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First report on State responsibility by Mr. Roberto Ago, Special Rapporteur - Review of previous work on codification of the topic of the international responsibility of States

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First report on State responsibility, by Mr. Roberto Ago, Special Rapporteur

Review of previous work on codification of the topic of the international responsibility of States

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Introduction

1. The international responsibility of States has long been among the topics which have most often attracted the attention of scholars and learned societies engaged in attempts to codify international law. In particular, when codification was taken up at the official level, both regional and universal, State responsibility was one of the first topics to be considered and to be included in the programmes of work which were established.

2. Nevertheless, as a result of the exceptional difficulties inherent in the subject, the uncertainties with which it has always been fraught, and the divergences of opinion and interests in the matter, previous codification efforts have not proved successful, their resumption having been postponed until a more propitious moment. On the strong
recommendation of the General Assembly of the United Nations, the International Law Commission has now decided to make a fresh attempt in that direction, with the firm intention of overcoming the obstacles and of ultimately succeeding in the task, so far unaccomplished, of preparing a draft codification for submission to States.

3. Now that the International Law Commission is about to engage in a new examination of the question, the Special Rapporteur thought it would be useful for its members to have before them, in the first place, a recapitulation of earlier attempts at codification, a general view of the subject that would also indicate the main obstacles encountered and draw attention to the few methodological conclusions which may nevertheless be considered to have been reached. In other words, it seemed desirable for such a summary to mention the trends which have become apparent and the comments and reactions elicited by the various drafts that have been prepared and considered. For although the scholarly and unstinted efforts so far made have not as yet led to definitive results, they have nevertheless made a valuable contribution to the exploration of the subject, a contribution which has, in particular, helped to clarify ideas and to provide some guidance regarding the changes of approach that should be adopted in the new stage on which we are to embark. This first report is accordingly intended to supply the historical review just described and thus to serve as an introduction and a point of departure for the work to be undertaken by the Commission.

4. In taking stock of the present situation, it should perhaps be emphasized that it is only in recent years that the bodies engaged in preparing the codification of international law have become aware of the need to deal with the international responsibility of States as a single and distinct general problem.

5. Most of the drafts hitherto prepared, both private and official, have concentrated on one particular sector of the topic, that of the responsibility of the State for injuries caused in its territory to aliens. Sometimes, the specific subjects of examination have even been more detailed problems arising within that sector, such as the exhaustion of local remedies as a condition for the submission of an international claim or certain aspects of the exercise of diplomatic protection. In the development of international legal theory, progress in the analysis of international responsibility has undeniably been linked with progress in the study of the status of aliens and advances in the understanding of one of these subjects have contributed to clearer thinking on the other.

6. At some stage, however, it unquestionably became essential to isolate the subject of responsibility stricito sensu, together with the relevant principles, and to divorce it from any other body of substantive rules of international law. The continued confusion of State responsibility with other topics was undoubtedly one of the reasons which prevented it from becoming ripe for codification. The Special Rapporteur firmly believes that, for purposes of codification, the international responsibility of the State must be considered as such, i.e., as the situation resulting from a State’s non-fulfilment of an international legal obligation, regardless of the nature of that obligation and the matter to which it relates. This conclusion even seems to the Special Rapporteur to be the most valuable lesson to be drawn from a retrospective examination of the successive efforts to codify this important and delicate sector of international law.

Chapter I

Codification by private bodies

7. Many drafts codifying the rules which govern the international responsibility of the State have been prepared by learned societies and private individuals. Some of these drafts have even influenced the development of international law on the subject. Reference will be made here only to the more important of these drafts and chiefly to those prepared with a view to official action, since it is on measures taken collectively by States themselves that attention should be focused.

8. In 1925, the American Institute of International Law, at the invitation of the Governing Board of the Pan American Union, prepared thirty “projects” dealing with various subjects of international law. Project No. 16, as indicated by its title “Diplomatic Protection”, dealt with the rules governing the exercise of diplomatic protection, the requirement of the exhaustion of local remedies, the question of denial of justice, etc.

9. In 1926, in connexion with the work undertaken by the League of Nations for the progressive codification of international law the Kokusaiho Gakkwai (International Law Association of Japan) prepared, in cooperation with the Japanese branch of the International Law Association, a draft code of international law. Chapter II of that code, entitled “Rules Concerning Responsibility of a State in Relation to the Life, Person and Property of Aliens”, set forth the rules relating to certain problems of responsibility which arise in connexion with the violation of the duties of a State towards aliens.

10. In 1927, at its Lausanne session, the Institute of International Law, in anticipation of the consideration of the same subject by the Codification Conference to be held at The Hague in 1930, adopted a resolution on “International responsibility of States for injuries on

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3. See chapter III below.


5. See paragraph 39 below.
their territory to the person or property of foreigners". This resolution, drawn up in the form of draft articles, included many provisions on the basis of international responsibility and on the imputability of wrongful acts and their consequences. The Institute has not discussed the general problem of State responsibility since 1927. It has, however, adopted two other resolutions dealing with particular aspects of the problem: the resolution on "The Rule of the Exhaustion of Local Remedies", which was adopted at the Granada session in 1956 and the resolution on "The National Character of an International Claim Presented by a State for Injury Suffered by an Individual", which was adopted at the Warsaw session in 1965.

11. Another draft convention on "Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners" was produced by the Harvard Law School in 1929, also in contemplation of the Codification Conference to be held at The Hague in 1930. This draft, the preparation of which was entrusted to Professor Borchard, covered the same problems as that of the Institute of International Law. Each article of the draft was followed by a commentary which cited the treaty provisions, international judicial decisions, practice of States and writings of authors relied on.

12. In 1956, at the suggestion of the Secretary of the International Law Commission of the United Nations, the Harvard Law School decided to revise the draft convention and bring it up to date, entrusting that task to Professors Sohn and Baxter. The final text of the "Draft Convention on the International Responsibility of States for Injuries to Aliens", together with a commentary, was published in 1961. This text is much more than a mere revision and bringing up to date of the 1929 text: it constitutes an entirely new draft.

13. Another draft convention on the responsibility of States for injuries caused in their territory to the person or property of aliens was prepared in 1930 by the Deutsche Gesellschaft für Völkerrecht (German International Law Society). This draft, like that of the Institute of International Law, contains many provisions dealing with problems of responsibility proper.

14. Before concluding this rapid examination of the draft codifications on the subject of international responsibility prepared by private bodies, reference should also be made to two private publications: the draft "Treaty concerning the responsibility of a state for internationally illegal acts" prepared by Professor Strupp in 1927 and the draft convention on the responsibility of States for international wrongful acts prepared by Professor Roth in 1932. These two drafts are of interest chiefly because the articles which they contain set forth the rules governing State responsibility in general, regardless of the content of the obligations violated, instead of confining themselves to failure by a State to observe its obligations relating to treatment of aliens.

CHAPTER II

Codification under the auspices of regional bodies

A. Codification by inter-American bodies

15. The question of the responsibility of States for injuries caused to aliens has an important place in the history of inter-American efforts to codify international law. The principles governing the responsibility of States for the violation of obligations towards aliens are, however, generally set forth in instruments which deal mainly with the content of these obligations.

16. Thus, the First International Conference of American States, held at Washington in 1889-1890, adopted a recommendation concerning "Claims and Diplomatic Intervention", which referred to the enjoyment by foreigners of civil rights and legal remedies open to natives. The Second Conference (Mexico City, 1901-1902) adopted a "Convention Relative to the Rights of Aliens", which dealt, inter alia, with the problem of State responsibility for the acts of individuals, the question...
of diplomatic protection and the rule of the exhaustion of local remedies.  

17. A specific examination of the entire problem of State responsibility for injuries caused to aliens was first undertaken by the Seventh Conference held at Montevideo in 1933. That Conference adopted a resolution reaffirming certain principles which had been laid down at previous Conferences and resolved that the study of the whole problem should be undertaken by the agencies of codification instituted by the International Conferences of American States, and that their studies should be co-ordinated with the work of codification being done under the auspices of the League of Nations. This recommendation, however, was not followed up.

18. In 1954, the Tenth International Conference of American States, held at Caracas, based its position on two considerations: first, that the General Assembly of the United Nations, during its eighth session, had requested the International Law Commission to proceed to the codification of the principles of international law that govern the responsibility of the State and, second, that co-operation between the International Law Commission and the inter-American organs charged with the development and codification of international law should be encouraged. The Conference accordingly recommended to the Inter-American Council of Jurists and its permanent committee, the Inter-American Juridical Committee of Rio de Janeiro, the preparation of a study on the contribution made by the American continent to the development and the codification of the principles of international law that govern the responsibility of the State.

19. In view of the wide scope of the task entrusted to it, the Inter-American Juridical Committee decided to confine its work to the rules which govern the responsibility of the State for injuries caused to aliens. This sector was selected not only because a large body of documentation already existed on the subject but also in the belief that it was precisely in this sector that the American continent had made its most original contribution to the development of international law. The Committee considered that, in the case of problems of a more universal character, such as the basis of State responsibility or the imputability of wrongful acts, the contribution of American thinking and practice had been of a less original character. The Committee also decided to confine its study to the practice of the Latin American countries because, in its opinion, only those countries had made a "contribution to the development of international law" on the subject. In the Committee's view, the position of the United States of America, which in many respects differed from that of the Latin American States, did not represent a new departure, but was based rather on the principles upheld by the European States in the nineteenth century.

20. Having thus defined the subject of its study, the Committee adopted, at its 1961 session, a report entitled "Contribution of the American Continent to the principles of international law that govern the responsibility of the State", setting out the principles which the Latin American States considered to be applicable in the matter. The report was followed by a commentary outlining the views of international authorities and international practice. The dissenting opinions of Mr. H. J. Gobbi, the Argentinian representative, and of Mr. J. O. Murdock, the United States representative, were annexed to the report.

21. The report of the Committee was submitted to the Inter-American Council of Jurists at its fifth session held at San Salvador in 1965. In the resolution which it adopted on the subject, the Council recalled the principles stated in the Committee's report and declared that they presented the Latin American contribution to the principles of international law that govern the responsibility of the State; it expressed its appreciation of the Committee's work and recommended that it should be expanded by incorporating the contribution of all the American States. To that end, the Committee was requested to prepare a supplementary report on the contribution of the United States of America. The first report would then be maintained as a statement of the opinion of the Latin American countries; the second would present the opinion of the United States of America.

22. In response to the Council's request, the Inter-American Juridical Committee has examined at its 1965 session the question of the contribution of the American continent to the principles of international law that govern the responsibility of the State and prepared a second report setting out the principles applied by the United States.

23. The questions considered by the Inter-American Juridical Committee include one which, although more directly relevant to another subject, is of interest for the purposes of determining the rules governing State responsibility: that of the law of outer space. Many problems of State responsibility in fact arise under this heading, such as those of the basis of responsibility and the imputability of wrongful acts.

24. In 1965, at its fifth session, the Inter-American Council of Jurists recommended that the Committee should carry out preliminary studies on the law of outer space. The legal department of the Pan American Union

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17 Ibid., pp. 90-91. For the text of the Convention, see annex XII below.  
19 See paragraph 42 below.  
21 Inter-American Juridical Committee, Contribution of the American Continent to the principles of international law that govern the responsibility of the State, doc. CIJ-61 in OAS Official Records, OEA/SER.I/IV.2 (Washington, D.C., Pan American Union, 1962). For the text of the above-mentioned principles, see annex XIV below.  
23 Ibid., pp. 7-12. For the text of the second report, see annex XV below.
accordingly prepared a study which was submitted to the Committee at its 1966 session. This study provided the basis for an extensive discussion during which many interesting problems of State responsibility were considered. On the conclusion of that discussion, the Committee recommended the Governments of the American States to accede to the general “Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space” contained in resolution 1962 (XVIII) adopted by the General Assembly of the United Nations in 1963.24

B. Codification by African and Asian countries

25. At its first session held at New Delhi in 1957, the Asian-African Legal Consultative Committee dealt, among other topics, with that of the status of aliens, including questions relating to the responsibility of States in respect of the treatment of foreign nationals. A general discussion on that subject took place at the second session of the Committee held at Cairo in 1958. Following the discussion, the Committee decided that the subject should be studied in greater detail and accordingly requested the secretariat to submit to it at its next session a report in the form of draft articles.

26. At its third session held at Colombo in 1960, the Committee considered the report submitted by the secretariat and decided to differentiate “the aspects relating to the diplomatic protection of citizens abroad and the responsibility of the State for maltreatment of aliens” from the other aspects of the status of aliens, on the grounds that the first two were not related to the substantive rules governing the status and treatment of aliens. The Committee then approved a set of provisional draft articles on the second aspect of the problem, a draft which was adopted in its final form at the Committee’s fourth session at Tokyo in 1961. Where the first aspect of the problem was concerned, the Committee decided, at that same session, to include in the agenda of its fifth session the topic of State responsibility and the diplomatic protection of citizens abroad.25 In view, however, of the large number of questions before it, the Committee was not able to consider that problem either at its fifth or sixth sessions.

27. At its seventh session, held at Baghdad in 1965, the Committee considered, at the request of the Government of Japan, the questions of the diplomatic protection of aliens by their home States and of the responsibility of States arising out of maltreatment of aliens. It decided to study these two questions together at some future session and, to that end, requested the secretariat to revise the draft it had prepared for the 1960 session, taking into account subsequent developments.26

28. The Asian-African Legal Consultative Committee has examined two other questions which primarily involve other issues, but which are nevertheless relevant to the study of State responsibility: the question of the legality of nuclear tests and that of the law of outer space. The question of the legality of nuclear tests was placed on the Committee’s agenda at its third session in 1960 and the secretariat was requested to assemble the relevant documentation, which was examined by the Committee at its fourth session (1961); after a general debate, the Committee decided to make a more detailed study of the question at its fifth session and requested the secretariat to collect fuller information on the subject.27

29. In accordance with this decision, the secretariat prepared a memorandum which was submitted to the Committee at its fifth session, held at Rangoon in 1962. The Committee, after an extensive debate, adopted a draft report which it submitted to member States for their comments.28 At its sixth session, held at Cairo in 1964, the Committee re-examined the question in the light of the comments which it had received and adopted the final report.29

30. At its seventh session (1965), the Committee dealt with the question of the law of outer space. It held a preliminary discussion on that topic and directed the secretariat to prepare a detailed study on the subject.30

CHAPTER III

Codification under the auspices of the League of Nations31

31. By a resolution adopted on 22 September 1924, the Assembly of the League of Nations, “Desirous of increasing the contribution of the League of Nations to

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the progressive codification of international law", requested the Council to convene a committee of experts which would have the duty:

(1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment;

(2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and

(3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.\(^{32}\)

32. The Committee of Experts for the Progressive Codification of International Law held its first session at Geneva from 1 to 8 April 1925, at which it selected a provisional list of eleven subjects. It appointed a sub-committee for each subject to carry out a preliminary inquiry and report to the Committee. The responsibility of States for injury caused in their territory to the person or property of foreigners was among the subjects chosen.\(^{33}\)

33. At its second session (Geneva, 12-29 January 1926), the Committee of Experts considered the reports of the sub-committees. It selected seven subjects and drafted a questionnaire on each to be circulated to States, whether Members of the League or not, to ascertain whether, in their view, those subjects lent themselves to international regulation. The report of the sub-committee which had studied the problem was annexed to each questionnaire.\(^{34}\) Questionnaire No. 4 concerned the "Responsibility of States for damage done in their territories to the person or property of foreigners". The report of the sub-committee, composed of Mr. Guerrero, Rapporteur, and Mr. Wang Chung-Hui, was annexed to the questionnaire.\(^{35}\)

34. The replies of Governments to the questionnaires were examined by the Committee of Experts at its third session, held at Geneva from 22 March to 2 April 1927.\(^{36}\) In its report to the Council of the League of Nations, the Committee stated that, in its view, the replies received indicated that all the subjects selected were sufficiently ripe for treatment in an international convention. The questionnaires adopted by the Committee at its second session, the replies of Governments to the questionnaires and an analysis of those replies prepared by the Committee were annexed to the report.\(^{37}\) With regard to the question of State responsibility, twenty-five Governments had expressed themselves in favour of codification without reservations, five had replied affirmatively but with certain reservations and only four had expressed the opinion that the conclusion of a convention on the subject was neither possible nor opportune.

35. On 13 June 1927, the Council of the League of Nations, having considered the report of the Committee of Experts, decided to place the question on the agenda of the eighth session of the Assembly and transmitted documents to it for that purpose.\(^{38}\)

36. The Assembly considered the documents transmitted to it by the Council\(^{39}\) and decided, by a resolution of 27 September 1927, to convene a conference for the codification of the following subjects: nationality; territorial waters; and responsibility of States for damage done in their territory to the person or property of foreigners. A preparatory committee was set up to prepare for the conference and, in particular, to study the three subjects and draft reports on each comprising sufficiently detailed bases of discussion.\(^{40}\)

37. The Preparatory Committee for the Codification Conference held three sessions at Geneva between February 1928 and May 1929. At its first session (6-15 February, 1928), it prepared requests to be sent to States for information concerning existing municipal law, the position reflected in national court decisions and doctrine; their domestic and international practice; their opinions regarding possible or desirable changes in existing international law.\(^{41}\) At its second session (28 January-19 February 1929), it examined the replies received from States and drew up bases of discussion.\(^{42}\) At its third session (6-11 May 1929), it reviewed the bases of discussion and drafted them in final form.\(^{43}\)
38. In drafting the bases of discussion for the Conference, the Committee’s purpose was not to reflect its members’ view regarding the existing rules or the rules which it might be desirable to adopt. Those bases of discussion represented, rather, an effort to harmonize the opinions expressed by Governments in their replies. Moreover, the Committee based itself not only on what Governments held to be the existing law but also on what Governments, or certain Governments, were disposed to accept as a new provision of international law. To use the language which has since become current, the Committee’s work represented a compromise between a simple codification of the existing law and proposals for the progressive development of international law, the whole, however, being based on information supplied by States.

39. The Conference for the Codification of International Law met at The Hague from 13 March to 12 April 1930. It set up three committees, one for each question on the agenda. The Committee on responsibility of States for damage done in their territory to the person or property of foreigners considered the question as a whole and adopted in first reading the text of ten articles (dealing with the basis of responsibility and the objective and subjective elements of wrongful international acts). Serious divergences appeared, however, which related less to the principles concerning responsibility as such than to the substantive principles governing the treatment of foreigners, the two questions being closely connected in the draft under consideration. Owing to lack of time, the Committee was unable to complete its study of the problem. Moreover, since, as stated above, the various questions were closely interdependent, each being subordinated to the others, the Committee considered it preferable not to embody the adopted articles in definite formulae, and informed the Conference that it was unable to submit any conclusions on the subject. The Conference merely took note of that situation.

40. After the Hague Conference of 1930, the League of Nations continued to promote the progressive codification of international law but took no further action in regard to the question of State responsibility.

**CHAPTER IV**

Codification under the auspices of the United Nations

41. After the Second World War, the legacy of the League of Nations in the matter of efforts to codify the rules governing the international responsibility of States passed to the United Nations and to the body entrusted by the General Assembly with the task of promoting the codification and the progressive development of international law. At its first session in 1949, the International Law Commission of the United Nations drew up a provisional list of fourteen topics which it considered suitable for codification. Among these topics was the question of State responsibility.

42. In 1953, the Cuban delegation submitted a draft resolution to the Sixth Committee of the United Nations General Assembly requesting the International Law Commission to undertake, as soon as possible, the codification of the principles of international law governing State responsibility. After a brief debate, the draft resolution was adopted, in a slightly amended form, by the Sixth Committee and then, upon the latter’s recommendation, was adopted without discussion by the General Assembly on 7 December 1953.

43. The complete text of the resolution is as follows:

Request for the codification of the principles of international law governing State responsibility

The General Assembly,

Considering that it is desirable for the maintenance and development of peaceful relations between States that the principles of international law governing State responsibility be codified,

Noting that the International Law Commission at its first session included the topic “State responsibility” in its provisional list of topics of international law selected for codification,

Requests the International Law Commission, as soon as it considers it advisable, to undertake the codification of the principles of international law governing State responsibility. (Resolution 799 (VIII)).

44. At its sixth session (1954), the International Law Commission took note of General Assembly resolution 799 (VIII). After considering a memorandum by Mr. F. V. Garcia Amador describing the background and scope of the General Assembly resolution, the Commission decided to undertake the study of the principles governing State responsibility. However, because of the many questions included in its agenda, it was unable to begin the study of the matter during its sixth session.

45. At its seventh session (1955), the Commission appointed Mr. F. V. Garcia Amador Special Rapporteur for the topic of State responsibility.

46. In connexion with the preliminary work for the study of the principles governing State responsibility, the
Commission's secretariat took the initiative of requesting the Harvard Law School Research Center, directed by Mr. Milton Katz, to revise and bring up to date the draft convention on "Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners"; prepared for the Center in 1929 by Professor Borchard with the assistance of an advisory committee with a view to its use by the Conference for the Codification of International Law, held at The Hague in 1930. The Commission confirmed the secretariat's action at its eighth session (1956).  

47. At the Commission's eighth session (1956), the Special Rapporteur submitted an initial report of a preliminary nature. In his introduction, he emphasized the development which, in his opinion, had occurred in the international law governing responsibility. According to him, that development had been marked, firstly, by the emergence of an international criminal responsibility in addition to the ordinary traditional duty to make reparation for injury caused by the breach or non-fulfilment of an international obligation. Consequently, it would in future be necessary to draw a distinction between acts which are "merely wrongful" and acts which are "punishable". Secondly, and, in his view, even more obviously, that development had been characterized by the appearance of international organizations and, in particular, of individuals in the capacity of subjects of international responsibility. That capacity, in his opinion, was even twofold, since the individual could be considered both as a subject to whom responsibility might be directly imputed and as the possessor of the subjective international right which had been violated and of the right to claim reparation. Mr. Garcia Amador concluded that individuals themselves must be recognized as having the right to bring international claims with a view to obtaining reparation for injuries sustained. Thirdly and lastly, the Special Rapporteur, in describing the recent development of international law on the topic, drew attention to the consequences of the progressive definition which had been achieved in the field of human rights, a definition which, in his opinion, should make it possible to modify the terms of the traditional antagonism between the principle of a certain "international standard of justice" to be guaranteed to aliens and the principle of equality of treatment between nationals and aliens.

48. In the light of the developments just described, the Special Rapporteur examined, in particular, the grounds for exoneration from responsibility, with particular reference to the renunciation of diplomatic protection both by the State and by the injured individual. He also studied the character, function and measure of reparation; and, lastly, international claims and modes of settlement. In that connexion, the Rapporteur expressed support for the view that an international claim was identical with the claim previously brought under municipal law.

49. The conclusions of Mr. Garcia Amador's report were summarized in the form of "bases of discussion", on which the Commission was called upon to give an opinion with a view to settling the fundamental criteria that were to govern the actual work of codification. In this connexion, the Special Rapporteur proposed that the work of codification should initially be limited to one aspect of the topic, namely, the "responsibility of States for damage caused to the person or property of aliens".

50. The Commission devoted its 370th to 373rd meetings to the consideration of this first report. The Special Rapporteur's scholarly report was duly appreciated by the members of the Commission, who congratulated him on his work. However, certain differences of opinion became evident during the discussion, concerning the ideas he had expressed on the developments he believed to have occurred in the matter of international responsibility. Some speakers suggested that the question of international criminal responsibility should be completely set aside. The great majority of the Commission also took exception to the idea that an individual could be regarded as the possessor of international subjective rights, could plead international responsibility for the violation of those rights or bring claims on his own behalf in international courts. Reservations were also expressed regarding the possibility of taking the violation of a fundamental human right as a criterion in establishing international responsibility for injuries to aliens. Lastly, emphasis was placed on the need to consider whether international responsibility was an objective responsibility or a responsibility by reason of fault.

51. At the Commission's next session (ninth session, 1957), the Special Rapporteur submitted a second report which was expressly limited, even in its title, to responsibility of the State for injuries caused in its territory to the person or property of aliens. The report, which was accompanied by a preliminary set of draft articles, at that stage consisted only of a first part entitled "Acts and omissions", the presentation of the part concerning "procedure" being left to a later stage. In addition, the Rapporteur explained that, in deference to the opinions expressed by some members of the Commission, he had deliberately refrained from considering the problem of international criminal liability and had set aside the question of "causality" and "fault" as being purely "academic".

52. A special feature of the report was the fact that only two chapters were devoted to the problems of responsibility stricto sensu, i.e. the chapter concerning the questions of the imputability of acts and omissions of organs and officials and the chapter dealing with the acts of ordinary private individuals and acts committed during internal disturbances. On the other hand, the central and most outstanding part was devoted—and this point was

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83 For the text of these bases of discussion, see annex XIX below.
specifically emphasized by the Special Rapporteur—to
determining the substantive rules “which govern the
conduct or acts of the State in relation to aliens”. This
part was composed of two sections. The first contained
a proposed definition of the “fundamental human rights”
which the State would be under a duty to ensure to aliens;
the second stated the special obligations of States towards
aliens with respect to contractual obligations, public
debts and acts of expropriation.

53. The Commission considered the second report of
Mr. F. V. García Amador at its 413th, 416th and 418th
meetings. During the discussion, several participants
stressed the care and zeal displayed by the Special
Rapporteur in the preparation of that new document.
At the same time, however, serious reservations were
made with respect to the contents of the different parts
of the report and the report as a whole.

54. In the first place, many members of the Commission,
while fully appreciating the lofty sentiments which had
inspired the Special Rapporteur, said it was necessary
to bear in mind that the Universal Declaration of Human
Rights did not create any legal obligations for signatory
States. It was difficult, therefore, to subscribe to the
idea that any violation of one of the numerous human
rights mentioned in the report could give rise to interna-
tional responsibility. Similarly, doubts were also
expressed concerning the very broad criteria by which
ordinary violations of contracts under municipal law
were elevated to the status of sources of international
State responsibility.

55. Criticisms were also made of methods. These criti-
cisms were essentially that the attempt at codification,
which should have been devoted to the entire topic of
responsibility, now appeared to be limited to the sole
field of responsibility for injuries caused to individual
aliens. The Special Rapporteur was thus reproached for
having disregarded other aspects of the question which
were of much greater importance, especially from the
standpoint of consequences.

56. In general, two main conclusions may be said to
have emerged from the discussion:

(1) It was clearly demonstrated that, in practice,
responsibility for injuries to the person or property of
aliens could not be treated without raising, in relation
to that particular sector, all the fundamental problems
presented by international State responsibility, its causes
and particular aspects, regardless of the field in which
the responsibility arose. Thorny questions, such as the
conflict between objective responsibility and a responsi-
bility by reason of fault, the moment at which responsi-
bility arose, the circumstances excluding wrongfulness and
responsibility, the responsibility of a State for the
act of another State, the consequences of the wrongful
act, etc., could not be avoided merely by deciding to
treat responsibility in relation to a single specific sector.
The attempt to evade the difficulties inherent in the
problems of responsibility in general by limiting the
attempt at codification to responsibility for the violation
of obligations concerning the treatment of aliens was
therefore seen to be illusory.

(2) On the other hand, as a result of the fact that, in
the sector selected, no clear dividing line had been drawn
between the definition of the substantive rules governing
the status of aliens and the consideration of the rules
governing the responsibility arising from a breach of
the obligations created by those substantive rules,
the difficulties inherent in the topic of responsibility
proper were compounded by the difficulties, which were
at present even more intractable, concerning the deter-
mination of the status of aliens. The codification of
this special sector proved to be more difficult than that of
the general rules concerning responsibility stricto sensu.

57. Owing to lack of time, however, the Commission
was compelled to limit itself to a general and preliminary
discussion at its ninth session. It was unable to make a
detailed examination of the report; the Special Rappor-
teur did not therefore modify it for consideration at the
following session, but simply added to it. He consequently
submitted to the Commission at its fifth session (1958),
a third report which, like its predecessor, was accompanied
by a set of draft articles. This report contained the second
part of the study on the responsibility of the State for
injuries caused in its territory to the person or property
of aliens. This part was divided into four chapters, the
first two being devoted to the grounds for exoneration
from responsibility and to the exhaustion of local
remedies, and the remaining chapters, to the submission
of international claims and the nature and scope of
reparations.

58. The most striking feature of this new part of the
report was the emphasis placed on the need to recognize
the right of a foreign national—regarded as the potential
possessor of international subjective rights—to present
an international claim directly. Under the system outlined
by the Special Rapporteur, this capacity was even to
take precedence over the right possessed, by virtue of
diplomatic protection, by the State of which the injured
private individual was a national. That result was held
to be the logical consequence of the emergence of bodies,
both judicial and arbitral, expressly set up to hear claims
submitted by private individuals. In that connexion, the
Special Rapporteur placed together on one and the same
footing judicial bodies set up by intergovernmental
agreements, such as the Central American Court of
Justice, the mixed arbitral tribunals, etc., and other
bodies which were merely provided for in agreements
between Governments and private individuals, such as
the arbitral tribunals set up to settle disputes concerning
the performance of certain contracts concluded with
commercial companies. The new part of the report thus
contained material which was difficult to discuss. How-
ever, since the Commission was fully occupied in con-
sidering the other items on its agenda, it did not have

time at its tenth session to deal, even briefly, with the
question of the international responsibility of States.
and deferred consideration of Mr. Garcia Amador’s third report to the following session. 58

59. At the Commission’s eleventh session, 59 the Special Rapporteur submitted a fourth report in which he undertook a new and more detailed study of the questions which had been dealt with in chapter IV of his second report, i.e. the international protection of acquired rights, expropriation and the contractual rights of private individuals vis-à-vis foreign States. Even at that session, however, the Commission was unable to consider either that report or its predecessors. The problem of international responsibility was dealt with only at its 512th meeting and during half of its 513th meeting, which were almost entirely devoted to a report by Professor Sohn and Professor Baxter of Harvard University on the draft which they had prepared at the request of the Harvard Law School Research Center and which was not yet in final form; 60 their report was followed by a very short discussion of this draft. 61

60. According to its authors, this draft differed considerably from the text prepared by the Center in 1928, and its basic ideas showed many analogies with those developed by Mr. Garcia Amador in his reports. Like the preliminary draft prepared by Mr. Garcia Amador, the Harvard Law School draft was limited to the single sector of State responsibility for injuries to the person or property of aliens and, at the same time, dealt together with the subject of international responsibility proper and that of the status of aliens. A large part of the draft was, in fact, devoted to a highly original attempt to define the principal obligations of States vis-à-vis aliens, even though it took the form of a list of the most important possible violations of those obligations. Moreover, the draft, clearly departing from the traditional view—which, its authors considered, had been largely abandoned at that stage—not only envisaged the possibility of the direct submission of international claims by private individuals, but gave such claims definite priority over claims presented by the State on the traditional ground of diplomatic protection. According to the draft, the State was debarred from presenting a claim in the event of a waiver by the private individual concerned. That was a clear departure from the rule upheld by the International Court of Justice, namely, that, in exercising diplomatic protection, the State was relying on its own right, not that of the private individual who considers himself to have been injured.

61. Abandonment of the idea that only States may invoke international responsibility; the affirmation of the identity of a claim under municipal law with a claim submitted at the international level and of the law relied on by the private individual with the law which may be relied upon by the State; the assimilation, at the international level, of disputes between Governments and private individuals to disputes between States—these, in brief, are the ideas which made the draft of Professor Sohn and Professor Baxter broadly similar to the various reports of the Commission’s Special Rapporteur.

62. The brief discussion which followed the report by the authors of the draft showed that the members of the Commission, though highly appreciative of the work done by the Harvard University Research Center and expressing their gratitude for the valuable contribution made to the Commission’s work, were not generally prepared to accept a number of the ideas and trends reflected in the draft or to follow its authors in so marked a departure from the traditional views on the subject. It was seriously questioned whether the existing law could be regarded as providing corroboration of the principles upheld by the Harvard jurists. At the same time, it was yet again evident that the constant confusion between the formulation of rules concerning international responsibility and rules concerning the status of aliens increased the difficulty of any systematic consideration of the subject and made the possibility of reaching agreement more doubtful.

63. A fifth report on State responsibility 62 was presented by Mr. Garcia Amador at the Commission’s twelfth session (1960). This report was divided into three parts. The first was a continuation of the study in the fourth report of measures affecting acquired rights, in which the extraterritorial effects of such measures were examined together with the methods and procedures applicable to the disputes to which they might give rise. The second part of the report was devoted to the problem of the constituent elements of the wrongful act, with particular regard to the problems of the “abuse of rights” and “fault”. On the basis of the information supplied by these new studies, proposals were made in the third part of the report for amendments and additions to the preliminary draft on State responsibility contained in the Special Rapporteur’s second and third reports.

64. But the Commission was yet again unable to undertake a study of that report or of its predecessors. It devoted two meetings (566th and 568th meetings) 63 to the problem of responsibility, and that solely in order to hear and briefly comment on, first, the statement of Mr. Gomez Robledo, Observer for the Inter-American Juridical Committee 64 and, secondly, a second statement by Professor Sohn, who presented a new version of the Harvard Law School draft containing amendments to the first draft but leaving the main lines of that draft unchanged.

65. During the discussion, the positions already taken by the various members of the Commission were reaffirmed, and in particular emphasis was placed on the need to remove the continued confusion between inter-

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60 See paragraph 11 above.
64 The Inter-American Juridical Committee was requested by the Tenth Inter-American Conference (1954) to prepare a study or report on the contribution of the American continent to the principles of international law that govern the responsibility of the State. See para. 18 above.
national responsibility and the status of aliens and of considering, in the first place, responsibility per se without reference to any particular sector. In the second place, definite reservations were again expressed to the idea that the individual and not the State was the owner of the international subjective right violated by an international wrongful act, and that, consequently, the right to bring a claim before an international tribunal belonged to the individual rather than to the State.

66. In 1960, the question of the codification of State responsibility was raised in the United Nations General Assembly for the first time since 1952. This took place at the Assembly’s fifteenth session, during the consideration of the International Law Commission’s report on the work of its twelfth session.65

67. In its report the Commission expressed its intention to complete its work on consular intercourse and immunities at its thirteenth session, and thereafter to take up at the same session the subject of responsibility.66 When speaking on this matter, some representatives expressed regret that the Commission had not found time to undertake a thorough study of the subject, although it had before it five reports prepared by Mr. Garcia Amador. Turning to the work already done, they maintained that it was inadmissible to confine the subject of the responsibility of States to responsibility for injury caused in their territory to the person or property of aliens. Such an approach, they maintained, would be contrary to the spirit of General Assembly resolution 799 (VIII); the subject should therefore be extended to include the principles governing State responsibility for violation of the national sovereignty, independence and national integrity of other States, and of the right of nations to self-determination and the use of their natural resources. The same representatives criticized the United Nations Secretariat for having, in 1955, invited the Harvard Law School to revise and bring up to date its 1929 draft on State responsibility. In their opinion, the Secretariat had consequently consulted only that Law School without a prior decision by the Commission. Because of that action, and the fact that the Special Rapporteur had consequently consulted only that Law School, without seeking the views of learned bodies in other countries with different legal systems, the report took into account only certain concepts, which were not universally accepted.

68. Replying to those criticisms, the representative of the Secretary-General affirmed that the Secretariat’s action had been correct and had been approved by the International Law Commission in its report to the General Assembly. Some representatives expressed the same view and noted that the Secretariat had sought the assistance of the Harvard Law School because, at that time, it was the only legal institution which had prepared a draft on the subject.

69. Several speakers expressed the hope that the International Law Commission would give priority to the question of responsibility so that the General Assembly should have before it a preliminary draft on the subject at its sixteenth session. As serious differences of opinion had also arisen regarding other subjects to be studied by the International Law Commission, however, the Sixth Committee finally expressed the view that the General Assembly should, at its next session, reconsider the question of the International Law Commission’s future work on the subject of responsibility and in other fields.

70. On the recommendation of the Sixth Committee, the General Assembly decided, in its resolution 1505 (XV), to include in the agenda of its sixteenth session the question of future work in the field of the codification and progressive development of international law, and invited Member States to submit in writing any views or suggestions they had on the subject.

71. At its thirteenth session, in 1961, the International Law Commission had before it the sixth and last report by Mr. Garcia Amador on the subject of repair for injury.67 That report included, as an addendum, the complete revised text of the preliminary draft articles on the international responsibility of States for injuries caused in their territory to the person or property of aliens.68 As indicated in the explanatory note preceding it, the preliminary draft was revised in the light of the conclusions reached by the Special Rapporteur in his three previous reports.

72. Being fully occupied with the subject of consular intercourse and immunities, the Commission was unable, despite its stated intention, to take up the question of State responsibility at the thirteenth session.69 It nevertheless touched on the problem of the codification of State responsibility when, at its 614th, 615th and 616th meetings, it discussed the planning of its future work in the light of the debate which had taken place in the Sixth Committee of the General Assembly and of General Assembly resolution 1505 (XV).70 During that discussion, the question of the work to be done on the subject of State responsibility was raised. All the members who spoke on the subject believed that it should be included among the priority topics. There were again differences of opinion, however, regarding the approach to the subject, and in particular as to whether the Commission should begin by codifying the general rules governing

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66 Ibid., pp. 46 ff. Although that document was prepared for the Commission’s thirteenth session, it was only submitted in December 1961, that is, after the closure of the session. As the term of office of the Commission’s members ended at the thirteenth session, and Mr. Garcia Amador was not re-elected, he submitted that report to the Commission, so that his contribution to the work of codification in the field of responsibility should not remain incomplete. For the text of the revised preliminary draft, see annex XIX below.
State responsibility, or whether it should codify at the same time the rules whose violation entails international responsibility.

73. At its 613th meeting, the Commission also heard Professor L. B. Sohn present the final draft, prepared by the Harvard Law School, on the responsibility of States for injury caused in their territory to the person or property of aliens.  

74. At its sixteenth session (1961) the General Assembly had before it, in response to its invitation in resolution 1505 (XV), the comments of seventeen Governments on future work in the field of codification and progressive development of international law.  

81. Divergent opinions were also expressed regarding the method to be adopted in studying the question of State responsibility, wherever it was incurred, and then perhaps go on to study its application in specific fields, especially that of injury to aliens. That suggestion was supported by many members of the Commission.

82. Some members also urged that in delimiting the subject care must be taken to avoid being influenced by a situation which was purely the result of historical circumstances. Though responsibility theory had no doubt been based on a body of judicial precedents concerned specifically with violation of the rights of aliens, a distinction must now be made between two subjects: State responsibility in general and the treatment of aliens. The Commission should begin by studying the general principles governing State responsibility, wherever it was incurred, and then perhaps go on to study its application in specific fields, especially that of injury to aliens. That suggestion was supported by many members of the Commission.

83. Divergent opinions were also expressed regarding the method to be adopted in studying the question of State responsibility. Some members believed that the Commission should adopt the usual method and appoint a special rapporteur to study the subject. In the opinion of other members of the Commission, because of the special difficulties involved in a study of State responsibility, it was necessary to depart from the usual procedure and establish a sub-committee, consisting of a few members, which would be asked to submit a report dealing, initially, not with the substance of the question, but with ways of approaching it and the aspects to be considered.
82. The Commission finally agreed to adopt the latter procedure. It therefore established, at its 637th meeting, a Sub-Committee on State Responsibility consisting of ten members: Mr. Ago (Chairman), Mr. Briggs, Mr. Gros, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Tsuruoka, Mr. Tunkin and Mr. Yasseen.76

83. The Sub-Committee held its first meeting on 21 June, 1962. At that meeting it formulated a number of suggestions, which it submitted to the Commission at the 686th meeting. In the light of those suggestions, the Commission adopted the following decisions: (1) the Sub-Committee would meet at Geneva between the Commission’s current session and its next session; from 7 to 16 January 1963; (2) its work would be devoted primarily to the general aspects of State responsibility; (3) the members of the Sub-Committee would prepare for it specific memoranda relating to the main aspects of the subject, those memoranda to be submitted to the Secretariat not later than 1 December 1962 so that they could be reproduced and circulated before the meeting of the Sub-Committee in January 1963; (4) the Chairman of the Sub-Committee would prepare a report on the results of its work for submission to the Commission at its next session.76

84. The differences of opinion which emerged from the outset in the International Law Commission regarding the most appropriate way of approaching the codification of State responsibility recurred in the Sixth Committee of the General Assembly (seventeenth session, 1962) during the debate on the work of the International Law Commission’s fourteenth session.77

85. Again, some representatives expressed the view that the work should begin with codification of responsibility for injury to aliens, in view of the importance of that aspect and the extensive documentation on it. The other aspects of the subject had not been reduced to systematic order, or universally recognized, and were therefore not yet ready for codification and might delay the work to be done.

86. In the opinion of the vast majority of representatives, however, it was inadmissible at that stage for the Commission to confine itself to codification of responsibility for injury to aliens. The scope of the study should be firmly extended to include the principles governing responsibility for acts contrary to the purposes and principles of the United Nations Charter, and especially acts constituting a threat to international peace and security. Many speakers supported the Commission’s suggestion that it should begin by studying the general aspects of State responsibility.

87. Accordingly, the General Assembly, noting that the International Law Commission had established a Sub-Committee on State Responsibility, which was to meet in January 1963 and report to the Commission at its fifteenth session, recommended that the Commission should:

(a) continue its work on State responsibility, taking into account the views expressed at the seventeenth session of the General Assembly and the report of the Sub-Committee on State Responsibility and giving due consideration to the purposes and principles enshrined in the Charter of the United Nations (resolution 1765 (XVII)).

It should be noted that this recommendation, which was made in a resolution adopted on 20 November 1962, was shortly to be confirmed in the declaration contained in section II of resolution 1803 (XVII) on Permanent sovereignty over natural resources, adopted by the General Assembly on 14 December 1962, on the recommendation of the Second Committee. In that declaration, the Assembly stated that it

Welcomes the decision of the International Law Commission to speed up its work on the codification of the topic of responsibility of States for the consideration of the General Assembly;78

88. The Sub-Committee on State Responsibility held seven meetings during its January session.79 All its members were present, with the exception of Mr. Lachs, who was absent because of illness. The Sub-Committee had before it memoranda prepared by the following members: Mr. Jiménez de Aréchaga (ILC (XIV)/SC.1/WP.1); Mr. Paredes (ILC (XIV)/SC.1/WP.2 and Add.1, A/CN.4/SC.1/WP.7); Mr. Gros (A/CN.4/SC.1/WP.3); Mr. Tsuruoka (A/CN.4/SC.1/WP.4); Mr. Tunkin (A/CN.4/SC.1/WP.5); Mr. Yasseen (A/CN.4/SC.1/WP.6).80 The Sub-Committee held a general discussion of the questions to be studied in connexion with the work relating to the international responsibility of States, and with the directives to be given by the Commission to the Special Rapporteur on that topic.

89. Some members of the Sub-Committee expressed the view that it would be desirable to begin the study of the very broad subject of the international responsibility of the State by considering a well-defined sector such as that of responsibility for injuries to the person or property of aliens. Other members, on the other hand, argued that it was necessary to carry out a general study of the subject, taking care not to confuse the definition of the rules relating to responsibility with that of the main rules—and in particular those relating to the treatment of aliens—the breach of which could give rise to respons-

76 Resolution I A, which appeared in the annex to the report submitted in 1961 by the Committee on Permanent Sovereignty over Natural Resources (A/AC.97/5/Rev.2 - E/3511 - A/AC.97/13) contained in fine the following passage:

"Requests the International Law Commission to speed up its work on the codification of the topic of responsibility of States for the consideration of the General Assembly".

This report also contains the Secretariat study on the status of permanent sovereignty over natural wealth and resources, chapter III of which gives a most useful survey of "International adjudication and studies prepared under the auspices of intergovernmental bodies relating to responsibility of States in regard to the property and contracts of aliens".

79 Ibid., p. 191, para. 68.
77 Official Records of the General Assembly, Seventeenth Session, Sixth Committee, 734th to 752nd meetings, and ibid., Seventeenth Session, Annexes, agenda item 76, document A/5287, paras. 44-47.
sibility. Some of the members in this second group stressed in particular that, in the study of the topic of responsibility, recent developments of international law in other fields, notably that of the maintenance of peace, ought also to be taken into account.

90. In the end, the Sub-Committee agreed unanimously to recommend that the Commission should, with a view to the codification of the topic, give priority to the definition of the general rules governing the international responsibility of States. It was agreed, firstly, that there would be no question of neglecting the experience and material gathered in certain special sectors, especially that of responsibility for injuries to the person or property of aliens; and, secondly, that careful attention should be given to the possible repercussions which new developments in international law might have had on responsibility. The Sub-Committee suggested that the question of the responsibility of other subjects of international law, such as international organizations, should be left aside.

91. Having reached that general conclusion, the Sub-Committee discussed in detail an outline programme of work submitted by Mr. Ago. After that debate, it decided unanimously to recommend to the Commission the following main points for consideration in connexion with the general aspects of the international responsibility of the State, the understanding being that these points might serve as a guide to the special rapporteur to be appointed by the Commission.

Preliminary point: Definition of the concept of the international responsibility of the State.

First point: Origin of international responsibility.

(1) International wrongful act: the breach by a State of a legal obligation imposed upon it by a rule of international law whatever its origin and in whatever sphere.

(2) Determination of the component parts of the international wrongful act.

(a) Objective element: act or omission objectively conflicting with an international legal obligation of the State. Problem of the abuse of rights. Cases where the act or omission itself suffices to constitute the objective element of the wrongful act and cases where there must also be an extraneous event caused by the conduct.

(b) Subjective element: imputability to a subject of international law of conduct contrary to an international obligation. Questions relating to imputation. Imputation of the wrongful act and of responsibility. Problem of indirect responsibility.

Questions relating to the requirement that the act or omission contrary to an international obligation should emanate from a State organ. System of law applicable for determining the status of the organ. Legislative, administrative and judicial organs. Organs acting ultra vires.

State responsibility in respect of acts of private persons. Question of the real origin of international responsibility in such cases.

Must there be fault on the part of the organ whose conduct is the subject of a complaint? Objective responsibility and responsibility related to fault lato sensu. Problems of the degree of fault.82

(3) The various kinds of violations of international obligations. Questions relating to the practical scope of the distinctions which can be made.

International wrongful acts arising from conduct alone and those arising from events. The causal relationship between conduct and event. Practical consequences of the distinction.

International wrongful acts and omissions. Possible consequences of the distinction, particularly with regard to restitutio in integrum.

Simple and complex, non-recurring and continuous international wrongful acts. Importance of these distinctions for the determination of the tempus commissi delicti and for the question of the exhaustion of local remedies.

Problems of participation in the international wrongful act.

(4) Circumstances in which an act is not wrongful.

Consent of the injured party. Problem of presumed consent;

Legitimate sanction against the author of an international wrongful act;

Self-defence;

State of necessity.

Second point: The forms of international responsibility.

(1) The duty to make reparation, and the right to apply sanctions to a State committing a wrongful act, as consequences of responsibility. Question of the penalty in international law. Relationship between consequences giving rise to reparation and those giving rise to punitive action. Possible distinction between international wrongful acts involving merely a duty to make reparation and those involving the application of sanctions. Possible basis for such a distinction.


(3) Sanction. Individual sanctions provided for in general international law. Reprisals and their possible role as a sanction for an international wrongful act. Collective sanctions.

92. The work of the Sub-Committee on State Responsibility was reviewed by the Commission at its 686th meeting, held during its fifteenth session (1963), on the

81 The Sub-Committee considered that the question of possible responsibility based on "risk", in cases where a State's conduct does not constitute a breach of an international obligation, might be studied in this connexion.

82 The Sub-Committee believed that it would be desirable to consider whether or not the study should include the very important questions which might arise in connexion with the proof of the events giving rise to responsibility.
basis of the report prepared by the Chairman of the Sub-Committee.  

93. All the members of the Commission who took part in the discussion agreed with the general conclusions contained in the Sub-Committee’s report, and already mentioned in paragraph 90 above. Some members of the Commission reiterated their opinion that emphasis should be placed on State responsibility in matters relating to the maintenance of peace, in the light of the changes which had occurred in international law on that subject. Other members contended that no aspect of responsibility should be neglected and that a study should be made of precedents in all fields where the principle of State responsibility had been applied.

94. The members of the Commission also approved the work programme proposed by the Sub-Committee, without prejudice to their position on the substance of the topics set out in the programme. During the discussion some doubts or reservations were expressed regarding the procedures to be adopted to deal with certain problems arising in connexion with the questions listed. It was pointed out in connexion that those questions were merely intended to serve as a guide for the Special Rapporteur in his study of the substance of particular aspects of the definition of general rules governing the international responsibility of States, but that he would not be obliged to pursue one solution in preference to another. The Sub-Committee’s suggestion that the study of the responsibility of other subjects of international law, such as international organizations, should be left aside also met with the general approval of the members of the Commission.

95. After unanimously approving the report of the Sub-Committee on State Responsibility, the Commission appointed Mr. Ago as Special Rapporteur for the topic of State responsibility. It was also agreed that the Secretariat should prepare certain working papers on that question.

96. The report of the International Law Commission on the work of its fifteenth session was considered by the Sixth Committee of the General Assembly at its 780th-793rd meetings (eighteenth session (1963)). With respect to the problem of the codification of State responsibility, many representatives congratulated the Sub-Committee on its work, and all approved the general conclusions reached by the Commission.

97. One representative, while approving those general conclusions, stated that in his opinion the problem of responsibility for injuries caused to aliens was still the central problem and that it would be wrong to make it a secondary question. All the other representatives who spoke on that item, however, supported the Commission’s decision to begin the codification of the topic by defining the general rules governing State responsibility. Some of them once more expressed the hope that when doing so, the Commission would take due account of the recent evolution of international law, particularly in the sector of the maintenance of international peace and security.  

98. Following that discussion, the General Assembly, in its resolution 1902 (XVIII) of 18 November 1963, recommended that the International Law Commission should:

(b) Continue its work on State responsibility, taking into account the views expressed at the eighteenth session of the General Assembly and the report of the Sub-Committee on State Responsibility and giving due consideration to the purposes and principles enshrined in the Charter of the United Nations.

99. At its sixteenth session (1964), the Commission had before it two working papers concerning State responsibility. Those documents, which had been prepared by the Secretariat in compliance with the wish expressed by the Commission at its preceding session, contained, respectively, a summary of the discussions in various United Nations organs and the resulting decisions and a digest of the decisions of international tribunals relating to State responsibility.  

100. Owing, however, to the fact that the term of office of the members of the Commission would expire in 1966, and that it was desirable to complete, by that date, the study of the topics which were already in an advanced state, the Commission decided to devote its 1964, 1965 and 1966 sessions to the completion of the work on the law of treaties and special missions, and not to begin its consideration of the substance of the question of responsibility until it had completed its study of those topics.

101. In its resolution 2045 (XX) of 8 December 1965, the General Assembly approved that decision of the Commission, at the same time recommending that the Commission should continue, when possible, its work on State responsibility.

102. In 1967, at its nineteenth session, the Commission had before it a working note on State responsibility prepared by the Special Rapporteur. Since the term of office of the members who had been elected in 1962 had expired in 1966, and since the General Assembly had altered the membership of the Commission, Mr. Ago expressed the wish that the Commission, as newly constituted, should consider afresh the report which it had approved at its fifteenth session, and that it should let him know whether it intended to confirm his appointment and repeat, if it thought necessary, the instructions it had given him at that time. In that connexion, the Special Rapporteur drew attention to the work which the Commission had devoted to the subject at its fourteenth and fifteenth sessions.

103. The Commission considered the note submitted by Mr. Ago at its 934th and 935th meetings. The decision

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taken at the fifteenth session to give priority, in the
codification of the topic, to a definition of the general
rules of the international responsibility of States, as
well as the programme of work drawn up for that purpose,
met with the approval of all the members of the Com-
misson. After a discussion, in the course of which
certain questions of detail were also raised, the Com-
misson repeated to Mr. Ago—whose appointment as
Special Rapporteur for that topic had been con-
firmed—the instructions it had given him at its fifteenth session.
The Special Rapporteur stated that he intended to present
an initial detailed report on the question of responsibility
at the Commission's twenty-first session.

104. In the Sixth Committee of the General Assembly,
the representatives who spoke on the item at the twenty-
second session (1967) approved the decision recently
taken by the International Law Commission and ex-
pressed the hope that the Commission would finally be
in a position to make progress with that topic, which
had been on its agenda since 1954. The General
Assembly accordingly recommended, in its resolution
2272 (XXII) of 1 December 1967, that the Com-
misson should "expedite the study of the topic of State
responsibility".

99 Official Records of the General Assembly, Twenty-second Ses-
Sion, Sixth Committee, 957th to 968th meetings, and ibid., Twenty-
second Session, Annexes, agenda item 85, document A/8898,
paras. 84-85.

ANNEXES

ANNEX I
Project on “diplomatic protection”, prepared by the
American Institute of International Law (1925)
[For the text, see Yearbook of the International Law Commis-

ANNEX II
Draft code of international law, adopted by the Japanese branch of
the International Law Association and the Kokusaiho Gakkwai
(International Law Association of Japan) in 1926a

II. RULES CONCERNING THE RESPONSIBILITY OF A STATE
IN RELATION TO THE LIFE, PERSON AND PROPERTY OF ALIENS

Article 1

A State is responsible for injuries suffered by aliens within
its territories, in life, person or property through wilful act,
default or negligence of the official authorities in the discharge
of their official functions, if such act, default or negligence constitutes
a violation of international duty resting upon the State to which
the said authorities belong.

a International Law Association, Report of the Thirty-Fourth

105. In 1968, at its twentieth session, the International
Law Commission confirmed its decision to undertake, at
its following session, substantive consideration of the
topic of State responsibility.100

106. On 11 December 1968, at its twenty-third session,
the General Assembly adopted a resolution in which it
recommended, inter alia, that the Commission should:

(c) Make every effort to begin substantive work on State respon-
sibility as from its next session, taking into account the views and
considerations referred to in General Assembly resolutions 1765
(XVII) and 1902 (XVIII), (resolution 2400 (XXIII)).

107. In 1969, with a view to assisting the International
Law Commission in its work on the question of State
responsibility, the Secretariat published a supplement91
to the “Digest of the decisions of international tribunals
relating to State responsibility” and a supplement92 to
the “Summary of the discussions in various United
Nations organs and the resulting decisions”. The two
initial documents93 had been prepared in 1964 at the
Commission’s request.

90 Yearbook of the International Law Commission, 1968, vol. II,
93 Yearbook of the International Law Commission, 1964, vol. II,
ANNEX III
Draft on “international responsibility of States for injuries on their territory to the person or property of foreigners”, prepared by the Institute of International Law (1927)

ANNEX IV
Resolution on “the rule of the exhaustion of local remedies”, adopted by the Institute of International Law in 1956
[Original text: French]
When a State claims that an injury to the person or property of one of its nationals has been committed in violation of international law, any diplomatic claim or claim before a judicial body vested in the State making the claim by reason of such injury to one of its nationals is receivable if the internal legal order of the State against which the claim is made provides means of redress available to the injured person which appear to be effective and sufficient and so long as the normal use of these means of redress has not been exhausted.

This rule does not apply:
(a) if the injurious act affected a person enjoying special international protection;
(b) if the application of the rule has been set on one side by agreement between the States concerned.

ANNEX V
Resolution on “the national character of an international claim presented by a State for injury suffered by an individual”, adopted by the Institute of International Law in 1965
[Original text: French]
The Institute of International Law,
Considering it opportune to formulate with precision the rules regarding the national character of claims as developed from the practice of States and from international jurisprudence;
Reserving the study of proposals which might improve the protection of individuals whether by diplomatic protection or by other methods and in particular by any special procedures established by an international organization;
Reserving more especially for later examination the case where the nationality of the injured individual has changed as a consequence of territorial modifications of the State of which he was a national or by modifications of his personal statute;
Adopts the following rules as applicable in the absence of contrary provisions agreed upon by the Parties:

Article 1
(a) An international claim brought by a State for injury suffered by an individual may be rejected by the State to which it is presented unless it possessed the national character of the claimant State both at the date of its presentation and at the date of the injury. Before a court (jurisdiction) seised of such a claim, absence of such national character is a ground for inadmissibility.
(b) An international claim presented by a new State for injury suffered by one of its nationals prior to the attainment of independence by that State, may not be rejected or declared inadmissible in application of the preceding paragraph merely on the ground that the national was previously a national of the former State.

Article 2
When the beneficiary of an international claim is a person other than the individual originally injured, the claim may be rejected by the State to which it is presented and is inadmissible before the court seised of it unless it possessed the national character of the claimant State both at the date of injury and at the date of its presentation.

Article 3
(a) An international claim presented in respect of an injury suffered by an individual possesses the national character of a State when the individual is a national of that State or a person which that State is entitled under international law to assimilate to its own nationals for purposes of diplomatic protection.
(b) By date of injury is meant the date of the loss or detriment suffered by the individual.
(c) By date of presentation is meant, in case of a claim presented through diplomatic channels, the date of the formal presentation of the claim by a State and, in case of resort to an international court (jurisdiction), the date of filing of the claim before it.

Article 4
(a) An international claim presented by a State for injury suffered by an individual who possesses at the same time the nationalities of both claimant and respondent States may be rejected by the latter and is inadmissible before the court (jurisdiction) seised of the claim.
(b) An international claim presented by a State for injury suffered by an individual who, in addition to possessing the nationality of the claimant State, also possesses the nationality of a State other than the respondent State may be rejected by the latter and is inadmissible before the court (jurisdiction) seised of the claim, unless it can be established that the interested person possesses a closer (prépondérant) link of attachment with the claimant State.
(c) An international claim presented by a State for injury suffered by an individual may be rejected by the respondent State or declared inadmissible when, in the particular circumstances of the case, it appears that naturalization has been conferred on that individual in the absence of any link of attachment.

ANNEX VI
Draft convention on “responsibility of States for damage done in their territory to the person or property of foreigners”, prepared by the Harvard Law School (1929)

ANNEX VII
Draft convention on the international responsibility of States for injuries to aliens, prepared by the Harvard Law School, 1961
[Original text: English]
SECTION A
GENERAL PRINCIPLES AND SCOPE
Article 1
(Basic principles of State responsibility)
1. A State is internationally responsible for an act or omission which, under international law, is wrongful, is attributable to that
State responsibility

State, and causes an injury to an alien. A State which is responsible for such an act or omission has a duty to make reparation therefor to the injured alien or an alien claiming through him, or to the State entitled to present a claim on behalf of the individual claimant.

2. (a) An alien is entitled to present an international claim under this Convention only after he has exhausted the local remedies provided by the State against which the claim is made.

(b) A State is entitled to present a claim under this Convention only on behalf of a person who is its national, and only if the local remedies and any special international remedies provided by the State against which the claim is made have been exhausted.

Article 2

(Primacy of international law)

1. The responsibility of a State under Article 1 is to be determined according to this Convention and international law, by application of the sources and subsidiary means set forth in paragraph 1 of Article 38 of the Statute of the International Court of Justice.

2. A State cannot avoid international responsibility by invoking its municipal law.

3. Nothing in this Convention shall adversely affect any right which an alien enjoys under the municipal law of the State against which the claim is made if that law is more favorable to him than this Convention.

SECTION B

WRONGFUL ACTS AND OMISSIONS

Article 3

(Categories of wrongful acts and omissions)

1. An act or omission which is attributable to a State and causes an injury to an alien is “wrongful”, as the term is used in this Convention:

(a) if, without sufficient justification, it is intended to cause, or to facilitate the causing of, injury;

(b) if, without sufficient justification, it creates an unreasonable risk of injury through a failure to exercise due care;

(c) if it is an act or omission defined in Articles 5 to 12; or

(d) if it violates a treaty.

2. The wrongfulness of such an act or omission may be the result of the fact that the law of the State does not conform to international standards or of the fact that the law, although conforming to international standards, has been misapplied.

Article 4

(Sufficiency of justification)

1. The imposition of punishment for the commission of a crime for which such punishment has been provided by law is a “sufficient justification” within the meaning of sub-paragraph 1 (a) of Article 3, except when the decision imposing the punishment is wrongful under Article 8.

2. The actual necessity of maintaining public order, health, or morality in accordance with laws enacted for that purpose is a “sufficient justification” within the meaning of sub-paragraphs 1 (a) and 1 (b) of Article 3, except when the measures taken against the injured alien clearly depart from the law of the respondent State or unreasonably depart from the principles of justice or the principles governing the action of the authorities of the State in the maintenance of public order, health, or morality recognized by the principal legal systems of the world.

3. The valid exercise of belligerent or neutral rights or duties under international law is a “sufficient justification” within the meaning of sub-paragraphs 1 (a) and 1 (b) of Article 3.

4. The contributory fault of the injured alien, or his voluntary participation in activities involving an unreasonable risk of injury, to the extent that such fault or voluntary participation bars the claim of a person under both the law of the respondent State and the principles recognized by the principal legal systems of the world, is a “sufficient justification” within the meaning of sub-paragraph 1 (b) of Article 3.

5. In circumstances other than those enumerated in paragraphs 1 to 4 of this Article, “sufficient justification” within the meaning of sub-paragraphs 1 (a) and 1 (b) of Article 3 exists only when the particular circumstances are recognized by the principal legal systems of the world as constituting such justification.

Article 5

(Arrest and detention)

1. The arrest or detention of an alien is wrongful:

(a) if it is a clear and discriminatory violation of the law of the arresting or detaining State;

(b) if the cause or manner of the arrest or detention unreasonably departs from the principles recognized by the principal legal systems of the world;

(c) if the State does not have jurisdiction over the alien; or

(d) if the arrest or detention otherwise involves a violation by the State of a treaty.

2. The detention of an alien becomes wrongful after the State has failed:

(a) to inform him promptly of the cause of his arrest or detention, or to inform him within a reasonable time after his arrest or detention of the specific charges against him;

(b) to grant him prompt access to a tribunal empowered both to determine whether his arrest or detention is lawful and to order his release if the arrest or detention is determined to be unlawful;

(c) to grant him a prompt trial; or

(d) to ensure that his trial and any appellate proceedings are not unduly prolonged.

3. The mistreatment of an alien during his detention is wrongful.

Article 6

(Denial of access to a tribunal or an administrative authority)

The denial to an alien of the right to initiate, or to participate in, proceedings in a tribunal or an administrative authority to determine his civil rights or obligations is wrongful:

(a) if it is a clear and discriminatory violation of the law of the State denying such access;

(b) if it unreasonably departs from those rules of access to tribunals or administrative authorities which are recognized by the principal legal systems of the world; or

(c) if it otherwise involves a violation by the State of a treaty.

Article 7

(Denial of a fair hearing)

The denial to an alien by a tribunal or an administrative authority of a fair hearing in a proceeding involving the determination of his civil rights or obligations of any criminal charges against him is wrongful if a decision or judgment is rendered against him or he is accorded an inadequate recovery; in determining the fairness of any hearing, it is relevant to consider whether it was held before an independent tribunal and whether the alien was denied:

(a) specific information in advance of the hearing of any claim or charge against him;

(b) adequate time to prepare his case;

(c) full opportunity to know the substance and source of any evidence against him and to contest its validity;
of an alien, or of the use thereof, for a public purpose clearly recognized as such by a law of general application in effect at the time of the taking is wrongful if it is not accompanied by prompt payment of compensation in accordance with the highest of the following standards:

(a) compensation which is no less favorable than that granted to nationals of such State; or

(b) just compensation in terms of the fair market value of the property or of the use thereof unaffected by this or other takings or by conduct attributable to the State and designed to depress the value of property in anticipation of the taking; or

(c) if no fair market value exists, just compensation in terms of the fair value of such property or of the use thereof.

If a treaty requires a special standard of compensation, the compensation shall be paid in accordance with the treaty.

3. (a) A “taking of property” includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.

(b) A “taking of the use of property” includes not only an outright taking of use but also any unreasonable interference with the use or enjoyment of property for a limited period of time.

4. If property is taken by a State in furtherance of a general program of economic and social reform, the just compensation required by this Article may be paid over a reasonable period of years, provided that:

(a) the method and modalities of payment to aliens are no less favorable than those applicable to nationals;

(b) a reasonable part of the compensation due is paid promptly;

(c) bonds equal in fair market value to the remainder of the compensation and bearing a reasonable rate of interest are given to the alien and the interest is paid promptly; and

(d) the taking is not in violation of an express undertaking by the State in reliance on which the property was acquired or imported by the alien.

5. An uncompensated taking of property of an alien or a deprivation of the use or enjoyment of property of an alien which results from the execution of the tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health, or morality; or from the valid exercise of belligerent rights; or is otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful, provided:

(a) it is not a clear and discriminatory violation of the law of the State concerned;

(b) it is not the result of a violation of any provision of Articles 6 to 8 of this Convention;

(c) it is not an unreasonable departure from the principles of justice recognized by the principal legal systems of the world; and

(d) it is not an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property.

Article 10

(Taking and deprivation of use or enjoyment of property)

1. The taking, under the authority of the State, of any property of an alien, or of the use thereof, is wrongful:

(a) if it is not for a public purpose clearly recognized as such by law of general application in effect at the time of the taking; or

(b) if it is in violation of a treaty.

2. The taking, under the authority of the State, of any property of an alien, or of the use thereof, for a public purpose clearly recognized as such by a law of general application in effect at the time of the taking is wrongful if it is not accompanied by prompt payment of compensation in accordance with the highest of the following standards:

(a) compensation which is no less favorable than that granted to nationals of such State; or

(b) just compensation in terms of the fair market value of the property or of the use thereof unaffected by this or other takings or by conduct attributable to the State and designed to depress the value of property in anticipation of the taking; or

(c) if no fair market value exists, just compensation in terms of the fair value of such property or of the use thereof.

If a treaty requires a special standard of compensation, the compensation shall be paid in accordance with the treaty.

3. (a) A “taking of property” includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.

(b) A “taking of the use of property” includes not only an outright taking of use but also any unreasonable interference with the use or enjoyment of property for a limited period of time.

4. If property is taken by a State in furtherance of a general program of economic and social reform, the just compensation required by this Article may be paid over a reasonable period of years, provided that:

(a) the method and modalities of payment to aliens are no less favorable than those applicable to nationals;

(b) a reasonable part of the compensation due is paid promptly;

(c) bonds equal in fair market value to the remainder of the compensation and bearing a reasonable rate of interest are given to the alien and the interest is paid promptly; and

(d) the taking is not in violation of an express undertaking by the State in reliance on which the property was acquired or imported by the alien.

5. An uncompensated taking of property of an alien or a deprivation of the use or enjoyment of property of an alien which results from the execution of the tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health, or morality; or from the valid exercise of belligerent rights; or is otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful, provided:

(a) it is not a clear and discriminatory violation of the law of the State concerned;

(b) it is not the result of a violation of any provision of Articles 6 to 8 of this Convention;

(c) it is not an unreasonable departure from the principles of justice recognized by the principal legal systems of the world; and

(d) it is not an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property.

Article 11

(Deprivation of means of livelihood)

1. To deprive an alien of his existing means of livelihood by excluding him from a profession or occupation which he has hitherto pursued
in a State, without a reasonable period of time in which to adjust
his affairs, by way of obtaining other employment, disposing of his
business or practice at a fair price, or otherwise, is wrongful if the
alien is not accorded just compensation, promptly paid in the manner
specified in Article 39, for the failure to provide such period of
adjustment.

2. Paragraph 1 of this Article has no application if an alien:
   (a) has, as a result of professional misconduct or of conviction
       for a crime, been excluded from a profession or occupation which
       he has hitherto pursued, or
   (b) has been expelled or deported in conformity with international
       standards relating to expulsion and deportation and not with the
       purpose of circumventing paragraph 1.

Article 12
(Violation, annulment, and modification of contracts and concessions)

1. The violation through an arbitrary action of the State of a contract
   or concession to which the central government of that State and an
   alien are parties is wrongful. In determining whether the action of
   the State is arbitrary, it is relevant to consider whether the action
   constitutes:
   (a) a clear and discriminatory departure from the proper law of
       the contract or concession as that law existed at the time of the
       alleged violation;
   (b) a clear and discriminatory departure from the law of the
       State which is a party to the contract or concession as that law
       existed at the time of the making of the contract or concession, if
       that law is the proper law of the contract or concession;
   (c) an unreasonable departure from the principles recognized by
       the principal legal systems of the world as applicable to governmental
       contracts or concessions of the same nature or category; or
   (d) a violation by the State of a treaty.

2. If the violation by the State of a contract or concession to which
   the central government of a State and an alien are parties also
   involves the taking of property, the provisions of Article 10 shall
   apply to such taking.

3. The exaction from an alien of a benefit not within the terms of
   a contract or concession to which the central government of a State
   and an alien are parties or of a waiver of any term of such a contract
   or concession is wrongful if such benefit or waiver was secured through
   the use of any clear threat by the central government of the State to
   repudiate, cancel or modify any right of the alien under such contract
   or concession.

4. The annulment or modification by a State, to the detriment of an
   alien, of any contract or concession to which the central government of a
   State and an alien are parties is wrongful if it constitutes:
   (a) a clear and discriminatory departure from the proper law of
       the contract or concession;
   (b) an unreasonable departure from the principles recognized by
       the principal legal systems of the world as applicable to such
       contracts or concessions; or
   (c) a violation by the State of a treaty.

Article 13
(Lack of due diligence in protecting aliens)

1. Failure to exercise due diligence to afford protection to an alien,
   by way of preventive or deterrent measures, against any act wrongfully
   committed by any person, acting singly or in concert with others, is
   wrongful:
   (a) if the act is criminal under the law of the State concerned; or
   (b) the act is generally recognized as criminal by the principal
       legal systems of the world.

2. Failure to exercise due diligence to apprehend, or to hold after
   apprehension as required by the laws of the State, a person who has
   committed against an alien any act referred to in paragraph 1 of
   this Article is wrongful; to the extent that such conduct deprives
   that alien or any other alien of the opportunity to recover damages
   from the person who has committed the act.

SECTION C
INJURIES

Article 14
(Definitions of injury and causation)

1. An “injury” as the term is used in this Convention, is a loss or
   detriment caused to an alien by a wrongful act or omission which
   is attributable to a State.

2. Injuries within the meaning of paragraph 1 include, but are not
   limited to:
   (a) bodily or mental harm;
   (b) loss sustained by an alien as the result of the death of another
       alien;
   (c) deprivation of liberty;
   (d) harm to reputation;
   (e) destruction, damage to, or loss of property;
   (f) deprivation of use or enjoyment of property;
   (g) deprivation of means of livelihood;
   (h) loss or deprivation of enjoyment of rights under a contract
       or concession; or
   (i) any loss or detriment against which an alien is specifically
       protected by a treaty.

3. An injury is “caused”, as the term is used in this Convention, by
   an act or omission if the loss or detriment suffered by the injured
   alien is the direct consequence of that act or omission.

4. An injury is not “caused” by an act or omission:
   (a) if there was no reasonable relation between the facts which
       made the act or omission wrongful and the loss or detriment suffered
       by the injured alien; or
   (b) if, in the case of an act or omission creating an unreasonable
       risk of injury, the loss or detriment suffered by the injured alien
       occurred outside the scope of the risk.

SECTION D
ATRIBUTION

Article 15
(Circumstances of attribution)

A wrongful act or omission causing injury to an alien is “attribu-
table to a State”, as the term is used in this Convention, if it is
the act or omission of any organ, agency, official, or employee of
the State acting within the scope of the actual or apparent authority
or within the scope of the function of such organ, agency, official,
or employee.

Article 16
(Persons and agencies through which a State acts)

1. The terms “organ of a State” and “agency of a State”, as used
   in this Convention, include the Head of State and any legislative,
deliberative, executive, administrative, or judicial organ or agency
of a State.

2. The terms “official of a State” and “employee of a State”, as used
   in this Convention, include both a civilian official or employee of
   a State and any member of the armed forces or of a para-military
organization.
Article 17
(Levels of government)
1. The terms "organ of a State", "agency of a State", "official of a State", and "employee of a State", as used in this Convention, include any organ, agency, official or employee, as the case may be, of:
   (a) the central government of a State;
   (b) in the case of a federal State, the government of any state, province, or other component political unit of such federal State;
   (c) the government of any protectorate, colony, dependency, or other territory of a State, for the international relations of which that State is responsible, or the government of any trust territory or territory under mandate for which a State acts as the administering authority; or
   (d) the government of any political subdivision of any of the foregoing.
2. The terms "organ of a State", "agency of a State", "official of a State", and "employee of a State", as used in this Convention, do not include any organ, agency, official, or employee of any enterprise normally considered as commercial which is owned in whole or in part by a State or one of the entities referred to in paragraph 1 if such enterprise is, under the law of such State, a separate juristic person with respect to which the State neither accords immunity in its own courts nor claims immunity in foreign courts.

Article 18
(Activities of revolutionaries)
1. In the event of a revolution or insurrection which brings about a change in the government of a State or the establishment of a new State, an act or omission of an organ, agency, official, or employee of a revolutionary or insurrectionary group is, for the purposes of this Convention, attributable to the State in which the group established itself as the government.
2. In the event of an unsuccessful revolution or insurrection, an act or omission of an organ, agency, official, or employee of a revolutionary or insurrectionary group is not, for the purposes of this Convention, attributable to the State.

SECTION E
EXHAUSTION OF LOCAL REMEDIES
Article 19
(When local remedies considered exhausted)
1. Local remedies shall be considered as exhausted for the purposes of this Convention if the claimant has employed all administrative, arbitral, or judicial remedies which were made available to him by the respondent State, without obtaining the full redress to which he is entitled under this Convention.
2. Local remedies shall be considered as not available for the purposes of this Convention:
   (a) if no remedy exists through which substantial recovery could be obtained;
   (b) if the remedies are in fact foreclosed by an act or omission attributable to the State; or
   (c) if only excessively slow remedies are available or justice is unreasonably delayed.

SECTION F
PRESENTATION OF CLAIMS BY ALIENS
Article 20
(Persons entitled to present claims)
1. A claim may be presented, as provided in Article 22, by an injured alien or by a person entitled to claim through him.

2. Injured aliens, for the purposes of this Convention, include:
   (a) the alien who has suffered an injury;
   (b) in the case of the killing of an alien, another alien who is:
      (1) a spouse of the decedent;
      (2) a parent of the decedent;
      (3) a child of the decedent; or
      (4) a relative by blood or marriage actually dependent on the decedent for support;
   (c) an alien who holds a share in, or other analogous evidence of ownership or interest in a juristic person which is a national of the respondent State or of any other State of which the alien is not a national, and who suffers an injury to such interest through the dissolution of, or any other injury to, such juristic person, if that juristic person has failed to take timely steps adequately to defend the interests of such alien.
3. Upon the death of an alien who has suffered an injury, such claim as may have accrued to him before his death may be presented by an heir, if such heir is an alien, or by the personal representative of the decedent.
4. If a claim has been assigned, it may be presented by the assignee thereof; provided such assignee is an alien.

Article 21
(Definition of alien, national, and claimant)
1. An "alien", as regards a particular State, is, as the term is used in this Convention, a person who is not a national of that State.
2. A "person", as the term is used in this Convention, is a natural person or a juristic person.
3. A "national" of a State, for the purposes of this Convention, shall be considered to include:
   (a) a natural person who possesses the nationality of that State;
   (b) a natural person who possesses the nationality of any territory under the mandate, trusteeship, or protection of that State;
   (c) a stateless person having his habitual residence in that State; and
   (d) a juristic person which is established under the law of that State or of one of the entities referred to in paragraph 1 of Article 17.
4. A member of the armed forces of a State or an official of a State, who does not possess the nationality of that State, is treated as if he were a national of that State as regards injuries incurred by him in the service of that State.
5. A "claimant", as the term is used in this Convention, is a person who asserts that he is an injured alien or a person entitled to claim through such injured alien.

Article 22
(Procedure)
1. A claimant is entitled to present his claim directly to the State alleged to be responsible.
2. A claimant is entitled to present his claim directly to a competent international tribunal if the State alleged to be responsible has conferred on that tribunal jurisdiction over such claim.
3. Subject to Article 25, a claimant shall not be precluded from submitting his claim directly to the State alleged to be responsible or to an international tribunal by reason of the fact that the State of which he is a national has refused to present his claim or that there is no State which is entitled to present his claim.
4. No claim may be presented by a claimant if, after the injury and without duress, the claimant himself or the person through whom he derived his claim waived, compromised, or settled the claim.
5. No claim under this Convention may be presented by a claimant with respect to any injury listed in sub-paragraphs 2 (e), 2 (f), 2 (g), or 2 (h) of Article 14:
(a) if prior to his acquisition of property rights or of a right to exercise a profession or occupation in the territory of the State responsible for the injury, or as a condition of obtaining rights under a contract with or a concession granted by that State, the alien to whom such rights were accorded agreed to waive such claims as might arise out of a violation by the respondent State of any of the rights thus acquired,

(b) if the respondent State has not altered the agreement unilaterally through a legislative act or in any other manner, and has otherwise complied with the terms and conditions specified in the agreement, and

(c) if the injury arose out of the violation by the State of the rights thus acquired by the alien.

6. No claim may be presented by a claimant with respect to any of the injuries listed in paragraph 2 of Article 14, if as a condition of being allowed to engage in activities involving an extremely high degree of risk, which privilege would otherwise be denied to him by the State, the alien has agreed to waive any claim with respect to such injuries and if the claim arises out of an act or omission attributable to the State which has a reasonably close relationship to such activities. Such a waiver is effective, however, only as to injuries resulting from a negligent act or omission or from a failure to exercise due diligence to afford protection to the alien in question and not as to injuries caused by a wilful act or omission attributable to the State.

7. No claim may be presented by a juristic person if the controlling interest in that person is in nationals of the State alleged to be responsible or in an organ or agency of that State. This provision shall not, however, affect the rights of aliens under sub-paragraph 2 (c) of Article 20.

8. The right of the claimant to present or maintain a claim terminates if, at any time during the period between the original injury and the final award, the injured alien, or the holder of the beneficial interest in the claim while he holds such interest, becomes a national of the State alleged to be responsible.

SECTION G
ESPOUSAL AND PRESENTATION OF CLAIMS BY STATES

Article 23
(Espousal of claims and continuing nationality)

1. A State is entitled to present a claim on behalf of its national directly to the State which is alleged to be responsible and, if the claim is not settled within a reasonable period, to an international tribunal which has jurisdiction of the subject-matter and over the States concerned, whether or not its national has previously presented a claim under Article 22. If a claim is being presented both by a claimant and by the State of which he is a national, the right of the claimant to present or maintain his claim shall be suspended while reded, is being sought by the State.

2. If so provided in an instrument by which a State has conferred jurisdiction upon an international tribunal pursuant to paragraph 2 of Article 22, the presentation of a claim by any other State on behalf of the claimant to present or maintain his claim shall be suspended remedies thus made available to him.

3. A State is not entitled to present a claim on behalf of a natural person who is its national if that person lacks a genuine connection of sentiment, residence, or other interests with that State.

4. A State is not entitled to present a claim on behalf of a juristic person if the controlling interest in that person is in nationals of the State alleged to be responsible or in an organ or agency of that State.

5. A State is entitled to present a claim of its national arising out of the death of another person only if that person was not a national of the State alleged to be responsible.

6. A State has the right to present or maintain a claim on behalf of a person only while that person is a national of that State. A State shall not be precluded from presenting a claim on behalf of a person by reason of the fact that that person became a national of that State subsequent to the injury.

7. The right of a State to present or maintain a claim terminates, if, at any time during the period between the original injury and the final award or settlement, the injured alien, or the holder of the beneficial interest in the claim while he holds such interest, becomes a national of the State against which the claim is made.

Article 24
(Waiver, compromise, or settlement of claims by claimants and imposition of nationality)

1. A State is not entitled to present a claim if the claimant or a person through whom he derives his claim has waived, compromised, or settled the claim under paragraphs 4, 5 or 6 of Article 22.

2. A State is not relieved of its responsibility by having imposed its nationality, in whole or in part, on the injured alien or any other holder of the beneficial interest in the claim, except when the person concerned consented thereto or nationality was imposed in connection with a transfer of territory. Such consent need not be express; it shall be implied if the law of the State provides that an alien thereafter acquiring real estate, obtaining a concession, or performing any other specified act shall automatically acquire the nationality of that State for all purposes and the alien voluntarily fulfills these conditions. Such a requirement may be applied to both natural and juristic persons, subject to the provisions of sub-paragraph 2 (c) of Article 20.

Article 25
(Waiver, compromise, or settlement of claims by States)

A State may by a treaty waive, compromise, or settle any actual or potential claim of its nationals accruing under this Convention and may make such waiver, compromise, or settlement binding not only on itself but also on any actual or potential claimant who is a national of such State, even if that person became a national of such State after the waiver, compromise, or settlement was effected.

SECTION H
DELAY

Article 26
(Claims barred by lapse of time)

If the presentation of a claim is delayed, after the exhaustion of local remedies to the extent provided for in Article 19, for a period of time which is unreasonable under the circumstances, the claim shall be barred by the lapse of time.

SECTION I
REPARATION

Article 27
(Form and purpose of reparation)

1. The reparation which a State is required to make for a wrongful act or omission for which it is responsible may take the form of:

(a) measures designed to re-establish the situation which would have existed if the wrongful act or omission attributable to the State had not taken place;

(b) damages; or

(c) a combination thereof.
2. Measures designed to re-establish the situation which would have existed if the act or omission attributable to the State had not taken place may include:

(a) revocation of the act;
(b) restitution in kind of property wrongfully taken;
(c) performance of an obligation which the State wrongfully failed to discharge; or
(d) abstention from further wrongful conduct.

3. Damages are awarded in order to:

(a) place the injured alien or an alien claiming through him in as good a position, in financial terms, as that in which the alien would have been if the act or omission for which the State is responsible had not taken place;
(b) restore to the injured alien or an alien claiming through him any benefit which the State responsible for the injury obtained as the result of its act or omission; and
(c) afford appropriate satisfaction to the injured alien or an alien claiming through him for an injury suffered by the injured alien as the result of an act or omission occasioned by malice, reckless indifference to the rights of the injured alien, any category of aliens, or aliens in general, or a calculated policy of oppression directed against the injured alien, any category of aliens, or aliens in general.

4. Factors normally to be taken into account in the computation of damages are set forth in Articles 28 to 38, but such enumeration in no wise limits the scope of this Article.

**Article 28**

(Damages for personal injury or deprivation of liberty)

Damages for bodily or mental harm, for mistreatment during detention, or for deprivation of liberty shall include compensation for past and prospective:

(a) harm to the body or mind;
(b) pain, suffering, and emotional distress;
(c) loss of earnings and or earning capacity;
(d) reasonable medical and other expenses;
(e) harm to the property or business of the alien resulting directly from such bodily or mental injury or deprivation of liberty; and
(f) harm to the reputation of the alien resulting directly from such deprivation of liberty.

**Article 29**

(Damages for death)

Damages in respect of the death of an alien shall include compensation for the expected contribution of the decedent to the support of the persons specified in sub-paragraph 2 (b) of Article 20.

**Article 30**

(Damages for wrongful acts of tribunals and administrative authorities)

1. If, as set forth in Articles 6, 7, and 8, in any civil proceeding an alien has been denied access to a tribunal or an administrative authority or an adverse decision or judgment has been rendered against an alien or an inadequate recovery obtained by an alien, damages shall include compensation for the amount wrongfully assessed against or denied such alien and any other losses resulting directly from such proceeding or denial of access.

2. If in any criminal proceeding an alien has been arrested or detained as set forth in Article 5 or an adverse decision or judgment has been rendered against an alien as set forth in Articles 7 and 8, damages shall, in addition to damages otherwise payable under this Section, include compensation for the costs of defense, litigation, and judgment, and any other losses resulting directly from such proceeding.

**Article 31**

(Damages for destruction of and damage to property)

1. Damages for destruction of property under Article 9 shall include:

(a) an amount equal to the fair market value of the property prior to the destruction or, if no fair market value exists, the fair value of such property; and
(b) payment, if appropriate, for the loss of use of the property.

2. Damages for damage to property under Article 9 shall include:

(a) the difference between the value of the property before the damage and the value of the property in its damaged condition; and
(b) payment, if appropriate, for the loss of use of the property.

**Article 32**

(Damages for taking and deprivation of use or enjoyment of property)

1. In case of the taking of property or of the use thereof under paragraph 1 of Article 10, the property shall, if possible, be restored to the owner and damages shall be paid for the use thereof.

2. Damages for the taking of property or of the use thereof under paragraph 2 of Article 10, or under paragraph 1 of Article 10 if restoration of the property is impossible, shall be equal to the difference between the amount, if any, actually paid for such property or for the use thereof and the amount of compensation required by paragraph 2 of Article 10.

**Article 33**

(Damages for deprivation of means of livelihood)

Damages for the deprivation of an existing means of livelihood under Article 11 shall include compensation for any losses caused to the alien by failure to accord him a reasonable period of time in advance of such deprivation in which to adjust his affairs. In particular, such damages shall include the difference between the amount, if any, actually received by the alien in connection with such deprivation of means of livelihood and the compensation required by Article 11.

**Article 34**

(Damages for violation, annulment, or modification of a contract or concession)

1. Damages for the violation, annulment, or modification of a contract or concession under paragraph 1 or 4 of Article 12 shall include compensation for losses caused, and gains denied as the result of such wrongful act or omission or compensation which will restore the claimant to the same position in which the injured alien was immediately preceding such act or omission.

2. Damages for the exacting of a benefit not within the terms of a contract or concession or for the waiver of a term thereof under paragraph 3 of Article 12 shall include compensation for the benefit wrongfully exacted.

**Article 35**

(Damages for failure to exercise due diligence)

Damages for any injury sustained as the result of the failure of a State under Article 13 to exercise due diligence to afford protection to an alien or to apprehend or to hold a person who has committed a criminal act shall be computed as if the State had originally caused such injury directly.
**Article 36**

(Costs)

The claimant shall be reimbursed for those expenses incurred by him in the local and international prosecution of his claim which are reasonable in amount and the incidence of which was necessary to obtain reparation on the international plane.

**Article 37**

(Subtraction of damages obtained through other remedies)

Damages which a State is required to pay on account of an act or omission for which it is responsible shall be diminished by the amount of any recovery which has been obtained through local and international remedies. The amount so recovered must be payable in the form specified in Article 39.

**Article 38**

(Interest)

1. The amount of any award shall include interest, either by way of inclusion in the lump sum awarded or by the addition of an amount computed from the date of the injury to the date of the award. If, however, the injured alien is dilatory in presenting his claim, such interest may be computed from the date at which he gave notice of his claim to the responsible State.
2. Interest on the amount of the award shall be due for the period from the date of the award to the date of the payment thereof.
3. The rate of interest under paragraphs 1 and 2 shall be that prevailing with respect to obligations of analogous amount and duration at the time of the award in the place in which the injured alien was habitually resident at the time of the injury.

**Article 39**

(Currency and rate of exchange)

1. Damages shall, except in the case dealt with in paragraph 2 of this Article, be computed and paid in the currency of the State of which the injured alien was a national at the time of the injury or, in the case of claims accruing under Article 12, in the currency specified in the contract or concession. The respondent State may pay the award either in that currency or in any other currency readily convertible to that currency, computed at the rate of exchange prevailing on the date of the award or payment, whichever is more favorable to the claimant. In the case of a multiple exchange rate, the rate of exchange shall be that approved by the International Monetary Fund for such transactions or, in the absence of a rate so approved, a rate which is equitable under the circumstances of the case.
2. If, however, the injured alien was a natural person and had his habitual residence in the territory of the respondent State for an extended period of time prior to the injury, damages under Articles 31 to 34 may, in the discretion of that State, be paid in the currency thereof.
3. The provisions of this Article shall apply also to the compensation payable under Articles 10 and 11.
4. Damages and compensation payable under paragraphs 1 and 3 of this Article shall be exempt from exchange controls.

**Article 40**

(Local taxes prohibited)

Neither damages nor compensation shall be subjected to special taxes or capital levies within the State paying such damages or compensation pursuant to this Convention.

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**ANNEX VIII**

Draft convention on the responsibility of States for injuries caused in their territory to the person or property of aliens, prepared by the Deutsche Gesellschaft für Völkerrecht (German International Law Association) in 1930a

[Original text: German]

**Article 1**

1. Every State is responsible to other States for injury caused in its territory to the person or property of aliens as a consequence of the violation by that State of any of its obligations towards the other State under international law.
2. The violation of an obligation under international law may consist of an omission if action or a specific act would, in the circumstances, have been an obligation under international law.
3. It is immaterial whether the violation results from acts or omissions of the constituent or legislative power, of the Government, of the administrative authorities, of the courts or of the corporations and agencies which perform public functions in its territory.
4. Responsibility is not avoided by reason of the fact that an authority acts beyond its competence, provided that it purports to be acting in its official capacity and is employing the official machinery, or by reason of the fact that the violation is committed in the performance of official functions. Where an act does not fulfil these conditions, the State is responsible in the same manner as in the case of acts and omissions of private persons.

**Article 2**

1. In the absence of special agreements or other rules of international law, every State is obligated to protect the life, freedom and property of aliens in its territory.
2. This obligation means, in particular, that:
   (a) An alien may not be wrongfully deprived of his freedom. Wrongful deprivation of freedom is deemed to include, in particular, the upholding of an unlawful arrest, detention in provisional custody for a manifestly unnecessary or inadmissible length of time, and imprisonment without due cause or in conditions of unnecessary hardship.
   (b) Expropriation of duly acquired rights is admissible only for reasons of the general welfare and against appropriate compensation.
   (c) Concessions granted to aliens or rights conferred by contract on aliens may be withdrawn only for compelling reasons of public welfare and against full compensation.
   (d) The obligations of indebtedness of a State towards an alien may not be annulled by that State and performance of them may not be refused by that State without lawful cause. Payments of interest and repayments of principal may be suspended or modified only in the event of financial necessity.

**Article 3**

1. Apart from the foregoing, the State is obligated only to apply conscientiously to aliens municipal law relating to international law and to allow them access to the courts.
2. In the case of the application of municipal law in conformity with international law by its governmental and administrative authorities, the State is responsible only if it has failed to do all such things as are appropriate to and necessary in the circumstances in order to ensure a just application of such municipal law to aliens.

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3. In the case of the application of municipal law in conformity with international law by its courts, State responsibility arises only in the event of denial of justice. A denial of justice takes place:

(1) If the courts which exist for the protection of person and property are not functioning, or are not available to aliens, or proceedings relating to aliens are unduly prolonged.

(2) If the decision of the court is so defective that it cannot be deemed to be the expression of a conscientious judicial determination. Lack of a conscientious judicial determination may be presumed if the courts do not present those guarantees of independence which are essential to the proper administration of justice or if the courts have acted with malice towards aliens in general or towards persons having the nationality of the aliens concerned.

Article 4

A federal State is responsible for its component States, irrespective of whether a case concerns its own obligations under international law or the like obligations of such component States.

Article 5

1. The State is responsible only according to the measure of Article 1, paragraph 2, for injury caused in its territory by the acts of private persons.

2. The public status of an alien and the circumstances under which he is present in its territory oblige the State to exercise special diligence and care.

Article 6

1. A State is responsible for injury caused on the occasion of riots, insurrections and civil war or in similar cases only if it has failed to apply such diligent care as the circumstances require in order to prevent or counteract the injuries and if it fails to afford to aliens the same protection and the same compensation for injury as it affords to its own nationals.

2. If the disturbances are directed against aliens in general or against persons of a given State or nationality, the State is responsible for injuries caused to the foreign nationals unless it proves that it is not chargeable with any failure as specified in paragraph 1.

3. If the State recognizes the insurgents as a belligerent party, its responsibility terminates in respect of injuries caused after such recognition. Its responsibility towards States which have recognized the insurgents as a belligerent party terminates in respect of injuries caused after such recognition.

Article 7

1. The criterion for State responsibility is afforded solely by international law.

2. Accordingly, responsibility is not, in particular, avoided by reason of the fact that the organs of the State:

   (1) Are acting in contravention of municipal law or of the orders of their superiors;

   (2) Are complying with the Constitution, with municipal law or with the orders of their superiors;

   (3) Are, in accordance with their municipal law, treating aliens in the same manner as their own nationals, where the treatment of their own nationals does not conform to the principles laid down by international law for the protection of life, freedom and property.

Article 8

1. A State which is responsible in accordance with the foregoing provisions is obligated towards the State which has been injured in the person of its nationals to make reparation, in an appropriate manner and as fully as is practicable, for the injury consequent on the act which is contrary to international law.

2. An injury which is only remotely connected with the act contrary to international law is not deemed to be consequent on that act.

3. Damages shall include, in addition to damages for the injury caused to the injured national, damages for any injury thereby caused to the State itself.

Article 9

1. The injured State may in the first instance demand the re-establishment of the situation in fact and in law which would have existed if the event causing the injury had not taken place, to the extent that such re-establishment is possible.

2. Difficulties in effecting such re-establishment, and in particular the necessity of expropriating and compensating third-party assignees, do not preclude the right to demand such re-establishment.

3. Re-establishment may not be demanded if such a demand is unreasonable, and in particular if the difficulties of re-establishment are disproportionate to the advantages for the injured person.

Article 10

1. If re-establishment is not demanded or under the terms of the preceding article may not be demanded, or if and to the extent that re-establishment does not constitute full reparation for the injury caused, the injured person is entitled to monetary compensation.

2. Interest at an appropriate rate shall be paid as from the date of the injury. Compensation may be demanded for any demonstrable loss of earnings over and above the amount of the interest. Costs of litigation shall be reimbursed.

3. The domestic price levels of the State causing the injury shall not be taken into account in computing the amount of compensation if that State had depressed the domestic price through special measures. If the injured person is compelled by circumstances to obtain the compensation or to re-establish his livelihood outside the State causing the injury, the price and currency levels of the State in which he obtains the compensation or re-establishes his livelihood shall be taken into account.

Article 11

The compensation shall be placed at the disposal of the State which has been injured in the person of one of its nationals. If payment to the injured private person is demanded, this may only be deemed to constitute designation of the place of payment for the State entitled to compensation.

Article 12

1. A State injured in the person of its nationals may in appropriate cases demand, in addition to re-establishment of the situation formerly existing and in addition to compensation for material injury, compensation for mental injury.

2. The foregoing shall apply in particular in the case of serious violations of the life, freedom, reputation, intellectual property or means of livelihood of aliens.

Article 13

1. Where an injured private person has a claim to compensation under the terms of municipal law, the State injured in the person of one of its nationals may advance its claim to compensation under international law only if and to the extent that the municipal law of the responsible State does not make available to the injured
private person in this connexion legal remedies that are effective and adequate and are endowed with the necessary guarantees, or if and to the extent that the injured private person has employed and exhausted such legal remedies without obtaining reparation for his injury.

2. This restriction shall not apply if, in the circumstances, the injured private person cannot reasonably be expected to employ such legal remedies.

(Reservation to article 13)

The foregoing shall be without prejudice to the question whether, to what extent and in what manner it is advisable to grant to injured private persons an individual right to bring actions before international tribunals and to the question in what relationship the proceedings and judgements of such international tribunals stand to the proceedings and judgements of domestic tribunals and to those of the international tribunals which have jurisdiction of disputes between States in matters of State responsibility, inasmuch as these questions appear to be not yet ripe for regulation by international treaty.

Article 14

1. Without prejudice to the provisions of articles 9 to 13, a State injured in the person of its nationals may demand satisfaction, where the general principles of international law entitle it to do so.

2. Such satisfaction may not be disproportionate to the injury or by its nature be humiliating to the State affording satisfaction.

Article 15

A State injured in the person of its nationals may hold the State causing the injury responsible only if the injured private persons were already its nationals at the time of the injury or if it was entitled at that time under existing international law to grant them protection.

Article 16

1. Unless otherwise provided in special agreements between individual States, such States undertake to refer any disputes concerning the interpretation and application of this Convention to commissions of inquiry, settlement boards, arbitral tribunals or the Permanent Court of International Justice, and to take measures of self-defence only if the other party refuses such a settlement of the disputes.

2. Measures of self-defence shall not exceed the bounds of necessity and shall not be disproportionate to the injury. In the event of disagreement on whether this is the case, the States shall endeavour to settle the disagreement by peaceful means.

Article 17

This Convention shall be without prejudice to special provisions of martial law.

Article 18

Where, under the national legislation of a State which is obligated in accordance with this Convention to provide compensation for injury or under international agreements which a State has concluded with other States parties to this Convention, the obligation to provide compensation has been made dependent on a guarantee of reciprocity, reciprocity is deemed to be guaranteed in the case of States which are signatories of this Convention.

ANNEX IX

Draft treaty concerning the responsibility of a State for internationally illegal acts, prepared by Professor Strupp in 1927

[Original text: German]

Convinced that the question of the international responsibility of States, which has so often given rise to doubts and difficulties can and must be regulated by treaty, the High Contracting Parties have agreed upon the following articles, reserving for a subsequent treaty the responsibility of States in the absence of illegality.

Article 1

A State is responsible to other States for the acts of persons or groups whom it employs for the accomplishment of its purposes (its "organs"), in so far as these acts conflict with the duties which arise out of the State's international legal relations with the injured State.

If the act consists of an omission, the employing State is responsible only if it is chargeable with fault.

Article 2

Such responsibility is not relieved or avoided by the fact that the person or group has exceeded his or its authority provided it had general jurisdiction to undertake the act or action in question.

Article 3

A State is responsible only according to the measure of Article 1, paragraph 2, for the acts of private persons, especially for disadvantages or injuries which foreigners sustain on the occasion of riots, insurrections, civil war and in similar cases through the acts of persons or groups.

Article 4

In the case of an omission, a State may release itself from responsibility by proving that it has not acted wilfully or has not negligently failed to observe the necessary care.

Such care is required as may be demanded from a civilized or constitutional State (Kultur- oder Rechtsstaat).

Defective legislation, and particularly in federal States constitutional limitations upon the legislative power of the central government, can neither release nor diminish the responsibility of a State.

Article 5

In composite States (federations, confederations, protectorates) the sovereign State (Oberstaat) is responsible for the inferior or protected State (Unterstaat). Articles 1 and 2 are to be applied here also.

Article 6

The State is responsible for courts only if they have been guilty of an intentional denial or delay of justice.

A denial of justice takes place if foreigners are denied access to the courts or if, contrary to existing international duties, such access is made dependent upon special conditions.

Article 7

An injured State is not unlimited in its election of remedies. Such remedies may not be uncommensurate in severity with the original injury or by their nature be humiliating.

Article 8

If a private person is injured, a State may advance a claim only if the injured person was at the time of injury a citizen of the State.

Article 9

All claims arising of this treaty, if diplomatic processes fail to result in an agreement, or if special tribunals are not otherwise designated by treaty, shall be submitted to the Permanent Court of International Justice at The Hague.

Article 10

The international rules concerning the responsibility of States in the absence of illegality are not affected by this treaty.

Article 11

This treaty shall come into force as soon as at least five Powers have deposited their ratification at... and only in relations between or among the ratifying States. For other States, particularly non-signatories, to whom adhesion is unconditionally open, the treaty shall come into force with the deposit of ratifications at...

ANNEX X

Draft convention on the responsibility of States for international wrongful acts, prepared by Professor Roth in 1932

[Original text: German]

Article 1

A State is responsible for the acts contrary to international law of any individuals whom or corporations which it entrusts with the performance of public functions, provided that such acts are within the general scope of their jurisdiction.

Article 2

The State is not liable for the acts of private persons.

Article 3

The State is liable for omissions only if it has failed to exercise such care as should, with due regard to the circumstances, be expected of a member of the international community.

Article 4

The State may not evade its liability by invoking its municipal law.

Article 5

In the case of confederations and of dependencies under international law, the sovereign State (Oberstaat) is liable for the inferior State (Unterstaat).

ANNEX XI

Recommendation concerning “claims and diplomatic intervention”, adopted at the First International American Conference (Washington, 1889-1890)


ANNEX XII

Convention relative to the rights of aliens, signed at the Second International Conference of American States (Mexico City, 1902)


ANNEX XIII

Resolution on “international responsibility of the State”, adopted at the Seventh International Conference of American States (Montevideo, 1933)

ANNEX XIV

Principles of international law that govern the responsibility of the State in the opinion of Latin American countries, prepared by the Inter-American Juridical Committee in 1962

I

Intervention in the internal or external affairs of a State is not admissible to enforce the responsibility of said State.

On the contrary, intervention establishes the responsibility of the intervening State.

II

The State is not responsible for acts or omissions with respect to foreigners except in those same cases and conditions whereby, according to its own law, it has such responsibility towards its own nationals.

III

The responsibility of the State for contractual debts claimed by the government of another State to be due to it or its nationals cannot be enforced by recourse to armed force.

This principle applies even where the debtor State fails to reply to a proposal for arbitration or fails to comply with an arbitral award.

IV

A State is relieved of all international responsibility if the alien has, by contract, renounced the diplomatic protection of his government, or if domestic legislation subjects the contracting alien to the jurisdiction of the local courts, or if it places him in a similar status with nationals for all purposes of the contract.

V

Damages suffered by aliens as a consequence of disturbances or commotion of a political or social nature and injuries caused to aliens by acts of private parties create no responsibility of the State, except in the case of the fault of duly constituted authorities.

VI

The theory of risk as the basis for international responsibility is not admissible.

VII

The State responsible for an aggressive war is responsible for damages that may arise therefrom.

VIII

The obligation of the State regarding judicial protection shall be considered as having been fulfilled when it places at the disposal of foreigners the national courts and the legal remedies essential to implement their rights. A State cannot initiate diplomatic claims for the protection of its nationals nor bring an action before an international tribunal for this purpose when the means of resorting to the competent courts of the respective State have been made available to the aforementioned nationals.

Therefore:

(a) There is no denial of justice when aliens have had available the means to place their case before competent domestic courts of the respective States.

(b) The State has fulfilled its international obligations when the judicial authority pronounces its decision, even if it disallows the claim, action or appeal brought by the foreigner.

(c) The State is not internationally responsible for a judicial decision that is not satisfactory to the claimant.

IX

The State is responsible if it provides aid, within its territory or abroad, to persons who conspire or encourage hostile movements against a foreign State, or when it fails to take the available legal measures to prevent such situations from arising.

X

The definition and enumeration of the basic rights and duties of the State, contained in American international declarations and treaties, also represent a contribution to the development and codification of the international law regarding the responsibility of the State.

ANNEX XV

Principles of international law that govern the responsibility of the State in the opinion of the United States of America, prepared by the Inter-American Juridical Committee in 1965

I

General standard of responsibility

When a State admits foreigners to its territory, it has an international duty to protect their life and property according to a minimum standard of rights determined by international law. Neither the receiving State nor the foreigner's State can by its own law determine this international standard. It is determined by international law.

A State that fails to comply with the applicable international law, as regards the person or property of foreigners in its territory, incurs international responsibility and must make reparation in such form as may be appropriate.

II

Responsibility for acts and omissions of the legislative organ (including deprivation of property)

Enactment of legislation of a constitutional or any other character incompatible with international customary law or the treaty rights of other States will, if enforced by the State to the injury of a foreigner, give rise to international responsibility.

Failure to enact legislation necessary for the purpose of implementing a treaty or other international obligation of the State makes the State responsible internationally, if an injury is caused thereby to a foreigner or his property.

Enacting legislation incompatible with the terms of concessions or contracts granted to or concluded with foreigners or of a nature

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a Inter-American Juridical Committee, Contribution of the American Continent to the principles of international law that govern the responsibility of the State, document CIJ-78, in OAS Official Records, OEA/Ser.J.V1.2 (Washington D.C., Pan American Union, 1965), pp. 7-12.
to obstruct their execution may make the State responsible inter-
nationally, if an injury is caused thereby to a foreigner or his
property.

Similarly, the enactment of legislation infringing vested rights
of foreigners and the repudiation of debts may form the basis for
State responsibility for injuries caused thereby, since a State may
not take property of aliens except for a public purpose and upon
payment of just compensation.

III

Responsibility for acts of tribunals, denial of justice

The State becomes responsible when there is a pronounced degree
of improper administration of justice by the courts, some notable
examples of which are as follows:

(a) Refusal to allow foreigners access to tribunals to defend
their rights.

(b) Decisions of the tribunal irreconcilable with the treaty
obligations or the international duties of the State.

(c) Unconscionable delay on the part of the tribunal.

(d) Decisions of the tribunal that are manifestly discriminatory
against foreigners.

(e) The use of the tribunal to harass and persecute foreigners.

(f) The courts are under the arbitrary control of the executive.

IV

Responsibility for acts of executive officials

A State becomes responsible when there is a pronounced degree
of improper governmental administration due to acts or omissions
of executive officials.

V

Acts of private persons (failure to protect aliens, failure to
apprehend and punish individuals who injure aliens)

The State is not responsible for the acts of private persons since
international responsibility of the State must be attributable to an
official or agency of the government.

The State, however, is responsible for:

(a) A failure to exercise due diligence to protect the life and
property of foreigners.

(b) A failure to exercise due diligence to apprehend and punish
private individuals who injure foreigners.

VI

Damage caused by insurgents, rioters, or mob violence

For damage done to the person or property of foreigners by
persons engaged in insurrections or riots, or through mob violence,
in general the State is not responsible in such cases, except:

(a) Where negligence on the part of the Government or its
officials can be established, or where connivance on the part of
the latter can be shown.

(b) Where the Government pays compensation for damage done
in such cases to its own nationals or to other foreigners.

(c) Where a rebellion is successful and the insurgent party which
did the damage is installed in power and becomes the Government.

VII

Responsibility of the State for acts of its subdivisions

Responsibility of the State for acts of its subdivisions applies
to tort cases but not ordinarily to contract cases.

VIII

Circumstances in which a State is entitled
to disclaim responsibility

In each particular case, there are factual circumstances that
permit a State to disclaim responsibility.

Several arbitral awards are cited in this respect, among them:

(a) The United States was exonerated from responsibility for the
capture of a British vessel in 1794 by United States privateers when
the loss to the ship's cargo was due to negligence of the claimant
in failing to make a timely appeal to United States authorities and
demand bond and bail; (b) Nonadmission of a claim for imprison-
ment, damage to reputation, and bankruptcy where the claimant
who was arrested as a spy was given opportunity to return to France
and refused to do so.

IX

Exhaustion of the remedies afforded by the municipal law

The enforcement of the responsibility of the State under inter-
national law is ordinarily subordinated to the exhaustion by the
individuals concerned of the remedies afforded by the municipal
law of the State whose responsibility is in question.

X

The Calvo Clause and exhaustion of local remedies

Where an alien contracts with a national Government and agrees
not to resort to the diplomatic or other protection of the Govern-
ment of the State of which he is a national, in connection with the
contract, his Government is not precluded from espousing a claim
based on a violation of international law by the other Government.

According to the United States jurisprudence, the Calvo Clause
in no case acquired true legal force, in the sense that its existence
influenced the final decision of a case that, in its absence, would
have been decided in a contrary way.

The Calvo Clause generally provides that the alien must rely
upon local remedies for the adjustment of differences arising under
the contract and may not invoke the diplomatic protection of his
Government.

XI

National character of the claim

Ordinarily the person interested in the claim should be a national
of the State making the claim from the time of damage until the
claim is settled.

XII

Modes of settlement

A State may present by diplomatic representation a claim for
reparation for the injury caused by the breach or nonperformance
of an international obligation.

Where recourse to diplomatic representation does not settle
disputes arising from the breach or nonperformance of an inter-
national obligation, States are under a duty to submit the dispute
to impartial third-party decision, or some other means of pacific
settlement.

ANNEX XVI

Conclusions of the report of the Sub-Committee on State Responsi-
bility, annexed to Questionnaire No. 4 adopted by the League of
Nations Committee of Experts for the Progressive Codification
of International Law (Geneva, 1926)

[For the text, see Yearbook of the International Law Commission,
ANNEX XVII

Bases of discussion drawn up in 1929 by the Preparatory Committee of the Conference for the Codification of International Law (The Hague, 1930) arranged in the order that the Committee considered would be most convenient for discussion at the Conference


ANNEX XVIII

Text of articles adopted in first reading by the Third Committee of the Conference for the Codification of International Law (The Hague, 1930)


ANNEX XIX

Bases of discussion drawn up in 1956 by Mr. F. V. Garcia Amador, Special Rapporteur of the International Law Commission on State responsibility


ANNEX XX

Draft on international responsibility of the State for injuries caused in its territory to the person or property of aliens, prepared in 1957 by Mr. F. V. Garcia Amador, Special Rapporteur of the International Law Commission on State responsibility


ANNEX XXI

Draft on international responsibility of the State for injuries caused in its territory to the person or property of aliens, prepared in 1958 by Mr. F. V. García Amador, Special Rapporteur of the International Law Commission on State responsibility


ANNEX XXII

Revised draft on international responsibility of the States for injuries caused in its territory to the person or property of aliens, prepared in 1961 by Mr. F. V. García Amador, Special Rapporteur of the International Law Commission on State responsibility


ANNEX XXIII

List of International Law Commission documents relating to State responsibility

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Appendix: Memoranda submitted by members of the Sub-Committee

ILC (XIV)/SC.1/WP.1. The duty to compensate for the nationalization of foreign property: submitted by Mr. Eduardo Jiménez de Aréchaga | Ibid., vol. II, p. 237. |

ILC (XIV)/SC.1/WP.2 and Add.1. An approach to State responsibility: submitted by Mr. Angel Modesto Paredes | Ibid., p. 244. |


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<td>A/CN.4/169</td>
<td>Digest of the decisions of international tribunals relating to State responsibility, prepared by the Secretariat</td>
<td>Ibid., p. 132.</td>
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<tr>
<td>A/CN.4/208</td>
<td>Supplement to the &quot;Digest of the decisions of international tribunals relating to State responsibility&quot;, prepared by the Secretariat</td>
<td>Reproduced in this volume, p. 101.</td>
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