaneous nature of the Goan freedom movement was also demonstrated to the Court. Professor Waldock pointed it out that Portugal itself had " provoked the subversive expedition of Goans into Dadra by her suppression of human rights and fundamental freedoms and; for that reason was in any event precluded from calling upon India to prevent Goan attempt to subvert the enclaves ". He added that it was inconceivable that India could be under a duty " to defend with her armed forces the oppressive Portuguese regime in Nagar-Aveli—under a duty, that is, to shed Indian blood to ensure that Indian's kith and kin remained for ever in bondage". Mr. Setalvad of India pin-pointed the large issue. When addressing the Court he said :

> ...the real complaint of Portugal is that India refused to help in the frustration of this popular will and in the resubjugation of territories which had achieved their own freedom. Mr. President and members of the Court, this is an accusation of which India is truly proud.[40]

[39] *I.C.J. Reports, 1960*, p. 30; Also see the arguments of Prof. Bourquin, *The Statesman*, 1 November 1959.

[40] Also arguments advanced by Prof. Henri Rolin, *The Times of India*, 8 November 1959. India in Submissions of 21 October 1959 had said : "Whereas once the liberation movement had been begun at Dadra, the Indian Union was entitled, both in accordance with the principle of international law of non-intervention and out of regard for the right of self-determination of peoples

That is why the Court did not attach any value to Portugal's charges and has held that India has not acted contrary to its obligations. The Court was indeed impressed by the peculiar situation and the attitude of the Indian government thereto. After referring to the Portuguese requests to the Indian government made on 26 July 1954 and the reply therefrom,[41] the Court accepted the validity of the reply of the Indian government and said :

> In view of the tension then prevailing in intervening Indian territory, the Court is unable to hold that India's refusal of passage to the proposed delegation and its refusal of visas to Portuguese nationals of European origin and to native Indian Portuguese in the employ of the Portuguese Government was action contrary to its obligation resulting from Portugal's right of passage. *Portugal's claim of a right of passage is subject to full recognition and exercise of Indian soverignty over the intervening territory and without any immunity in favour of Portugal.*

recognized by the Charter, to refuse the Portuguese authorities authorization for the passage of reinforcements assuming that any had been available; Whereas finally it is not reasonably possible to describe the events which occured in the enclaves as 'invasion' or foreign 'occupation', when the few individuals, who in fact came from outside to Dadra and Nagar-Aveli to support the liberation movement, were for the most part Goans, that is, the compatriots and kith of the inhabitants, whereas the majority of these left the enclaves a few days after having entered them, whereas the independent administration which was then constituted and which has since functioned, is in large part composed of people born in the enclaves or who for a long time resided there, and whereas the sympathies of the inhabitants for the nationalist movement had as early as 1931 and on diverse occasions since then been noted by the Portuguese administration. . . ." *I.C.J. Reports 1960*, p. 25.

[41] On 26 July 1954, Portugal had requested the Indian government to allow passage to some delegates of the Governor of Daman. The Indian government, in its reply of 28 July, stressed the fact that tension had prevailed in the intervening territory and that hence it was not possible for the Indian Government to allow the Portuguese governmental authorities to pass through Indian territories. It reads as follows : "This tension is bound to increase if Portuguese officials are permitted to go across Indian territory for the purposes mentioned in the note. The passage of these officials across Indian territory might also lead to other undesirable consequences in view of the strong feelings which have been aroused by the repressive actions of the Portuguese authorities. In these circumstances, therefore, the Government of India regret that they cannot entertain the demand of the Portuguese authorties for facilities to enable them to send a delegation from Daman to Dadra and Nagar-Aveli across Indian territory." *Ibid.*, p. 45.

The Court is of the view that India's refusal of passage in those cases was, in the circumstances, covered by its power of regulation and control of the right of passage of Portugal.[42]

The third Portuguese request to the Court was to issue an injunction against India that she should grant passage to Portuguese authorities and to abstain from any measures that might strengthen the *de facto* government of the people of Dadra and Nagar-Aveli. India had represented before the Court that the future of the people of these enclaves was inevitably tied with that of the people of India and had also warned that a restoration of Portuguese power by force of arms " would encounter desperate resistance on the part of the population ". This resistance, it was added, would extend to surrounding Indian territory, the population of which " would feel solidarity with the resistance which would result in an undoubted threat to the internal order and external peace of the Indian Union ".[43] In particular it was submitted :

> Whereas the Indian Government and people have doubtless never concealed their desire that the Goans should be allowed to join the Union of Independent India to which they are attached ethnically and culturally, whereas however the Indian Government has always said with equal force that that reunion must be achieved without violence; whereas it is difficult to see why any different attitude should have been adopted with regard to the enclaves....

[42] *Ibid.* (Emphasis mine). The Court noted the allegation of Portugal that India had failed to fulfil its international obligations by tolerating on its territory enterprises directed against Portuguese authorities but said: "The Court is not required to deal with this issue, for it has not been asked, either in the Application or in the final Submissions of the Parties, to decide whether or not India's attitude towards those who instigated and brought about the events which occurred in 1954 at Dadra and Nagar-Aveli constituted a breach of its obligations under international law. The Court is only asked to adjudicate upon the compatibility of India's action with the obligations resulting from Portugal's right of passage. It is not asked to determine whether India's conduct was compatible with any other obligation alleged to be imposed upon it by international law." *Ibid.*, pp. 30-31.

[43] A part of India's Submission of 21 October 1959 read as follows : "Whereas moreover even if obligations with regard to passage had in the past been binding upon India, they should be regarded as having lapsed as a result of the change which has occured in the essential circumstances, in particular by reason of the formation at Silvassa of an independent local administration." *Ibid.*, p. 26.

> Where it would likewise appear to be inadmissible to seek by means of a judicial decision to prevent in perpetuity any evolution of the situation in a sense unfavourable to the restoration of the Portuguese regime or to regulate the relationships which the Indian Union inevitably has with the population and the administration of enclaves integrated in its economic system....[44]

The Court, however, did not pass its judgement on this point because the first two requests of Portugal were already rejected. The net result, therefore, is that Portugal " has no means of putting the clock back in Dadra and Nagar-Aveli ". The Court has given no satisfaction to the Portuguese claim for an injuction nor has it called upon India to do or to refrain from doing anything.[45]

There was a general awareness on the part of all the Permanent Judges that no right of passage could be exercisable in the present circumstances. Even those Permanent Judges who dissented from the majority and held that Portugal had a right of passage in 1954 in respect of armed forces, armed police and arms and ammunition, did not care to discuss the question whether Portugal had any right of passage after " the overthrow of Portuguese authority ". On the contrary, some judges have categorically held that Portugal's limited right of passage in respect of private persons, civil officials and goods in general must be deemed to have been suspended or extinguished as a result of the events in the enclaves in 1954. Thus Judge Armand-Ugon of Uruguay stated :

> The changes which have occurred in the enclaves affect the causes which gave rise to the right of passage and must naturally have their effect on the right of passage itself or on the ways in which it may be exercised. These new facts must lead to holding either that the right which has been recognized must be suspended or that it has become extinguished. In either case, it must be concluded that the passage claimed must be regarded as incapable of exercise (in) the present situation.[46]

[44] *Ibid.*, pp. 24, 26.

[45] C. J. Chacko's editorial note "The World Court's Judgement on Portugal's Request for Access to Dadra and Nagar-Aveli," *Indian Journal of International Law*, Vol. I (1960-61), p. 296.

[46] *Ibid*, p. 87. Judge Armand-Ugon had earlier pointed out as follows: "A preliminary observation is necessary with regard to the present situation in the enclaves. It is a fact which cannot be overlooked in these proceedings that the population of the enclaves, in the month of December 1954 or perhaps before, set up for itself

Similarly Judge Spiropolous of Greece remarked:

> It is a fact that after the departure of the Portuguese authorities, the population of the enclaves set up a new autonomous authority based upon the will of the population. Since the right of passage assumes the continuance of the administration of the enclaves by the Portuguese, the establishment of a new power in the enclaves must be regarded as having *ipso facto* put an end to the right of passage.[47]

The Court's interpretation and understanding of certain historical aspects of Indo-Portuguese relations especially the relevant treaties is of considerable interest in order to follow its conclusions. Portugal had relied on the Treaty of Poona of 1779 and on *sanads* (decrees) issued by the Maratha ruler in 1783 and 1785 as having conferred sovereignty on her over the enclaves with the right of passage to them. They had especially relied on Article 17 of the Treaty as constituting a transfer of sovereignty.[48] The Portuguese Counsel, Professor Telles, had submitted before the Court that " this Treaty in making a territorial concession to the Portuguese, necessarily conferred on them at the same time the means indispensable to the exercise of the rights implied by that concession ". He added that these enclaves had been given to Portugal " in full sovereignty " and not, as India would have it, " in the form of a fiscal concession revocable at the discretion of the giver ".[49]

The Court declined to accept this view ; on the contrary it held that under the Treaty of 1779, the Marathas never granted any

a free government in the territory of the enclaves. This factual situation existed when, on 22 December 1955, the Application was submitted to the Court. The right of passage regarded as a whole arose and was exercised in normal periods when the enclaves were indubitably under effective Portuguese sovereignty. This was the position from the year 1783 until July 1954. This long practice was never disturbed by facts putting Portuguese authority in issue. The right of passage, in its different forms, was exercised in peaceful circumstances." *Ibid.*

47 *Ibid.*, p. 53.

48 See the treaty in India's Annex. F No. 23. Article 17 reads : "The Firangee State (Portuguese State of India) entertains friendly sentiments towards the Pandit Pradhan (the Maratha ruler) ; the envoy conveyed assurances. Therefore, it is agreed that the Pandit Pradhan should assign towards Daman from the current year a *jagir* of the revenue of twelve thousand rupees in Prant Daman. Accordingly, a *sanad* listing the villages to be given to the Firangee State by making a separate agreement." Quoted in *ibid.*, p. 91.

49 The proceedings of the Court as reported in *The Tribune*, 30 October 1959.

sovereignty to the Portuguese because all that was granted was only a revenue tenure called a *jagir* or *saranjam* of the value of 12,000 rupees a year. It said :

> This was a very common form of grant in India and not a single instance has been brought to the notice of the Court in which such a grant has been construed as amounting to a cession of territory in sovereignty.[50]

The position during the Maratha period, according to the Court, was as follows:

> During the Maratha period sovereignty over the villages comprised in the grant, as well as over the intervening territory between coastal Daman and the villages, vested in the Marathas. There could, therefore, be no question of any enclave or of any right of passage for the purpose of exercising sovereignty over enclaves. The fact that the Portuguese had access to the villages for the purpose of collecting revenue and in pursuit of that purpose exercised such authority as had been delegated to them by the Marathas cannot in the view of the Court, be equated to a right of passage for the exercise of sovereignty.[51]

Judge Quintana also expressed similar ideas by referring to specific instances. He said :

> It therefore does not appear that the Marathas had abandoned their *de facto* and *de jure* sovereignty over the enclaves despite the fact that they issued the necessary permits for every such passage. On three occasions the Marathas even confiscated the said revenues, which seems to show that they had no intention of surrendering sovereignty. In a word, an examination of this period shows that passage always took place with the agreement of the Maratha sovereigns. The applicant furnished no evidence that its alleged right of passage was exercised independently of the express will of the territorial sovereign in every case.[52]

Later, when the British arrived on the scene, the Court said, they found the Portuguese in occupation of the villages and exercising full and exclusive administrative authority over them. It added:

[50] *I.C.J. Reports 1960*, p. 38.
[51] *Ibid.*, pp. 38-39.
[52] *Ibid.*, p. 94.

The British did not, as successors of the Marathas, themselves claim sovereignty, nor did they accord express recognition of Portuguese sovereignty, over them. The exclusive authority of the Portuguese over the villages was never brought in question. Thus Portuguese sovereignty over the villages was recognized by the British in fact and by implication and was subsequently tacitly recognized by India. As a consequence the villages comprised in the Maratha grant acquired the character of Portuguese enclaves within Indian territory.[53]

Some of the Judges have been even less favourable to Portugal on the question of sovereignty as given in the majority Judgement. For example, Judge Badawi in his Declaration appended to the Judgement pointed out that "by proceeding on the basis of a finding that the British and, after them, the Indians recognized the sovereignty of Portugal, the question is postulated instead of being proved". He added :

The alliance between Great Britain and Portugal and the former's guarantee of Portugal's colonial possessions may have disguised the true legal aspects of their relations as regards the enclaves. The fact remains that on an analysis of these relations it must be recognized that there existed between them only a factual situation *sui generis* having well-defined limits.

It is, however, difficult to classify this situation in a category of rights recognizable in international law, and still more difficult to classify it in the category of sovereignty; to admit the sovereignty of Portugal would be to admit that it could involve legal consequences other than those which are recognized in practice. That conclusion should alone suffice to exclude such admission, since it would go beyond the factual situation which the Court has recognized.[54]

He further argued that even if such a right existed, no state succession regarding the same had taken place :

However much the alliance between Great Britain and Portugal

[53] *Ibid.*, p. 39. Prof. Verzjil has commented on this point as follows: "The conclusion to be drawn from this reasoning would seem to be that a new, unusual title of acquisition of territorial sovereignty has been added to the traditional titles, one cognate to acquisitive prescription." Verzjil, *op. cit.*, p. 232.

[54] *I.C.J. Reports 1960*, p. 51.

and the British guarantee to protect Portuguese possessions may have served to obscure the extent of Portugal's rights over the enclaves, it is clear that this treaty could only create personal rights and obligations between Portugal and Great Britain which were obviously not transmitted to the national Government of India. With the change of partner, the situation would necessarily be less favourable to Portugal.[55]

Judge Quintana pointed out that "India, as the territorial successor, was not acquiring the territory for the first time, but was recovering an independence lost long since. Its legal position at once reverted to what it had been more than a hundred years before, as though the British occupation had made no difference."[56] Referring to the events of 1954 he said "that the Indians had closed their legation in Lisbon because of Portugal's refusal to negotiate the surrender of its sovereignty over parts of India. As the result of circumstances the mutual rights and obligations under the Treaty of Punem were extinguished. There could not be a better application than this of the rule... *rebus sic stantibus*. The Treaty of Punem was no more; Portugal no longer claimed the payment of *jagir*; passage between Daman, Dadra and Nagar-Aveli had no further *raison d'etre*."[57]

While the Court held that Portugal had in 1954 a limited right of passage over intervening Indian territory in respect of private persons, civil officials and goods in general, it took a differnt position regarding armed forces, armed police and arms and ammuni-

[55] *Ibid.*

[56] *Ibid.*, p. 95. He further added: "The British do not seem to have renounced exercise of the powers of the territorial sovereign any more than the Marathas did. Daman and the coastal possessions were surrounded by a frontier cordon. . . .It must be remembered that under the treaty concluded on 13 June 1817 between the British East India Company and the Maratha Empire, sovereignty over this part of the Indian territory passed to the British Crown, and that situation continued until 15 August 1947 when Great Britain recognized the independence of India. The obligations of the territorial sovereign passed to the conqueror in application of the rules governing succession by States. No legal act by the British Government altered the *status juris* established by the Maratha rulers with regard to the so-called enclaves. Portugal could not claim any more rights than it had previously possessed, nor could Great Britain arrogate such to itself. In those circumstances no usage in the matter of passage during this period could be transformed into such a practice as to create an international custom invocable against any territorial successor." *Ibid.*, pp. 94-5.

[57] *Ibid.*, pp. 92-3.

tion. It pointed out that up to 1878 passage of armed forces between British and Portuguese possessions was regulated on the basis of reciprocity rather than as of right. From then onwards, the matter was covered by paragraph 3 of Article XVIII of the Treaty of Commerce and Extradition of 26 December 1878. The practice showed that the treaties were respected and the Portuguese showed due deference to the British authorities.[58] The correspondence which took place between the two governments regarding an alleged violation of the treaty by the Portuguese government makes the legal position on the matter quite clear.[59] Similarly, in conformity with the practice hitherto followed the requirement of a formal request before passage of armed forces could take place was also repeated in an agreement of 1913.[60]

The same was true of the armed police. Besides the agreements of 1878 and 1913, one of 1920 had provided that armed police below a certain rank should not enter the territory of the other without the consent previously obtained. Similar provision was made in the agreement of 1940. In the words of the Court "this necessity for authorization before passage could take place constitutes a negation of passage as of right. The territorial sovereign had the discretionary power to withdraw or to refuse permission."[61] Regarding arms and ammunition, the treaty of 1878 provided that exportation of arms and ammunition or military stores from the territories of one party to those of the other "shall not be permitted, except with the consent of and under rules approved by, the latter ". The same was true of the treaty of 1880.[62]

As the various treaties were clear on the matter, the Court did not think it desirable to discuss Portugal's argument of international custom and general principles of law as applicable in the case.[63] It, therefore, rejected the submissions of the Portuguese govern-

[58] *Ibid.*, pp. 40-42.

[59] On account of the British complaint regarding the violation of the treaty of 1878 and the Portuguese reply thereto, further correspondence took place between the two parties. The Portuguese government wrote a letter dated 1 May 1891 in which it stated: "His Excellency thanks you for the communication with regard to the circumstances in which the matter is placed, and requests to state that on the part of this Government injunctions will be given for the strictest observance of the provisions of Article XVIII of the Anglo-Portuguese Treaty." *Ibid.*, pp. 41-2.

[60] *Ibid.*, p. 42.

[61] *Ibid.*

[62] *Ibid.*, p. 43.

[63] *Ibid.*, pp. 43-4.

ment and decided that no right of passage in favour of Portugal involving a correlative obligation on India has been established in respect of armed forces, armed police and arms and ammunition. The Court further added :

> The course of dealings established between the Portuguese and the British authorities with respect to the passage of these categories excludes the existence of any right. The practice that was established shows that, with regard to these categories, it was well understood that passage could take place only by permission of the British authorities. This situation continued during the post-British period.[64]

One more point needs to be considered. Besides the legal technicalities involved, the International Court was faced with the broad issue of freedom versus colonialism. The Indian government in one of its submissions had requested the Court to note that the question of the independence of Goans from Portuguese colonialism and in that sense the question of the independence of the Indian people had always been pressing the Indian mind. "It is in that sense", the Indian government submitted, "that the Government of India has been concerned with the withdrawal of the Portuguese from India. The insurrection in Dadra and Nagar-Aveli was brought about by Goans and the people of the enclaves, and it must be seen in the background of the existence of a movement of the people of the Portuguese possessions for emancipation from colonial rule".[65] The Attorney General of India reminded the Court that "the dispute raised the issue of Portuguese colonialism in 'India' as against the freedom of the people of those colonies ; Portugal came to this Court not merely to seek endorsement of its colonial rule in India. Portugal asks for legal sanction of Portuguese rule over a people who have declared themselves free. Portugal asks that under the auspices of international law she should be allowed to take armed forces over the territory of India to achieve that object."[66] Referring to the factual situation he said :

> The insurrection in Dadra took place on July 21 and the people

[64] *Ibid.*, p. 43.

[65] See the proceedings of the Court as reported in *The Times of India*, 10 October 1959.

[66] *Ibid.* Also see C. Azavedo, "Anti-Colonialism versus Colonialism : Real issue before the Court", *United Asia*, Vol. 9 (1957), pp. 358-60.

declared their independence and set up their administration. Portugal demanded passage for armed forces on July 24, only after the insurrection had taken place. This demand made three days after the success of the insurrection in Dadra, was for the purpose of re-establishing Portuguese sovereignty, not for the purpose of defending it in the first instance. But Portugal knew that she was asking for something for which India would never agree to. In the circumstances which existed, India could not consent to the passage through her territory of Portuguese armed forces for the purpose of crushing the movement for independence from colonial rule. No responsible Government would permit the use of its territory by foreign armed forces—forces whose sole and declared object would be to crush a nationalist movement. Since the circumstances had greatly changed, the right of passage of Portuguese armed forces over Indian territory is unthinkable.[67]

The Court has, while interpreting old treaties, practices, and the principles of international law, declined to come to the assistance of the Portuguese regime to enable them to reimpose their colonial rule on people who have freed themselves. The refusal of the Court to decide on Portugal's submission of 6 October 1959 "that the right of passage *is* a right possessed by Portugal and which must be respected by India " is based on the assumption that such a right no longer existed after the successful revolution whatever right may have been available prior to 1954. One of the Judges has very categorically referred to this point while holding that the Portuguese government's claims in this connection should have been dismissed:

> To support the Portuguese claim in this case, which implies survival of the colonial system, without categorical and conclusive proof is to fly in the face of the United Nations Charter.
>
> As judge of its own law—the United Nations Charter—and judge of its own age—the age of national independence—the International Court of Justice cannot turn its back upon the world as it is. "International law must adapt itself to political necessities ", said the Permanent Court of Arbitration .... That is the reason why the Charter made legal provision to cover the independence of non-self-governing territories.[68]

[67] *The Times of India*, 21 October 1959.
[68] Dissent of Judge Quintana, *I.C.J. Reports 1960*, pp. 95-6. For a general

CONCLUSIONS

The decision of the Court was considered as a victory both by Portugal and India.[69] Portugal rejoiced because the Court had recognized that in 1954 she had a right of passage over intervening Indian territory between the enclaves of Dadra and Nagar-Aveli and the coastal district of Daman and between these enclaves in respect of private persons, civil officials and goods in general. India expressed satisfaction because the Court had found that Portugal did not have in 1954 such a right of passage in respect of armed forces, armed police and arms and ammunition. Moreover, it held that even with regard to the limited right recognized in favour of Portugal, India had not acted contrary to its obligations.

It must be pointed out, however, that the decision of the Court in terms of victory for Portugal, is more imaginary than real. The right of passage which has been upheld in favour of Portugal is admissible "to the extent necessary for the exercise of Portuguese sovereignty over the enclaves and subject to the regulation and control of India". The addition of this reservation makes a mockery of the limited right conceded to Portugal. As pointed out by Judge Quintana, "a right that is on each occasion made conditional upon the judgement of the local authority in the place where it is exercised, is a right in name only. It does not constitute a legal right; rather it is a faculty tolerated by the territorial sovereign."[70] India would be the final determining authority whether to allow Portugal to use Indian territory for these limited purposes or not. This subjective determination makes the right as good as non-existent.[71]

In the present case, the Court accepted the determination of India regarding some facts presented to it and thus did not arrogate to itself the right to decide whether the facts warranted Indian action. She accepted India's reply of 28 July 1954 refusing the request

treatment of the Goan problem from an international law point of view see, K. Narayana Rao, "The Problem of Goa", *Indian Yearbook of International Affairs*, Vol. V (1956), pp. 46-69.

[69] It was reported from Lisbon that fireworks were set off in many provincial cities. Navy warships fired a 21 gun salute to the "victory". Typical newspaper headlines were : "Portugal's Full Sovereignty over the Enclaves Recognized"; "Portugal Has Won"; and "Portugal in the Right According to Hague Court." *The Times of India*, 14 April 1960.

[70] *I.C.J. Reports 1960*, p. 89 ; also Judge Armand-Ugon, *ibid.*, p. 85.

[71] Judge Chagla had also similar point in mind in his Dissenting Note. *Ibid.*, 1957, p. 177.

of Portugal to allow the passage of some governmental personnel, on account of the strong feeling and tension which would have prevailed in the intervening Indian territory. Without questioning the strength of the Indian reply the Court accepted it as a controlling point and also stated that "in view of the tension then prevailing in intervening Indian territory, it is unable to hold that India's refusal of passage to the proposed delegation. . .was action contrary to its obligations resulting from Portugal's right of passage".[72] It is submitted, therefore, that the right as sanctioned by the Court is whittled down to a nullity by the addition of the clause giving the regulation and control to India. In the circumstances it would have been proper on the part of the Court not to distinguish between private persons, civil officials and goods in general and armed forces, armed police, arms and ammunition because in practice Portugal is not entitled to enjoy any right of passage with respect to any of these categories. Perhaps the Court found it desirable that after all it does not cost to give at least some momentary psychological satisfaction to the losing party.

One would have thought that Portugal would immediately approach the Court regarding clarification as to the scope of its limited right against India and the mode of its enforcement. On second thoughts, however, she must have realized the implication of the Court's judgement and the futility of its effectuation.

It is also evident that the Court has not given any positive indication regarding its views on the position of enclaved territories under general international law. For the purposes of the present case it was satisfied with the interpretation of the relevant treaties dealing with the matter. By ignoring Portuguese pleas for a consideration of the matter under general international law, it may have by implication given the benefit of the doubt to the territorial sovereign who in the absence of a treaty may be entitled to use discretion in the matter. This view which is in accordance with the Indian position, expressed elsewhere, may need to be further investigated.[73]

The Court has not gone into the implications of the argument put forth by India regarding insurrection and its effect on existing rights and duties. She has, however, sympathized with India's arguments. This attitude which is based on an awareness of the new

[72] *I.C.J. Reports 1960*, p. 45.

[73] The problem is, to a certain extent, similar to the question of free access to the sea of land-locked countries. See the views of India on this point: *UN* A/CONF, 13/43.10 (25 March 1958), paras 25-8.

conceptions of international law is especially welcomed. Law must cater to the needs and interests of the newly emerging Afro-Asian States so that these States may pin their faith in the rule of law in the world.

8

THE LIBERATION OF GOA

A LOT of heat has been generated in some international circles over India's liberation of Goa with the help of brief military action. The reactions, however, have been mixed. They have ranged from calling India "aggressor" "a wolf in sheep's clothing", "user of double standards in international relations"[1] to one of approval and satisfaction and as an action highly justified, right, and long overdue.[2] Of course much criticism in western capitals was the product of extraneous considerations.[3] But because it has come even from some of those known for sobriety of judgement and liberality of views, it becomes desirable to study the issue in the context of the rules of international law to determine whether India has really committed an international delinquincy and whether such an action may justifiably be considered as the beginning of the end of the United Nations.[4]

[1] The European and American press was on the whole critical of Indian action. Regarding Europe see a despatch by Mr. M. V. Kamath, *The Times of India*, 18 December 1961 and Mr. C. R. Sheldon, "America's Reaction to India's Goa Action", *The Statesman*, 3 January 1962. Besides, see the debates in the UN Security Council. *UN Weekly Newsletter*, Vol. 9., No. 52 (29 December 1961), pp. 1-4.

[2] The Soviet President L. I. Brezhnev in a civic reception in Bombay. *The Times of India*, 28 December 1961; for a summary of favourable opinion in most of the Afro-Asian countries see, *ibid.*, 21 December 1961.

[3] For example, Japan and West Germany had substantial investments in the Goan manganese and iron mines and in the means of their exploitation. Statement of Mr. Adriano Moreira, Portugal's Minister for Overseas Territories in a statement at Lisbon. *The Statesman*, 23 December 1961. Last year the Federal Republic of Germany imported 2.2 million tons of ore costing 125 million marks from Goa. *The Times of India*, 21 December 1961.

[4] See for example the statement of Mr. Adlai Stevenson in the UN Security Council after a resolution jointly sponsored by USA, Britian, Turkey and France calling for an immediate cease-fire and withdrawal by India of its forces to be followed by negotiations failed to be adopted: "The League of Nations died, I remind you, when its members no longer resisted the use of aggrsssive force.

COLONIALISM AND INTERNATIONAL LAW

Any scientific study of the problem would necessarily involve a discussion of colonialism under customary international law and the United Nations Charter. The main point which merits our attention is whether colonialism, especially that of western dominance over Asian and African people, is an accepted principle of international law. If the answer is in the affirmative, then, Indian action questioning the existence of Portuguese colonialism in India would be derogatory to established international order. If the answer is in the negative then Portugal and all other States which have carved out colonies and continue to hold on to them, have all along committed a violation of the rules of international law.

It must be pointed out that colonialism as has been brought into existence by the European powers in Asia and Africa was the product of conquest and hence an act of aggression. Early in the sixteenth century Portugal conquered Goa through naked force.[5] The conquest of Goa could be justified only on the basis of the *bellum justum* theory according to which a State was entitled to use force only for a just cause or as a sanction to oppose gross violation of international law. Grotius and others wrote unmistakably against an unjust war.[6] As Portugal and India were separated by thousands of miles, having no common boundaries or other mutual interests which may bring the parties into conflict with each other, there was no justifiable interest of Portugal which may have been invaded by the local Indian authorities to give cause for conquest. Rather, the facts show that in order to whet their economic appetite and to force Christianity over the Indian people, the invading Portuguese used all fair and foul means to overpower them.[7] This is established conclusively

So, it is with a most heavy heart that I must add a word of epilogue to this fateful discussion, by far the most important in which I have participated since this organization was founded 16 years ago. The failure of the Security Council to call for a cease-fire tonight in these simple circumstances is a failure of the United Nations". As reported in *The Times of India*, 20 December 1961; Also *UN Weekly Newsletter*, Vol. 9, No. 52 (29 December 1961), pp. 1-2.

[5] For the historical background see, *supra*, pp. 165-8.

[6] Grotius in refuting Ayala who believed in unjust war: "I do not think that a precept of this sort can be tolerated even if it exists because not only it has got no rational basis but much more it can incite men to do evil". *De Jure Praede*, Vol. I, Livre XII; also Grotius in *Le Droit De La Guerre Et La Paix*, II Livre, Ch. I, S. S. 3, p. 5; also, *ibid.*, Livre III, Ch. X.

[7] Vattel had also criticized the Spanish government for waging war against Mexico in order to propagate Christianity: "We cannot authorize an impudent

by a letter addressed by Albuquerque to the Portuguese authorities soon after the conquest of Goa in 1510:

> I then burnt the city and put everything to the sword, and for days continuously the people shed blood. Wherever they were found and caught, no life was spared to any Mussalman and their mosques were filled up and set on fire. We counted 6,000 dead bodies. It was my lord, a great deed, well fought and well finished.[8]

These and many other actions[9] show that the original title of Portugal to Goa was based on a violation of the prevalent rules of international law and continued to be so because no Indian government has ever voluntarily accepted the legitimacy of the status quo. In the words of Mr. V. K. Krishna Menon "it was a perpetual aggression on the part of Portugal and India has rightfully recovered the areas belonging to her".[10]

It has been argued by the protagonists of colonialism that even though originally Portugal had occupied Goa in contravention of international law, its continuous occupation for more than 400 years had conferred a valid title on her.[11] This is justified on the basis of

zeal for making converts without endangering the peace of all Nations and placing the missionaries in the position of aggressors, at the very times when they think they are performing a meritorious work; for after all, it is certainly an uncharitable act, and indeed a vital injury to a Nation, to spread a false and dangerous doctrine among its citizens. Now, there is no Nation which does not think that its own form of religion is the only true and proper one." Emmerich de Vattel, *The Law of Nations*, Book II, Ch. 4, Sections 60-61 (Carnegie Edition), p. 133.

[8] Quoted in B. G. Verghese, "Operation Goa", *The Times of India*, 10 January 1962; also Frederick Charles Danvers, *The Portuguese in India* (London, 1894), Vol. I, pp. 211-12.

[9] For a good summary of the unjust actions and other barbarities committed by the early Portuguese invaders and compiled from authoritative Western sources, see Ved Prakash Luthera, "Goa and the Portuguese Republic", *The Indian Journal of Political Science*, Vol. XVII (July-September 1956), pp. 262-4.

[10] In a meeting at Bombay. *The Times of India*, 1 January 1962; Mr. C. S. Jha for a similar argument in the UN debate, *ibid.*, 20 December 1961. Also for a similar approach to the problem see Jackson H. Ralston, *Democracy's International Law* (Washington, 1927), esp. Chapter entitled *Imperialistic Adventures under International Law*, pp. 69-83; G. Mencier, "Colonialism and International Law", *Review of Contemporary Law* (June 1961), pp. 48-57.

[11] This seems to be the implication of Mr. Adlai Stevenson's remarks that these territories had been under the Portuguese for over four centuries and that now they had been invaded by India. Quoted in *The Times of India*, 20 December 1961. But see the remarks of Mr. Malalkesara of Ceylon who rebutted the argu-

the principle *ex factis jus oritur* according to which an illegal act becomes a source of legal right to the wrongdoer if it is perpetuated successfully over a long period of time.[12] Such a rule which in the ultimate end accepts might rather than right, cannot be considered as a part of international jurisprudence. As pointed out by Professor Lauterpacht "the principle *ex injuria jus non oritur* is one of the fundamental principles of jurisprudence which says that an illegality cannot as a rule become a source of legal right to the wrongdoer. And so to admit that an unlawful act, or its immediate consequences may become *suo vigore* source of legal right for the wrongdoer is to introduce into the legal system a contradiction which cannot be solved except by a denial of its legal character. International law does not and cannot form an exception to that imperative alternative."[13]

There are ample decisions of the world court which have given expression to the view that no rights can be derived from an illegality.[14] Moreover, such an illegality was not validated by the operation of the rule of prescription because it is not applicable in the case of colonialism. The Portuguese rule in Goa was made effective not only by the use of the worst tyranny but also with the active moral and material help provided by the British who had succeeded the Moghuls in the same circumstances as did the Portuguese. As soon as India was in a position to protest against this patent illegality, she served a notice not only on Portugal but also on the whole world regarding her determination to throw the Portuguese out.[15]

ment of Stevenson and said: "We were moved by his statement but we were not quite sure of its relevance. He claimed that the Portuguese had been in occupation for over 400 years. This occupation was unjust when it began as everyone acknowledges now and the longer it lasted the greater, therefore, the injustice perpetrated. If Portugal conquered Goa, then the people of Goa have a right of rebellion." *Ibid.*

[12] For a justification of this doctrine see Robert W. Tucker, "The Principle of Effectiveness in International Law", in George A. Lipsky (Ed), *Law and Politics in the World Community* (1953), pp. 40, 42.

[13] H. Lauterpacht, *Recognition in International Law* (Cambridge, 1947), pp. 421-22.

[14] *Ibid.*, 421-2.

[15] It is doubtful if the argument of prescription can be applicable in this case. Prescription involves (*i*) the stopping of protests and claims by the victim. The birth of national movement in Goa is testimony to the fact that the local people did not accept the status quo and struggled to drive the Portuguese out. (*ii*) acceptance that the new status quo is in conformity with international order. Colonialism can never be considered as consistent with international order. Professor Lauter-

Lastly, the argument that the defect of illegality can be considered to have been waived and the title validated as a result of the consent of the people and the affected State is also not applicable in the present case. The Indian people had never in any way accepted the status quo as depriving them of their birth right to be masters of their own territory. Ever since its forcible occupation by the Portuguese till its liberation, more than 70 revolutions have taken place in Goa. Inside Goa and other enclaves, this movement kept pace with a similar struggle in British India. With the departure of the British and later the French from the Indian sub-continent, this movement gained a greater momentum. All these facts prove beyond any reasonable doubt that in spite of the extraordinarily long period during which the Portuguese maintained their sway in Goa and other territories in India, the inhabitants never accepted the sovereignty of Portugal over these territories. It is not, therefore, possible to accept the argument that effective Portuguese occupation over Goa created a legal right in its favour.[16]

The same conclusion may be arrived at even if we accept the questionable rule that the invalidity of the results of an unlawful action can be cured by recognition of the new status quo by members of the international community. In the first place it must be pointed out that even a large number of western States have previously maintained that "they will not recognize any situation, treaty or agreement" which may be brought about by means contrary to the rules of international law.[17] Secondly, in the present case even the

pacht has said that "the patent illegality of the purported acquisition, combined with continued protests on the part of the dispossessed State, are sufficient to rule out the legalization, in that manner of the original illegality". Lauterpacht, *op. cit.*, p. 428. Also Nehru's statement: "During the British period in India, they were protected by the British. They were not here by their own strength, but just like the Indian princes and others because the British gave them protection". *The Times of India*, 29 December. 1961. This shows that prescription is not involved.

[16] The Portuguese case rests on the assumption that Goa was a part of foreign sovereignty. Oliveira Salazar, *Goa and the Indian Union*: *Legal Aspects* (Lisbon, 1954), pp. 7, 9.

[17] For the Stimson Doctrine and the related jurisprudence see Q. Wright, "The Legal Foundations of the Stimson Doctrine", *Pacific Affairs*, Vol. 8 (December 1935), pp. 439 ff; Herbert Briggs, *The Law of Nations* (New York, 1952), pp. 251-52. Professor Lauterpacht sums up the position in the following words: "The true and principal significance of non-recognition in relation to the Japanese action in China—as indeed in respect of any other internationally illegal action—is one of upholding the authority of international law against successful assertion

western States which have criticized Indian action have not questioned the right of India to integrate these territories as a part of the Indian Union but have taken exception to the means used. Hence not to speak of India and other Afro-Asian States which have criticized colonialism in no uncertain terms, even the Western powers have not given the stamp of approval to the continuation of Portuguese colonialism.[18] It would mean, therefore, that there are ample facts to prove that even the Western powers have not recognized the sovereignty of Portugal over Goa. Even if they had done so, "recognition *de jure*", in the words of an eminent international lawyer "constitutes a logical absurdity seeming that it is impossible to give juridical consecration to a situation which is contrary to law". To hold otherwise would be to provide a legal foundation for illegality.[19]

The various arguments advanced here show that India has not violated any rule of traditional international law by liberating a part of its territory from foreign yoke. But even if she has done so, because traditional international law was the product of imperialist Europe, its rules cannot be applicable to the newly emerging Afro-Asian States. They were never a willing partner to the evolution of such a jurisprudence. If common consent is the basis of international

of illegal force. The importance of that function in periods of general relaxation of the restraints of international law cannot be overestimated". Lauterpacht in *Legal Problems in the Far Eastern Conflict* (New York, 1941), p. 154.

[18] For peaceful transfer of such territories even the Western powers have voted in the affirmative which shows that they have not questioned Indian right to Goa and other areas but only to the means used. See the debate in the United Nations. *UN Weekly Newsletter* (29 December 1961), pp. 1-4.

[19] Professor Scelle in Preface to Rousseau, *Le Conflit Italo-Ethopie devant le Droit International* (1938), p. x. Similarly, Professor Lauterpacht is also very reluctant to accept the results of an illegality even if it may have been perpetrated over a long period: "There is a difference between this manner of recognition on general grounds and the almost automatic incorporation of any successful breach of international law as part of the law of nations on the ground that the law must follow the facts. Law follows facts which are not unlawful. When they are unlawful, and in particular when their illegality consists in acts of aggression against the very life of other members of the community in deliberate disregard of fundamental legal obligations of conduct, a heavy and most responsible burden of proof falls upon those embarking upon the legalization of the effects of illegality. Recognition of the effects of illegality may be a wise weapon of international policy or a bitter pill of unavoidable political necessity. Its merits in any particular case are not a matter for legal judgement so long as it is clear that in the opinion of those taking the decision non-recognition of the fruits of lawlessness is and remains an essential principle of law". *Recognition in International Law*, p. 430. Also *International Law* (Moscow: Academy of Sciences of the USSR), p. 87.

law, its rules based on colonial exploits, unjust wars for the protection of vested interests and between unequal parties cannot be accepted as the rules of the world community but only valid in the European region.[20] As Portuguese action in the early sixteenth century was based on naked force and India was never a willing partner to the creation of this arrangement, it is clear that the latter has never accepted a rule of international law which recognizes the legitimacy of colonial countries to sovereignty over such territories. Hence there is no question of India having violated any rule of international law.[21]

COLONIALISM AND THE UN CHARTER

While rules of international law created by the imperialist powers were never accepted as valid by more than two-thirds of the world's population, recent developments regarding colonialism evidence a re-examination of it by the members of the world community. The institution of mandates and trusteeship system coupled with the Declaration regarding Non-Self Governing Territories is based on the

[20] India's permanent delegate argued on the same basis in the United Nations. *The Times of India*, 20 December 1961. Similarly many western writers believe that the rules of international law in the 16th and 17th centuries were European and were based on conquest. They haveal so advocated a reappraisal of these rules in the light of new conditions. H.A. Smith, *The Crisis in the Law of Nations* (London, 1947), pp. 5, 7; Ralston, *op. cit.*, pp. 58-68; C. Wilfred Jenks, *The Common Law of Mankind* (London, 1958), p. 245: "It is futile to take refuge in the dogma of sovereignty which no longer commands the respect of those who challenge the existing order. . .It is idle to disregard these forces; they are vital; they are growing in strength; and the civilization of West Europe must come to terms with them on a basis of mutual respect and cooperation or it will be overwhelmed by them." "It is not the primary purpose of international law in the second half of the twentieth centrury to protect vested interests arising out of an international distribution of political and economic power which has irrevocably changed, but to adjust conflicting interests on a basis which contemporary opinion regards as sufficiently reasonable to be entitled to the organized support of a universal community". p. 85. Also see the editorial in pro-government "Koenische Rundschau" of Cologne which said: "There can hardly be any doubt that Goa is Indian territory. The United Nations Security Council, like the entire world, may condemn the use of force but it will hardly be in a position to comply with the Portuguese wish to support what in our time has already become amoral: namely the perpetuation of the colonial regime." Quoted in *The Times of India*, 21 December 1961.

[21] Mr. Nehru in a press conference in New Delhi. *The Times of India*, 29 December 1961; also Mr. Menon in a speech under the auspices of the Goan Citizens Committee in Bombay. *Ibid.*, 1 January 1962.

assumption that colonialism is an anamoly, is highly unjust and that these areas must revert to the rightful parties in the near future. Chapter XI of the United Nations Charter enshrines this principle in the jurisprudence of the world organization. There is sufficient legal opinion supporting the view that the colonial powers are under an obligation to grant self-government and independence to such territories.[22] The United Nations has also passed a number of resolutions for the achievement of these goals. On 14 December 1960 she made a solemn declaration proclaiming "the necessity of bringing to a speedy and unconditional end of colonialism in all of its forms and manifestations".[23] On 27 November 1961 the General Assembly

[22] Georges Scelle, *Manuel De Droit International Public* (Paris, 1948), pp. 220-21, 225; Quincy Wright, *International Law and the United Nations* (Bombay, 1960), pp. 72-73; C. V. L. Narayan, *United Nations Trusteeship of Non-Self Governing Territories* (Geneva, 1951), pp. 81-2.

[23] This is entitled as Declaration on the granting of Independence to Colonial Countries and Peoples, and contains the following main provisions:

1. The subjection of peoples to alien subjugation and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation.

2. All people have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for denying independence.

4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

5. Immediate steps shall be taken in Trust and Non Self Governing Territories or all other territories which have not as yet attained independence to transfer all powers to the peoples of those territories, without any condition or reservation, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to entitle them to enjoy complete independence and freedom.

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity. General Assembly, *Official Records*, 15th Session, Suppl. No. 16(A/4684), pp. 66-67.

created a seventeen member Special Committee to make recommendations on implementing the declaration on colonialism and requested all States concerned to take action without further delay to achieve independence for all colonies.[24]

This new international law is in conformity with the action of India in liberating Goa from Portuguese colonialism. On the contrary the policies of Portugal are in utter conflict with the letter and spirit of the UN Charter and its jurisprudence. By accepting the membership of the UN in 1955 Portugal had assumed an obligation to play its due role in voluntarily handing over Goa and other colonial territories on the Indian sub-continent to the Indian government. In practice she has deliberately flouted the UN mandate.[25] Far from becoming a willing party to the liquidation of its colonies in India and Africa as required by the UN resolutions, she has attempted to propound a fiction that her overseas territories are an integral part of metropolitan Portugal and hence outside the purview of Chapter XI of the Charter.[26] That is why she has refused to submit information to the UN as required under Article 73. Moreover, far from promoting the movement towards eventual independence and to guarantee human rights and fundamental freedoms in Goa and elsewhere she indulged in severe repression and had converted these territories into a police State. This was even recognized by the United Nations when its Special Committee on 27 November 1961 by 97 to nil with 4 abstentions passed a resolution condemning Portugal for the continuing deterioration in the situation in territories under its jurisdiction.[27] The United Nations has also made a list

[24] *UN Weekly Newsletter*, Vol. 9., No. 49 (8 December 1961), p. 1. This resolution was sponsored jointly by 38 delegations, was adopted by 97 to none, with 4 abstentions (France, South Africa, Spain and the United Kingdom).

[25] Oliviera Salazar: "The fate of our State of India could not be the subject of negotiations for Portugal to let go of it, as if it was an object to be given away or sold; it would be to negotiate over something that was impossible ". *Goa and the Indian Union*, p. 4.

[26] Alberto Xavier, *The Rights of Portuguese India* (Lisbon, 1950), p. 9: "By centuries of tradition Portuguese India is a very dear and beloved part of the Lusitanian Mother-country"; also O. Salazar, *Portugal and Its Overseas Provinces* (Lisbon, 1953), p. 11. But see the views of Gandhi: "It is ridiculous to write to Portugal as the motherland of Indians of Goa. Their mother country is as much India as mine. Goa is outside British India but it is within geographical India as a whole. And there is very little, if anything, in common between the Portuguese and the Indians of Goa." *Harijan*, Vol. X, No. 31 (8 September 1946), p. 305.

[27] *The Statesman*, 22 December 1961.

of territories regarding which Portugal must submit information as required under Article 73 and has condemned Portugal for not furnishing the same.[28] Indian action in liberating Goa, Daman and Diu must, therefore, be seen in the light of the open flouting of the United Nations resolutions by Portugal and its intransigence and imperviousness to world public opinion.

Portugal's argument that her overseas territories constitute an integral part of metropolitan territory and come under matters of domestic jurisdiction covered by Article 2(7) of the Charter is also contrary to international law[29] and the practice of the United Nations.[30] The action which the United Nations has taken in helping Indonesia, Tunisia, Morocco and many other areas to be freed from foreign yoke is based on the assumption that colonialism is prohibited by the law of nations and is a matter of international concern. Indian action in freeing the last remnants of its territory from a recalcitrant and rigid imperialist power far from being a violation of the Charter was an effectuation of it.[31]

MISCELLANEOUS ARGUMENTS

Besides, Indian action as it came can also be justified from many other angles. Portuguese rule in Goa was the worst form of political domination, cultural arrogance and racial prejudice ever seen in the history of the world. Ever since the withdrawal of the British

[28] UN Doc. A/4684, *op. cit*, p. 30-31. "Goa and dependencies, called the State of India" is included as item number 'g' in the list.

[29] Scelle, *op. cit.*, p. 213.

[30] Narayan, *op. cit.*, p. 81. The UN resolutions on Non-Self Governing Territories in General and Portuguese colonies in India in particular was based on the assumption that such matters are not within the domestic jurisdiction of any State but are the concern of the whole world community. See for example the resolution passed on 1 December 1961 urging Portugal to comply with the UN Charter obligations. *The Times of India*, 2 December 1961.

[31] Professor Stone has shown how such an action is allowed under the UN Charter. He had probably such a situation in mind when he said: "A situation may have arisen in which attempts to settle disputes by peaceful means may be so delayed, and prospects of success so fantastically remote, that a minimal regard for law and justice in inter-State relations might require the use of force in due time to vindicate these standards, and avoid even more catastrophic resort to force at a later stage. There is at any rate, no clear warrant for reading the Charter and the *travaux preparatoires* as is sometimes done, as if Article 2(4) excluded all resort to force except in self-defence or under the authority of the United Nations, thus excluding these other possibilities." Julius Stone, *Aggression and World Order* (London, 1958), p. 43.

from India, they had imposed more restrictions on the local people and had converted Goa virtually into a prison-house. The local nationalist leaders were arrested and brutally treated. Non-violent *satyagrahis* were fired upon. The inhabitants were deprived of even the elementary human rights which are guranteed by the UN Charter and have found a concrete shape in the Universal Declaration of Human Rights.[32] On grounds of humanity, the Indian government was entitled to free the Goans from this abnormal situation. The Indian government had expressed the hope that "in accordance with the principles of humanity and irrevocable processes of history the Government of Portugal will leave their Indian colonies forthwith and remove their persistent irritants against international peace".[33] As the Goan people are the kith and kin of the people living in India, in such an abnormal situation, there was no alternative except to intervene and save them from this tyranny. Such a procedure is allowed by the rules of international law.[34]

Moreover, even within Goa a strong movement for emancipation had taken root. After liberating the enclaves of Dadra and Nagar-Aveli, the local patriotic elements had raised a banner of revolt against the Portuguese authorities in Goa itself. The uprising was spontaneous. "The Portuguese administration had crumbeld down long before Indian troops entered Goa and unsocial elements were beginning to get the upper hand. If the vacuum had remained unfilled there would have been lawlessness."[35] The warm welcome which the Indian armed forces received from the local population and the insignificant resistance put up by the Portuguese troops show how broad based the rebellion was and how the Portuguese administration had been overwhelmed by the local movement. As law and order had broken down, India was entitled to send its troops in order to clear the Portuguese and set the house in order.

India's action was justified even on the basis of self preservation. It was known on reliable authority that Portugal had been negotiating with Pakistan and some Western countries for sale or lease of

[32] See Sardar Panikkar's talk on "The Long Darkness of Goa" delivered under the auspices of the Indian School of International Studies. *The Times of India*, 21 January 1962; R. G. Verghese, "Operation Goa: Portrait of a Colony", *ibid*, 10 January 1962. Gandhi in *Harijan*, Vol. X, No. 27 (11 August 1946), p. 260; *ibid.*, No. 29 (25 August 1946), p. 279; Luthera, *op. cit.*, p. 278.

[33] India's note to Portugal. *The Times of India*, 18 December 1961.

[34] Oppenheim, *op. cit.*, pp. 279-80.

[35] Mr. Nehru in a statement to the press in his office in the External Affairs Ministry. *The Times of India*, 20 December 1961 and 29 December 1961.

Goa. Moreover, it was also found that she had sought the services of mercenaries from hostile countries in order to perpetuate its regime.[36] Besides, Portugal had become a member of the NATO alliance, had imported a lot of NATO arms and there was a danger that Goa might be used as a military base by such powers for the defence of Portugal's colonies and for other military action in Asia.[37] Portugal had quite frequently violated India's airspace, had attacked her merchant shipping on its normal and traditional course, had shot at Indian fishermen engaged in their centuries-old vocations, had fired at Indian villagers inside the Indian territories and had ordered her warships to patrol the Indian coast.[38] All these facts contained an actual threat to India's security. As India has to deal with hostile neighbours both in the north and the west, in the interest of her own security, she was entitled under international law to remove this threat which in case of hostilities from these quarters may have assumed serious proportions and might have threatened India's defence capabilities. All these facts viewed in terms of Indian security, forced the Indian government to hasten the liberation of these territories which in the ultimate analysis belonged to her.[39]

India had waited for fourteen long years hoping that ultimately the Portuguese would see reason and peacefully hand over these areas to her where it rightfully belonged. Certainly she had exhausted all the peaceful means towards that end and had given ample time to the "friends" of Portugal to persuade the latter to heed the processes of history.[40] As Portugal was not willing even to

[36] Mr. Menon's statement in New York. *The Statesman*, 23 December 1961.

[37] Mr. S. C. Jha in a press conference in New York. *The Times of India*, 15 December 1961; Mr. Menon: "A new situation arose for India when Portugal became a member of NATO. Apart from the possibility of NATO weapons being used against this country, India had also to worry about Goa being possibly used as a military base by the big powers. Any such eventuality would have jeopardized the political integrity of this nation". In a speech delivered under the auspices of the Indian Society of International law in Vigyan Bhavan. *The Times of India*, 19 January 1962. About NATO arms which have been captured from the Portuguese by the Indian military authorities, see the statement of Lt. Col. Bhonsle. *Ibid.*, 31 December 1961.

[38] India's second note to the President of the Security Council. *Ibid*, 15 December 1961.

[39] India's case is also strong in terms of the Monroe doctrine. See a short note on the same by Mr. S. R. Chowdhury. *The Statesman*, 20 December 1961, p. 8; also Mahesh Chandra, "International Law and Goan Action", *ibid.*, 22 December 1961.

[40] Mr. Nehru has revealed that at the instance of two Western powers Goa

talk about the transfer of its colonies, India had no alternative except to use force so that Portugal may be forced to vacate aggression and the UN resolutions may be put into practice. Any further delay would have seriously jeopardized her security.[41]

CONCLUSIONS

The occupation of Goa by the Portuguese in the early sixteenth century was brought about by the unjust use of force and hence it amounted to an act of aggression against the Indian people who had never agreed to this arrangement. The reason why it took so long to eliminate colonialism from its territory was because it was protected by British imperialism which had indulged in a similar illegal action in India on a wider scale. Whatever authority regarding conquest as conferring a valid title may be found in classical international law, the newly independent States in Asia and Africa cannot be bound by these rules because they never willingly subscribed to such jurisprudence which were the product of the imperialist West. The Afro-Asian States did not participate in the evolution of such rules on the basis of equality. They were associated with these rules because they were the victims of aggression.[42]

The new international law of the United Nations in which the

action was put off twice but both nations had intimated to India immediately afterwards that the suggestions were turned down by Portugal. *The Times of India*, 29 December 1961; also: " It was clear from the indiscriminate shooting of people in Angola by the Portuguese and their hostile plans regarding India that Portugal wanted to continue its rule in Goa". Mr. Nehru while addressing a meeting organized by the Birbhum District Congress Committee. *The Statesman*, 24 December 1961.

[41] Professor Stone's observations are quite instructive: ". . . We refer, in particular, to the steady and repeated stress on the requirements of justice, on respect for the obligations of treaties and international law, and on the principle of "the sovereign equality of all its Members". It would be a strange application of such principles to require law-abiding Members of the Organization to submit indefinitely to admitted and persistent violations of rights. ". . . Indeed. . . it is well to pause and consider how it would be if States were committed by Membership in the United Nations to submit in default of collective action, to all kinds of illegality, injustice and inhumanity as long as they do not take the specific form of an 'armed attack' under Article 51. . . ." Stone, *op. cit.*, p. 97.

[42] Some Western writers are quite angry over this historical development and lament the deteriorating position of the European nations in the world orgnization. See especially, Clyde Eagleton, "Self-Determination in the United Nations" *American Journal of International Law*, Vol. 47 (1953), p. 92; Josef L. Kunz, "Chapter XI of the United Nations Charter in Action", *ibid.*, Vol. 48 (1954), pp. 109-110.

Afro-Asian nations have participated on the basis of equality is certainly contrary to the laws based on conquest. India ever since her independence has supported the movements for national emancipation. Her understanding of the rules of international law are based on the conception of *Dharma* or right reason. In conformity with this approach she has accepted the validity of only those rules which are just and to which she has given her consent. Indian action in Goa, therefore, has exposed Portuguese colonialism as a violation of the law of nations. It has, moreover, fortified India's position as a law abiding nation and the defender of the purposes and principles of the United Nations Charter.[43]

[43] Stone, *op. cit.*, p. 44, is of the opinion that such an action is not inconsistent with the purposes and principles of the UN Charter. Otherwise "such an organization could only become a protective shield for those States whose predatory and imperial interests" are already realized and who are interested in the maintenance of the *status quo*, and the United Nations "under cover of restoring *status juris* may restore a *status injuriae*." *Ibid.*, pp. 101,102.

9

AN EVALUATION

A STUDY of India's international disputes reveals that in all these cases, India's position can be successfully vindicated on the basis of the prevalent rules of international law. In the case of persons of Indian origin in the Union of South Africa, although Indian representatives have played a leading role in the UN deliberations, the climate of world public opinion regarding the sanctity of human rights and fundamental freedoms has reached such a pitch, that concerted action has always been forthcoming. This necessarily has supported the Indian position. Moreover, a large number of disputes bearing on this very point have been brought to the United Nations by many other States as a result of which certain well established practices and jurisprudence have evolved which are favourable to India's contentions. Similarly, the Indian case on Jammu and Kashmir is fully justified on the basis of the rules of international law and Mr. V. K. Krishna Menon's forceful and clear exposition of it before the Security Council in 1957 has left no room for doubt that India has a right to hold on to Jammu and Kashmir. Regarding the Indo-Pakistan water dispute also, it must be said that, according to general international law the Harmon doctrine is still the accepted law. India was, therefore, entitled to use her discretion in the diversion and use of the Indus Basin water. But she has been guided more by humane considerations than by legal technicalities. That is why she has conceded more than what Pakistan deserved. India's position on the question of the people of Indian origin in Ceylon is also overwhelmingly favourable and the same is true of the enclaves of Dadra and Nagar-Aveli about which the International Court of Justice has sustained her position in no uncertain terms. In the case of Tibet, from all aspects—Seventeen Point agreement, asylum and human rights—her position is unassailable although for political reasons she has found it desirable not to take a vocal attitude on the matter. With regard to the border dispute with China, excepting the western

sector of the boundary, her rights are well established and her claims are firmly vindicated on the basis of the practice of international law. Even with respect to the western sector, India has a good case if she is able to show that she has continued to exercise jurisdiction as was possible in such a terrain with the intention of holding on to it and that the Chinese military authorities occupied the area with the threat and use of force. Finally in the case of liberation of Goa, the correctness of her position is borne out both by the rules of traditional international law which question the legality of colonial conquests as conferring a valid title and the international law of the United Nations which is overwhelmingly favourable to her views. All told it may be said without any reservation that India has sufficient legal precedent on her side and is in a favourable position to voice its views on any of these issues in international forums without hesitation and fear of embarrassment.

It must be said, however, that Indian representatives have emphasized the moral and political aspects of their cases rather than the legal ones. At times they have subordinated a discussion of the rules of international law to moral and human considerations. At other times even the presentation has been half-hearted and faulty. For example, in the case of persons of Indian origin in the Union of South Africa, Mrs. Pandit and other Indian representatives in 1946 and later have frequently reiterated it as a political and moral question and have appealed to other members of the United Nations not to discuss it in legal straitjackets. The somewhat legal clarity which has been achieved in the presentation of the Indian case in recent years is perhaps partly due to Mr. V. K. Krishna Menon who has served as India's spokesman at the United Nations. Partly it may be on account of many similar disputes which have been brought to the United Nations in a discussion of which the interested delegates have pooled their forensic skill. In the case of the waters of the Indus System, throughout the lengthy period of negotiation, the Indian government has shown more enthusiasm for an economic and humanitarian solution rather than for the legal one which was overwhelmingly favourable to her. Similarly the predicaments of the Dalai Lama and his party have also been viewed more from a humanitarian point of view rather than by exposing the high-handedness of the Chinese government with the yardstick of law. The same is also true of the right of passage case and that of the liberation of Goa. At the Hague the

Attorney General of India devoted more time to the moral and political aspects of the case just as the Indian Prime Minister and India's permanent representative at the United Nations repeatedly reminded the Portuguese authorities of the "writing on the wall" in place of combining such approach with a frontal attack on colonialism as antithetical to a sound international order and as contrary to the principles of international law.

Besides the rather negative attitude towards the legalistic approach we find that frequently her representatives have been carried away by moralistic considerations which have served as detriment to her well established rights. In the case of Jammu and Kashmir she has agreed to the principle of a plebiscite on the question of accession in spite of the clear rule of international law that no State is obliged to do so. Similarly, in the case of the Indus Waters Treaty of 1960 she has agreed to part with a large volume of water which according to the rules of international law is hers. In the case of the right of passage over Indian territory, she has followed the lengthiest course in integrating the enclaves with Indian territory and, in so doing, she even risked an adverse decision by the World Court. In Tibet she voluntarily gave up all her well-established rights without even attempting to seek a clarification from the Chinese government regarding her borders which would have been favourably procured in 1954. Similarly, it is possible that the Sino-Indian border dispute would not have arisen in the circumstances it did now, if India had been vigilant and if she had not been lulled by the high sounding Chinese declarations of peaceful coexistence. The net result has been that in the search for sincere and lofty idealism and moral principles, she has created difficulties for her cases which otherwise are based on sound legal foundations.

Although such an ideal approach is commendable, there is a danger that its too frequent use at the expense of well established legal rights may bring about confusion and unpredictability in the contents of the law. It is imperative, therefore, that India must also exploit its rightful legal position in the settlement of international disputes. This is not only desirable but essential particularly because the other parties are bent on contesting Indian submissions by using all legal arguments available to them. Idealism in international affairs must be viewed in the light of the immediate and pressing needs of India.

One more point must also be mentioned. India is bound to play an important part in international affairs and hence it is necessary

and proper that a serious study of international law and international relations receives first priority both from its government and the people. As her foreign relations were controlled by the British government she came to the international arena with only a few experienced and qualified foreign service officers on whose shoulders fell the burden of conducting India's foreign policies. That is why immediately after independence she had to organize her foreign service from scratch. And hardly had she set down to organizing her foreign service when she got involved in many international disputes. In this race for putting things in order, the government was forced to engage the services of people who, during their life-time, had very little to do with the conduct of international diplomacy. Gradually, however, the Indian government has evolved a separate cadre of foreign service to which selection is made on the basis of merit.

The study of international law is essential for Indian diplomats to effectively argue the Indian point of view in international forums. It is essential also for a proper appreciation by the people of policies adopted by their government from time to time. In order to achieve these goals the Indian government should play its due role. She should sanction grants for universities and other centres of learning to establish research fellowships and prizes to encourage research in international legal problems with which India is immediately concerned. She should also finance establishment of Chairs in International Law in Indian universities like the Whewell Chair in Cambridge University and give financial assistance to academic societies like the Indian Society of International Law to prosecute research programmes. There should also be more intellectual contacts between the experts serving the government and members of the teaching profession. In India we have a large number of younger academicians who have had an opportunity to sit at the feet of world renowned international lawyers like Hans Kelsen, Philip Jessup, Hersh Lauterpacht, Julius Stone, Quincy Wright, J. L. Brierly, Arnold McNair, Manley Hudson, Josef Kunz, Paul Guggenheim and many others who are widely known in their field of specialization. The Indian government should be able to tap this talent.

The various suggestions presented here will go a long way in meeting India's needs in the field of international law. India is a young country and it may take years before qualified and mature personnel may be available for the asking. But in the limited span

of about a dozen years, her accomplishments in the realm of international law and international relations have been substantial and bear testimony to the fact that a lot of talent is available in the country. Let us hope that in the not too distant future through the co-operation of the government and the various seats of learning and the financial support of interested Foundations, Indian scholarship may command respectful attention in international councils. In view of the prominent part which India is destined to play in the development of sound international relationships, it is of utmost importance to increase the number of men and women who can give an intelligent guidance to public opinion in international affairs. In this, the newly established Indian Society of International Law can also play an important part.

INDEX

INDEX

AALAND ISLAND CASE, 15
Aquisition of Polish Nationality Case, 91
Afro-Asian States, 194, 196, 200, 207, 208
Aitchison's treaties, 146
Albuquerque, 197
Alfaro, Dr., 21
Amritsar, Treaty of, 66
Anglo-Chinese Convention (1890), 116
Anzilotti, Judge, 162
Apartheid, 10, 13, 135
Armand-Ugon, Judge, 184, 185
Asylum, 114, 123ff, 137
Ayub Khan, Field Marshal, 62

BADAWI, JUDGE, 175, 176, 187
Baghbad Pact, 84
Bakshi Sapju, 157
Bandarnaike, Solomon, 106, 111
Bandung Conference, 130
Bandung Spirit, 136
bellum justum Theory, 196
Berubari Union Case, 80
Bhutan-Tibet Boundary, 152
Bidault, 85
Billimoria Case, 99
Black, Eugene, 43
Brierly, Professor, 8, 15

CAPETOWN AGREEMENTS, 16
Caroe, 143
CENTO Pact, 84
Ceylon Workers' Congress, 95
Chacko, Professor C. J., 67
Chagla, M.C., Judge, 173, 175, 179
Chinese Aggression, 135, 163
Colonialism: and international law, 196ff, 211; and the UN Charter, 201ff
Controller of Labour, 89
Court of Arbitration, Indus, 55
Cunha, T. B., 167

DALAI LAMA, 114, 115, 116, 117, 119, 121, 122, 123, 124, 128, 133, 141, 144; his Missourie statement, 122
D. D. Cement Co *v* Commissioner of Income Tax, 69
Demilitarization, 79, 81
Desai, C. C., 106, 107
Dixon, Sir Owen, 86
Domestic Jurisdiction, nature and origin, 6-8; procedural points, 9-14; relative character of, 14-19
Doraiswamy Case, 97
Duress, Argument of, 71, 121
Dulles, John Foster, 85

EAST INDIA COMPANY, 64
Eastern Greenland Case, 120
Eden, Anthony, 85
Efficacy, Doctrine of, 86, 149
Electoral register, 93, 95
Electricity Company of Sofia and Bulgaria, 178
Emigre Government Status, 128
Evatt, Dr., 10, 21, 22
ex factis jus oritur, 198
ex injuria jus non oritur 198

GAMA, VASCO DA, 165, 166
Gandhi, 3
Genocide, 133
Gratiaen, Mr Justice, 98
Grotius, 78, 196
Gulab Singh, 63, 64, 157, 158

HARMON DOCTRINE 33, 34, 35, 36, 37, 58
Himachal-Tibet Border, 139

Human Rights and Fundamental Freedoms, 15, 20-27, 129-33, 135, 205, 209
Hari Chand, 157

ILANGRATNE, T. B., 93, 104, 109
Illicit immigration, 91-6.
Iliff, 45
Imperial Conference, 16
Indentured Labour, 1ff, 88
Indian Citizenship Act of 1955, 103
Indian Constitution, Article 8, 102-03
Indian High Commissioner in Ceylon, 87, 94, 95, 96, 103, 105, 106, 107
Indian Independence Act (1947), 30, 63, 66, 68
Indian Society of International Law, 212, 213
Indian Statutory Commission, 65
Indian and Pakistani Residents (Citzenship) Act, 1949, 96-100
Indo-Sikkim Treaty of 1950, 153
Indus Water Treaty, 1960, 45ff
Indus Basin Development Fund, 51, 54, 58, 60
Indus Commission, 41, 47, 54
Instrument of Accession, 70, 71, 73, 74, 75, 76
Inter-Dominion Agreement on the Canal Waters Dispute, 1948, 57, 58
Interhandel Case, 178
International Court of Justice, 165, 168ff, 180ff, 191, 192
International Law Association, India Branch, 40
Institute of International Law, 15

JAMMU AND KASHMIR, CONSTITUENT Assembly of, 74
Jarring Report, 84
Jessup, Professor, 15
Jha, C. S., 19

KALIMPONG, 127
Kelsen, Professor, 14, 15
Khan, Hashmattulah, 157
Kodakan Pillai v Mudanyake Case, 97
Kotlewala, Sir John, 91, 102, 105,108
Kunz, Professor, 15
Kunzru, Dr. H. N., 127

LADAKH-TIBET BORDER, 139
Lahore, Treaty of, 64, 66
Lauterpach, Professor, 15, 42, 90, 198
Lilienthal, David, 43

MAC-MAHON LINE, 139, 140ff, 146ff, 150ff, 155ff, 160, 164
Mahajan, M. C., 80
Magher Singh v Principal Secretary, Jammu and Kashmir (1953), 69
Mangla Dam, 86
Martin, Professor Charles E., 38
Menon, V. K. Krishna, 72, 74, 79, 80, 134, 209, 210
Mohammad Zafrulla Khan, Sir, 70
Monroe, Sir Leslie, 18
Moralistic considerations, 211
Mountbatten, Lord, 72, 74, 78

NARAIN J. P., 119
National Provident Fund Scheme, 103, 104
Nationality Decrees in Tunis and Morocco Case, 14, 16, 27, 91
Nationality in International Law, 90-91
NATO, 208
Nehru, Jawaharlal, 124, 136, 137, 147, 162
Nehru-Kotlewala Agreement, 87, 89ff, 107
Nepal-Tibet Treaty (1856), 116
New International Law, 194, 103, 107, 210, 86
Nizam of Hyderabad, 65
Norbulingka Palace, 124
Nottebohm Case, 170

OPPENHEIM, PROFESSOR, 70, 85, 126

PALAMASIVAN V. THE COMMISSIONER, 98
Palaniyandi Case, 98

Pandit, Mrs. Vijay Lakshmi, 4
Peaceful Co-existence, 136
Permanent Court of Arbitration, 191
Permanent Court of International Justice, 14, 35, 68, 91
Plebiscite, 77, 78, 80, 85
Privy Council, 89, 101

QUINTANA, JUDGE, 186, 188, 192

RADCLIFFE AWARD, 30
Raja Mahendra Pratap, 126
Rau Commission, 41
Reading, Lord, 65
rebus sic stantibus, 85, 188
Recognition, 67, 199, 200
Roosevelt, 85
Romulo, General , 22
Reserve Bank of India, 39
Ruler of Jammu and Kashmir, 80

SEATO, 84
Self-preservation, 205
Senanayke, R.G., 92, 93
Setalvad, 181
Seventeen Point Agreement, 118, 120, 122, 134, 137
Simla Convention, 116, 141, 145, 149
Sino-Indian Agreement of 1954, 136, 147
Sino-Nepalese Treaty of 1956, 116
Sri Lanka Freedom Party, 93
Smuts, Field Marshal, 4, 23
Sovereignty, 68, 186, 201
South Africa, Discriminatory Legislation, 2-3
Spiropolous, Judge, 185
SS Truro 2
Statelessness, 108-10
Supreme Court of India, 74

TIBET, STATUS OF, 115ff
Tibetan-Outer Mongolian Treaty of 1913, 116
Treaty of Poona (1779), 185

UNITED NATIONS: General Assembly, Ad Hoc Political Committee, 13; discussion of Treatment of Indians in the Union of South Africa, 4ff; discussion of the Tibetan Issue, 129ff; Economic and Social Council, 21, 22 ; Security Council, 19, 27, 77, 84, 85, 195; Commission for India and Pakistan, 77, 78; its Resolutions, 78, 79, 81, 84, 86 ; Secretary General, 29; Universal Declaration of Human Rights, 22, 23, 26, 129, 130, 205

WOLDOCK, 181
Watershed, Principle of, 149, 152, 155, 163
Wazir Ratna, 157
Wimbeldon Case, 35, 68, 91
World Bank, 51, 57, 60

YOUNGHUSBAND. EXPEDITION, 1140

ZORAWAR SINGH, 157