

STATE RESPONSIBILITY

[Agenda item 5]

DOCUMENT A/CN.4/106

International responsibility. Second report by F. V. García Amador, Special Rapporteur

RESPONSIBILITY OF THE STATE FOR INJURIES CAUSED IN ITS TERRITORY TO THE PERSON OR PROPERTY OF ALIENS. PART I: ACTS AND OMISSIONS

[Original text: Spanish]
[15 February 1957]

CONTENTS

<i>Chapter</i>		<i>Page</i>
	INTRODUCTION	104
I.	NATURE AND SCOPE OF RESPONSIBILITY	105
	1. The "duty to make reparation"	105
	2. Imputability of acts or omissions	106
	3. Scope of responsibility	106
	4. The "international obligations of the State"	107
	5. The supremacy of international obligations	107
II.	ACTS AND OMISSIONS OF ORGANS AND OFFICIALS OF THE STATE	107
	6. Acts and omissions of the legislature	108
	7. Acts and omissions of officials	109
	8. The "denial of justice"	110
III.	VIOLATION OF FUNDAMENTAL HUMAN RIGHTS	112
	9. The international recognition of human rights	113
	10. Fundamental rights as embodied in post-war instruments	114
	(a) Equality of rights and equality before the law	114
	(b) Substantive rights	115
	(c) Judicial and other guarantees	116
	11. Method adopted in the draft	116
IV.	NON-PERFORMANCE OF CONTRACTUAL OBLIGATIONS AND ACTS OF EXPROPRIATION	116
	12. Contractual obligations in general	117
	13. Public debts	119
	14. Acts of expropriation	120
V.	ACTS OF INDIVIDUALS AND INTERNAL DISTURBANCES	121
	15. The rule of "due diligence"	122
	16. Acts of ordinary private individuals	123
	17. Internal disturbances in general	125
	18. Acts of the constituted authority and of successful insurgents	127
<i>Annex.</i>	DRAFT ON INTERNATIONAL RESPONSIBILITY OF THE STATE FOR INJURIES CAUSED IN ITS TERRITORY TO THE PERSON OR PROPERTY OF ALIENS	128

Introduction

1. In his first report (A/CN.4/96), the Special Rapporteur indicated that the subject of State responsibility was so vast and complex that the immediate codification of the law covering the entire field was not practicable. As in the case of other topics, the International Law

Commission had to adopt a gradual approach, dealing first with the branch which was most ripe for codification and in which the solution envisaged in General Assembly resolution 799 (VIII) was most urgently required. The branch covered by the title "international responsibility of the State for injuries caused in its territory to the person or property of aliens" seemed to satisfy these two require-

ments. In this second report, therefore, the Special Rapporteur has embarked on a study of this vast branch of the subject, and submits draft articles to serve as the basis of discussion at the Commission's ninth session.

2. The Special Rapporteur has taken into account the opinions expressed by the members of the Commission during its eighth session.¹ For example, in deference to the general opinion expressed in the Commission, the draft contains no mention of *criminal* liability for the failure to comply with certain international obligations, even in those cases where the criminal aspect may have some effect on the strictly *civil* responsibility. Hence, the draft is concerned solely with the "duty to make reparation", *stricto sensu*, that is incumbent upon the State which violates or fails to comply with its international obligations.

3. For reasons which will be stated later, this report and the draft deal only with principles and rules of a *substantive* nature, i.e. only with *acts and omissions* which give rise to the international responsibility of the State for injuries caused to aliens. Principles and rules of a procedural or adjective character are not touched upon. These include the rules governing the exhaustion of local remedies, the waiver of diplomatic protection by the foreign individual concerned or his national State, modes and procedures of settlement (including the principle of the nationality of the claim and the rules concerning the capacity to bring an international claim), prescription and other exonerating, extenuating or aggravating circumstances and the form and measure of reparation.

4. The principal reason for this pruning of the subject-matter is the shortness of the Commission's session. As its programme of work already includes, among other topics, the law of treaties, diplomatic intercourse and immunities, and consular intercourse and immunities, the Commission will be unable to spend more than three weeks in discussing the topic of responsibility. In this brief period, in view of the increase in its membership, the Commission would not be able to discuss the entire subject in detail. Another consideration which the Special Rapporteur took into account is the fact that, despite their undeniable interdependence, the substantive and procedural aspects can be discussed separately. In fact, as the work of codification is in its initial stage, there may even be certain advantages in this method. Any decisions on the principles and rules contained in the draft, as also the opinions expressed by members, will certainly facilitate the work of codification on the remaining questions. At its next session, therefore, the Commission should be in a position to prepare a draft covering the entire subject and to invite comments from Governments.

5. This report consists of five chapters, each dealing with the field covered by the corresponding chapter of the draft. In order to avoid unnecessary repetition in cases where particular questions were fully considered in the first report, the Special Rapporteur has expressly refrained from citing in the commentaries on the various articles many precedents and other background material; in those

cases, he has confined himself to references. In other respects, the Special Rapporteur has followed the same method of work, examining each principle or problem in the light of existing conventions, international judicial practice, previous efforts at codification and the opinions of learned authorities.

CHAPTER I

Nature and scope of responsibility

ARTICLE 1

1. For the purposes of this draft, the "international responsibility of the State for injuries caused in its territory to the person or property of aliens" involves the duty to make reparation for such injuries, if these are the consequence of some act or omission on the part of its organs or officials which contravenes the international obligations of the State.

2. The expression "international obligations of the State" shall be construed to mean, as specified in the relevant provisions of this draft, the obligations resulting from any of the sources of international law.

3. The State may not plead any provision of its municipal law for the purpose of repudiating the responsibility which arises out of the breach or non-observance of an international obligation.

Commentary

1. THE "DUTY TO MAKE REPARATION"

1. Under paragraph 1 of this article, the responsibility with which the draft is concerned "involves the duty to make reparation" for injuries caused to the person or property of aliens. In his first report, the Special Rapporteur examined in detail the juridical nature of international responsibility, and reached the conclusion that, in its present state of development, international law does not justify the assimilation of the notion of responsibility to the "duty to make reparation", pure and simple, because there exist certain obligations the non-observance of which involves, besides civil responsibility in the strict sense of the term, some criminal responsibility and the consequent punishment of the author of the injury (A/CN.4/96, chap. III).

2. As was stated in the introduction, in deference to the general opinion expressed in the International Law Commission, the Special Rapporteur has excluded from the draft the penal consequences of the non-fulfilment of certain international obligations, even where such consequences might affect the strictly *civil* responsibility. At least as far as the Special Rapporteur is concerned, this aspect of the question is therefore left pending. There is hardly any need, moreover, to elaborate on what was said in the first report regarding the meaning of "the duty to make reparation". The only question which matters now for the purposes of the draft is the exact nature and measure of reparation, a question which will be considered when the Commission discusses the relevant article.

¹ *Yearbook of the International Law Commission, 1956*, vol. I (United Nations publication, Sales No.: 1956.V.3 vol.I), 370th to 373rd meetings.

2. IMPUTABILITY OF ACTS OR OMISSIONS

3. Article 1, paragraph 1, next refers to "some act or omission" which is capable of engaging the international responsibility of the State. Most learned authorities agree that the responsibility of the State does not extend beyond the acts or omissions imputable to the State itself. This problem of imputability was considered fully, though rather more generally, in the first report (chapter IV). When viewed in relation to the narrower concept of responsibility with which the draft is concerned the question becomes much less complex. The reason is not merely that the draft concentrates exclusively on the responsibility of *the State*, but also that, the draft being no longer concerned with the *criminal* responsibility which may exist in certain cases, it is now sufficient to determine what conditions and circumstances must be present before a given act or omission is properly imputable to the State. The article simply states the general principle that responsibility is involved only if the injuries are the consequence of some act or omission which is imputable to the organs or officials of the State. Other provisions of the draft specify these necessary conditions and circumstances.

3. SCOPE OF RESPONSIBILITY

4. Lastly, article 1, paragraph 1, refers to some act or omission "which contravenes the international obligations of the State". In the first report, it was shown that the prevailing, not to say unanimous, trend in doctrine and practice is to regard responsibility as "a consequence of the breach or non-performance of an international obligation" (A/CN.4/96, para. 35). In its draft of 1927, the Institute of International Law stated that "The State is responsible for injuries caused to foreigners by any action or omission contrary to its international obligations..." (article 1).² The texts adopted in first reading by the Third Committee of the Conference for the Codification of International Law (The Hague, 1930) were based on the same line of thinking. One of these texts (article 3) even affirms that "The international responsibility of a State imports the duty to make reparation for the damage sustained in so far as it results from failure to comply with its international obligation".³ This conception of responsibility was also repeatedly reflected in the decisions of the former Permanent Court of International Justice to which reference was made in the writer's first report (A/CN.4/96, para. 37).

5. At the eighth session of the International Law Commission, some members, discussing this view of responsibility, referred to the traditional theories of "causality", "fault", "risk" and so forth. After careful reflexion the Special Rapporteur has reached the conclusion that, because they are so academic, an inquiry into these theories would not produce any practical results or solutions conducive to the codification of the subject. In fact,

they are relevant only to certain instances of "omission" and even among these they have a bearing only on the conduct of the organs and officials of the State with respect to acts of private persons and internal disturbances which result in injury to the person or property of aliens. The proper context for the discussion of these matters, however, is chapter V below which deals with the draft articles concerning acts of individuals and internal disturbances.

6. In the course of the debate in the Commission one specific question was brought up, however, which is directly related to article 1 (even though it was brought up in connexion with the theories just mentioned). The question was: Can there be responsibility even in the absence of any breach or non-observance of a specific international obligation? The case cited, for the purposes of illustration, was that of the damages paid by the United States Government to Japanese fishermen after the atomic explosion on the Bikini atoll.⁴ A similar situation was considered in the *Trail Smelter Arbitration* (1938-1941) between the United States and Canada, where the Tribunal expressly held that responsibility existed. The Tribunal concluded that "...under the principles of international law...no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence".⁵

7. In situations such as those mentioned above, it seems impossible to deny the responsibility of the State or its duty to make reparation for the injury caused. There is admittedly no breach or non-performance of a concrete or specific obligation, but there is a breach or non-performance of a general duty which is implicit in the functions of the State from the point of view of both municipal and international law, namely, the duty to ensure that in its territory conditions prevail which guarantee the safety of persons and property. The rule of "due diligence" (for which see chapter V below) is in reality nothing more than an expression of the same idea, and is recognized as an integral part of the international law relating to responsibility. But would it not be most dangerous to depart from the traditional formula and to include in such draft as the Commission may prepare a clause providing for responsibility in the absence of any violation or non-observance of specific international obligations? Such a clause would without doubt open the door to wholly unjustified claims, and so produce chaos in the current theory of State responsibility. The most important point, however, is that, as long as the draft does not in any way exclude such responsibility whenever the circumstances genuinely justify a claim against the State for negligence in the discharge of its essential functions, any clause of this nature would be completely redundant.

² Harvard Law School, *Research in International Law, II, Responsibility of States* (Cambridge, Mass., Harvard Law School, 1929), p. 228.

³ League of Nations publication, *V.Legal, 1930.V.17* (document C.351(c)M.145(c)1930.V), p. 236.

⁴ *Yearbook of the International Law Commission, 1956*, vol. I (United Nations publication, Sales No.: 1956.V.3, vol.I), 372nd meeting, para. 27.

⁵ United Nations, *Reports of International Arbitral Awards*, vol.III (United Nations publication, Sales No.: 1949.V.2), p. 1965.

4. THE " INTERNATIONAL OBLIGATIONS OF THE STATE "

8. Article 1, paragraph 2, seeks to define the meaning and scope of the expression "international obligations of the State". The only codification in which a formula of this nature was ever attempted is the text adopted by the Third Committee of The Hague Conference, whose article 2 reads as follows:

"The expression 'international obligations' in the present Convention means (obligations resulting from treaty, custom or the general principles of law) which are designed to assure to foreigners in respect of their persons and property a treatment in conformity with the rules accepted by the community of nations.

"[The Drafting Committee proposed to replace the words in parentheses by the following words: '... obligations which result from treaties as well as those which are based upon custom or the general principles of law ...']."⁶

9. The Hague formula, it will be noted, specified the sources of international obligations, but, in indicating the nature of the latter, confined itself to stating that they were "designed to assure to foreigners in respect of their persons and property a treatment *in conformity with the rules accepted* by the community of nations". The purpose of the present codification, however, as indeed of all its predecessors, is precisely to determine what acts or omissions give rise to the international responsibility of the State, i.e., to enunciate the *rules* which govern the State's conduct with respect to aliens. Clearly, a mere general reference to the sources of international obligations and to the "rules accepted by the community of nations" cannot accomplish the purpose of this codification which is, precisely, to enumerate those very obligations and rules and to define their content.

10. For this reason, the article expressly uses the phrase "as specified in the relevant provisions of this draft". The provisions in question describe the acts and omissions which engage the international responsibility of the State for injuries caused in its territory to the person or property of aliens, and they also specify the conditions and circumstances the presence or absence of which determines whether such acts or omissions may be qualified as wrongful for the purposes of an international claim. The enumeration of the acts and omissions and of the decisive conditions and circumstances should be as exhaustive as possible, for otherwise the work of codification will necessarily prove deficient and incomplete. In other words, the draft prepared by the Commission should be self-sufficient, and should not constitute a merely subsidiary instrument which leaves the final solution of the problems to the very principles and rules of international law which it is supposed to assemble and formulate in an ordered and systematic form.

11. Every work of codification is, of course, always apt to contain "gaps" and, at least in the present stage of the development of international law, such shortcomings are virtually inevitable. In articles 5 and 6, which deal with

the responsibility for violation of fundamental human rights, the Special Rapporteur has expressly followed a system which takes this factor into account. In the other possible areas of responsibility, the "gaps" can also be filled without undue difficulty: the article defines "international obligations" as those resulting from "any of the sources of international law"; consequently, while the draft endeavours to provide for every contingency, any situation not expressly foreseen in the text only necessitates reference to such sources and a search for an applicable principle or rule which is not incompatible with the provisions of the instrument. Hence, the expression "obligations resulting from any of the sources of international law" allows for the application, as a subsidiary expedient, of principles or rules not expressly set forth in the draft prepared by the Commission.

5. THE SUPREMACY OF INTERNATIONAL OBLIGATIONS

12. The Special Rapporteur's first report contains a full discussion (A/CN.4/96, section 14) of the principle stated in article 1, paragraph 3, so that further commentary on this point is unnecessary. This principle, generally recognized by the learned authorities, has been affirmed in previous draft codes and in the recorded decisions of the former Permanent Court of International Justice. It is now therefore accepted that the State cannot appeal to any provision of its municipal law in order to escape a responsibility arising out of the non-observance of its international obligations.

CHAPTER II

Acts and omissions of organs and officials of the State

ARTICLE 2

Acts and omissions of the legislature

1. The State is responsible for the injuries caused to an alien by the enactment of any legislative (or, as the case may be, constitutional) provisions which are incompatible with its international obligations, or by the failure to enact the legislative provisions which are necessary for the performance of the said obligations.

2. Notwithstanding the provisions of the foregoing paragraph, the international responsibility of the State shall not be involved if, without amending its legislation (or its constitution), it can in some other way avoid the injury or make reparation therefor.

ARTICLE 3

Acts and omissions of officials

1. The State is responsible for the injuries caused to an alien by some act or omission on the part of its officials which contravenes the international obligations of the State, if the officials concerned acted within the limits of their competence.

2. The international responsibility of the State is likewise involved if the official concerned exceeded his competence but purported to be acting by virtue of his official capacity.

⁶ League of Nations publication, *V.Legal*, 1930.V.17 (document C.351(c)M.145(c)1930.V), p. 236.

3. Notwithstanding the provisions of the foregoing paragraph, the international responsibility of the State shall not be involved if the lack of competence was so apparent that the alien should have been aware of it and could, in consequence, have avoided the injury.

ARTICLE 4

Denial of justice

1. The State is responsible for the injuries caused to an alien by some act or omission which constitutes a denial of justice.

2. For the purposes of the provisions of the foregoing paragraph, a "denial of justice" shall be deemed to have occurred if the court, or competent organ of the State, did not allow the alien concerned to exercise any one of the rights specified in article 6, paragraph 1 (f), (g) and (h) of this draft.

3. For the same purposes, a "denial of justice" shall also be deemed to have occurred if a judicial decision has been rendered, or an order of the court made, which is manifestly unjust and which was rendered or made by reason of the foreign nationality of the individual affected.

4. Cases of judicial error, whatever may be the nature of the decision or order in question, do not give rise to responsibility within the meaning of this article.

Commentary

1. It is not strictly the purpose of the foregoing three articles to define, from the point of view of their *nature*, the acts and omissions of the organs and officials of the State which give rise to international responsibility on its part by reason of the injuries caused by such acts or omissions to the person or property of aliens. That is the purpose of the articles contained in the other chapters of the draft. For reasons of method, it was considered desirable that the draft should open (as do a number of earlier codifications) with a statement indicating the circumstances and conditions which have to be present if the act or omission is to give rise to responsibility. In principle, the conduct of any organ or official is *prima facie* an act or omission imputable to the State. Yet, before the act or omission can in fact involve the international responsibility of the State, specific circumstances and conditions must be present which support the description of the act or omission as an international wrong. Some of these circumstances and conditions are common to all organs of the State, but others are not, owing to the diversity of the nature and function of these organs. It is these latter circumstances and conditions which will be discussed more particularly below.

2. First, however, it should be explained why this chapter of the draft does not deal with cases of international responsibility arising out of acts or omissions of organs and officials of the political subdivisions of the State or of its colonies and other dependencies. As stated in the first report (A/CN.4/96, para. 72), in essence there are two decisive considerations: the degree of control or authority exercised by the State over the internal affairs of its political subdivision, colony, or dependency; and

the extent to which the State is responsible for the international relations and representation of the entity concerned. Consequently, each case must be considered and decided in the light of its own characteristics. Of course, some cases, such as those involving the political subdivisions of a federal State, will present no difficulty. This is not, however, true in other cases, such as those involving certain semi-sovereign entities, some of which have acquired an international personality of a fairly advanced type. An article to supplement the three now contained in this chapter can best be drafted when the Commission comes to deal with the international responsibility of other subjects of modern international law.

6. ACTS AND OMISSIONS OF THE LEGISLATURE

3. One of the drafts approved at the first reading by the Third Committee of The Hague Conference dealt specifically with cases of responsibility for injuries caused to aliens by acts or omissions on the part of legislative bodies. The provision in question (article 6) reads as follows:

"International responsibility is incurred by a State if damage is sustained by a foreigner as a result either of the enactment of legislation incompatible with its international obligations or of the non-enactment of legislation necessary for carrying out those obligations."⁷

Basis of discussion No. 2 of the Preparatory Committee of the Conference was to the same effect. All the replies received at the time from Governments agree that it is possible for a State to incur responsibility by reason of either of the two circumstances described in the provision cited.⁸

4. It is indeed possible for the State to incur international responsibility by reason either of an act or of an omission on the part of the legislature (or, as the case may be, of the constitution-making body), for the injury sustained by the alien may result from the enactment of a law which conflicts with some particular international obligation of the State or from the non-enactment of legislation which is necessary for the performance of that or some other obligation. Each of these two possibilities might be illustrated with a wealth of practical examples. For instance, expropriation laws which do not provide for adequate compensation or indemnity in respect of the assets expropriated would be in breach of an international obligation; while, on the other hand, typical cases of wrongful inaction are all those in which the legislature fails to take the proper measures for giving effect to the State's contractual obligations. Naturally, this does not mean that the legislature's action or failure to act is in itself, or in itself alone, a circumstance which invariably gives rise to international responsibility. In practice, a State may not necessarily have to refrain from passing a legislative act, or have to enact some particular measure, if it can prevent or make good the injury in some other way.

5. These cases of responsibility are based on the familiar principle that a State cannot rely on its municipal law

⁷ *Ibid.*

⁸ League of Nations publication, *V.Legal, 1929.V.3* (document C.75.M.69.1929.V), pp. 25-30.

as an excuse for failing to perform its international obligations. In conformity with this principle, if its municipal law is incompatible with these obligations, in that it conflicts with them or fails to provide for their performance, the State will be internationally responsible for injuries caused to the person or property of aliens. With respect to this point, the former Permanent Court of International Justice stated, in the *Case concerning certain German interests in Polish Upper Silesia* (1926): "From the standpoint of international law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures".⁹

7. ACTS AND OMISSIONS OF OFFICIALS

6. Where the act or omission giving rise to the international responsibility of the State emanates from the executive authority or from some specific official, the problem does not present itself in the same terms as in the case of other State organs. The distinctive features of this type of responsibility, as considered in this chapter, are the competence of the authority in question and the capacity in which it is acting. They are "distinctive" because in some way they are peculiar to the cases of responsibility which have their origin in acts or omissions of the executive. The explanation is that, by reason of the intrinsic nature of the different organs of the State, one cannot inquire, or one can inquire only exceptionally, into the competence or capacity of the legislature and the judiciary. This observation can be easily confirmed by a reference to international case-law and codifications. Moreover, a study of these sources shows that it is important to distinguish between an official who acted within the limits of his competence, one who exceeded his competence, and one who acted in a private capacity.

7. The abundant case-law of arbitration tribunals and claims commissions on this point will be cited below, in connexion with the different questions posed by these cases of responsibility. For this purpose, let us first consider earlier attempts to codify the principles and rules governing the subject.

8. The report of the Sub-Committee of the Committee of Experts for the Progressive Codification of International Law of the League of Nations (Guerrero report) contains the following paragraphs:

"3. A State is responsible for damage incurred by a foreigner attributable to an act contrary to international law or to the omission of an act which the State was bound under international law to perform and inflicted by an official within the limits of his competence, subject always to the following conditions:

"(a) If the right which has been infringed and which is recognized as belonging to the State of which the injured foreigner is a national is a positive right established by a treaty between the two States or by the customary law;

"(b) If the injury suffered does not arise from an

act performed by the official for the defence of the rights of the State, except in the case of the existence of contrary treaty stipulations;

"The State on whose behalf the official has acted cannot escape responsibility by pleading the inadequacy of its law.

"4. The State is not responsible for damage suffered by a foreigner, as a result of acts contrary to international law, if such damage is caused by an official acting outside his competence as defined by the national laws, except in the following cases:

"(a) If the Government, having been informed that an official is preparing to commit an illegal act against a foreigner, does not take timely steps to prevent such act;

"(b) If, when the act has been committed, the Government does not with all due speed take such disciplinary measures and inflict such penalties on the said official as the laws of the country provide;

"(c) If there are no means of legal recourse available to the foreigner against the offending official, or if the municipal courts fail to proceed with the action brought by the injured foreigner under the national laws."¹⁰

In effect, therefore, the Guerrero report admitted the international responsibility of the State both where the official acted within the limits of his competence and also where he exceeded his competence, but in both cases it stipulated that his conduct had to be characterized by specific conditions or circumstances. In general, the conditions or circumstances mentioned in the passages quoted above are based on a rather restrictive view of responsibility. A contrasting view, in certain respects, is that underlying the two bases of discussion of the Preparatory Committee of The Hague Conference, quoted below:

"Basis of discussion No. 12

"A State is responsible for damage suffered by a foreigner as the result of acts or omissions of its officials, acting within the limits of their authority, when such acts or omissions contravene the international obligations of the State."¹¹

"Basis of discussion No. 13

"A State is responsible for damage suffered by a foreigner as the result of acts of its officials, even if they were not authorized to perform them, if the officials purported to act within the scope of their authority and their acts contravened the international obligations of the State."¹²

One of the texts approved by the Third Committee of the Conference reflected the fundamental ideas of these bases of discussion in article 8:

¹⁰ League of Nations publication, *V.Legal, 1927.V.1* (document C.196.M.70.1927.V), p. 104.

¹¹ *Idem*, *V.Legal, 1929.V.3* (document C.75.M.69.1929.V), p. 74.

¹² *Ibid.*, p. 78.

⁹ Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 7, p. 19.

"1. International responsibility is incurred by a State if damage is sustained by a foreigner as a result of acts or omissions of its officials, acting within the limits of their authority, when such acts or omissions contravene the international obligations of the State.

"2. International responsibility is likewise incurred by a State if damage is sustained by a foreigner as a result of unauthorized acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State.

"International responsibility is, however, not incurred by a State if the official's lack of authority was so apparent that the foreigner should have been aware of it and could, in consequence, have avoided the damage."¹³

9. These three texts, especially the last two, contain the basic principle which has been confirmed by international practice: the responsibility of the State is involved if the official acted within the limits of his competence. Likewise, there seems to be general agreement that the State also incurs responsibility if the official acted "under cover of his official character", although possibly in excess of his functions. The essential point in this second type of responsibility is the fact that the act or omission which causes the injury may occur precisely by reason of the official function and authority of the agent.¹⁴ The saving clause in the last paragraph of article 8 as approved by the Third Committee of the Conference is self-explanatory: if the lack of authority or the excess of competence is so plain and obvious that the alien can be aware of it and avoid the injury, the situation is analogous, if not identical, to that which arises when the official acts in his private capacity.

10. In the light of a number of precedents from practice, an attempt has been made to distinguish between acts of "higher authorities" and those of "subordinate officers or employees". Article 7 of the Harvard Law School draft, quoted below, makes this distinction:

"(a) A State is responsible if an injury to an alien results from the wrongful act or omission of one of its higher authorities within the scope of the office or function of such authority, if the local remedies have been exhausted without adequate redress.

"(b) A State is responsible if an injury to an alien results from the wrongful act or omission of one of its subordinate officers or employees within the scope of his office or function, if justice is denied to the injured alien, or if, without having given adequate redress to the injured alien, the State has failed to discipline the officer or employee."¹⁵

In the comment on this article, the reason for the distinction is explained as follows: It is only rarely that acts or omissions of "higher authorities" of the State are

¹³ League of Nations publication, *V.Legal*, 1930.V.17 (document C.351(c).M.145(c).1930.V), p. 237.

¹⁴ See, for example, Antonio Sánchez de Bustamante y Sírvén, *Derecho internacional público* (Havana, Carasa y Cía, 1936), vol. III, p. 495.

¹⁵ Harvard Law School, *op. cit.*, p. 157.

reviewable, whereas in the case of subordinate officers or employees, "the State may be responsible if it fails to discipline the subordinate officer or employee or if it denies justice to the injured alien."¹⁶ This distinction, which was introduced by Borchard in the Harvard draft, has been much criticized. Eagleton, for example, says that the cases in which this distinction appears were decided according to different criteria, and that, where responsibility was not admitted, the principal ground of the ruling was the non-exhaustion of local remedies.¹⁷ The comment of the Harvard Research authorities actually reaches the same conclusion, which raises the question how far it is necessary and justifiable to maintain the distinction in the codification of the general principles of responsibility.

11. If the official acted in a capacity wholly unrelated to his office or function and commits a purely private act, such as homicide, theft or other crime, then the opinion of learned writers and practice agree unanimously that the State does not incur any responsibility for the said act. This is readily understandable, for neither the status of the official nor the official function has anything to do with the action injuring the alien in his person or property. In so far as there is any responsibility, which there may be in certain cases, it will originate in the State's conduct with respect to the injurious act; in other words, in some new act or omission on the part of some other organ or official of the State. In brief, these cases of responsibility fall within the category of those originating in "acts of private persons", which will be considered in a later chapter.

8. THE "DENIAL OF JUSTICE"

12. The last question to be discussed in this chapter is this: "Under what conditions and in what circumstances can the conduct of the judiciary involve the international responsibility of the State?" In cases of responsibility of this type, the problem is the definition of the term "denial of justice", which is constantly employed in learned writings, in diplomatic practice, in international case-law and in codifications. In the first place, "denial of justice" has sometimes been interpreted in a broad sense as including all the acts or omissions capable of giving rise to international responsibility on the part of the State for injuries caused to the person or property of aliens, independently of the organ which may have been the proximate cause of such injury. We find this very broad conception of the term even in arbitral opinions.¹⁸ As a general rule, of course, "denial of justice" is construed in a narrower sense as including only acts and omissions of the judicial authorities, acts or omissions of some organ or official of the State concerned with the administration of justice, and at times merely some of these acts and omissions. Yet, even within the limits of this interpretation there is no unanimity concerning the acts and omissions

¹⁶ *Ibid.*, p. 158.

¹⁷ Clyde Eagleton, *The Responsibility of States in International Law* (New York, The New York University Press, 1928), pp. 47-49.

¹⁸ See references to these opinions in Herbert W. Briggs (ed.), *The Law of Nations: Cases, Documents and Notes*, 2nd ed. (New York, Appleton-Century-Crofts, Inc., 1952), pp. 677 and 678.

which truly give rise to responsibility. In other words, the authorities do not agree under what conditions and in what circumstances the conduct of the judiciary with respect to aliens involves the international responsibility of the State.

13. Unfortunately, the international case-law on this point is somewhat confusing. Not only are there conflicting decisions by arbitration tribunals and claims commissions, but also the precedents, considered as a whole, do not yield any general and objective criteria applicable to situations which occur in reality. Practically all types of situations are dealt with and described in the decisions, but one will look in vain for specific criteria by reference to which the act or omission was held capable of giving rise, or of not giving rise, to responsibility on the part of the State.¹⁹ And these are precisely the criteria one would like to discover, at least for the purposes of codification.

14. In this respect, the draft codifications cited above offer much surer guidance. It will be noticed that although these drafts do not always agree on the definition of the acts and omissions which give rise to responsibility, they do in general agree remarkably on fundamental points. The following extract is taken from the conclusions of the Guerrero report.

"6. The duty of the State as regards legal protection must be held to have been fulfilled if it has allowed foreigners access to the national courts and freedom to institute the necessary proceedings whenever they need to defend their rights.

"It therefore follows:

"(a) That a State has fulfilled its international duty as soon as the judicial authorities have given their decision, even if those authorities merely state that the petition, suit or appeal lodged by the foreigner is not admissible;

"(b) That a judicial decision, whatever it may be, and even if vitiated by error or injustice, does not involve the international responsibility of the State.

"7. On the other hand, however, a State is responsible for damage caused to foreigners when it is guilty of a *denial of justice*.

Denial of justice consists in refusing to allow foreigners easy access to the courts to defend those rights which the national law accords them. A refusal of the competent judge to exercise jurisdiction also constitutes a *denial of justice*.²⁰

The conclusions lay down some specific rules, including a general principle, namely, there is no responsibility if the alien had unrestricted access to the courts and was permitted to institute the proceedings provided for by the municipal law. If these conditions are not fulfilled, the case will be one of "denial of justice" which, consequently, engages the international responsibility of the State. Apart from this particular instance, the conduct of the judicial authorities does not give rise to responsibility.

¹⁹ Concerning these judicial precedents, see Harvard Law School, *op. cit.*, pp. 181-187.

²⁰ League of Nations publication, *V.Legal, 1927.V.1* (document C.196.M.70.1927.V), p. 104.

Accordingly, the term "denial of justice" (in the sense of acts or omissions on the part of the judiciary which involve international responsibility) expressly excludes rulings declaring a suit inadmissible, judicial error and unjust decisions.

15. Other codifications contain stricter definitions of the acts or omissions which may give rise to responsibility. For example, the draft of the Institute of International Law provides as follows:

V

"The State is responsible on the score of denial of justice:

"1. When the tribunals necessary to assure protection to foreigners do not exist or do not function.

"2. When the tribunals are not accessible to foreigners.

"3. When the tribunals do not offer the guarantees which are indispensable to the proper administration of justice.

VI

"The State is likewise responsible if the procedure or the judgement is manifestly unjust, especially if they have been inspired by ill-will toward foreigners, as such, or as citizens of a particular State."²¹

According to this draft, it is not only the denial of access to the courts which constitutes "denial of justice" but also the mere fact that the courts "necessary to assure protection to foreigners do not exist or do not function" or that the courts do not offer the guarantees "indispensable to the proper administration of justice". In addition, the draft includes "manifestly unjust" judgements among the acts involving responsibility. The purport of article 9 of the Harvard Research draft is essentially the same.²²

16. Other codifications follow similar lines, though their language is considerably less strict; examples are basis of discussion No. 5 drafted by the Preparatory Committee of the Hague Conference and the text approved by the Third Committee of the Conference. The former reads as follows:

"A State is responsible for damage suffered by a foreigner as the result of the fact that:

"1. He is refused access to the courts to defend his rights.

"2. A judicial decision which is final and without

²¹ Harvard Law School, *op. cit.*, p. 229.

²² Article 9 reads as follows: "A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable in the proper administration of justice, or a manifestly unjust judgement. An error of a national court which does not produce manifest injustice is not a denial of justice". See Harvard Law School, *op. cit.*, p. 173.

appeal is incompatible with the treaty obligations or other international obligations of the State.

"3. There has been unconscionable delay on the part of the courts.

"4. The substance of a judicial decision has manifestly been prompted by ill-will toward foreigners as such or as subjects of a particular State."²³

The text approved by the Third Committee appears to have been influenced by the basis of discussion but was less explicit.²⁴ The cases described in paragraphs 1, 3 and 4 have their parallels, in identical or similar terms, in some of the drafts cited earlier. The contingency referred to in paragraph 2, however, is not dealt with in other drafts; the passage in question is somewhat vague and the Preparatory Committee did not elaborate on its meaning in its observations to the Conference. Still, in the light of the replies of Governments on which the Committee relied, and of some arbitral decisions which have dealt with this question, this paragraph 2 might be interpreted to mean that a judicial decision, although in conformity with municipal law, involves responsibility if it is incompatible with some international obligation of the State. If this interpretation of the basis of discussion is correct, there is no doubt that it contains a rule which may have considerable significance in certain cases. But this is a point which will be discussed further below.

17. The inter-American codifications reveal a different line of thought. The Convention relative to the Rights of Aliens, signed at the Second International Conference of American States (Mexico City, 1902), stipulates that claims shall not be made, through diplomatic channels, "except in the cases where there shall have been, on the part of the Court, a manifest denial of justice, or unusual delay, or evident violation of the principles of International Law".²⁵ The resolution on "International Responsibility of the State", adopted by the Seventh International Conference of American States (Montevideo, 1933), reduces the possible cases of responsibility to two: cases where there is a manifest denial of justice or unreasonable delay of justice. And it adds that these cases "shall always be interpreted restrictively, that is, in favour of the sovereignty of the State in which the difference may have

²³ League of National publication, *V.Legal*, 1929.V.3 (document C.75.M.69.1929.V), p. 48.

²⁴ Article 9 reads as follows: "International responsibility is incurred by a State if damage is sustained by a foreigner as a result of the fact: (1) That a judicial decision, which is not subject to appeal, is clearly incompatible with the international obligations of the State; (2) That, in a manner incompatible with the said obligations, the foreigner has been hindered by the judicial authorities in the exercise of his right to pursue judicial remedies or has encountered in the proceedings unjustifiable obstacles or delays implying a refusal to do justice. The claim against the State must be lodged not later than two years after the judicial decision has been given, unless it is proved that special reasons exist which justify extension of this period." League of National publication, *V.Legal*, 1930.V.17 (document C.351.(c).M.1145(c).1930.V), p. 237.

²⁵ *The International Conferences of American States, 1889-1928* (New York, Oxford University Press, 1931), p. 91.

arisen".²⁶ Project No. 16 on "Diplomatic Protection" prepared by the American Institute of International Law in 1925, makes provision for the three contingencies mentioned in the Convention of 1902, but in article IV adds the following definition of "denial of justice":

"Denial of justice exists:

"(a) When the authorities of the country where the complaint is made interpose obstacles not authorized by law in the exercise by the foreigner of the rights which he claims;

"(b) When the authorities of the country to which the foreigner has had recourse have disregarded his rights without legal reason, or for reasons contrary to the principles of international law;

"(c) When the fundamental rules of the procedure in force in the country have been violated and there is no further appeal possible." (A/CN.4/96, annex 7).

Whatever view one takes of the enumeration of the acts and omissions referred to in these codifications, their outstanding characteristic lies in the general and fundamental conception behind them. In the codifications cited, the terms in which the acts of the judiciary are described conform, expressly or by implication, with the "international standard of justice", in the sense that, even if there has been no violation of municipal law, the State incurs responsibility if the act or omission constitutes disregard of some generally accepted "standard" in the matter of judicial organization or procedure. In the inter-American codifications, on the other hand, at least in so far as they relate to "denial of justice" and "unusual delay", the definition of the act or omission for the purpose of determining international responsibility depends exclusively on municipal law. In fact, all of them contain other articles (discussed in detail in the writer's first report (A/CN.4/96, chap. VI, sect. 21), which specifically apply the principle of the equality of nationals and aliens in these cases of responsibility.

18. It will be seen that in the matter of responsibility for the conduct of judicial bodies this is the fundamental problem: is the act or omission which caused the injury to be judged in conformity with an international standard or with the country's own municipal law? The next chapter will seek to demonstrate that the problem cannot and should not be presented in terms of irreconcilable opposites, as was the practice in the past. The acts or omissions meant here are, of course, those which violate *fundamental* human rights; for those which violate other rights are dealt with either in article 4 or in other provisions of the Special Rapporteur's draft.

CHAPTER III

Violation of fundamental human rights

ARTICLE 5

1. The State is under a duty to ensure to aliens the

²⁶ See *The International Conferences of American States, First Supplement, 1933-1940* (Washington, D.C., Carnegie Endowment for International Peace, 1940), p. 92.

enjoyment of the same civil rights, and to make available to them the same individual guarantees as are enjoyed by its own nationals. These rights and guarantees shall not, however, in any case be less than the "fundamental human rights" recognized and defined in contemporary international instruments.

2. In consequence, in case of violation of civil rights, or disregard of individual guarantees, with respect to aliens, international responsibility will be involved only if internationally recognized "fundamental human rights" are affected.

ARTICLE 6

1. For the purposes of the foregoing article, the expression "fundamental human rights" includes, among other, the rights enumerated below:

- (a) The right to life, liberty and security of person;
- (b) The right of the person to the inviolability of his privacy, home and correspondence, and to respect for his honour and reputation;
- (c) The right to freedom of thought, conscience and religion;
- (d) The right to own property;
- (e) The right of the person to recognition everywhere as a person before the law;
- (f) The right to apply to the courts of justice or to the competent organs of the State, by means of remedies and proceedings which offer adequate and effective redress for violations of the aforesaid rights and freedoms;
- (g) The right to a public hearing, with proper safeguards, by the competent organs of the State, in the determination of any criminal charge or in the determination of rights and obligations under civil law;

(h) In criminal matters, the right of the accused to be presumed innocent until proved guilty; the right to be informed of the charge made against him in a language which he understands; the right to speak in his defence or to be defended by a counsel of his choice; the right not to be convicted of any punishable offence on account of any act or omission which did not constitute an offence, under national or international law, at the time when it was committed; the right to be tried without delay or to be released.

2. The enjoyment and exercise of the rights and freedoms specified in paragraph 1 (a), (b), (c), and (d) may be subjected to such limitations or restrictions as the law expressly prescribes for reasons of internal security, the economic well-being of the nation, public order, health and morality or to secure respect for the rights and freedoms of others.

Commentary

9. THE INTERNATIONAL RECOGNITION OF HUMAN RIGHTS

1. In the Special Rapporteur's first report (A/CN.4/96) the question of human rights was treated in connexion with the "doctrine of diplomatic protection" and formed the subject of basis of discussion No. IV (chapter X). In chapter VI (paras 134 and 135) the report stated:

"In traditional international law the 'responsibility of States for damage done in their territory to the person or property of foreigners' frequently appears closely bound up with two great doctrines or principles: the so-called 'international standard of justice', and the principle of the equality of nationals and aliens. The first of these principles has been invoked in the past as the basis for the exercise of the right of States to protect their nationals abroad, while the second has been relied on for the purpose of rebutting responsibility on the part of the State of residence when the aliens concerned received the same treatment and were granted the same legal or judicial protection as its own nationals. Although, therefore, both principles had the same basic purpose, namely, the protection of the person and of his property, they appeared, both in traditional theory and in past practice, as mutually conflicting and irreconcilable."

"Yet, if the question is examined in the light of international law in its present stage of development, one obtains a very different impression. What was formerly the object of these two principles—the protection of the person and of his property—is now intended to be accomplished by the international recognition of the essential rights of man. Under this new legal doctrine, the distinction between nationals and aliens no longer has any *raison d'être*, so that both in theory and in practice these two traditional principles are henceforth inapplicable. In effect, both of these principles appear to have been outgrown by contemporary international law."

2. In what manner, and to what extent, then, have these two traditional principles been outgrown by the development of international law? Here again, the first report offers an answer. The "international standard of justice" was evolved and obtained recognition at a time when ideas differed from those which prevail at present: international law recognized and protected the essential rights of man in his capacity as an alien, or, in other words, by virtue of his status as a national of a certain State. The principle of equality between nationals and aliens, in its turn, was formulated in order to counteract the consequences of the difference in the status which the law attached to nationals and aliens. Both principles had therefore the same basis; the distinction between two categories of rights and two types of protection. That distinction disappeared from contemporary international law when that law gave recognition to human rights and fundamental freedoms without drawing any distinction between nationals and aliens. The object of the "internationalization" (to coin a term) of these rights and freedoms is to ensure the protection of the legitimate interests of the human person; human beings, as such, are under the direct protection of international law.

3. In this connexion, it should again be pointed out that the fact that these two traditional principles are no longer applicable does not necessarily imply that the new conception of the law ignores their essential elements and basic purposes. On the contrary, the "international recognition of human rights and fundamental freedoms" constitutes precisely a synthesis of the two principles. From

a study of the United Nations Charter and of the regional instruments which provide for such international recognition, and from the two great declarations and other instruments which enumerate and define these rights and freedoms, it becomes evident that all of them accord a measure of protection which goes well beyond the *minimum* protection which the rule of the "international standard of justice" was meant to ensure to aliens. Moreover, in all these documents there is no reference to any case or circumstance in which aliens enjoy a legal status more favourable than that of nationals. In reality, as will also be seen in the next section, the idea of equality of rights and freedoms is the very essence of all these instruments.

4. The foregoing needs to be amplified only by one remark, concerning what seems the only possible method of making provision in this codification for the protection of internationally recognized human rights. Not all these rights are equally relevant to this codification; indeed, many of them are wholly irrelevant. In this respect, the international responsibility of the State extends solely to acts and omissions which infringe particular rights of the alien, and not to all the rights which he possesses or would like to claim. Only in its extreme expressions did the doctrine of the international standard aspire to protect all the rights of the alien. Nor did the principle of equality cover all these rights. In both cases the idea of protection related solely to certain rights, namely, those which modern constitutional provisions recognize as *fundamental* or *essential*.

10. FUNDAMENTAL RIGHTS AS EMBODIED IN POST-WAR INSTRUMENTS

5. The principal sources of these rights are: the United Nations Charter, the Charter of the Organization of American States, the American Declaration of the Rights and Duties of Man (Bogotá, 1948), the Universal Declaration of Human Rights (Paris, 1948), the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950), and the draft covenant on civil and political rights prepared by the United Nations Commission on Human Rights (1954).

6. The first two neither enumerate nor define these rights, but confine themselves to proclaiming them and to stipulating certain obligations concerning their observance and effectiveness. For example, Article 1 of the United Nations Charter states that one of the purposes of the United Nations is "to achieve international co-operation... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion". The Charter admittedly does not contain any provision that binds Member States in law to respect these fundamental rights and freedoms or to guarantee their effective exercise. However, this is a defect of form only, inasmuch as the binding nature of the obligation imposed on Member States is implied in other provisions. Under Article 55, for example, "the United Nations shall promote... universal respect for, and observance of, human rights and fundamental freedoms for all...". And under Article 56, "all Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of

the purposes set forth in Article 55." The Charter of the Organization of American States, which was signed three years later, also provides for the recognition and protection of human rights and fundamental freedoms. Article 5 reaffirms the principles on which the Organization is based and proclaims "the fundamental rights of the individual without distinction as to race, nationality, creed, or sex". And the chapter relating to "Fundamental Rights and Duties of States" categorically stipulates that, in the free development of its cultural, political and economic life, "the State shall respect the rights of the individual".

7. These human rights and fundamental freedoms are enumerated and defined in the supplementary instruments mentioned above. Broadly speaking, the catalogue of the rights and freedoms is identical in all these instruments, and the treatment is also largely analogous. For the purposes of the present draft, they may be conveniently discussed under the following heads.

(a) Equality of rights and equality before the law

8. Both in the United Nations Charter and in the Charter of the Organization of American States the fundamental rights are recognized "without distinction" based on racial, religious or other reasons. The other instruments are more explicit in stipulating this "equality of rights". The Universal Declaration of Human Rights, for instance, states:

"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (article 2, paragraph 1).

The corresponding provision of the draft covenant (article 2, paragraph 1) is to the same effect. From the point of view of the international responsibility of the State, it is particularly noteworthy that nationality is not included among the reasons or factors which are expressly mentioned in connexion with the recognition of the equality of rights.

9. "Equality before the law" is a corollary of the foregoing principle, and is in some ways complementary thereto. In article 7 of the Universal Declaration it is expressed as follows:

"All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination".

The terms of article II of the American Declaration are analogous. The fundamental idea is that of "protection against any discrimination" that is incompatible with the equality of rights laid down in these instruments. The two which have been cited are the only ones in which this idea is enunciated in general terms. In the Charters, as well as in the two declarations, the concept of equality of protection is applied to various concrete situations, in order that the equality of protection should be effective with respect to all the rights and guarantees proclaimed. This, however, may be better appreciated from a closer inspection of those rights and guarantees.

(b) Substantive rights

10. Naturally, not all the rights enunciated in the above instruments are *fundamental* human rights, or at least not all can be regarded as fundamental for the purposes of the present codification. In some of the cases it is easy to see that a particular right or freedom is not truly *fundamental* in the strict sense of the term, but in others the use of the term will depend on the view one takes of the content of the right or freedom in question. For the purposes of this codification, however, the important point is to indicate those rights and freedoms whose *essential* or *fundamental* character appears to be beyond all doubt.

11. This category includes, in the first place, the "right to life, liberty and the security of person", as proclaimed in the Universal Declaration (article 3), and in the corresponding provisions of the other instruments mentioned. The rights which are enunciated in these provisions and which are formulated in general terms have different forms of expression and application. Sometimes the case contemplated is that in which exceptions are made to the recognition or exercise of the rights; at other times the reference is to the specific form which the guarantee takes. An illustration of one of these types of provision is offered by article 6 of the draft covenant, which states that "No one shall be arbitrarily deprived of his life"; whilst an example of the other is article 5 of the European Convention: "No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law". Actually, however, these various forms of expressing and applying the right to life, liberty and security constitute the judicial and other guarantees provided by the instruments themselves; as such, they will be discussed below.

12. A second group of substantive rights consists of the rights to the inviolability of the privacy, home and correspondence of the person, and to respect for honour and reputation. In this connexion the draft covenant, which is based on the earlier declarations, stipulates in article 17:

"1. No one shall be subjected to arbitrary or unlawful interference with his privacy, home or correspondence, nor to unlawful attacks on his honour and reputation.

"2. Everyone has the right to the protection of the law against such interference or attacks."

Furthermore, the European Convention interprets the scope of the "protection" which the law is to extend to these interests in providing in article 8, paragraph 2:

"There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

This provision epitomizes the limitations or conditions to which the recognition and protection of these rights are subordinated. Since public and social interests may prevail

over the rights, the State's obligation to respect the rights is not absolute.

13. The treatment is similar in the case of other rights, such as freedom of thought, conscience and religion, for which all the instruments make provision. For example, the individual's freedom to profess his own religion or beliefs is expressly governed under the draft covenant by the "limitations... prescribed by law and... necessary to protect public safety, order, health or morals or the fundamental rights and freedom of others" (article 18, paragraph 3); and as regards freedom of expression, the draft covenant states that this is a right which "carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall be such only as are provided by law and necessary, (1) for respect of the rights or reputation of others, (2) for the protection of national security or of public order, or of public health or morals" (article 19, paragraph 3).

14. The right to own property is another of the rights recognized in the instruments mentioned. The Universal Declaration states in article 17: "Everyone has the right to own property alone as well as in association with others." A second paragraph of the same article adds: "No one shall be arbitrarily deprived of his property". The object of the word "arbitrarily" seems to allow for exceptions in contingencies in which the State may legitimately deprive persons of their property or goods. This is also the interpretation of the provision relating to private property rights in the Protocol to the European Convention, signed at Paris on 20 March 1952, to ensure the collective implementation of certain rights and freedoms not provided for in the Convention. Article 1 of the Protocol states: "... No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law". This right, in so far as it may be affected by acts of expropriation, will be discussed further in the next chapter.

15. The last substantive right to be mentioned here may be of special interest for the purposes of this codification. According to article XVII of the American Declaration, "Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights." The Universal Declaration and the draft covenant also state quite simply that everyone has the right to recognition everywhere as a person before the law (articles 6 and 16, respectively). When this article was discussed during the preparation of the draft covenant, the general idea was "to ensure recognition of the legal status of every individual and of his capacity to exercise rights and enter into contractual obligations".²⁷ Clearly, the recognition of the juridical personality and capacity of every individual is intended to remedy the more or less unfavourable treatment extended to aliens by the legislation of practically all countries in the world, in the form of restrictions and special obligations affecting their right to acquire property, their contractual capacity, appearance in court, etc. The dominant idea of these instruments is to abolish such limitations affecting the personality of the

²⁷ Official Records of the General Assembly, Tenth Session, Annexes, agenda item 28 (part II), document A/2929, p. 46.

individual in civil law, so that he may be recognized as possessing and enjoying all rights of this nature which are by law conferred upon nationals.

(c) *Judicial and other guarantees*

16. The American Declaration contains the following article: "Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights" (article XVIII). A similar general provision occurs in the other instruments. The Universal Declaration speaks of "the right to an effective remedy by the competent national tribunals . . ." (article 8); and the draft covenant says it is the duty of the State "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity" (article 2, paragraph 3 (a)). The language of article 13 of the European Convention is similar. The object of these provisions is apparently to lay down the general principle that every person should have at his disposal judicial or other remedies which offer an adequate and effective means of asserting his rights.

17. Most of the guarantees stipulated in the various instruments relate to criminal proceedings. In some cases, however, they also relate to civil proceedings. For example, article 14 of the draft covenant (as distinct from the two declarations) provides: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

18. So far as criminal proceedings are concerned, all the instruments mentioned provide, in identical or similar terms, that the accused shall have the following rights and guarantees: the right to be presumed innocent until proved guilty; the right to be informed of the charge against him, in a language which he understands; the right to have adequate time and facilities for the preparation of his defence; the right to speak in his defence or to be defended by a counsel of his choice, and so forth. It is also stipulated that no one shall be convicted of any punishable offence on account of any act or omission which did not constitute an offence, under national or international law, at the time when it was committed.

19. Some of these guarantees represent forms of expressing and applying certain of the substantive rights referred to above. For example, in connexion with the right to freedom and security of the person, the instruments in question lay down the following guarantees, among others: the right of every detained or imprisoned person to be informed immediately of the charge against him, and to be tried without delay or to be released.

11. **METHOD ADOPTED IN THE DRAFT**

20. For the purposes of the codification of the topic dealt with in this chapter three methods are possible. One method would be to lay down a general rule, under which

the specific acts or omissions on the part of organs or officials of the State would be judged in the light of existing instruments that enumerate and define the fundamental human rights. The draft would then say, simply, that the State incurs international responsibility for injuries sustained by aliens in their person or property if internationally recognized fundamental human rights have been violated. If this method were employed, however, the text would be open to the serious criticism of uncertainty, for at the present stage of development of the international law relating to this topic the question whether particular rights can or cannot be treated as "internationally recognized fundamental human rights" would frequently be the subject of controversy. Accordingly, what is needed is a method which will yield a more precise rule.

21. An enumeration—a provision itemizing the various rights and guarantees, the violation of which would give rise to responsibility—would naturally be the most effective method. But since no single instrument is now in force with respect to all or to a great majority of States, an attempt to enumerate all these rights and guarantees would undoubtedly encounter serious difficulties. Moreover, the enumeration would be bound to be restrictive—with the consequence that it might omit certain rights and guarantees which are now regarded as "fundamental human rights". Alternatively, the enumeration might be too broad and include some rights which are not genuine "fundamental human rights".

22. There is a third method, which has all the advantages of the first two and yet none of their defects. This would be a "mixed" method—a text containing both a general definition and an enumeration. This is the method adopted in the Special Rapporteur's draft laid before the Commission. In any specific situation it is possible to apply articles 5 and 6, either directly (i.e. where the right or freedom in question is expressly mentioned in the non-exhaustive enumeration of article 6, paragraph 1), or else by analogy with the rights and freedoms described in that clause as "fundamental" for the purposes of article 5.

CHAPTER IV

Non-performance of contractual obligations and acts of expropriation

ARTICLE 7

Contractual obligations in general

1. The State is responsible for the injuries caused to an alien by the non-performance of obligations stipulated in a contract entered into with that alien or in a concession granted to him, if the said non-performance constitutes an act or omission which contravenes the international obligations of the State.

2. For the purposes of the provisions of the foregoing paragraph, the repudiation or breach of the terms of a contract or concession shall be deemed to constitute an "act or omission which contravenes the international obligations of the State" in the following cases, that is to say, if the repudiation or breach:

- (a) Is not justified on grounds of public interest or of the economic necessity of the State;
 - (b) Involves discrimination between nationals and aliens to the detriment of the latter; or
 - (c) Involves a "denial of justice" within the meaning of article 4 of this draft.
3. None of the foregoing provisions shall apply if the contract or concession contains a clause of the nature described in article...*

* The article referred to in this paragraph will be drafted when the subjects remaining pending are studied.

ARTICLE 8

Public debts

The State is responsible for the injuries caused to an alien by the repudiation, or the cancellation, of its public debts, save in so far as the measure in question is justified on grounds of public interest and does not discriminate between nationals and aliens to the detriment of the latter.

ARTICLE 9

Acts of expropriation

The State is responsible for the injuries caused to an alien by the expropriation of his property, save in so far as the measure in question is justified on grounds of public interest and the alien receives adequate compensation.

Commentary

12. CONTRACTUAL OBLIGATIONS IN GENERAL

1. The above three articles deal with cases of responsibility which are closely interrelated, both by reason of the nature of the injuries caused and by reason of the type of act or omission that causes them. The injury in question here is invariably pecuniary, originating in the non-performance on the part of the State of residence of an obligation towards a particular alien. Apart from a few cases of expropriation in which there is no concession or other form of contract between the State and the individual, the hallmark of these cases of responsibility is accordingly the non-performance or non-observance of a contractual obligation. However, does a State which fails to perform an obligation of this kind really incur international responsibility? On this point, one well-known claims commission, after reviewing the jurisprudence, declared that it was impossible to hold either that there was a rule of international law establishing responsibility for violation of contract, or that there was no such rule.²⁸

²⁸ United States-Mexican General Claims Commission (Illinois Central Railroad Company Case). See *Opinions of Commissioners under the Convention concluded September 8, 1923, between the United States and Mexico—February 4, 1926, to July 23, 1927* (Washington, D.C., United States Government Printing Office, 1927), pp. 15 ff.

Dunn observes that "this subject presents a diversity of views among legal authorities and a confusion of precedents quite as great if not greater than any subject previously considered". (Frederick Sherwood Dunn, *The Protection of Nationals: A Study in the Application of International Law* (Baltimore, The Johns Hopkins Press, 1932), p. 163.)

2. What is the crux of the question? If both parties are States, the failure to perform contractual obligations undoubtedly involves some kind of international responsibility, but responsibility of this type falls outside the scope of the present report. If the obligations in question arise out of contracts between private persons of different nationality, the rules which apply are those of private international law. The failure to perform obligations of this type could only give rise to international responsibility indirectly, i.e. if an injury has been suffered by reason of some action or inaction of a local authority; but then the case would be one of denial of justice or of some other illegal act or omission on the part of a State organ or official. Nevertheless, there is a certain analogy between the obligations with which this chapter is concerned and the obligations under contracts to which private persons of different nationalities are parties. Learned opinion and practice are agreed that contracts made between the Government of a State and an alien are governed, so far as their conclusion and performance are concerned, by the municipal law of that State and not by public international law, for a private person who enters into a contract with a foreign Government *ipso facto* agrees to be bound by the local law with respect to all the legal consequences which may flow from that contract. If this is the correct view in law of the contractual relationship between a State and an alien, can it really be said that the obligations contracted by the State are "international", as they have to be before their non-performance can give rise to international responsibility?

3. This is certainly the consideration which decisively influenced the prevailing opinion on the subject, which is that the non-performance of contractual obligations of this type does not *per se* constitute an international wrong. Or, to put it differently, the failure to perform these obligations does not in itself engage the international responsibility of the State. Eagleton, who recognized the right of the private person's national State to intervene on his behalf and even resort to armed force to recover his claim, concedes that it is not only necessary to exhaust the local remedies but also that the claim should be based on the absence of such remedies or on the fact that they are dilatory.²⁹ Other authors have been more explicit on this point. In the opinion of one of them, it is often impossible in these cases to prove that an unlawful act exists, or that one of the parties possesses the specific right asserted in support of the contract, until the competent courts have determined the facts and ruled on the matter. For this reason, in order to substantiate an international claim of this kind, it is necessary to prove that the respondent Government has committed a wrong through its duly authorized agents, or that the claimant has suffered a denial of justice in attempting to secure redress.³⁰ Borchard himself, relying on cases which had arisen and had been decided in actual practice, was one of the first who helped to establish this opinion. Discussing the propriety of "diplomatic interposition" in these cases of respon-

²⁹ Eagleton, *op. cit.*, pp. 160, 167 and 168.

³⁰ Marjorie M. Whiteman, *Damages in International Law* (Washington, United States Government Printing Office, 1943), vol. III, p. 1558.

sibility, he contends that it would not lie "for the natural or anticipated consequences of the contractual relation, but only for arbitrary incidents or results, such as a denial of justice or flagrant violation of local or international law".³¹

4. This conception of the international responsibility which the State may incur owing to the non-performance of contractual obligations towards aliens is not reflected in all private and official codifications. The first codification to deal with this type of responsibility was the Harvard Law School draft. Its article 8 reads as follows:

"(a) A State is responsible if an injury to an alien results from its non-performance of a contractual obligation which it owes to the alien, if local remedies have been exhausted without adequate redress.

"(b) A State is not responsible if an injury to an alien results from the non-performance of a contractual obligation which its political subdivision owes to an alien, apart from responsibility because of a denial of justice."³²

5. The commentary explains that it is the duty of the State to perform these contractual obligations and that "subject to the exhaustion of local remedies, it will be responsible to the alien's State for non-performance. The article implies, of course, an unlawful or wrongful non-performance." The commentary adds that the purpose of paragraph (b) is to make an exception to the rule laid down in article 3 which admits the responsibility of the State for an injury attributable to one of its political subdivisions.³³ As can be seen, in both cases responsibility is admitted if the non-performance of the contractual obligation is accompanied by an act or omission that constitutes an international wrong.

6. The bases of discussion prepared by the Preparatory Committee of The Hague Codification Conference diverged considerably from the prevailing doctrine. The relevant texts are reproduced below:

"Basis of discussion No. 3

"A State is responsible for damage suffered by a foreigner as the result of the enactment of legislation which directly infringes rights derived by the foreigner from a concession granted or a contract made by the State.

"It depends upon the circumstances whether a State incurs responsibility where it has enacted legislation general in character which is incompatible with the operation of a concession which it has granted or the performance of a contract made by it.

"Basis of discussion No. 8

"A State is responsible for damage suffered by a foreigner as the result of an act or omission on the part of the executive power which infringes rights derived by the

foreigner from a concession granted or a contract made by the State.

"It depends upon the circumstances whether a State incurs responsibility when the executive power has taken measures of a general character which are incompatible with the operation of a concession granted by the State or with the performance of a contract made by it.

"Basis of discussion No. 4

"A State incurs responsibility if, by a legislative act, it repudiates or purports to cancel debts for which it is liable.

"A State incurs responsibility if, without repudiating a debt, it suspends or modifies the service, in whole or in part, by a legislative act, unless it is driven to this course by financial necessity.

"Basis of discussion No. 9

"A State incurs responsibility if the executive power repudiates or purports to cancel debts for which the State is liable.

"A State incurs responsibility if the executive power, without repudiating a State debt, fails to comply with the obligations resulting therefrom, unless it is driven to this course by financial necessity."³⁴

7. What were the Preparatory Committee's reasons in formulating the rules contained in bases of discussion Nos. 3 and 8? (Bases of discussion Nos. 4 and 9 will be discussed in the next section of this report, which deals with public debts). According to the Committee's observations, the replies received from Governments differed greatly with respect to the question whether responsibility existed in these cases. In its opinion, "certain difficulties will be met if a distinction is made between legislation [or executive measures, as the case may be] which directly infringes rights conferred by the State upon a foreigner in a concession or a contract and legislation of a general character which is incompatible with such concession or contract; as regards the latter, the responsibility of the State would seem to depend to some extent on the circumstances of the case."³⁵ As can be seen without difficulty, the distinction drawn by the Committee was not only unsupported by any evidence taken from practice but is also plainly artificial and unjustified. The lawfulness of a legislative or executive measure of the nature referred to in the basis of discussion does not, surely, depend on the generality or particularity of the measure, for if there are grounds justifying the adoption of the measure the State has an equal right to take action with respect to either particular (private) or general interests, regardless whether the particular interests are national or foreign. It would be more logical, and also far more consistent with the principles of international law governing responsibility, if the

³¹ Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (New York, The Banks Law Publishing Co., 1915), p. 284.

³² Harvard Law School, *op. cit.*, pp. 167 and 168.

³³ *Ibid.*, p. 168.

³⁴ League of Nations publication, *V. Legal*, 1929.V.3 (document C.75.M.69.1929.V), pp. 33 ff. (There is no provision on this subject in the draft approved in first reading by the Third Committee of the Conference).

³⁵ *Ibid.*, pp. 33 and 58.

distinction were drawn by reference to the discriminatory character (if any) of the measure in question; it would be held internationally unlawful if, while affecting both national and foreign interests, it discriminated against the latter.

8. Questions concerning pecuniary claims have been given special attention by the inter-American conferences and their codification committees.³⁶ At the request of the Inter-American Conference for the Maintenance of Peace (Buenos Aires, 1936), the Committee of Experts on the Codification of International Law prepared a report on the subject which was based both on precedents and on the discussions held at that Conference. After thorough study of the problem, the Committee approved the following draft articles:

"1. The High Contracting Parties pledge themselves, without any reservation, not to employ armed force for the collection of public debts or contractual debts.

"2. The High Contracting Parties agree not to intervene diplomatically in support of claims arising out of contracts, unless there has been a denial of justice or infraction of a generally recognized international duty.

"3. In the event of unjustified repudiation or breach of the terms of a contract and the failure to settle the claims by resort to local remedies and diplomatic negotiations, either creditor or debtor may demand and obtain the arbitration of the issue of unjustified repudiation or violation, denial of justice or infraction of a generally recognized international duty."³⁷

In the light of the above text, what are the constituent elements of international responsibility in the case of failure to perform or to observe contractual obligations? In the first place, the repudiation or breach of the terms of a contract will not constitute a basis for a claim in every case, but only in cases where the contracting State has committed some *unjustified* act. In the second place, before there can be arbitration, the local remedies and direct diplomatic negotiations must first be resorted to. Lastly, the international claim can only relate to the issues of "unjustified repudiation or violation, denial of justice or infraction of a generally recognized international duty". In this respect, the draft of the Committee of Experts agrees in substance with the prevailing doctrine on this subject.

13. PUBLIC DEBTS

9. Borchard was perhaps the first to distinguish claims based on contracts between a private person and a foreign Government from those arising out of bonds issued by a foreign Government. He says: "This distinction . . . is important, inasmuch as there is far less reason for governmental intervention to secure the payment of defaulted bonds of a foreign Government than there is in the case

³⁶ See the writer's first report (A/CN.4/96), section 4.

³⁷ See *Informes y Proyectos Sometidos por la Comisión de Expertos* (Washington, D.C., Pan American Union), p. 4. The report is signed by the following members: Afranio de Mello Franco, Chairman; Alberto Cruchaga Ossa; Luis Anderson and Edwin M. Borchard.

of breaches of concession and similar contracts."³⁸ In a memorandum submitted to the Committee of Experts, Accioly made the same distinction and explicitly indicated the reasons justifying it. According to this jurist, it is desirable to make a distinction between the non-payment of public debts and the breach of ordinary contractual obligations. In the first case, the reason for the non-performance of the obligation may be genuine and honest financial incapacity, for which the creditors ought to show some consideration, not only because the foreign Government did not enter into direct relations with them when it negotiated its loan, but more particularly because the creditors, when they acquired the bonds in question, should have been aware of the risks involved in such a transaction. Clearly, this will not be an admissible defence if the debtor Government acted fraudulently or in bad faith. In the case of ordinary contractual obligations the situation is different, inasmuch as the Government, acting like an individual, entered into direct relations with specific, known persons and the latter relied upon its word.³⁹

10. As will have been observed, bases of discussion Nos. 4 and 9 of the Preparatory Committee of The Hague Conference, quoted above, were drawn up without proper regard for this distinction and for the reasons supporting it. To some extent, the same may be said about the Committee's interpretation of the replies sent in by Governments on that subject. It is true that those replies admitted, in principle, the responsibility of the State for repudiation of public debts. But it is equally true that the comments and reservations made by Governments did not refer solely to the distinction, made in the bases of discussion, between the repudiation or purported cancellation of public debts and the suspension or modification of debt service in whole or in part. The majority of the replies contained a number of important exceptions to the general rule concerning responsibility. For example, some suggested that if the repudiation of a debt was justifiable, no claim would lie so long as the foreign creditors had been treated on a footing of equality with national creditors. Other replies distinguished between arbitrary acts on the part of a State and acts which it carried out for juridical reasons. Yet others pointed out that the public interest prevailed over private interests, whether the creditors were nationals or aliens.⁴⁰

11. These arguments are undoubtedly far more in keeping with the views of leading writers than are the distinctions and solutions contained in the Preparatory Committee's bases of discussion. Actually, when a State repudiates or purports to cancel its public debts, there can be no question of international responsibility, unless the measure cannot be justified by reasons of public interest, or unless it discriminates between nationals and aliens to the detriment of the latter.

³⁸ Borchard, *op. cit.*, p. 282.

³⁹ See *Informes y Proyectos Sometidos por la Comisión de Expertos* (Washington, D.C., Pan American Union), pp. 84 and 85. In the same sense, see Luis A. Podestá Costa, "La responsabilidad Internacional del Estado", *Cursos Monográficos* (Havana, Academia Interamericana de Derecho Comparado e Internacional, 1952), vol. II, p. 216.

⁴⁰ League of Nations publication, *V.Legal*, 1929, V.3 (document C.75.M.69.1929.V), pp. 37-40.

14. ACTS OF EXPROPRIATION

12. The codifications considered in this report and in its predecessor do not contain any provision specifically referring to acts of expropriation. This omission may be due to the fact that in most actual cases such acts involve the non-performance of an obligation derived from a concession or from some other type of contractual relationship. Nevertheless, there are some occasions when no contractual obligations of any kind are involved, inasmuch as the objects expropriated are assets or rights which have been acquired in some other way. For this reason, it is necessary to determine when and in what circumstances the State will incur international responsibility. In addition, however, even where there is a contract or concession, it will be equally necessary to determine the specific circumstances in which an act of expropriation can give rise to responsibility.

13. Most of the quite large number of precedents found in diplomatic practice offer an accurate guide to the rules of international law which govern this subject. One of the earliest and best known cases is that of the expropriation of the Delagoa Bay Railway (1900), which was arbitrated between Great Britain and the United States on one side and Portugal on the other. The *compromis* entered into by the parties to define the arbitration tribunal's terms of reference was concerned exclusively with the *quantum* of the indemnity payable by the Portuguese Government for having cancelled the railway concession. At no time was any question raised as to the validity of the act of expropriation itself; the only issue was the form and measure of the compensation to be paid to the aliens affected. The issue was put in similar terms in a case in 1911 brought by a number of countries whose nationals were going to be affected by draft legislation to establish an Italian State insurance monopoly. The same principles were also applied in the arbitration of the case of the expropriation of the Portuguese religious properties.⁴¹ Diplomatic practice furnishes more recent examples, but in these too (though in various guises) the really controversial issue has always been the duty of the State to compensate for the expropriated property.⁴²

14. The foregoing paragraphs explain the general tenor and dominant ideas in the replies of Governments to point III, No. 3, of the questionnaire drawn up by the Preparatory Committee of The Hague Conference. In keeping with the opinions expressed on the similar question mentioned above, these replies recognized expropriation as

⁴¹ For a fuller discussion of these precedents, see Alexander P. Fachiri, "Expropriation and International Law", *The British Year Book of International Law*, 1925, pp. 165-169.

⁴² For these more recent cases, see B. A. Wortley, "Expropriation in International Law", *The Grotius Society: Transactions for the Year 1947* (London, Longmans, Green and Co., 1948), vol. 33, pp. 25-48; Chargueraud-Hartmann, "Les intérêts étrangers et la nationalisation", *Etudes internationales*, vol. I (1948) (Brussels, Librairie Encyclopédique), pp. 331-354; Arthur K. Kuhn, "Nationalization of Foreign-Owned Property in its Impact on International Law", *The American Journal of International Law*, vol. 45 (1951), pp. 709-712; S. Friedman, *Expropriation in International Law* (London, Stevens and Sons Limited, 1953), *passim*.

one of the acts which the State could lawfully execute. Some replies added that in such cases the private interest should yield to the public interest, irrespective of the nationality of the persons affected. Others drew a distinction between cases in which there was an obligation arising out of a treaty, and those in which the rights affected had been acquired under municipal law; they recognized responsibility in the former cases only. Lastly, several argued from the principle of equality between nationals and aliens that the State would incur responsibility if in adopting measures of expropriation it discriminated against aliens.⁴³

15. In the jurisprudence of the former Permanent Court of International Justice, the question is more closely related to the doctrine of "vested rights". In conformity with the "generally accepted principles of international law generally" applicable to aliens, to which the Court certainly referred, it is the obligation of the State to respect vested rights. In particular, the Court developed this doctrine in the *Case concerning certain German interests in Polish Upper Silesia* (1926). In its judgement in this case, the Court said that acts of expropriation in the public interest and other similar measures were exceptions to the general principle of respect for vested rights.⁴⁴ The Court's attitude in this case is consistent with its statement in a later judgement: "In principle, the property rights and the contractual rights of individuals depend in every State on municipal law."⁴⁵ For the purpose of determining the form and measure of compensation in each case, the Court distinguished between acts of expropriation pure and simple and those not involving the non-performance of contractual obligations.⁴⁶

16. The authors who have made a careful study of the question have arrived at the same fundamental conclusions. According to Fachiri, no international responsibility will be incurred if the expropriation does not involve discrimination against aliens and if compensation is paid, always provided that the compensation is not so inadequate as to amount, in effect, to confiscation.⁴⁷ Sir John Fischer Williams goes further; he states that where no treaty or other contractual or quasi-contractual obligation exists by which a State is bound in its relations to foreign owners of property, no general principle of international law compels it not to expropriate except on terms of paying full or "adequate" compensation. In his opinion, this does not imply that a State is free to discriminate against foreigners

⁴³ League of Nations publication, *V. Legal*, 1929.V.3 (document C.75.M.69.1929.V), pp. 33-36. The Preparatory Committee did not draft a basis of discussion on this point because the replies disclosed substantial differences of opinion and doubts as to the exact meaning of the expression "vested rights" (*ibid.*, p. 37).

⁴⁴ Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 7, pp. 21 and 22.

⁴⁵ *Idem, Judgments, Orders and Advisory Opinions*, series A/B, No. 76 (The Panevezys-Saldutiskis Railway Case, 1939), p. 18.

⁴⁶ *Idem, Collection of Judgments*, series A, No. 17 (Case concerning the Factory at Chorzów), p. 48.

⁴⁷ Fachiri, *loc. cit.*, p. 171.

and attack their property alone.⁴⁸ Lastly, Kaeckenbeeck (who is familiar with the subject through experience), discussing rights acquired under concession or contract, takes the view that the freedom of the State to modify the existing rights by some general enactment does not in itself imply either the duty or the absence of a duty on the part of the State to compensate the owners of the rights for any injuries caused to them. And he adds that the question of the circumstances in which compensation is payable, or the fairness of compensation, is an independent question which in reality is likewise within the competence of the legislature. Moreover, as stated earlier, the machinery of diplomatic protection cannot legitimately be invoked, except in the case of discrimination against foreigners, unless the State of the legislator fails to conform to the minimum standard of civilized societies.⁴⁹

17. Article 9 is based on all the precedents and considerations cited above, and follows the general trend of the other two articles in this chapter. The only point requiring an explanation is why this article does not contain the clause on discrimination which appears in articles 7 and 8. The reason is obvious: acts of expropriation generally affect specific assets, the property of an individual or of a body corporate, and the owner may be either a national or an alien. That being so, the problem of discrimination obviously does not arise. Should the situation be otherwise (in that the measure affects the property both of nationals and of aliens), then the general principle would be applicable, namely, international responsibility is incurred if the indemnity is not identical for all owners, and if the discrimination is based on the status of the owners as nationals or aliens.

CHAPTER V

Acts of individuals and internal disturbances

ARTICLE 10

Acts of ordinary private individuals

The State is responsible for injuries caused to an alien by acts of ordinary private individuals, if the organs or officials of the State were manifestly negligent in taking the measures which are normally taken to prevent or punish such acts.

ARTICLE 11

Internal disturbances in general

The State is responsible for injuries caused to an alien in consequence of riots, civil strife or other internal disturbances, if the constituted authority was manifestly negligent in taking the measures which, in such circum-

⁴⁸ John Fischer Williams, "International Law and the Property of Aliens", *The British Year Book of International Law*, 1928, p. 28.

⁴⁹ Georges Kaeckenbeeck, "La protection internationale des droits acquis", *Recueil des cours de l'Académie de droit international*, 1937, I, p. 412.

stances, are normally taken to prevent or punish the acts in question.

ARTICLE 12

Acts of the constituted authority and of successful insurgents

1. The State is responsible for injuries caused to an alien by measures taken by its armed forces or other authorities for the purpose of preventing or suppressing an insurrection or any other internal disturbance, if the measures taken affected private persons directly and individually.

2. In the case of a successful insurrection, the international responsibility of the State is involved in respect of injuries caused to an alien if the injuries were the consequence of measures which were taken by the revolutionaries and which were analogous to the measures referred to in the foregoing paragraph.

Commentary

1. In the circumstances envisaged in this chapter of the draft, the author of the act which directly causes the injury to the alien is not an organ, or official, of the State but a person, or group of persons, acting in a private capacity. As it is one of the fundamental principles of international law on the subject of responsibility that the State cannot be held responsible except for "its own acts or omissions", its responsibility and the duty to make reparation can only arise in these cases if there is a second act or omission imputable to an organ of the State, or to one of its officials. As was stated in the writer's first report (A/CN.4/96, para. 73), the State's responsibility is not involved directly by the injurious act, but is rather the consequence of the conduct of its authorities with respect to the act. Viewed in these terms, the imputation of international responsibility will necessarily depend on the existence of factors and conditions extraneous to the actual event which caused the injury. This explains why, in doctrine and in practice, there has been so much argument, and such divergence of opinions, concerning the conditions which have to be present before the State can be truly said to be responsible.

2. In these cases, the problem whether the international responsibility of the State is purely *objective*, or whether it originates in a specific attitude deliberately adopted by some organ or official, does not even arise. For not only must there be a harmful act committed by an individual, but, in addition, it must be possible to attribute to the State some conduct with respect to the act that implies a specific attitude wilfully adopted by the organ or official (fault, *culpa*). Where imputability is determined by this indirect process, it is not difficult to see that what is in essence imputed to the State is not really the act or deed which causes the injury, but rather the non-performance of an international duty, a duty the content and scope of which are as a rule very hard to define, and in certain specific cases utterly undefinable. This "duty" is discussed in the next section, where, for the purpose of these cases of responsibility, it is formulated in terms of the concept or rule of "due diligence".

15. THE RULE OF "DUE DILIGENCE"

3. Some of the drafts prepared for The Hague Conference contain a provision which speaks in general terms of the standard or rule of "due diligence". One of these is the Harvard Law School draft, article 10 of which provides:

"A State is responsible if an injury to an alien results from its failure to exercise due diligence to prevent the injury, if local remedies have been exhausted without adequate redress for such failure. The diligence required may vary with the private or public character of the alien and the circumstances of the case."⁵⁰

4. The relevant comment explains the meaning and scope of this article as follows. "Due diligence" assumes that the State has jurisdiction to act, i.e. to take measures of prevention, and also that it has the opportunity to act. Due diligence is a standard and not a definition. What is "due diligence" in a given case is therefore often difficult to determine. The term "due diligence", as contrasted with the terms "means at its disposal" employed in article 8 of the Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War (The Hague, 1907), emphasizes the efficiency and care used by governmental instrumentalities, rather than the instrumentalities themselves. The responsibility of a State for failure to use diligence to prevent injuries to aliens must be distinguished from its responsibility for failure to use diligence to bring offenders to justice. The latter is a responsibility for denial of justice. It grows out of a State's exercise of the remedial function, while the former grows out of a State's duty to exercise the preventive function.⁵¹

5. Basis of discussion No. 10 drawn up by the Preparatory Committee of The Hague Conference expressed the same fundamental idea in another manner:

"A State is responsible for damage suffered by a foreigner as the result of failure on the part of the executive power to show such diligence in the protection of foreigners as, having regard to the circumstances and to the status of the person concerned, could be expected from a civilized State. The fact that a foreigner is invested with a recognized public status imposes upon the State a special duty of vigilance."⁵²

6. In its observations, the Preparatory Committee stated that the following points emerged from the replies received from Governments: the degree of vigilance must be such as may be expected from a civilized State; the diligence required varies with the circumstances; the standard cannot be the same in a territory which has barely been settled and in the home country; and the standard varies according to the persons concerned, in the sense that the State has a special duty of vigilance, and has therefore a greater responsibility, in respect of persons invested with a recognized public status. The reply of the Government of Poland stressed that the State was under a fundamental duty to lend the alien assistance and to protect his life and pro-

perty, but that international responsibility only arose in cases where there had been a serious breach of that duty.⁵³

7. The learned authorities are in almost unanimous agreement that the rule of "due diligence" cannot be reduced to a clear and accurate definition which might serve as an objective and automatic standard for deciding, regardless of the circumstances, whether a State was "diligent" in discharging its duty of vigilance and protection. On the contrary, the conduct of the authorities must, in each particular case, be judged in the light of the circumstances. In effect, therefore, the rule of "due diligence" is the expression *par excellence* of the so-called theory of fault (*culpa*), for if there is any category of cases in which it cannot be said that responsibility arises through the simple existence of a wrong it is surely the category dealt with in this chapter. Accordingly, though the rule is vague and, consequently, of only relative value in practice, there is no choice—so long as some better formula is not devised in its stead—but to continue to apply the rule of "due diligence" in these cases of responsibility.

8. For the purposes of its interpretation and application to the particular case in question, the rule of "due diligence" has been linked, for easily discernible reasons, to the "international standard of justice". Eagleton, for example, says that the State's performance must be measured by the international standard, because "it is not enough to say that the diligence required for the protection of citizens is sufficient for the alien".⁵⁴ At the same time, and for the same purposes, the rule has been linked to the principle of equality between citizens and aliens. For example, the Convention relative to the Rights of Aliens, signed at the Second International Conference of American States (Mexico City, 1902), provides in article 2:

"The States do not owe to, nor recognize in favor of, foreigners, any obligations or responsibilities other than those established by their Constitutions and laws in favor of their citizens."

"Therefore, the States are not responsible for damages sustained by aliens through acts of rebels or individuals, and in general, for damages originating from fortuitous causes of any kind, considering as such the acts of war, whether civil or national; except in the case of failure on the part of the constituted authorities to comply with their duties."⁵⁵

9. As will be shown below, the basic principle apparent in previous codifications, in the decisions of international tribunals, and in the works of the learned authorities is that there is a presumption against responsibility. In other words, the State is not responsible unless it displayed, in the conduct of its organs or officials, patent or manifest negligence in taking the measures which are normally taken in the particular circumstances to prevent or punish the injurious acts. This is the principle which is endorsed in the chapter of the Special Rapporteur's draft under comment here; the latter does not follow the casuistic

⁵⁰ Harvard Law School, *op. cit.*, p. 187.

⁵¹ *Ibid.*, pp. 187 and 188.

⁵² League of Nations publication, *V. Legal*, 1929.V.3 (document C.75.M.69.1929.V), p. 67.

⁵³ *Ibid.*, p. 65.

⁵⁴ Eagleton, *op. cit.*, pp. 130-131.

⁵⁵ *The International Conferences of American States, 1889-1928*, p. 91.

method employed by earlier authors and codifications that generally drafted elaborate provisions relating to the multiplicity of diverse circumstances which can occur in practice. In fact, the same method of codification might be employed, to a greater or lesser extent, with respect to all the other cases of responsibility. Yet, this method or technique would invariably lead to the same result, namely, an enumeration and detailed regulation which could never claim to be exhaustive, with the consequence that the codification would lose the technical and practical advantages offered by a general statement of the rules and principles.

16. ACTS OF PRIVATE INDIVIDUALS

10. Although in most of the cases actually occurring in practice the responsibility with which this chapter is concerned arises out of harmful acts committed in connexion with civil strife or other internal disturbances, and although the fundamental principle always remains the same, nevertheless the acts of ordinary private individuals should be distinguished and considered separately. In the course of the discussion which follows it will be found that the distinction is useful, if only as a means of facilitating the study of the problem. At this stage, it is sufficient to point out that, despite the weight of opinion to the contrary, there has always been firm resistance to the idea of attributing to the State any responsibility whatsoever for injuries resulting from the acts of ordinary private individuals. One familiar expression of this school of thought can be found in conclusion 5 of the Guerrero report, which states that "losses occasioned to foreigners by the acts of private individuals, whether they be nationals or strangers, do not involve the responsibility of the State". As will be shown later, however, the report admits that a State may, in certain circumstances, be responsible in cases of riot, revolution or civil war.⁵⁶

11. Most authorities on this subject still adhere essentially to the view enunciated by Grotius, who rejected the notion of "community liability" which was widely accepted in his day. In his opinion, the State could only be held responsible if its conduct with respect to the injurious act was inconsistent with its duties. The two most important and frequent forms of such conduct, according to Grotius, were *patientia* and *receptus*. The first of these two terms denotes the situation in which the State is aware of an individual's intention to perpetrate a wrongful act against a foreign State or sovereign, but fails to take the proper steps to thwart his designs; the second term denotes the situation in which the State receives an offender and, by refusing either to extradite or to punish him, assumes complicity in the offence. By such conduct, which constitutes tacit approval of the offence, the State tends to identify itself with the offender. And it is this tacit approval—and not the relationship between the individual and the community—which gives rise to the responsibility of the State.⁵⁷ In other words, the respon-

sibility of the State can only arise in such circumstances if its organs or officials have been guilty of an act or omission which in itself constitutes an international delinquency.

12. The difficulty lies in determining whether a specific act or omission comes within this category. As was pointed out above, the nature and scope of the State's duties in such cases are very difficult to define and are sometimes quite undefinable. There is, however, a large volume of relevant precedent from which one can derive at least the basic principle applicable in such cases of responsibility. Examples are given below of the manner in which this principle has been formulated in decisions of international tribunals and in previous codifications. As will be seen, both in the former and in the latter, the general rule in these cases is the international irresponsibility of the State, while responsibility is the exception to the rule.

13. In the famous arbitration of the *Alabama Claims* (1872), the Tribunal held that the British Government had "failed to use due diligence in the performance of its neutral obligations", and especially that it had "omitted, notwithstanding the warnings and official representations made by the diplomatic agents of the United States during the construction of the said number '290' [subsequently known as the *Alabama*], to take in due time any effective measures of prevention, and that those orders which it did give at last, for the detention of the vessel, were issued so late that their execution was not practicable".⁵⁸ In other cases, the (unlawful) act or omission giving rise to the responsibility of the State was not the State's failure to take prompt action to prevent the individual from committing the wrong, but its negligence or impotence in taking the necessary measures which any State ought to take to punish the act by prosecuting and imposing penalties on the wrongdoer. An example of this second category of acts or omissions imputable to the State is offered by the *Janes Claim* (1926). In that case, the Claims Commission awarded damages amounting to \$12,000, not because that figure corresponded to the injury caused by the original wrong but because the respondent Government had been guilty of an "international delinquency" in failing to measure up to "its duty of diligently prosecuting and properly punishing the offender".⁵⁹ International jurisprudence contains many other decisions illustrating the circumstances in which arbitral tribunals or commissions have held a State responsible, and the precise manner in which they have applied the rule of "due diligence".

14. As far as the various codifications are concerned, they differ *inter se* more in the matter of form than in the matter of substance. Among those which deal separately with the question of responsibility for acts of private individuals, the earliest statement is that contained in the 1927 draft prepared by the Institute of International Law. Article III of that draft reads as follows:

"The State is not responsible for injurious acts committed

⁵⁶ League of Nations publication, *V. Legal*, 1927.V.I (document C.196.M.70.1927.V), p. 104.

⁵⁷ Dionisio Anzilotti, *CORSO DI DIRITTO INTERNAZIONALE*, 3rd ed. (Rome, 1928).

⁵⁸ Charles G. Fenwick, *CASES ON INTERNATIONAL LAW*, 2nd ed. (Chicago, Callaghan and Company, 1951), p. 708.

⁵⁹ United States-Mexican General Claims Commission, *op. cit.*, p. 115.

by individuals except when the injury results from the fact that it has omitted to take the measures to which, under the circumstances, it was proper normally to resort in order to prevent or check such actions.”⁶⁰ Some of the bases of discussion drawn up by the Preparatory Committee of The Hague Conference contained the same fundamental idea as that underlying the Institute’s draft: the injury caused by the act of the individual must be attributable to the non-performance of a duty incumbent upon the State in the particular circumstances of the case. In some of the other bases, however, the Preparatory Committee dealt with specific situations and formulated new rules applicable to them. The following five bases of discussion are of special interest:

“Basis of discussion No. 10

“A State is responsible for damage suffered by a foreigner as the result of failure on the part of the executive power to show such diligence in the protection of foreigners as, having regard to the circumstances and to the status of the persons concerned, could be expected from a civilized State. The fact that a foreigner is invested with a recognized public status imposes upon the State a special duty of vigilance.

“Basis of discussion No. 17

“A State is responsible for damage caused by a private individual to the person or property of a foreigner if it has failed to show in the protection of such foreigner’s person or property such diligence as, having regard to the circumstances and to any special status possessed by him, could be expected from a civilized State.

“Basis of discussion No. 18

“A State is responsible for damage caused by a private individual to the person or property of a foreigner if it has failed to show such diligence in detecting and punishing the author of the damage as, having regard to the circumstances, could be expected from a civilized State.

“Basis of discussion No. 19

“The extent of the State’s responsibility depends upon all the circumstances and, in particular, upon whether the act of the private individual was directed against a foreigner as such and upon whether the injured person had adopted a provocative attitude.

“Basis of discussion No. 20

“If, by an act of indemnity, an amnesty or other similar measure, a State puts an end to the right to reparation enjoyed by a foreigner against a private person who has caused damage to the foreigner, the State thereby renders itself responsible for the damage to the

extent to which the author of the damage was responsible.”⁶¹

15. The new features which can be perceived in the above texts are the following: the link between the rule of “due diligence” and the concept of a “civilized State”; the public status with which the foreigner may be invested and the “special duty of vigilance” which that fact imposes on the State; the question whether the act of the private individual was directed against the foreigner as such and whether the injured person provoked the injury by his conduct; and the provision for the situation where a State puts an end to the right to reparation enjoyed by the foreigner against the private individual who caused the injury. One of the texts adopted in first reading at The Hague Conference contains a general provision applicable to these cases of responsibility, but the rule formulated does not introduce any new idea not already covered by the Institute’s draft or by the bases of discussion.⁶²

16. The Harvard Law School draft is somewhat different. It contains one general provision relating to “due diligence”, and another which specifies the conditions to be fulfilled before there can be any responsibility on the part of the State in the case of injury resulting “from an act of an individual or from mob violence”. These two provisions read as follows:

“Article 10

“A State is responsible if an injury to an alien results from its failure to exercise due diligence to prevent the injury, if local remedies have been exhausted without adequate redress for such failure. The diligence required may vary with the private or public character of the alien and the circumstances of the case.

“Article 11

“A State is responsible if an injury to an alien results from an act of an individual or from mob violence, if the State has failed to exercise due diligence to prevent such injury and if local remedies have been exhausted without adequate redress for such failure, or if there has been a denial of justice.”⁶³

17. In section 15 above, the Special Rapporteur cited the views expressed in the Harvard Research comments on the rule of “due diligence”. With reference to the other two conditions stipulated in article 10—that local remedies must have been exhausted and that no adequate redress has been obtained—the comment contains the following statement: “Where a State has failed to exercise due diligence to prevent an injury, its responsibility is

⁶⁰ League of Nations publication, *V. Legal*, 1929.V.3 (document C.75.M.69.1929.V), pp. 67 ff.

⁶¹ Article 10 of those texts reads:

“As regards damage caused to foreigners or their property by private persons, the State is only responsible where the damage sustained by the foreigners results from the fact that the State has failed to take such measures as in the circumstances should normally have been taken to prevent, redress, or inflict punishment for the acts causing the damage.” See League of Nations publication, *V. Legal*, 1930.V.17 (document C.351(c).M.145(c).1930.V), p. 237.

⁶² Harvard Law School, *op. cit.*, pp. 187 and 188.

conditioned upon the exhaustion of the remedies afforded by its laws for the injury which is the result of its failure . . . However, if no local remedy is available, or if the available local remedy is exhausted without adequate redress for the injury suffered, the State is responsible. There may be no technical denial of justice, yet in the latter case the State may nevertheless be responsible, because of the State's delinquency.”⁶⁴

18. The inference to be drawn from this comment is that, in practically every imaginable case, the conduct of the State is so closely connected with the injury caused by the private individual that the responsibility of the State will always be involved. The accuracy of this interpretation of the text seems to be confirmed by the fact that “adequate redress” for the injury is an absolute prerequisite of exemption from responsibility. Indeed, does not the duty to make reparation for an injury always presuppose some act or omission imputable to the State? The comment on article 11 emphasizes the same idea, but the conduct of the State in such cases is more explicitly described as an “actual or implied complicity of the government in the act, before or after it, either by directly ratifying or approving it, or by an implied, tacit or constructive approval in the negligent failure to prevent the injury, or to investigate the case, or to punish the guilty individual, or to enable the victim to pursue his civil remedies against the offender”.⁶⁵

17. INTERNAL DISTURBANCES IN GENERAL

19. The contribution of the Americas to the development of the principles and rules of international law which govern this subject is so considerable that a brief summary of the relevant statements by American jurists should facilitate a better understanding of the prevailing doctrine and practice. Podestá Costa, who has written with profound knowledge of the subject in numerous learned works, says that it was a Colombian publicist, J. M. Torres Caicedo, who first advanced the theory of the irresponsibility of the State for injuries caused to aliens during civil strife.⁶⁶ Later, Calvo developed this theory further, especially in the doctrine which bears his name concerning the equality of nationals and aliens.⁶⁷ The theory of irresponsibility, combined with the principle of equality and formulated in the manner shown below, was one of the earliest expressions of the conventional law of the Americas. It can be found in the Convention relative to the Rights of Aliens, signed at the Second International Conference of American States (Mexico City, 1902). The relevant provisions of that Convention read as follows:

⁶⁴ *Ibid.*, p. 188.

⁶⁵ *Ibid.*, p. 189.

⁶⁶ See Luis A. Podestá Costa, “La responsabilidad del Estado por daños irrogados a la persona o a los bienes de extranjeros en luchas civiles”, *Revista de Derecho Internacional* (Havana, 1938), Year XVII, vol. XXXIV, No. 67, p. 7 and No. 68, p. 195.

⁶⁷ See Charles Calvo, “De la non-responsabilité des Etats à raison des pertes et dommages éprouvés par des étrangers en temps de troubles intérieurs ou de guerres civiles”, *Revue de droit international et de législation comparée*, vol. I, 1869, pp. 417-427.

“Article 2

“The States do not owe to, nor recognize in favor of, foreigners, any obligations or responsibilities other than those established by their Constitutions and laws in favor of their citizens.

“Therefore, the States are not responsible for damages sustained by aliens through acts of rebels or individuals, and in general, for damages originating from fortuitous causes of any kind, considering as such the acts of war, whether civil or national; except in the case of failure on the part of the constituted authorities to comply with their duties.

“Article 3

“Whenever an alien shall have claims or complaints of a civil, criminal or administrative order against a State, or its citizens, he shall present his claims to a competent Court of the country, and such claims shall not be made through diplomatic channels, except in the cases where there shall have been on the part of the Court, a manifest denial of justice, or unusual delay, or evident violation of the principles of International Law.”⁶⁸

20. As can be seen, neither of these articles states a theory of irresponsibility in absolute terms. In fact, article 2 expressly provides for the situation where the authorities of the State have failed “to comply with their duties”, while article 3 goes much further in admitting the possibility of a valid diplomatic claim in cases where there has been “a manifest denial of justice, or unusual delay, or evident violation of the principles of International Law”.

21. At first, the idea of making the responsibility of the State in such cases conditional on the presence of certain conditions and circumstances was not favourably received. One of the critics was Emilio Brusa, who, in a report presented to the Institute of International Law at its session of 1898, contended that even where the injurious act was defensible on grounds of *force majeure*, the State remained under a duty, as in the case of an expropriation, to indemnify the injured party by paying him compensation.⁶⁹ This opinion was shared by Fauchille, although he based it on the theory of risk (*risque étatique*): “A State”, he wrote, in proposing an amendment to the draft which was being discussed by the Institute, “which derives profit from the presence of aliens in its territory, is under an obligation to make reparation for injury caused to those aliens during any riot or civil war that may break out in that territory, unless it can prove that the injury was caused by the fault, imprudence or negligence of the aliens who sustained it.”⁷⁰

22. The view of these writers that the responsibility of the State arises in all cases, regardless of the State's con-

⁶⁸ *The International Conferences of American States, 1889-1928*, p. 91.

⁶⁹ *Annuaire de l'Institut de droit international, Edition nouvelle abrégée* (1928) (Paris, A. Pedone, 1928), vol. V, pp. 340 ff.

⁷⁰ *Ibid.*, p. 613.

duct with respect to the injurious act, rested on a misconception of the legal and political relationship between the State and the alien who resides or sojourns in its territory. As has been stated by virtually all the authors who have studied the problem, the State cannot be considered an insurer of the person or property of the alien; the latter, on the other hand, must have foreseen and weighed both the advantages and the risks involved in his leaving his country or in making investments outside his country. Nor would there seem to be much substance in the notion that the State of residence "derives profit from aliens", for—although it cannot be said that only the very opposite is true—the presence of an alien in the territory of a State presupposes a certain reciprocity of advantages and benefits. In any case, the Institute reached no decision in the matter at that particular session. And later, when it came to adopt a formula, it accepted—as will be shown below—a principle wholly different from that advocated by Brusa and Fauchille. The influence of their opinions can, however, be noted in the Harvard Research draft. Besides article 11, which deals both with acts of individuals and with "mob violence", the draft contains another similar provision applicable to injury resulting from an "act of insurgents".⁷¹ The general position adopted by this draft with respect to this question has been discussed earlier in the present report.

23. The essence of the prevailing doctrine on this subject is reflected in the other codifications. The draft finally prepared by the Institute of International Law (1927) itself does not require from the State more than "proper diligence" in taking measures to prevent and punish the injurious acts. Article VII of the Institute's draft provides:

"The State is not responsible for injuries caused in case of mob [*sc. violence*], riot, insurrection or civil war, unless it has not sought to prevent the injurious acts with the diligence proper to employ normally in such circumstances, or unless it has not acted with like diligence against these acts or unless it does not apply to foreigners the same measures of protection as to its nationals. It is especially obligated to give to foreigners the benefits of the same indemnities as to nationals with regard to communes of other persons..."⁷²

24. The Guerrero report, which admits no responsibility whatsoever for acts of ordinary private individuals, recognizes that the State may be responsible in case of riot, revolution or civil war, if certain specified circumstances are present; these circumstances are indicated in conclusions 8 and 9:

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

⁷¹ Article 12 of the draft reads as follows:

"A State is responsible if an injury to an alien results from an act of insurgents, if the State has failed to use due diligence to prevent the injury and if local remedies have been exhausted without adequate redress for such failure." Harvard Law School, *op. cit.*, p. 193.

⁷² Harvard Law School, *op. cit.*, p. 229.

"9. The category of damage referred to in the preceding paragraph does not include property belonging to strangers which has been seized or confiscated in time of war or revolution, either by the lawful Government or by the revolutionaries. In the first case the State is responsible, and in the second the State must place at the disposal of foreigners all necessary legal means to enable them to obtain effective compensation for the loss suffered and to enable them to take action against the offenders.

"The State would become directly responsible for such damage if, by a general or individual amnesty, it deprived foreigners of the possibility of obtaining compensation."⁷³

25. The Guerrero report thus places a restrictive interpretation on the prevailing doctrine, as generally formulated, but also introduces some noteworthy new factors. These include, in particular, the express reference to riots directed against foreigners as such, and the preferential treatment of aliens for the purposes of the reparation of the injuries in the event of an amnesty. Lastly, the subject was dealt with in the following terms in the bases of discussion drawn up by the Preparatory Committee of The Hague Conference:

"Basis of discussion No. 22

"A State is, in principle, not responsible for damage caused to the person or property of a foreigner by persons taking part in an insurrection or riot or by mob violence.

"Basis of discussion No. 22 (a)

"Nevertheless, a State is responsible for damage caused to the person or property of a foreigner by persons taking part in an insurrection or riot or by mob violence if it failed to use such diligence as was due in the circumstances in preventing the damage and punishing its authors.

"Basis of discussion No. 22 (b)

"A State must accord to foreigners to whom damage has been caused by persons taking part in an insurrection or riot or by mob violence the same indemnities as it accords to its own nationals in similar circumstances.

"Basis of discussion No. 22 (d)

"A State is responsible for damage caused to the person or property of a foreigner by persons taking part in a riot or by mob violence if the movement was directed against foreigners as such, or against persons of a particular nationality, unless the Government proves that there was no negligence on its part or on the part of its officials."⁷⁴

⁷³ League of Nations publication, *V. Legal*, 1927.V.1 (document C.196.M.70.1927.V), pp. 104 and 105.

⁷⁴ League of Nations publication, *V. Legal*, 1929.V.3 (document C.75.M.69.1929.V), pp. 111 ff.

26. The above texts clearly show that the Committee followed the broad lines of the rules formulated in the Institute draft and in the conclusions of the Guerrero report.

27. The numerous precedents found in relevant decisions of international tribunals also confirm the prevailing doctrine set forth above, namely, that, as a general rule, the State is not internationally responsible for injuries sustained by aliens in connexion with internal disturbances. Some cases can be cited by way of illustration. In the *W. A. Noyes Claim* (1933), the Commission declared that "the mere fact that an alien has suffered at the hands of private persons an aggression which could have been averted by the presence of a sufficient police force on the spot, does not make a Government liable for damages under international law. There must be shown special circumstances from which the responsibility of the authorities arises: either their behavior in connection with the particular occurrence, or a general failure to comply with their duty to maintain order, to prevent crimes or to prosecute and punish criminals".⁷⁵ In the case of the *Home Missionary Society* (1920), the Special Tribunal established by the United States of America and Great Britain held that "it is a well-established principle of international law that no government can be held responsible for the act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection".⁷⁶ In the *Rosa Gelbtrunk Claim* (1902), which arose from a dispute between El Salvador and the United States, the arbitrator (Sir Henry Strong) declared that the State to which the alien owes national allegiance "has no right to claim for him as against the nation in which he is resident any other or different treatment in case of loss by war—either foreign or civil—revolution, insurrection, or other internal disturbance caused by organized military force or by soldiers, than that which the latter country metes out to its own subjects or citizens. This I conceive to be now the well-established doctrine of international law."⁷⁷ In the *Sambiaggio Claim* (1903), between Italy and Venezuela, the umpire (Ralston) ruled as follows: "The ordinary rule is that a government, like an individual, is only to be held responsible for the acts of its agents or for acts the responsibility for which is expressly assumed by it... A further consideration may be added. Governments are responsible, as a general principle, for the acts of those they control. But the very existence of a flagrant revolution presupposes that a certain set of men have gone temporarily or permanently beyond the power of the authorities; and unless it clearly appears that the government has failed to use promptly and with appropriate force its constituted authority, it cannot reasonably be said that it should be responsible for a condition of affairs created without its volition."⁷⁸

⁷⁵ *Annual Digest and Reports of Public International Law Cases, 1933-1934* (London, Butterworth and Co., 1940), case No. 98.

⁷⁶ *Annual Digest of Public International Law Cases, 1919-1922* (London, Longmans, Green and Co., 1932), case No. 117.

⁷⁷ *Papers relating to the Foreign Relations of the United States—1902* (Washington, D.C., Government Printing Office, 1903), p. 878.

⁷⁸ Briggs, *op. cit.*, pp. 715 and 716.

18. ACTS OF THE CONSTITUTED AUTHORITY AND OF SUCCESSFUL INSURGENTS

28. In the preceding sections, this report has referred to situations in which the State may become responsible as a result of the conduct of its organs or officials in relation to the injurious acts of private persons acting either individually or as members of a group. In these situations, responsibility originates in the failure of the organ or official concerned to exercise "due diligence" to prevent the wrongful act or to punish the offender; in other words, it originates in an unlawful *omission* imputable to the State. In the course of internal disturbances, however, an alien may also suffer injuries to his person or property in consequence of the very measures taken by the constituted authority to restore order or to suppress a revolutionary movement. It has been thought that such *acts*, too, engage or may engage the international responsibility of the State.

29. Of all the codifications that have been examined, only one envisages the responsibility of the State for such acts. The text in question is basis of discussion No. 21 drawn up by the Preparatory Committee of The Hague Conference, which reads as follows:

"A State is not responsible for damage caused to the person or property of a foreigner by its armed forces or authorities in the suppression of an insurrection, riot or other disturbance.

"The State must, however:

"(1) Make good damage caused to foreigners by the requisitioning or occupation of their property by its armed forces or authorities;

"(2) Make good damage caused to foreigners by destruction of property by its armed forces or authorities, or by their orders, unless such destruction is the direct consequence of combatant acts;

"(3) Make good damage caused to foreigners by acts of its armed forces or authorities where such acts manifestly went beyond the requirements of the situation or where its armed forces or authorities behaved in a manner manifestly incompatible with the rules generally observed by civilized States;

"(4) Accord to foreigners, to whom damage has been caused by its armed forces or authorities in the suppression of an insurrection, riot or other disturbance, the same indemnities as it accords to its own nationals in similar circumstances."⁷⁹

30. In considering these cases of responsibility, Bustamante drew a distinction and formulated a rule containing what appears to be a much more accurate statement of the circumstances or conditions which must in fact be present before the State can be held responsible. In his opinion, the acts or omissions of public officials—whether civilian or military—in these cases can fall into one of two distinct categories: those of a general character, which are not directed against any specific persons (e.g. an attack by firearms or shelling on a locality), and those which affect

⁷⁹ League of Nations publication, *V. Legal, 1929.V.3* (document C.75.M.69.1929.V), p. 107.

private persons or bodies corporate directly and individually (e.g. the occupation or destruction of a railway, aqueduct or electric power station). Acts or omissions in the first category do not (according to Bustamante) give rise to responsibility, because there is no intention of causing injury solely to aliens, and aliens are in exactly the same position as nationals. If the measures employed injure an alien's person or property, the injury is but the consequence of the State's normal exercise of its right of self-defence, and whoever exercises his right is not answerable to anybody. If any other contention were accepted, it would be difficult to explain why identical acts in an international war do not engage the State's responsibility but do engage it in the case of a civil war. The situation is different, however, in the case of acts or omissions in the second category. In these cases, a State which temporarily expropriates private property for its own profit and for public use, or destroys or damages such property, may be held responsible. The duty to indemnify for such expropriation, destruction or damage of property—generally public concessions—arises out of the very nature of the act and is not connected with the nationality of the injured owners. By law, the State owes the duty to indemnify to all, whether they be citizens or aliens, not by reason of their nationality but by reason of the character and consequences of the act. It is, in fact, a case of internal rather than of international responsibility; but the case may have international repercussions, especially if the internal responsibility is not duly discharged.⁸⁰

31. For the purpose of determining whether a State is or is not responsible for the acts of insurgents or revolutionaries, some codifications distinguish between an unsuccessful revolution and a successful revolution, and between acts committed by the rebels before their recognition

⁸⁰ Bustamante, *op. cit.*, vol. III, pp. 549 and 550.

as belligerents and those committed after such recognition. Basis of discussion No. 22 (c) of the Preparatory Committee of The Hague Conference brings out the first of these distinctions as follows:

"A State is responsible for damage caused to foreigners by an insurrectionist party which has been successful and has become the Government to the same degree as it is responsible for damage caused by acts of the Government *de jure* or its officials or troops."⁸¹

Article 13 of the Harvard Research draft makes both the distinctions indicated above, in the following manner:

"(a) In the event of an unsuccessful revolution, a State is not responsible when an injury to an alien results from an act of the revolutionists committed after their recognition as belligerents either by itself or by the State of which the alien is a national.

"(b) In the event of a successful revolution, the State whose government is established thereby is responsible under article 7, if an injury to an alien has resulted from a wrongful act or omission of the revolutionists committed at any time after the inception of the revolution."⁸²

The situation envisaged in article 13, paragraph (a), of the Harvard Research draft presupposes the recognition of belligerency, which raises all the legal difficulties inherent in any act or relationship of such a distinctly political nature. By contrast, the case of a successful revolution is different, since there is at least some basis for drawing an analogy with the case of injuries caused by the predecessor authority or Government, so far as the measures taken affected aliens directly and individually.

⁸¹ League of Nations publication, *V. Legal*, 1929.V.3 (document C.75.M.69.1929.V), p. 118.

⁸² Harvard Law School, *op. cit.*, p. 195.

ANNEX

Draft on international responsibility of the State for injuries caused in its territory to the person or property of aliens

(PART I: ACTS AND OMISSIONS)

CHAPTER I

Nature and scope of responsibility

Article 1

1. For the purposes of this draft, the "international responsibility of the State for injuries caused in its territory to the person or property of aliens" involves the duty to make reparation for such injuries, if these are the consequence of some act or omission on the part of its organs or officials which contravenes the international obligations of the State.

2. The expression "international obligation of the State" shall be construed to mean, as specified in the relevant provisions of this draft, the obligations resulting from any of the sources of international law.

3. The State may not plead any provisions of its municipal law for the purpose of repudiating the responsibility which

arises out of the breach or non-observance of an international obligation.

CHAPTER II

Acts and omissions of organs and officials of the state

Article 2. *Acts and omissions of the legislature*

1. The State is responsible for the injuries caused to an alien by the enactment of any legislative (or, as the case may be, constitutional) provisions which are incompatible with its international obligations, or by the failure to enact the legislative provisions which are necessary for the performance of the said obligations.

2. Notwithstanding the provisions of the foregoing paragraph, the international responsibility of the State shall not be involved if, without amending its legislation (or its constitution), it can in some other way avoid the injury or make reparation therefor.

Article 3. *Acts and omissions of officials*

1. The State is responsible for the injuries caused to an alien by some act or omission on the part of its officials

which contravenes the international obligations of the State, if the officials concerned acted within the limits of their competence.

2. The international responsibility of the State is likewise involved if the official concerned exceeded his competence but purported to be acting by virtue of his official capacity.

3. Notwithstanding the provisions of the foregoing paragraph, the international responsibility of the State shall not be involved if the lack of competence was so apparent that the alien should have been aware of it and could, in consequence, have avoided the injury.

Article 4. Denial of justice.

1. The State is responsible for the injuries caused to an alien by some act or omission which constitutes a denial of justice.

2. For the purposes of the provisions of the foregoing paragraph, a "denial of justice" shall be deemed to have occurred if the court, or competent organ of the State, did not allow the alien concerned to exercise any one of the rights specified in article 6, paragraph 1 (f), (g) and (h) of this draft.

3. For the same purposes, a "denial of justice" shall also be deemed to have occurred if a judicial decision has been rendered, or an order of the court made, which is manifestly unjust and which was rendered or made by reason of the foreign nationality of the individual affected.

4. Cases of judicial error, whatever may be the nature of the decision or order in question, do not give rise to responsibility within the meaning of this article.

CHAPTER III

Violations of fundamental human rights

Article 5

1. The State is under a duty to ensure to aliens the enjoyment of the same civil rights, and to make available to them the same individual guarantees as are enjoyed by its own nationals. These rights and guarantees shall not, however, in any case be less than the "fundamental human rights" recognized and defined in contemporary international instruments.

2. In consequence, in cases of violation of civil rights, or disregard of individual guarantees, with respect to aliens, international responsibility will be involved only if internationally recognized "fundamental human rights" are affected.

Article 6

1. For the purposes of the foregoing article, the expression "fundamental human rights" includes, among others, the rights enumerated below:

- (a) The right to life, liberty and security of person;
- (b) The right of the person to the inviolability of his privacy, home and correspondence, and to respect for his honour and reputation;
- (c) The right to freedom of thought, conscience and religion;
- (d) The right to own property;
- (e) The right of the person to recognition everywhere as a person before the law;
- (f) The right to apply to the courts of justice or to the

competent organs of the State, by means of remedies and proceedings which offer adequate and effective redress for violations of the aforesaid rights and freedoms;

(g) The right to a public hearing, with proper safeguards, by the competent organs of the State, in the determination of any criminal charge or in the determination of rights and obligations under civil law;

(h) In criminal matters, the right of the accused to be presumed innocent until proved guilty; the right to be informed of the charge made against him in a language which he understands; the right to speak in his defence or to be defended by a counsel of his choice; the right not to be convicted of any punishable offence on account of any act or omission which did not constitute an offence, under national or international law, at the time when it was committed; the right to be tried without delay or to be released.

2. The enjoyment and exercise of the rights and freedoms specified in paragraph 1 (a), (b), (c) and (d) may be subjected to such limitations or restrictions as the law expressly prescribes for reasons of internal security, the economic well-being of the nation, public order, health and morality, or to secure respect for the rights and freedoms of others.

CHAPTER IV

Non-performance of contractual obligations and acts of expropriation

Article 7. Contractual obligations in general

1. The State is responsible for the injuries caused to an alien by the non-performance of obligations stipulated in a contract entered into with that alien or in a concession granted to him, if the said non-performance constitutes an act or omission which contravenes the international obligations of the State.

2. For the purposes of the provisions of the foregoing paragraph, the repudiation or breach of the terms of a contract or concession shall be deemed to constitute an "act or omission which contravenes the international obligations of the State" in the following cases, that is to say, if the repudiation or breach:

(a) Is not justified on grounds of public interest or of the economic necessity of the State;

(b) Involves discrimination between nationals and aliens to the detriment of the latter; or

(c) Involves a "denial of justice" within the meaning of article 4 of this draft.

3. None of the foregoing provisions shall apply if the contract or concession contains a clause of the nature described in article...*

* The article referred to in this paragraph will be drafted when the subjects remaining pending are studied.

Article 8. Public debts

The State is responsible for the injuries caused to an alien by the repudiation, or the cancellation, of its public debts, save in so far as the measure in question is justified on grounds of public interest and does not discriminate between nationals and aliens to the detriment of the latter.

Article 9. Acts of expropriation

The State is responsible for the injuries caused to an alien by the expropriation of his property, save in so far as the measure in question is justified on grounds of public interest and the alien receives adequate compensation.

CHAPTER V**Acts of individuals and internal disturbances***Article 10. Acts of ordinary private individuals*

The State is responsible for injuries caused to an alien by acts of ordinary private individuals, if the organs or officials of the State were manifestly negligent in taking the measures which are normally taken to prevent or punish such acts.

Article 11. Internal disturbance in general

The State is responsible for injuries caused to an alien in

consequence of riots, civil strife or other internal disturbances, if the constituted authority was manifestly negligent in taking the measures which, in such circumstances, are normally taken to prevent or punish the acts in question.

Article 12. Acts of the constituted authority and of successful insurgents

1. The State is responsible for injuries caused to an alien by measures taken by its armed forces or other authorities for the purpose of preventing or suppressing an insurrection or any other internal disturbance, if the measures taken affected private persons directly and individually.

2. In the case of a successful insurrection, the international responsibility of the State is involved in respect of injuries caused to an alien if the injuries were the consequence of measures which were taken by the revolutionaries and which were analogous to the measures referred to in the foregoing paragraph.