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Summary record of the 632nd meeting

Topic:
Programme of work

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the General Assembly. It had therefore enough work for many years to come, and any addition to that list of seven topics would have only a nominal significance.

68. With regard to Mr. Tunkin's proposal that a special working group be appointed to study the problem of state responsibility, he had at first been somewhat concerned at the vagueness of the terms of reference of the proposed group. After hearing the explanations given by Mr. Tunkin, he had the impression that the group in question would be performing the duties normally performed by a special rapporteur. He was opposed to that view of its duties and considered that the working group should do no more than demarcate the various chapters of the topic. He also strongly supported Mr. Ago in urging that the group should report to the Commission before the end of the session.

69. Sir Humphrey WALDOCK said that much would depend on the size of the proposed working group. He thought that even a small group would have to have a rapporteur of its own.

70. The discussion in the Commission should preferably take place after the small working group had submitted its suggestions.

71. Mr. TUNKIN said he could not accept the suggestion, implicit in some of the remarks made during the discussion, that the early appointment of a special rapporteur would mean that the Commission's work would move ahead faster. In fact, a special rapporteur had been appointed for state responsibility, and had submitted several reports over a long period, and yet the difficulties inherent in that topic had not been removed. The necessary ingredient for speedy progress was good preliminary work.

72. There could be no doubt that the current session would be taken up with the law of treaties and that at the next session the Commission would not be able to deal with any other topics than the law of treaties and special missions. Clearly, therefore, the Commission would not take up the topic of state responsibility either at its current or at its next session. There was therefore ample time to undertake a satisfactory preliminary study of that topic which would prove of great value to the future work of the Commission.

The meeting rose at 1 p.m.

632nd MEETING

Monday, 30 April 1962, at 3 p.m.
Chairman: Mr. Radhabinod PAL

Future work in the field of the codification and progressive development of international law (General Assembly resolution 1686 (XVI)) (item 2 of the agenda) **(A/CN.4/145)** (*continued*)

1. The CHAIRMAN invited the Commission to continue its discussion of item 2 of the agenda.

2. Mr. GROS said that the special rapporteur for the topic of state responsibility should be appointed at the current session. The Commission should have no difficulty in selecting a special rapporteur from among its members, several of whom had written well-known works on the subject.

3. The early appointment of a special rapporteur should not prevent careful examination of Mr. Tunkin's proposal, which contained valuable ideas for the improvement of the methods of work of the Commission. For example, between sessions the special rapporteur might with advantage draw on the knowledge and experience of fellow members of the Commission; it would be remembered what a remarkable contribution Mr. Bartos had made to the study of consular law and how much assistance he had given to the special rapporteur and to the Commission in the consideration of that topic. Indeed, it might be profitable if those members who were particularly interested in the topic of state responsibility met at Geneva two or three days before the opening of the fifteenth session to discuss with the special rapporteur the results of his work.

4. On the other hand, he was not in favour of the idea that the topic should be referred to a drafting committee. A useful draft could only be prepared by a single rapporteur who would specialize in a difficult problem for a number of years. The appointment of a committee was a procedural device which could not solve difficulties of substance. The real cleavage of opinion in the Commission was over the place of the question of the treatment of aliens in the subject of state responsibility. For some members, it was the foundation of the law of state responsibility; for others, it was simply one of the many hypotheses in international law where a breach of international law gave rise to state responsibility.

5. While there was some truth in both contentions, what concerned him particularly in that cleavage of opinion was the fact that it had already been responsible for the failure of the 1930 Conference to codify state responsibility. That conference had failed, not because of any difference of opinion on the principles underlying state responsibility, but because of its inability to agree on the rules governing the status of aliens; and yet even today it was the violation of those rules which most frequently gave rise to state responsibility.

6. He fully understood the misgivings with which certain members contemplated a discussion based exclusively on the treatment of aliens. Yet, it was hardly possible to avoid that question altogether and discuss the machinery of responsibility in the abstract; if the Commission formulated a draft on state responsibility which was silent on the treatment of aliens and the consequences of breaches of the rules governing the treatment of aliens, the draft would be nothing but an empty shell.

7. There were two aspects of the topic of state responsibility. One was the determination of the circumstances which gave rise to the international responsibility of the state; the other was that of the machinery for making international claims. Although it was not impossible to study the second aspect before the first, it would be more

logical to commence with a study of those acts which gave rise to responsibility on an analogy with torts in municipal law. In most systems of municipal law, there were certain general principles governing tortious liability. For example, in French law there were the two basic principles, laid down in articles 1382 and 1384 of the Civil Code: first, that a person's act or omission which caused damage to another rendered the first person liable to make good the damage caused to the second; and second, that any activity which created a risk of damage to other persons rendered the person exercising that activity liable to make good any damage thereby caused to such persons. In connexion with state responsibility, the first question would be to ascertain whether any such general rules existed in international law, to examine the "causes" of that responsibility.

8. In considering the principles governing state responsibility, it was not possible to ignore the impressive body of case-law built up by international tribunals which had adjudicated cases concerning the treatment of aliens. The majority of cases which had given rise to state responsibility had not involved direct claims by one state against another, but had been cases in which a state had acted to defend the rights of its nationals, in other words had made a claim against another state to assert the rules of international law in relation to the nationals of the claimant state, thereby, in the words of the Permanent Court, invoking its "own right".

9. The question of the protection of nationals abroad had not lost any of its relevance. All states, whatever their political, social or economic systems, protected their nationals abroad. That had been expressly recognized by the Commission in its draft articles on Consular Relations where article 5 stated that consular functions consisted more especially of protecting in the receiving state the interests of the sending state and of its nationals.[1] There was not a single state which ignored the interests of its nationals merely because they had chosen to live or work abroad. An example was the case of a French firm which had entered into a contract to set up a cardboard factory in the Soviet Union. The contract contained an arbitration clause which provided for arbitration by the Stockholm Chamber of Commerce and that the arbitral tribunal should adjudicate on the basis not only of the clauses of the contract but also of the general rules of international law. Examples of that type, of which he could give many, showed that countries considered that certain rules of international law concerned the protection of the rights and interests of their nationals abroad, and that machinery existed for the enforcement of those rules.

10. Accordingly, although he agreed that the treatment of aliens obviously did not cover the whole subject of state responsibility, he considered that breaches of international law in connexion with the treatment of aliens provided the most abundant source of international claims in which state responsibility was invoked. And it was not a question that could be avoided, because state responsibility only arose where an unlawful act which caused damage involved reparation, following the decision of an international body, in default of settlement by agreement.

11. He agreed with Mr. Tunkin on the desirability of giving directives to the special rapporteur; but in the space of the two months available, both the Commission officially, and its members informally, could make their views known to the special rapporteur, who would also be enlightened by the current debate.

12. Personally, he would advise the special rapporteur, first, to commence the study of the topic by an analysis of the sources of state responsibility and the role of that responsibility in contemporary international life, the determination of what constituted unlawful acts, the question of imputability, the concept of damages and that of reparation; secondly, to study the machinery and procedure for making the state effectively responsible: the mere recognition of certain acts as unlawful was of theoretical value, but unless a remedy were provided there was no law of state responsibility; thirdly, to bear in mind the international case-law on the treatment of aliens: in that respect, an analysis should be made of the cases relating to breaches connected with the treatment not only of privileged aliens — diplomats and consuls — but also of ordinary aliens; and fourthly, to follow the example set by Sir Humphrey Waldock in the case of the law of treaties, and submit for 1963 a preliminary report on state responsibility which would present the Commission with at least a general plan of work. A general discussion would be held in 1963, but that discussion, in order to be fruitful, should be conducted on the basis of a report by the special rapporteur. Unless such a report were available, a whole year might be wasted.

13. Mr. LACHS said he was pleased to note that his suggestion for a general discussion had been so well received. The discussion on procedure was of great value, in view of the serious issue facing the Commission, and would save time at a later stage when the Commission came to consider the substance of state responsibility.

14. The general discussion covered both substance and procedure. So far as substance was concerned, it appeared to be agreed that the topic of state responsibility should have priority and that work on the topic had to be started again from the beginning.

15. So far as procedure was concerned, there was a difference of opinion but it was not on a major issue. In fact the proposals of Mr. Tunkin and Mr. Ago were not irreconcilable and it was generally agreed that the future special rapporteur on state responsibility would derive much benefit from preparatory work by a special committee. The difference of opinion concerned timing; some members considered that the special rapporteur should be appointed forthwith, others that his appointment should be deferred. Article 19 (1) of the Commission's Statute provided that "The Commission shall adopt a plan of work appropriate to each case". Every topic should accordingly be examined on its own merits in

[1] *Yearbook of the International Law Commission 1961*, Vol. II (Sales No.: 61.V.1, Vol. II), p. 95.

order to determine what plan of work was best suited to it.

16. State responsibility was a complex subject. In view of the failure of past attempts to codify the rules of international law governing the responsibility of the state, the Commission was called upon to perform pioneer work. Mature reflection was therefore necessary before a decision on procedure was taken.

17. The Commission's past experience of the topic of state responsibility had at least the negative value of showing how not to proceed. The Commission had been invited to study the topic by General Assembly resolution 799 (VIII) of 7 December 1953; in 1955, at its seventh session, it had appointed a special rapporteur; work had been started in 1955, but in 1962 it found itself in the position of having to begin all over again. The mistakes of the past, which had led to that waste of eight years, must not be repeated.

18. One mistake had been to leave the special rapporteur without any guidance from the Commission, with the consequence that the report submitted reflected only the special rapporteur's personal opinions. It was precisely in order to avoid that mistake that the suggestion had been made that a special committee of three or four members should be appointed to prepare a preliminary report for discussion by the Commission as a whole. In the light of that discussion, one or several rapporteurs would be appointed to study the subject in detail.

19. He did not share the misgivings expressed by Mr. Gros on the subject of the work of a committee. The committee would not be engaged in actual drafting; it would be for the special rapporteur to prepare a draft. The committee's function would be to define the approach to the topic of state responsibility; it would not merely draw up a table of contents but would make an analysis of what the subject included.

20. Nor did he share the fear that the failure of the 1930 Conference would be repeated. The 1930 Conference had failed to codify the law of the sea, but the International Law Commission had achieved a substantial measure of success in that same field.

21. As he saw it, it would be the task of the committee to lay down the philosophical approach to state responsibility in the light of modern international law. It would have to consider whether there existed a set of rules on liability which applied to all branches of international law, as was the case in most systems of municipal law, or whether the rules of state responsibility applied only to some branches of international law; at that stage he would content himself with saying that, in principle, he did not favour the invasion of international law by private law. It would also have to consider whether or not the reports on state responsibility should deal with the question of remedies, and whether both direct and indirect responsibility should be studied. Cases of direct responsibility were those in which the claimant state itself had suffered the damage. Cases of indirect responsibility were those in which the claimant state acted on behalf of its injured national.

22. A mere preliminary glance at the topic of state responsibility thus showed what a vast subject it was and how many other branches of international law it penetrated. The Commission would have to consider how it was related to other topics on the Commission's programme of work. All those questions required time for reflection and he doubted whether, in view of the Commission's agenda, they could all be dealt with at the current session.

23. For those reasons, he suggested that the questions he had mentioned should be studied in the interval between the fourteenth and the fifteenth sessions. The time so spent would be time saved because, when the Commission came to consider the future special rapporteur's first report, it would be better prepared to undertake a fruitful discussion.

24. For the purpose of maintaining the continuity of the work, he suggested that the future special rapporteur should be one of the members of the committee. He would then benefit from the experience gained as a member of the committee and the results of his studies would be better than if he were to undertake the task single-handed.

25. He suggested, furthermore, that a similar method of work should be adopted in regard to the topic of succession of states and of governments.

26. The CHAIRMAN said that it was not due to any faulty procedure that the Commission had not achieved tangible results in the codification of the principles governing state responsibility; the reason was that pressure of other work had prevented the Commission from dealing with the reports prepared by the special rapporteur.

27. Improvements in the methods of work of the Commission would not prevent the recurrence of such a situation. If, as was unfortunately not impossible, the Commission did not find time in the next five years to deal with state responsibility, then — whatever procedure were adopted — the topic would have to be held over.

28. Mr. EL-ERIAN said that, although Mr. Gros and Mr. Lachs approached the subject of state responsibility from different angles, they both agreed on the importance of establishing a method of dealing with the topic. When, in 1953, the General Assembly had considered whether the topic of state responsibility should receive priority, difficulties had arisen about the delimitation of the topic, and when the Commission had appointed Mr. García Amador as special rapporteur and his valuable report had been discussed at the ninth session of the Commission (413th to 416th meetings) great attention had been given to the method of work and to the aspects to which priority was to be given. Mr. Padilla Nervo (413th meeting, paras. 55-59) and Mr. Pal (414th meeting, para. 8) had indicated, without minimizing the importance of the topic of the international responsibility incurred by the state by reason of injuries to aliens, that other aspects were of great importance. The Commission should therefore review the matter in the light of past experience and decide what use might be made of the reports already submitted to it and how far it should cover aspects other than the traditional aspect. There existed a gread deal of

state practice and case law on the problems of state responsibility for damage to aliens, and the subjects was ripe for codification; but the other aspects also needed codification or progressive development. If the method were considered immediately, time and discussion would be saved later.

29. Mr. CADIEUX thought that it would be better to hold a general discussion immediately than to appoint a rapporteur or committee, as all would derive considerable advantage from having heard the discussion. He had thought originally that the suggestion for the appointment of a committee was interesting, but since then he had become doubtful about its merits. A large committee would be open to the same objections as those advanced against the subdivision of the Commission, while a small committee would involve a rather delicate debate on the number of members and on the membership. There was the further objection of principle that the Commission should not delegate its powers in such an important matter. It could, of course, do so merely for drafting purposes, or to cope with technical problems such as the state of the documentation regarding the topic of succession of states; but to delegate its authority in so complex a subject as state responsibility would violate the spirit in which the Commission worked, and would not necessarily save time unless the committee was able to report before the end of the current session. The Commission had been instructed to report on its programme of work, and most members would undoubtedly wish to express their opinion on any conclusions reached by a small committee.

30. The idea of a consultative committee to be appointed after the appointment of a special rapporteur was equally open to objection, because when the General Assembly had increased the membership of the Commission, it had undoubtedly intended that the special rapporteur's preliminary report should be discussed by the whole Commission. If there were several rapporteurs working between the sessions and the other members of the Commission had to be consulted by post, financial and administrative difficulties would arise and, in any case, the other members would probably not have time to give their full attention to the work. The general debate on the topics in the work programme should be held forthwith, though Mr. Verdross' suggestion might be given further consideration.

31. Mr. TABIBI said that the Commission appeared to have begun discussing the substance, no doubt because it was difficult to separate sub-paragraphs 3 (*a*) and 3 (*b*) of General Assembly resolution 1686 (XVI). The general discussion would be useful in the long run, as it would save time later and would also enable the General Assembly to remain abreast of the Commission's thinking.

32. The Commission had been told that, in the light of the experience of its older members, it would be unwise to press any suggestion for splitting the Commission into two sub-commissions, which might duplicate work instead of accelerating it. A good compromise might be that suggested by Mr. Verdross.

33. It might not be possible for financial considerations to accept the Chairman's suggestion that the General Assembly should be asked to place the Commission on a permanent basis; the idea might be kept in abeyance. Equally, for financial reasons and because members were otherwise occupied, it was not possible to extend the sessions. No objection, however, had been raised to the suggestion — which had no financial implications — that the Commission's term of office should be extended to seven years. That extension might enable the Commission at least to finish its work on the law of treaties and to establish a sound work programme. He would suggest that a separate chapter in the Commission's report to the General Assembly should cover those points fully, so that the Assembly might realize the difficulties facing the Commission and the complexity of its work.

34. All members agreed that the debate on the report on the law of treaties should start on 7 May. As Mr. Gros had rightly stated, if states could be brought to agree on the way in which they concluded and terminated treaties, one of the most solid pillars of international law would have been built. When it had the report before it, the Commission would be able to obtain a clearer idea whether to codify the law of treaties as a whole or to subdivide the very broad subject.

35. The topic of state responsibility covered the whole body of positive international law and was of the greatest importance in view of the many changes in the relations between states, the emergence of new states and the development of the principle of political and economic self-determination. It would be a very difficult task, as had been shown by the reports of the special rapporteur, by the United Nations Secretariat's revised study on the status of permanent sovereignty over natural wealth and resources (A/AC.97/5/Rev.1 and Add.1) and the report of the Commission on Permanent Sovereignty over Natural Resources (E/3511). He agreed with Mr. Lachs that it was important to settle the method and with Mr. Tunkin and Mr. Ago that the subject of the treatment of aliens should be separated from the general subject of state responsibility. The general principles of international law, and particularly their application for the preservation of world peace, should be codified; the Commission might afterwards embark on a special study of the rules relating to responsibility for injuries to aliens.

36. He was entirely in favour of giving priority to the codification of the rules on succession of states. That topic had been included in the list drawn up by the Commission at its first session.[2] It was related to many important questions, including the right of peoples and nations to economic and political self-determination, the sanctity of treaties and the problems of nationality, inheritance, debts, acquired rights and compensation. He agreed, however, with previous speakers that for the moment the Commission should confine itself to succession of states and leave succession of governments until later.

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[2] *Yearbook of the International Law Commission 1949* (United Nations publication, Sales No.: 57.V.1), p. 281.

37. The Commission needed a great deal more material concerning the topic of succession of states. He had done some research into the subject himself, but had found only a few scattered articles and one interesting book, that by O'Connell.[3] According to Mervyn Jones, "State succession in general is a thorny subject, and one on which the literature of international law offers divided, and somewhat confusing, counsel.... The very phrase itself is apt to lead one astray. State succession may be used in two senses, (*a*) denoting succession in fact, and (*b*) denoting succession in law."[4] According to Oppenheim, "A succession of International Persons occurs when one or more International Persons takes the place of another International Person, in consequence of certain changes in the latter's condition."[5] That was a definition of what occurred in fact, but was not doctrine. He would therefore suggest that the Commission should hold a general discussion on the topic of succession of states before it appointed a special rapporteur or committee.

38. He supported the suggestion that a working group be established to select new topics for codification, in the light of the views expressed by governments and by the Sixth Committee of the General Assembly.

39. Mr. PAREDES said that the great problems of law were not only of interest to specialists, from the theoretical standpoint, but also of practical application in everyday life; that was why they should pay heed to the urgings of the Sixth Committee of the General Assembly to study the general problems of international law. All the members of the Commission were agreed that international law had changed and was changing in their own lives; but there were some who thought that its evolution merely reflected the natural course of events. In his opinion, in any evolutionary system there were a number of slow, gradual changes but also others which were sudden and violent, abrupt leaps forward. During their time, international law had undergone radical and unexpected changes through modifications to its very foundations. And that was what they had to clarify in accordance with article 18 of the Commission's statute.

40. With regard to the topics proposed for the Commission's present session, the law of treaties would necessarily have to be examined anew seeing that at least a third of the members of the Commission were meeting for the first time. And as regards its substance, if, as he earnestly hoped, it was their aim to try to ensure that treaties were complied with by the parties, then treaties would have to be surrounded by the greatest safeguards to ensure that they expressed exactly the free and spontaneous will of the peoples.

41. The problem of state responsibility seemed obviously to require urgent study and formulation and also to be wider in scope than any other international problem. But he did not believe that it could be reduced to the protection of aliens against arbitrary acts of the local government which was less a matter of public international law than of private international law.

42. What appeared to him of capital and primary importance was to bring out the responsibility of international persons for acts causing damage to other international persons: for instance, poisoning of the atmosphere by atomic explosions. Not long ago he had read a telegraphic report that the Japanese Government intended to put in a claim for damages suffered by the Japanese people through atomic explosions. If one state caused damage to another state unjustly or without reason it should make reparation for such damage. International obligations did not derive merely from treaties but from the simple fact of the relations between states and of their position in the world, based on the principle of interdependence and solidarity. That was the first requisite for international peace and security.

43. He did not deny the immense importance of protection of the individual but that was another matter with separate rules of procedure, because there the claimant was the state as representative of its injured national, though the direct beneficiary of the claim was the individual. That matter should be studied separately by a sub-committee appointed for the purpose.

44. Mr. JIMÉNEZ de ARÉCHAGA said that members should take the opportunity of expressing their views on the scope of the topic of state responsibility at that point rather than await a report from the suggested working group or committee. Mr. Ago had argued for a restrictive approach to the topic. Undeniably, some of the subjects which were usually dealt with under the heading of state responsibility, such as the responsibility of states for injury to the person or property of aliens, including measures of expropriation and nationalization, would, from a scientific point of view, perhaps fall more appropriately under the heading of the treatment of aliens. But he would challenge the conclusion that for that scientific reason the Commission should jettison those questions and confine the study of state responsibility to other less controversial and more academic aspects, such as the general principles of state responsibility, whether it was an objective responsibility or based upon *culpa*. Should it do so, the Commission would be disappointing the hopes and expectations not only of the General Assembly but also of various United Nations organs and scientific bodies. The United Nations Commission on Permanent Sovereignty over Natural Resources had been studying the right of every nation to exploit its own natural resources. When it had come to the legal aspect involving the right of expropriation and nationalization and the obligations which might arise therefrom, it had decided to suspend the study, since the topic was being dealt with by the International Law Commission under the heading of state responsibility, and simply to urge that the Commission should proceed with that task as speedily as possible. Similarly, the Economic and Social Council was considering ways and means of promoting the inter-

[3] D. P. O'Connell, "*The Law of State Succession*", Cambridge University Press, 1956.

[4] J. Mervyn Jones, "*State Succession in the Matter of Treaties*", British Yearbook of International Law, Vol. XXIV, 1957, p. 360.

[5] *International Law*, eighth edition, 1955, Vol. I, p. 157.

national flow of capital for the economic development of under-developed countries. It had reached the vital question of the legal status of foreign capital under international law and was looking to the Commission for guidance. That attitude was shared by scientific and other organizations, including the Asian-African Legal Consultative Committee. It was generally assumed that the Commission intended to deal with expropriation and nationalization as part of the topic of state responsibility. It was the Commission itself which had given rise to that expectation.

45. The reports of the special rapporteur had touched on that part of the question. At its eleventh session in 1959 the Commission had heard representatives of the Harvard Law School and at its 512th meeting had briefly discussed the Harvard draft dealing with the responsibility of states for damage to the person and property of aliens, the very question which it had been suggested should not be discussed by the Commission. He did not agree in many ways with the legal approach and conclusions of the Harvard draft, but he certainly thought that the matter covered by it was perhaps the most practical and urgent part of the topic of state responsibility.

46. No reasons had been advanced to justify the breaking up of the question assigned to the Commission by the General Assembly. Scientific precision and classification were not in themselves reasons for upsetting the traditional and generally accepted conception of the topic of state responsibility. When the General Assembly had instructed the Commission to give priority to the topic of state responsibility, it had quite definitely intended that the aspects of expropriation and nationalization should be included in the study. Some might fear that, without a restrictive approach, the work would be endangered by lack of agreement on the more controversial aspects. That fear would be allayed by separate treatment of the various aspects in separate reports. Naturally, it would be easier to reach conclusions on the general principles governing state responsibility, but such conclusions would be academic rather than the practical guidance which the General Assembly, the Economic and Social Council and the governments themselves expected. On the other hand, if even limited results were obtained on the aspects to which he had referred, the Commission would have made a real contribution to the codification of important rules of international law.

47. Again, without a restrictive approach, some might fear that the aspects of state responsibility to which he had referred might be regarded as colonialism, the imperialistic protection by a state of its nationals and their property in the territory of another state, since the relevant rules of international law had originally been framed by the colonial powers in the nineteenth century without the participation of the newly independent states in the Americas, Asia and Africa. But precisely for that reason, those rules should be considered and eventually agreed and codified. The developing countries complained that they had not participated in the formulation of those rules, but now that they had an opportunity to express their views, they were being asked to neglect that opportunity. An attempt should therefore be made to codify the rules, with the active participation of the enlarged membership of the Commission.

48. It was precisely because questions of responsibility for damage to aliens, especially that of the consequences of expropriation and nationalization, were so difficult that the Commission should consider them; otherwise it would be failing in its duty. The problems involved were no more intractable than those raised, for example, by disarmament. The argument that there were no international rules on the subject and that it was, therefore, not suitable for codification could not be sustained until the field had been thoroughly explored. Personally, he believed that such an effort would not be in vain. To prove his point he would have to comment briefly on some substantive aspects of the problem.

49. Although disputes arose over nationalization laws — some governments claiming adequate and prompt compensation while others denied that there was any obligation to indemnify — in fact states interested in re-establishing or maintaining trade and the flow of investment funds usually achieved a settlement in the end, as was apparent from the prevailing practice of "lump sum" agreements, which indicated that the classical conception of responsibility towards a foreign individual or company had given way to a concept of responsibility by one state towards another. The practice had become so widespread that it appeared in no fewer than 40 post-war bilateral agreements, including agreements between states which did not admit the private ownership of the means of production. Poland and Yugoslavia, for example, had entered into such agreements with Czechoslovakia.

50. The Commission might draw some interesting conclusions from that practice, as distinct from official pronouncements of foreign ministers. The fear of failure to find common ground on such matters might perhaps be due more to theoretical than to practical reasons, and to a mistaken insistence on seeking to base conclusions on the assumption that there was a rule of international law safeguarding respect for private property — a concept which was no longer recognized by all civilized states. At the Commission's twelfth session (568th meeting) Mr. Tunkin had rightly criticized the Harvard draft on state responsibility for ignoring the fact that there were two fundamentally different economic systems in the world.

51. The duty to compensate, as revealed by widespread treaty practice, might be based on the principle of unjust enrichment, which all legal systems recognized. That approach would have important repercussions on the scope and extent of the duty to compensate: the measure of the enrichment and, therefore, the amount of compensation would be more for newly established foreign investments than for those which had already amortized their capital and repatriated profits. The Commission might achieve practical results on such lines and he was convinced that it would be both premature and unsound

to circumscribe at that stage the scope of the study on state responsibility.

52. Mr. VERDROSS said he remained of the opinion that general principles concerning state responsibility could and should be formulated. His opinion found support in the rules laid down in the draft adopted by the Institute of International Law in 1927.[6] Admittedly the articles of that draft applied the rules of state responsibility to the treatment of aliens, but they also proclaimed general principles of state responsibility which were applicable to other matters of international law as well.

53. The topic of state succession was extremely vague and he doubted whether in fact any binding rules on the matter existed. No special rapporteur would be able to start work until the Secretariat had collected the requisite material, and that material should be assembled before the appointment was made.

54. He agreed that some minor topics of more restricted scope should be taken up, such as *ad hoc* diplomacy, but on that subject as well the Secretariat should assemble material. Personally he was not familiar with existing practice, but legal advisers in foreign ministries were doubtless better informed.

55. Sir Humphrey WALDOCK said there seemed to be general agreement that the next report on state responsibility should not attempt to cover the subject comprehensively but should be more in the nature of an exploratory paper exposing the issues to be studied by the Commission. In the process of discussing that paper the Commission would be able to delimit the scope of its ultimate study. The question to be settled therefore was how that paper could best be prepared. His own opinion was that, whether a working group was set up or not, a special rapporteur should be appointed, since only a rapporteur could carry out the extensive research. Certain elements, such as the treatment of aliens, might indeed be controversial, but they loomed large and could hardly be set aside. It was not possible to separate the subject of aliens from that of state responsibility in general, and some of the most pertinent illustrations could most easily be found in the law of the treatment of aliens, but he did not think that that particular aspect should receive priority at the moment. Such an exploratory paper, apart from setting out the main topics for discussion, should also indicate what material was available and what would be the consequences of adopting any particular method of approach.

56. He did not support the idea of a small working group, of perhaps two persons, for the process of consultation would considerably hamper the special rapporteur. If a working group had to be set up, he would prefer a large consultative body whose members could address memoranda to the special rapporteur for inclusion in his preparatory paper.

57. Though he shared Mr. Verdross's doubts as to whether there were any general principles of international law governing state succession, he was not so pessimistic as to think that some rules could not be deduced from practice. The subject had real topical relevance and should not be relegated to the background, since new states were anxious for guidance. From the point of view of the work on the law of treaties, with which it was intimately connected, it would also be most desirable to plan for a comprehensive draft on state succession based on the considerable volume of recent practice and other material of earlier date for consideration in two or three years' time. As was the Commission's usual procedure, a special rapporteur should be appointed for that topic.

58. Mr. BRIGGS said he agreed with Mr. Gros that at the conclusion of the general discussion on state responsibility a special rapporteur should be designated. He had come round to the view that the appointment of a working group would serve no useful purpose and would not save time. The functions some members wished to assign to such a group belonged to the Commission as a whole.

59. Though he had suggested earlier that the Commission should first study the question of the international responsibility of states for the just and humane treatment of aliens, he would have no objection to its discussing general principles, particularly those contained in article 1 of the draft of the Institute of International Law just mentioned by Mr. Verdross. What he would deplore was an abstract approach to the subject of state responsibility divorced from its roots in actual international life. In his view, what was meant by the responsibility of the state for the protection of aliens was not so much that the state had a positive duty of protection, as that it was responsible for making reparation for injuries caused to aliens in its territory by its acts or omissions in violation of international law.

60. Mr. de LUNA said that a debate *in vacuo*, not based on a document, was hardly profitable. Once it had concluded its general debate on state responsibility, state succession, and the future programme of work, the Commission should appoint special rapporteurs, as well as small working groups to prepare preliminary reports for submission at least three weeks before the end of the session. Those preliminary reports would serve to guide the special rapporteurs. Between sessions, the same method of consultation as that used by the Institute of International Law could be employed.

61. Mr. VERDROSS, referring to certain views as to the way in which the subject of state responsibility should be approached, said that the proposal to study first the general principles of state responsibility as such in no way excluded their later application to the specific subject of the treatment of aliens.

The meeting rose at 5.55 p.m.

[6] *Annuaire de l'Institut de Droit International,* Lausanne session, August-September 1927, Paris, Pedone, 1927. See also document A/CN.4/96, annex 8.