Document:-
A/CN.4/SR.413

Summary record of the 413th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1957 , **vol. I**

64. Mr. TUNKIN, recalling that he had raised the same point in connexion with article 27, said that the Drafting Committee should be asked to consider, in the light of the draft as a whole, whether it was not desirable to refer to it explicitly, either in article 27 or in a separate article.

65. Mr. SANDSTRÖM, Special Rapporteur, said that the point referred to by the Chairman had been implicitly covered in the last part of article 28. As that part of the article had been withdrawn, the point should perhaps be made explicit, though whether in the articles themselves or in the commentary he was not sure.

66. He willingly withdrew the first part of the article also, since most members appeared to think it was unnecessary.

67. The CHAIRMAN suggested that the Commission decide in principle that the failure of a diplomatic agent to discharge his duty under article 27 did not absolve the receiving State from its duty to respect his immunity, and that it be left to the Drafting Committee—which would also have to consider the point raised by Mr. Verdross—to decide whether some addition to the articles was necessary in order to give expression to that principle, or whether it was sufficient to refer to it in the commentary.

The Chairman's suggestion was adopted by 18 votes to 1, with 1 abstention.

68. Mr. MATINE-DAFTARY, explaining his vote against the suggestion, said that, in his view, it was quite unnecessary to state any such principle, since there was no possible relation between a diplomatic agent's duties and his rights.

69. Mr. BARTOS said he had abstained, not because he was opposed to the principle, but because his attitude would depend on the text which the Drafting Committee proposed, as the Drafting Committee was being authorized to solve a question which should have been decided by the Commission.

70. Mr. VERDROSS said he had voted in favour, with the proviso that it was the receiving State's right and duty to prevent a diplomatic agent from committing a crime if it caught him in the act.

ADDITIONAL ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

71. Mr. SANDSTRÖM, Special Rapporteur, replying to a question by the CHAIRMAN, said he would be quite willing for the five additional articles he had drafted in order to meet points raised in the course of the discussion to be submitted to the Drafting Committee direct, without prior consideration by the Commission.

72. The CHAIRMAN said that the text of the articles would be distributed to all members of the Commission, who would thus be able to submit any comments to the Drafting Committee and thus expedite final consideration of the articles in the Commission.

The meeting rose at 1 p.m.

413th MEETING

Friday, 7 June 1957, at 9.30 a.m.

Chairman: Mr. Jaroslav ZOUREK.

Diplomatic intercourse and immunities (A/CN.4/91, A/CN.4/98) *(continued)*

[Agenda item 3]

CONSIDERATION OF THE DRAFT FOR THE CODIFICATION OF THE LAW RELATING TO DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/CN.4/91) *(continued)*

ADDITIONAL ARTICLE PROPOSED BY MR. SCELLE

1. Mr. SCELLE said that, as experts in international law, all members of the Commission knew that any system of law necessarily comprised three elements: the law or rules; the act of jurisdiction, which added nothing to the rule of law but without which its interpretation and application would remain a matter of insoluble controversy between the parties concerned, in the present case between States; and, finally, were such required, some sanction or form of social pressure.

2. Now that the United Nations Charter had forbidden recourse to force or to the threat of force as a means of imposing the will of the stronger of the two parties, the sanction had been transformed, though it had not disappeared. The settlement of a dispute that was not dealt with by one of the peaceful means referred to in Article 33 might be delayed, and the process might take some time; but whatever means were adopted for settling it, they must be peaceful—and that was the main progress recorded by the Charter—and must still comprise some sanction, emanating either from the Security Council or from the General Assembly itself. Moreover, decisions of the Security Council were binding (Article 25); under Articles 36 and 37 the Council could, at any stage of the dispute, recommend appropriate procedures, including recourse to the International Court of Justice, or even such terms of settlement as it considered appropriate.

3. Thus, in choosing a means of settlement, the parties to a dispute could opt for a governmental, in other words a political, settlement. In most cases, however, if not in all, a legal settlement was preferable. That was particularly so in the event of disagreements or disputes relating to diplomatic incidents. It was increasingly rare for diplomatic incidents to involve really serious political issues; but, as the Commission had seen, even where the sending and the receiving States were both acting in perfect good faith, insoluble difficulties could arise between them with regard to a great many questions of minor importance, such as abuse of customs privileges, exemption from taxation, submission to local jurisdiction, conduct of private servants, refusal to grant privileges to subordinate staff, and so on. Surely it was not really necessary that the Security Council should be seized of disputes relating to such questions. While, therefore, he agreed that some disputes could be referred to arbitration or submitted to the International Court of Justice more readily than others, and that it was difficult, if not impossible, to press for a general treaty of compulsory arbitration or for application of Article 36, paragraph 2, of the Statute of the International Court of Justice in all cases whatsoever, he felt that, as a general rule, arbitration was the best means of settling diplomatic disputes, and, where it was not, that they should, again as a general rule, be submitted to the compulsory jurisdiction of the International Court of Justice.

4. He accordingly proposed the insertion of an additional article, reading as follows:

> "Any dispute that may arise between States concerning the exercise of diplomatic functions shall be referred to arbitration or submitted to the International Court of Justice."

5. Nevertheless, in order not to prevent the parties to the dispute from choosing some other means of peaceful settlement if they so desired, he would have no objection to adding some such words as "unless the parties agree to seek a solution by another method of peaceful settlement", as the Commission had already done in its draft articles on the law of the sea, both in article 57 relating to the conservation of the living resources of the high seas[1] and in article 73 relating to the continental shelf;[2] a somewhat similar choice had been left to the parties in article 11 of the draft conventions on statelessness.[3] The Commission should, however, be clear about the fact that that would entail bringing in the whole apparatus of article 33 of the Charter, including the possibility of a legally binding decision by the Security Council or a recommendation by the General Assembly, in disputes that were of much less importance than such as were likely to arise in the three fields he had referred to.

6. The CHAIRMAN pointed out that Mr. Scelle's proposal again raised the question of the final form the Commission's draft was to take, since, if it was to be a convention, the place for the proposed article would clearly be among the final clauses.

7. As the matter would only be decided definitely at the next session of the Commission, the Chairman wondered whether Mr. Scelle's proposal should be discussed at the current session, or whether consideration should be postponed until the next session.

8. Mr. SANDSTRÖM, Special Rapporteur, supported Mr. Scelle's proposal on the assumption that the Commission's draft would eventually take the form of a convention, and pointed out that a similar provision was to be found in section 39 of the draft convention that had been transmitted as a basis for discussion for the negotiations with the competent authorities of the United States of America concerning the arrangements required as a result of the establishment of the seat of the United Nations in that country.[4] His only doubt was whether the Commission should insert the proposed article in its present draft or defer consideration of it until it took up the other final clauses.

9. Mr. YOKOTA supported Mr. Scelle's proposal, but suggested that the words "concerning the exercise of diplomatic functions" should be replaced by the words "concerning the interpretation and application of this Convention".

10. Sir Gerald FITZMAURICE also supported Mr. Scelle's proposal on the assumption that the draft would eventually take the form of a convention. Diplomatic intercourse and immunities was, in his view, a subject with regard to which it was singularly appropriate to provide for compulsory recourse to arbitration, since it was one where it was very common for points to arise that had to be juridically determined, and since it was largely non-political in nature.

11. His only doubts related to Mr. Scelle's references to the Security Council. That organ's fundamental task was the maintenance or restoration of peace and security, and he did not see how it would ever be the most appropriate body to deal with disputes arising out of the matters referred to in the draft under consideration.

12. Mr. BARTOS agreed entirely that if the Commission's draft was to take the form of a convention under the auspices of the United Nations, it was essential that it should include a provision relating to the peaceful settlement of any disputes that arose out of it. If the Commission did not, so to speak, provide its articles with teeth, it would not really be laying down rules of law at all, but norms of conduct. Its task was to strengthen international law, and it should do all in its power to ensure that, unless the parties agreed to try and settle them by other peaceful means, disputes between them would be submitted to a judicial tribunal, by agreement between the parties, or, failing such agreement, automatically.

13. Without the additional words referring to other methods of peaceful settlement, however, the text proposed by Mr. Scelle unduly restricted the parties' freedom to choose the most appropriate procedure in each case. Diplomatic disputes could arise of a nature to endanger international peace and security, in which case it was clearly desirable that they should be submitted to the Security Council. In other cases the parties might agree that the disputes should be referred to a conciliation commission; but that if no settlement was reached before a certain date, the conciliation commission would be automatically transformed into an arbitral tribunal. To give them a simple choice between referring the dispute to arbitration and submitting it to the International Court of Justice was, therefore, much too rigid. It would be preferable to say, always on the assumption that the draft was to be a United Nations convention, that, unless the parties agreed to seek a solution by some other peaceful means, all disputes arising out of the convention should be submitted to the International Court of Justice.

14. Mr. EL-ERIAN wondered whether the Commission should not postpone consideration of the additional article proposed by Mr. Scelle, bearing in mind the fact that it would figure among the final clauses of a convention, and that the Commission's decision that its draft should take the form of a convention was still tentative.

15. Mr. FRANÇOIS regretted that he could not altogether agree with Mr. Scelle. Arbitration was a question entirely apart, and the Commission had always proceeded on the basis that it should be dealt with accordingly. It was true that it had inserted a compulsory arbitration clause in certain of its drafts, but only when it had been laying down new rules of law which it feared might otherwise lend themselves to abuse. Such was emphatically not the case with the draft articles on diplomatic intercourse and immunities, almost all of which stated rules that were already generally recognized. He did not need to assure the Commission that he was in favour of arbitration, but, in his view, it would be bad tactics to insert a compulsory arbitration clause in all its drafts indiscriminately.

16. Moreover, the disputes that were likely to arise out of the draft did not relate purely to juridical questions. The field of diplomatic intercourse and immunities was one in which good faith and the maintenance of good relations between States were of paramount importance, and he was by no means sure that good relations would be best served by automatically referring all disputes, however trifling, to an arbitral tribunal or the International Court of Justice.

[1] *Official Records of the General Assembly, Eleventh Session, Supplement No. 9*, p. 10.
[2] *Ibid.*, pp. 11 and 12.
[3] *Ibid., Ninth Session, Supplement No. 9*, pp. 5 and 6.
[4] *Ibid., First part of first session, Resolutions*, p. 30.

17. Mr. AGO thought that Mr. Scelle's proposal was clearly based on the assumption that the Commission's draft would eventually take the form of a convention. Yet if the draft had consisted merely of a restatement in written form of rules long established and recognized in practice, as Mr. François had suggested, there would be no place for a clause of the kind proposed by Mr. Scelle. If, on the contrary, as the majority of the members of the Commission seemed to wish, the draft were cast in the form of a convention, a clause along the lines proposed by Mr. Scelle would undoubtedly be valuable. It should, however, be made clear in the text itself that the clause would be included only if the draft in fact took the form of a convention.

18. He supported Mr. Yokota's proposal (para. 9 above) that the words "concerning the exercise of diplomatic functions" should be replaced by the words "concerning the interpretation and application of this Convention". Furthermore, it should be stipulated that the possibilities of settlement by diplomatic negotiations must be explored first. The whole text might then be amended to read as follows:

> "Any dispute between States concerning the interpretation or application of this Convention that cannot be settled through diplomatic channels shall be referred to conciliation or arbitration or, failing that, submitted to the International Court of Justice."

19. Mr. KHOMAN warmly supported the principle of Mr. Scelle's proposal. He entirely agreed with Sir Gerald Fitzmaurice that the Security Council was not the proper forum to try and settle disputes regarding diplomatic intercourse and immunities, but that was an additional argument in favour of a clause along the lines proposed.

20. In his view, however, the great majority of such disputes would be settled before any question of referring them to arbitration or submitting them to the International Court of Justice arose. He therefore felt it was essential to include some mention of other means of peaceful settlement, as suggested by Mr. Ago and by Mr. Scelle himself.

21. Mr. SCELLE said that Mr. Ago was perfectly correct in thinking that he (Mr. Scelle) had proceeded on the assumption that the Commission's draft would eventually take the form of a convention. The whole field of diplomatic intercourse and immunities was, indeed, singularly well-suited to conventional treatment, precisely because it was so ripe; and in international law the riper the field, the readier it was for arbitration, since the fewer would be the political questions that arose. In the field of diplomatic intercourse and immunities it would be exceedingly rare for political questions to arise of such importance as to make it desirable to have recourse to the Security Council. And it was one of the main purposes of his proposal to exclude such recourse when, as would usually happen, the circumstances of the case did not warrant it.

22. He fully agreed that, before referring a diplomatic dispute to arbitration or submitting it to the International Court of Justice, the parties should try to settle it by conciliation or another of the peaceful means of settlement referred to in Article 33 of the Charter; and, as he had said, he was willing to supplement his proposal accordingly. But the parties must realize that, whatever peaceful means of settlement they chose, the Security Council could, at any stage, intervene in the proceedings with a recommendation or legally binding decision: that had been the sole purpose of his reference to that organ.

23. Mr. EL-ERIAN said he still felt that the Commission was possibly wasting time discussing an article which might never be required; it should defer further consideration of Mr. Scelle's proposal until a final decision was taken on the form of the Commission's draft. If the final decision was in favour of a convention, the Commission could revert to the article proposed by Mr. Scelle in conjunction with the other final clauses.

24. Mr. TUNKIN entirely agreed with Mr. El-Erian. In his view, the Special Rapporteur should draft final clauses—including one on the subject referred to in Mr. Scelle's proposal, if he thought it opportune —for consideration at the next session, should the Commission confirm its tentative decision in favour of a convention.

25. Mr. BARTOS said he disagreed with Mr. El-Erian, since every rule of law was necessarily coupled with some means of enforcing it.

26. The CHAIRMAN said that the question raised by Mr. El-Erian was clearly one which had to be decided before the Commission could discuss the substance of the matter further.

27. He accordingly asked the Commission to decide whether it wished to continue the discussion of the new article proposed by Mr. Scelle at the current session, and to include, in the draft which would be submitted to Governments for consideration at the close of the session, an article on the settlement of disputes concerning the interpretation or application of the articles relating to diplomatic relations and immunities.

The question was decided in the affirmative by 15 votes to 4, with 2 abstentions.

28. Mr. TUNKIN said that since the Commission had decided, in his view mistakenly, to continue discussing the proposal submitted by Mr. Scelle, he too felt obliged to indicate his general views on it.

29. Reference had been made to the very important question of a supposed trend in international law relating to a matter which undoubtedly had a direct bearing on the topic the Commission was considering. It would, however, take him far too long to comment fully on what had been said in that connexion, and he would merely point out that it was quite incorrect to seek to apply the principles of municipal law in the field of international law or to try to bring the latter into line with the former: international law was a form of law *sui generis,* regulating relations between sovereign States.

30. Regarding Mr. Scelle's actual proposal, he fully shared Mr. François's views. It related to a problem which should, in his opinion, be dealt with separately from the task of codification on which the Commission was engaged. Even if the Commission's draft was to take the form of a convention, he would still be obliged to oppose the proposal as inadvisable.

31. Mr. HSU said that the international community had developed to the stage where it could be regarded as a legal community, and he was therefore in favour of Mr. Scelle's proposal, whether the Commission's draft took the form of a convention or not. For a legal community of nations clearly had to provide some means

for the peaceful settlement of disputes between its members. If disputes could not be settled by diplomatic means, they must be settled by law; the only alternative was recourse to war, which all Members of the United Nations had abjured.

32. Faris Bey EL-KHOURI suggested that arbitration could only be a suitable procedure for settling disputes relating to diplomatic privileges and immunities if they were regarded as rights of the individual; if, on the other hand, they were regarded as public rights, the rights of the sending State itself, a judicial procedure was necessary.

33. Mr. MATINE-DAFTARY said he could see no objection to the text proposed by Mr. Scelle, subject to insertion of the additional words suggested by Mr. Scelle himself. It was true that it would be out of place except in a convention; but if the Commission's draft did not eventually take the form of a convention, its labours of the past few weeks would, in his view, have been in vain. The Commission was surely drafting a convention for the twentieth century, just as the Congress of Vienna had drafted one for the nineteenth.

34. The CHAIRMAN suggested that the additional article proposed by Mr. Scelle (para. 4 above) be referred to the Drafting Committee for consideration in the light of the various comments made with regard to it.

It was so decided.

35. The CHAIRMAN proposed that further consideration of agenda item 3 be deferred pending receipt of the draft and commentary being prepared by the Drafting Committee.

It was so decided.

State responsibility (A/CN.4/106)

[Agenda item 5]

GENERAL DEBATE

36. Mr. GARCIA AMADOR, Special Rapporteur, introducing his second report which dealt with the responsibility of the State for injuries caused in its territory to the person or property of aliens (A/CN.4/106), stressed that he had endeavoured to comply scrupulously with the views that the Commission had expressed during the discussion of his first report (A/CN.4/96) at the previous session.[5] In particular, he had excluded from the draft articles contained in his report all mention of criminal liability; as a result the draft was concerned solely with civil liability or the "duty to make reparation". Moreover, the draft dealt only with "acts and omissions" which gave rise to civil liability and did not touch on the procedural aspects of the matter, such as the rules concerning the exhaustion of local remedies, the nationality of the claim and so on; those would therefore have to be dealt with separately at some later stage.

37. Generally speaking, he had sought to follow the same approach as the few earlier instruments on the subject, eschewing undue detail, avoiding all mention of exceptional cases, and formulating the rules in terms of general principles, but as precisely as possible. The only articles in which he had been compelled to make a completely fresh departure were articles 4, 5 and 6, relating to the denial of justice and violation of fundamental human rights, where the adoption of the Universal Declaration of Human Rights had made it necessary to try to bridge in an entirely novel way the gap between the concept of the international standard of justice and the Latin American concept of the equal treatment of aliens and nationals. In that respect he had been faced with the drafting difficulties which arose with any progressive rule of international law.

38. In the short time at the Commission's disposal, he suggested that it should begin with a brief general discussion, and then consider the draft articles one by one, concentrating, however, on the following four crucial points: first, whether it agreed with his approach to the problem of the nature and scope of responsibility and, in particular, with his decision to leave academic questions of "causality", "fault" and so forth aside and restrict responsibility to cases where there had been an actual breach or non-observance of a specific international obligation; secondly, the text of articles 4, 5 and 6 as a means of formulating an approach which it had appeared to favour at the previous session; thirdly, the question whether, and in what circumstances, responsibility was incurred by the non-fulfilment of a contractual obligation vis-à-vis an alien or expropriation of his property; and, finally, the degree of negligence required on the part of a State for it to be held responsible for injuries caused to aliens by the acts of ordinary private individuals or in the course of internal disturbance.

39. Mr. VERDROSS, after congratulating the Special Rapporteur on a well-conceived study, which elicited and expounded a number of valuable principles from the rich case law on the subject, said he would deal with the various principles as their turn came for discussion. For the moment he merely wished to draw attention to one problem of great importance which did not appear to have been touched, namely, whether there was in international law such a thing as objective responsibility, responsibility irrespective of any question of fault. The matter had been debated at length at the Lausanne session of the Institute of International Law (August-September 1927), which, despite the opposition of many members, including Professor Anzilotti, had recognized that fault was a necessary requisite for responsibility.

40. Mr. AMADO also congratulated the Special Rapporteur on a very competent report, from which the tendency to undue broadening of the concept of responsibility was gratifyingly absent. It was essential to bear in mind that the whole question of international responsibility was one of disputes involving claims for compensation. International responsibility was a legal concept, according to which a State to which an illicit act was imputable under international law owed reparation to the State against which the act had been committed. Thus, the essential feature of international responsibility was that it was a relation between States. The wrong done to an individual could in itself never constitute a violation of international law. Such a violation existed only when one State failed to honour an obligatin to the State of which the individual was a national. "The State which lodges a claim is exercising a *right of its own,* and the consequences for the aggrieved individual are only an incidental outcome thereof".[6]

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

[6] Charles Rousseau, *Droit international public* (Paris, Librairie du Recueil Sirey, 1953), p. 357.

41. Another point to be borne in mind was that international responsibility was a matter of customary international law. Previous attempts at codification having failed, the Commission must perforce base itself on international case law, which was extremely rich on the questions of international responsibility. Indeed, when he considered the immense contribution made by the numerous arbitral awards in disputes involving State responsibility, he found it difficult to share the pessimism of some other members of the Commission with regard to the efficacy of the institution of arbitration.

42. The view that was gaining acceptance in both teaching and practice was that the sole ground for international responsibility was the failure to observe a rule of international law. The Institute of International Law at its Lausanne session had confined itself to enunciating in article I of its draft the principle that: "The State is responsible for injuries caused to foreigners by any action or omission contrary to its international obligations, whatever be the authority of the State whence it proceeds" (A/CN.4/96, annex 8).

43. He was accordingly somewhat surprised at the Special Rapporteur's view that violations of any of the fundamental human rights listed in his draft article 6, with respect to aliens on the territory of a particular State, could involve the international responsibility of that State. He failed to see how the denial to an alien of freedom of thought, conscience and religion, however wrong it might be, could possibly give rise to international responsibility, or, in other words, be the ground for an international claim for compensation. He noted in that connexion that in article 1 the Special Rapporteur defined "international obligations", failure to fulfil which was a source of international responsibility, as "obligations resulting from any of the sources of international law". He could not, however, agree to regard general principles as a valid source of international law on a par with treaties and custom. To his knowledge, the first time that any such thing had been suggested was in Max Huber's arbitral award of 1 May 1925 on United Kingdom claims in the Spanish Zone of Morocco, when he had referred to a State's making "a diplomatic intervention on behalf of its national, quoting either conventional rights [...] or principles *juris gentium* applying apart from treaties on the rights of aliens."[7]

44. The principles enunciated in such texts as the Universal Declaration of Human Rights could not have binding force, as the Special Rapporteur appeared to believe. International obligations could be based only on the rules of international law as established by treaty or custom.

45. Mr. PADILLA NERVO said that, as far as Latin America was concerned, the history of the institution of State responsibility was the history of the obstacles placed in the way of the new Latin American countries—obstacles to the defence of their (at that time) recent independence, to the ownership and development of their resources, and to their social integration.

46. The vast majority of new States had taken no part in the creation of the many institutions of international law which were consolidated and systematized in the nineteenth century. In the case of the law of the sea, for instance, though the future needs and interests of newly-established small countries were not taken into account, at least the body of principles thus created was not directly inimical to them. With State responsibility, however, international rules were established, not merely without reference to small States but against them, and were based almost entirely on the unequal relations between great Powers and small States. Probably ninety-five per cent of the international disputes involving State responsibility over the last century had been between a great industrial Power and a small, newly-established State. Such inequality of strength was reflected in an inequality of rights, the vital principle of international law, *par in parem non habet imperium* being completely disregarded.

47. As a corollary to that state of affairs—with the noble influence of the Spanish theologians of the sixteenth century and their standards of morals and justice long forgotten—in international law an unbridled positivism had reigned supreme, whose sole criterion was the practice of States, and in the nineteenth century that meant the practice of the Great Powers. Once international lawyers had abandoned the criterion of justice in assessing the conduct of States and reduced the systematization of law to a catalogue of the practice of States, it was hardly surprising that the doctrine of State responsibility became a legal cloak for the imperialist interests of the international oligarchy during the nineteenth century and the beginning of the twentieth.

48. Mr. Scelle, in his report on arbitral procedure, had observed that recently established States were not so inclined as States with a long democratic tradition to submit their disputes to arbitration (A/CN.4/109, para. 8). As Mr. Padilla Nervo had already pointed out, such was not the case with Mexico. Since, however, consent to arbitration in a dispute generally signified willingness to submit to the application of the international rules applying at the moment to the subject under dispute, it was perfectly natural for new States to be reluctant to submit voluntarily in the matter of State responsibility to a body of rules which, far from taking account of their just aspirations, was created to serve the purposes of their probable opponents.

49. The solution to that state of affairs lay perhaps in allowing the new countries to participate fully in the formulation of international law. As new international rules were evolved which were not merely rules of law, in the sense that they reflected practice, but were also just rules, those countries would be more willing to submit to them.

50. All that he had just said implied, of course, no reproach to Mr. Scelle, who with his idealism and spirit of innovation had contributed, as few other jurists, to the improvement of international law.

51. In dealing with State responsibility, the Commission accordingly had an arduous task: to adjust principles to the new structure and conditions of post-war international society, and to replace the cold and naked positivism that had presided over the formulation of existing rules by an imaginative innovation based on the new values and needs of the contemporary world. Those values and needs were embodied in the purposes and principles of the United Nations as enunciated in its Charter, and were to foster the peaceful co-existence of all States, to raise the standard of living of mankind chiefly by the more rapid economic and social develop-

[7] United Nations, *Reports of International Arbital Awards*, Vol. II (United Nations publication, Sales No. :1949.V.1), p. 633.

ment of the under-developed countries, and to respect the sovereign equality of States. It was in the light of that trilogy of purposes and principles that the rules of State responsibility must be judged.

52. Mr. García Amador was to be congratulated on his report, which appeared to have been inspired by the same sentiments and considerations as those he himself had just expressed, to judge, at least, from the way in which the Special Rapporteur dealt with responsibility for the acts and omissions of the legislature and of officials, and from certain aspects of his treatment of non-performance of contractual obligations, of questions relating to public debts and acts of expropriation, of the problems raised by acts of private individuals and of the question of responsibility in connexion with internal disturbances. The Special Rapporteur's reference to the "Calvo clause" as a waiver of an international claim in contractual obligations appeared, in particular, to be inspired by such considerations.

53. He had certain reservations which he would express at the appropriate time; for instance, with respect to the definition of international obligations in article 1, paragraph 2.

54. As for the Special Rapporteur's theory of the violation of the fundamental human rights of foreigners as a source of international responsibility, despite certain reservations regarding the precision of such a criterion and some of its implications, he regarded it as a laudable and imaginative effort to replace the old and unacceptable criterion of the "international standard of justice". In that connexion, the rule of the fundamental equality of rights between nationals and foreigners must, he thought, be accepted purely and simply and without exception as the sole rule truly compatible with the principle of the sovereign equality of States.

55. There was one important point that he wished to raise in connexion with the nature and scope of State responsibility. According to the traditional rule, the international responsibility of a State was involved only when the damage caused resulted from acts or omissions contrary to the international obligations of that State. In other words—as was the case until recently in municipal law—there could be no liability without fault or negligence. However, the damage already caused, or which might be caused, to persons or property on the territory of other States by the manufacture or experimental explosion of nuclear weapons sheds doubts on the advisability of maintaining the traditional rule. According to the traditional concepts of fault and negligence, it was not strictly possible to talk of violation of interntaional obligations when the weapons were exploded on the territory of the State concerned or on the high seas, especially as every conceivable precaution was undoubtedly taken to prevent damage. On the other hand, it was difficult to accept the view that, when such explosions caused damage to the persons or on the territory of other States, no international responsibility, with the corresponding duty of compensation, arose. The payment made by the United States Government to the Japanese fishermen affected by an experimental explosion at Bikini, though only an *ex gratia* payment, had brought that much debated legal question ever more to the fore.

56. It had been suggested that the so-called theory of risk should be adopted in international law, or, in other words, that objective responsibility should be recognized, regardless of whether any fault or negligence existed, by analogy with the objective liability, under the factory legislation of many countries. The question was one which should be approached with caution. In the first place, it was no trivial matter to accept as a general principle of international law that responsibility could exist without a direct violation of a clearly defined international obligation; the implications of such a thesis were incalculable. Secondly, the principle of objective responsibility in municipal law had not been accepted in a day, but had been gradually adopted in face of the alarming increase in the industrial accident rate. Possibly the cases that might arise in the international sphere were not sufficiently frequent to justify so radical a departure from the accepted rule.

57. Perhaps the solution of the problem was to be sought in another direction. Perhaps the current conceptions of fault and negligence were no longer adequate to the conditions of the atomic age. Man had now learnt how to unleash forces that were beyond his control. He had in mind not so much the atomic explosions themselves as the resultant atomic radiation, the consequences of which for all living creatures were unforeseeable. That new factor might serve as a basis for a new category *sui generis* of fault or negligence, which might be formulated as follows: "Whoever knowingly unleashes forces that he cannot control and whose effects he cannot foresee commits a fault and is responsible for any damage caused." Countries which found themselves obliged, even for legitimate and lofty motives, to conduct such experiments wittingly ran the risk of causing incalculable damage to other peoples, in a word, international damage. And the fact of wittingly and voluntarily running that risk might perhaps be regarded as a source of international responsibility.

58. He was not sure whether, in stating the problem, he had not come too near to supporting the concept of objective responsibility, i.e., the acceptance of the theory of risk in international law, which was something he was anxious to avoid. But the nature of the phenomenon involved made it difficult to find one's way with the aid of traditional legal concepts. The best legal solution might be for the Great Powers to agree to regulate or prohibit atomic test explosions, for then the nature and scope of the international obligation involved would clearly emerge, and with it the responsibility of those breaking the agreement.

59. He was convinced that it was the duty of the Commission to face that vital problem squarely. It would indeed be paradoxical for it to codify minor cases of international responsibility, and ignore what might turn out to be the most dramatic and far-reaching of all.

60. Mr. HSU said that the Special Rapporteur had produced an excellent report on a subject that lent itself to codification. He particularly appreciated his attempt to turn to account the new attitude towards human rights, for the two existing principles, to replace which the new principle was formulated, often came into conflict with each other in application, though both were meant for one and the same purpose. While, as was clear from Mr. Amado's statement, it would be no easy task to formulate the rules governing international responsibility in the matter of human rights, he thought that the Special Rapporteur was on the right track.

61. Mr. AGO said that he was all the more grateful to Mr. García Amador for his report because the prob-

lems it dealt with had interested him for years. The Special Rapporteur had concentrated, in accordance with the Commission's recommendation, on the question of the responsibility of the State for damage caused in its territory to the person or property of aliens, a very important aspect of the problem, and one which had been given long consideration by doctrine. Its codification would be a most useful task. Though it was an aspect that lent itself to separate treatment, it was, as the Special Rapporteur had himself discovered, impossible to study it without raising all the fundamental problems and defining all the concepts connected with the general notion of State responsibility.

62. International responsibility might be defined as the situation which arose as a consequence of an unlawful fact imputable to a State as a subject of international law. An unlawful fact existed when there had been non-performance by a State of an international obligation owed by that State or, which amounted to the same thing, violation by the State of the subjective right of another State. For the purpose of determining whether non-performance or violation had occurred, several elements had to be considered. The first was the objective element, that of conduct contrary to the State's international obligations. The obvious conclusion to be drawn from that concept, which some authors at times tended to overlook, was that there could be no violation unless there was an international obligation capable of being violated, in other words, unless there was a rule of international law laying down the obligation in question. The second, subjective, element was that the fact must be imputable to a subject of international law. That involved first and foremost the necessity of the presence of a capable subject, and at the same time the question of whom the commission of a wrong against an alien was imputable in the case of a non-self-governing country or a State under military occupation: was it imputable to the country or State itself or to the administering or occupying Power? That raised the problem of indirect international responsibility. At all events the principle was that, in order to bear responsibility, a country must legally possess the capacity to commit unlawful facts. Furthermore, for a fact to be imputable there must have been some action or omission by an organ of the State. Lastly, there must be the psychological element of fault, a notion to which both Mr. Verdross and Mr. Padilla Nervo had referred, and which was considered by the Special Rapporteur in connection with the rule of "due diligence". In that connexion the various gradations of fault must be borne in mind, from *culpa levis* to *culpa lata*, and the extreme case where it was no longer a question of *culpa* but of *dolus*. Finally, once the prerequisites of responsibility had been laid down, there was yet another element to be considered, that of the circumstances, the unlawfulness of the fact and hence the responsibility, for example, the consent of the injured party, self-defence, etc.

63. A further question, with which the Special Rapporteur had dealt more fully in his first report, was that of the aspects of international responsibility: whether an unlawful international fact produced no other consequences than a duty on the part of the guilty State to make reparation, or whether, at least in certain cases, it conferred on the injured State the right to inflict a penalty on the guilty State. Thus there arose the problem of the punishable or penal consequences of an unlawful international fact, and such institutions as reprisals had to be taken into consideration.

64. In his report the Special Rapporteur dealt separately with unlawful facts committed by legislative, executive and judicial organs. In that connexion, Mr. Ago said that only in rare instances did international law require the performance of a specific act by a specific organ, so that failure by that organ to perform the specific act immediately constituted a breach of an international obligation. As Professor Anzilotti had pointed out, in the case of many obligations it was not specified exactly how they should be fulfilled, and international law left the State some discretion to decide whether such fulfilment should be ensured by the legislature, by the courts or through administrative practice.

65. In that connexion, another question was whether the rule that no claim could be lodged until local remedies had been exhausted was merely a rule of procedure, or a prerequisite for responsibility.

66. Finally, in connexion with the more advanced theory which regarded the violation of fundamental human rights as a source of international responsibility, as well as the subject covered by chapter IV of Mr. García Amador's report, Mr. Ago would merely point out that there could be no international responsibility where there was no genuine legal international obligation binding on States.

The meeting rose at 1 p.m.

414th MEETING

Tuesday, 11 June 1957, at 3 p.m.

Chairman: Mr. Jaroslav ZOUREK.

State responsibility (A/CN.4/106) *(continued)*

[Agenda item 5]

GENERAL DEBATE *(continued)*

1. The CHAIRMAN invited the Commission to continue its general discussion of Mr. García Amador's second report (A/CN.4/106) on the responsibility of the State for injuries caused in its territory to the person or property of aliens.

2. Mr. PAL associated himself wholeheartedly with what had been said by previous speakers in appreciation of the Special Rapporteur's erudite and illuminating report. Of course, that did not mean he was in complete agreement with the Special Rapporteur's views. Frankly speaking, he found himself in disagreement with some of his fundamental principles: it would be very difficult for him to accept, for instance, articles 6 and 9 and his principles of vicarious responsibility, nor could he accept his view of the binding character of the so-called traditional rules in the field of State responsibility.

3. The Special Rapporteur's entire argument was based on the principle that every State had the right to protect its nationals abroad, and that all the other States had a corresponding duty. That right, however, was not unlimited; it certainly did not extend to the exertion of pressure on weaker States in order to secure a privileged position for its own nationals. Much depended on the circumstances in which the nationals went abroad. For example, if it was in the pursuit of commercial enterprise, then freedom in that pursuit could be held to imply as a necessary corollary that the alien newcomer chose to cast in his lot with the citizens of the State in which he had decided to trade, and to expose himself to whatever political vicissitudes occurred there.