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STATE RESPONSIBILITY

[Agenda item 5]

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

RESPONSIBILITY OF THE STATE FOR INJURIES CAUSED IN ITS TERRITORY TO THE PERSON OR PROPERTY OF ALIENS.

PART II: THE INTERNATIONAL CLAIM

[Original text: Spanish]

[2 January 1958]

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Introduction

1. At its ninth session, the International Law Commission, not having enough time at its disposal for a

thorough consideration of the second report on international responsibility submitted by the Special Rapporteur (A/CN.4/106), requested him to continue his work.

The present report covers questions which had been left pending and also contains additional articles for the draft submitted to the Commission. These questions are dealt with under the headings "Exoneration from responsibility; extenuating and aggravating circumstances" (chapter VI), "Exhaustion of local remedies" (chapter VII), "Submission of the international claim" (chapter VIII), and "Character and measure of reparation" (chapter IX). Thus, although not aspiring to exhaust the subject in all its aspects, this report deals with all the questions generally included under the heading "(International) Responsibility of the State for injuries caused in its territory to the person or property of aliens". Consequently, when it resumes its discussion of the subject, the Commission will be able to consider all the principal problems and questions involved in this branch of the topic of international responsibility as a single whole.

2. In order to avoid unnecessary repetitions in the commentaries on the various articles of the draft where particular questions have already been fully considered in the first report (A/CN.4/96), the Special Rapporteur has followed the method used in the second report and has confined himself in those cases to references.

**Acts and omissions which give rise to responsibility
Questions raised in the Commission during the
discussion of the second report on international
responsibility**

[NOTE. The second report dealt with the first five chapters of the draft. The headings of these chapters were as follows:

- I. Nature and scope of responsibility
- II. Acts and omissions of organs and officials of the State
- III. Violation of fundamental human rights
- IV. Non-performance of contractual obligations and acts of expropriation
- V. Acts of individuals and internal disturbances.]

3. As already stated, the time which the Commission could devote at its ninth session to the discussion of the second report was so short that it was unable to consider in detail any of the problems encountered in any attempt to determine and to define the acts and omissions which give rise to the international responsibility of the State for injuries caused in its territory to the person or property of aliens. Nevertheless, during the discussion certain questions were raised which concern the method and technical approach to be adopted in the codification of the topic. That being so, it would perhaps be proper for the Special Rapporteur, in the light of the comments made, to explain the considerations which, in his opinion, justify the method and technical approach employed by him in the preparation of his reports. One of the points touched upon in these comments is the content or scope of this work of codification.

1. CONTENT OR SCOPE OF THIS CODIFICATION

4. Some members of the Commission considered that the scope of the codification ought to be delimited, and that the Commission ought not to deal with certain questions which they regarded as not strictly relevant to the task of codifying the "principles of international law governing State responsibility" in the terms of General Assembly resolution 799 (VIII). It was suggested that the subjects covered by the headings "Violation of fundamental human rights" and "Non-performance of con-

tractual obligations and acts of expropriation" (chapters III and IV of the draft) should be excluded, on the grounds that they raised substantive questions. The proponents of this view contended that consideration of those subjects would involve a definition of the international obligations of the State, an undertaking exceeding the Commission's terms of reference; a similar view, expressed in somewhat different words, was that the study should relate exclusively to State responsibility" in the strict sense of the word" (415th and 416th meetings).

5. The question of fundamental human rights, which is the subject of provisions included in the draft for special reasons, will be dealt with in the next section. The Special Rapporteur must first state, however, that he has genuine difficulty in understanding why some of his colleagues should have felt that the determination of the exact limits of the study and especially the exclusion of substantive questions were matters requiring a decision forthwith. In the first place, the problem of delimiting the exact scope of the subject matter to be codified is not peculiar to the topic of responsibility. As the experience of every body entrusted with codification, including this Commission, has shown, the same difficulties are also encountered, to a greater or lesser degree, in dealing with any other topic. This does not mean, of course, that the problem should be ignored, but the Commission should avoid premature action and not take hasty decisions which might perhaps have to be revoked later. A much more logical and practical course would be to continue the codification, and then, after a thorough study of every aspect of the topic (and, possibly, after the receipt of comments from Governments on the first draft to be prepared by the Commission), to think about omitting whatever is not pertinent to the principles of international law governing State responsibility. If it proceeded otherwise, the Commission would not only lose some valuable experience but would also be committing itself to an *a priori* selection which would not advance its proceedings in any way, and which would still be open to the objection mentioned.

6. The correctness of this view seems to be further confirmed by some reflection on the specific suggestion that the codification should omit the matters relating to contractual obligations in general, public debts and acts of expropriation. But surely the Commission could not decide that these should be omitted on the grounds that they involve substantive questions? In the course of the discussion, the writer stated, with all due respect to the views of his colleagues, that he had gained the impression that some speakers had introduced notions and distinctions totally absent from the texts and *travaux préparatoires* of the many draft codes, both private and official, prepared before this draft (416th meeting). Those texts, far from mentioning such notions and distinctions, contain explicit provisions on the subjects in question—and many of these provisions are reproduced in the commentaries on the relevant draft articles. The same is true of the decisions of courts and claims commissions, which contain ample precedent concerning the international responsibility of the State for the non-performance of obligations arising out of a contract concluded with an alien or out of a concession granted to him. In these circumstances, the exclusion of such matter from the draft which the Commission is to prepare seems impossible to justify.

7. Furthermore, these matters neither raise issues different in character from those covered by other provisions of the draft laid before the Commission, nor have they been treated as substantive questions in the articles.

Except for those dealing with fundamental human rights (articles 5 and 6), the provisions are not intended as precise statements or definitions of the manifold obligations which international law imposes on the State in its treatment of aliens. Their primary object is, rather, to indicate, sometimes quite specifically and sometimes less so, the conditions or circumstances which give rise to international responsibility in cases of breach or non-observance of those obligations. In brief, the aim of the draft provisions, which was essentially also the object of previous codifications, is to determine and state, in so far as is possible and advisable, the conditions and circumstances which must be present before some act or omission inconsistent with international law is imputable to the State. But surely one cannot speak of "imputability" without relating the act or omission to an international obligation of the State. None of the earlier codifications—in so far as any ever attempted to do so—succeeded in discussing "imputability" in the abstract in this way. That is why the provisions of chapter IV of the draft likewise mention the contractual obligations of the State, though with the immediate object of indicating when, in the event of non-performance or non-observance, international responsibility arises.

2. RESPONSIBILITY FOR VIOLATION OF FUNDAMENTAL HUMAN RIGHTS

8. Since writing his first report, the Special Rapporteur has repeatedly stressed the need for composing the traditional conflict between the "international standard of justice" and the principle of the equality of nationals and aliens. With this in mind, he suggested that a solution should be sought through a reformulation of both principles and their integration into a new legal rule, incorporating the essential elements and serving the main purposes of both. Such a rule would derive from the international recognition which has been extended to human rights and fundamental freedoms. In the writer's opinion, the conflict and the antagonism formerly existing between the "international standard" and the principle of the equality of nationals and aliens have become obsolete in consequence of the political and juridical phenomenon in the post-war world of the recognition of fundamental human rights, and hence it would be useless to ignore this phenomenon and to continue to hope that either the "international standard" or the principle of equality will prevail (see A/CN.4/96, chap. VI, and A/CN.4/106, chap. III).

9. During the discussion of the draft at the ninth session, as in the previous year, several members of the Commission stated that they were in sympathy with the idea, and that, in principle, they supported the system proposed in articles 5 and 6. Others, however, expressed objections, not always based on the same considerations, which call for some brief comment. The three essential objections can be summarized as follows: an individual, whether a national or an alien, cannot be regarded as a (direct) subject of international law; (fundamental) human rights have not yet been recognized by positive international law; any violation of these rights raises a substantive question and is therefore not germane to State responsibility but to the "legal status of aliens", which is a separate topic on the Commission's programme (413th, 415th and 416th meetings). These three objections are discussed one by one in the passages which follow.

10. The first objection, as formulated, actually raises a general problem the solution of which is hardly neces-

sary for the specific purposes of the draft. The only question is whether international law, in its present state of development, recognizes certain interests and rights of the human person regardless of his nationality. As for the second objection, if we accepted it we would also have to reject the basic premise underlying articles 4 and 5. Here there may be some confusion between legal rules which merely recognize a right (or impose an obligation) and those which by establishing procedures and guarantees of various kinds, ensure its effective exercise (or guarantee compliance with the obligation). The distinction may be of little consequence in an internal legal system which has been fully developed and refined, but it still has very great significance in the international legal order. Hence, even when speaking in terms of positive international law, nobody draws the distinction between the two categories of rules and nobody contends that only those in the second category have validity or binding force. In brief, therefore, one should not confuse in international law the *validity* or intrinsically obligatory nature of a rule with its *efficacy*.

11. Yet this confusion is still occasionally apparent in comments on the provisions of the United Nations Charter or of other more recent international instruments concerning "human rights and fundamental freedoms for all". As was indicated in the second report, the Charter, does not, of course, contain any explicit provision directly requiring Member States to respect these rights and fundamental freedoms or guaranteeing the effective exercise thereof. This, however, is rather a formal defect, since this duty owed by Member States is either implicitly or indirectly stipulated in other provisions, especially in Articles 55 and 56 of the Charter. Hence these provisions, regarded as a whole, cannot properly be described as fully effective rules. The same, however, can be said of other Charter provisions, the validity and binding force of which nobody questions. The one certain fact is that, with the exception of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950), there is no other international instrument or convention in which human rights and fundamental freedoms are enumerated. The question arises therefore whether, for the purposes of this codification, the existence of such an instrument or convention is in fact indispensable. Even if there were not similar—and often, indeed, identical—provisions in the instruments enumerating these rights and freedoms and in modern municipal statutes, the Commission would hardly have any difficulty in deciding which of those rights and freedoms are relevant to the purposes of this codification. To this it might be added that any such enumeration would still not be founded on positive law. If this objection were justified, it could also be raised for identical reasons, against the "international standard of justice" and against the principle of the equality of nationals and aliens, since both presuppose the existence of certain rights which have never been recognized in an international treaty. Despite this fact, however, both the "international standard" and the principle in question have been accepted and applied in diplomatic practice and by courts and claims commissions in decisions in cases of State responsibility for violation of human rights and freedoms.

12. The third objection raises an issue purely of form. It would obviously be idle to attempt to deny the close affinity and even identity between the subject matter of chapter III of the draft and the topic entitled "legal status of aliens". But the question cannot be put in this way, for, if it were, then this codification would have to be abandoned altogether. Indeed, whatever aspect of the topic

"International responsibility of the State for injuries caused in its territory to the person or property of aliens" is considered, one is driven to realize, invariably, that there is at bottom a problem related to the treatment of aliens. This does not mean, however, that the two topics cannot be codified separately, as, in fact, they have been in the past under the auspices of the League of Nations and by inter-American conferences and bodies (see A/CN.4/1/Rev.1, pp. 45-46). We only have to delimit, as far as possible, the subjects which each of the codifications should cover, and for this purpose it will be sufficient to bear in mind the objects of each.¹ Accordingly, in the codification of the principles governing State responsibility the sole concern is to determine under what conditions or in what circumstances the non-observance by the State of a duty owed to the alien renders the act or omission in question imputable to that State. In this connexion, it is permissible to point out that if the affinity or similarity between these two subjects had given rise to this kind of objection in earlier codifications the problem of the "international standard" and of the principle of equality, which are both principles applicable to the treatment of aliens, would have had to be regarded as outside the scope of the subject of responsibility and no solution thereof could ever have been envisaged.

3. THE PROBLEM OF SOURCES

13. Another problem which arose during the discussion on the method and technical approach to be adopted in this codification was that of the sources of international law. While some members of the Commission advocated the abandonment of the "unbridled positivism which had once reigned supreme", others insisted that the only rules to be taken into account were those established by treaties and custom (413th and 415th meetings). The comments made in this connexion referred mostly to the provisions of chapter III of the draft, but in view of the nature and scope of the problem it would perhaps be proper to explain briefly in what sense the expression "... from any of the sources of international law" is used in article 1, paragraph 2.

14. In the first place, it seems unnecessary to state expressly—and that is why the second report did not do so—that in employing a phrase analogous to that contained in the Preamble to the United Nations Charter ("... from treaties and other sources of international law...") the article did not mean the "sources" to be restricted exclusively to treaties and custom. In view of the developments which have taken place in the creative process that establishes new rules of international law, the term "sources" can be construed so broadly that the narrowest construction that can be envisaged is the one contained in Article 38 of the Statute of the International Court of Justice; that provision has the signal virtue of modifying the narrow positivist idea of sources which used to prevail.

15. The important point, however, is not merely the interpretation to be placed on the expression "sources of

¹ For examples of instruments concerning the legal status or treatment of aliens, see the Convention on the Status of Aliens signed at Havana on 20 February 1928 (League of Nations, *Treaty Series*, vol. CXXXII, 1932-1933, No. 3045); the draft convention prepared by the Economic Committee of the League of Nations for the International Conference on the Treatment of Foreigners, held at Paris in 1929 (League of Nations publication, II. *Economic and Financial*, 1928.II.14 (document C.174.M.53.1928.11), p. 11); and the more recent European Convention on Establishment and the Protocol thereto signed at Paris on 13 December 1955 (Council of Europe, *European Treaty Series*, No. 19.

international law". This problem is inextricably bound up with the basic principles which should guide the Commission in its work of codification. Even before the Commission was established the authors of its statute realized that the expressions "progressive development" and "codification" did not reflect absolute and mutually exclusive notions. In particular, the Rapporteur of the Committee on the Progressive Development of International Law and its Codification stated in his final report that "For the codification of international law, the Committee recognized that no clear-cut distinction between the formulation of the law as it is and the law as it ought to be could be rigidly maintained in practice". He added: "It was pointed out that in any work of codification, the codifier inevitably has to fill in gaps and amend the law in the light of new developments".² The codifying organs of the League of Nations, and the Assembly itself had previously made statements to exactly the same effect (see A/CN.4/1/Rev.1). As far as the Commission itself is concerned, there is no need to recall that all its earlier drafts were decisively influenced by the same considerations, in fact the Commission has frequently confirmed this very point in explicit terms in its reports. This approach, which has thus been recognized as the proper one to adopt in codification work in general, is especially necessary and justified now, for the reasons already explained in the introduction to the first report, in the codification of the principles governing international responsibility.

CHAPTER VI

Exoneration from responsibility; extenuating and aggravating circumstances

Article 13

1. Notwithstanding the provisions of the article last preceding, the State shall not be responsible for injuries caused to an alien if the measures taken are the consequence of force majeure or of a state of necessity due to a grave and imminent peril threatening some vital interest of the State, provided that the State did not provoke the peril and was unable to counteract it by other means.

2. Similarly, the State shall not be responsible for the injuries caused if the injurious act was provoked by some fault on the part of the alien himself.

3. Force majeure, state of necessity and the fault imputable to the alien shall, if not admissible as grounds for exoneration from responsibility, constitute extenuating circumstances in the determination of the quantum of reparation.

Article 14

In the cases of responsibility provided for in articles 10 and 11, the connivance or complicity of the authorities of the State in the injurious acts of private individuals shall constitute an aggravating circumstance for the purposes contemplated in article 25 of the present draft.

Commentary

1. The State's international responsibility for injuries caused to the person or property of aliens arises in cases where such injuries are the consequence of some act or omission on the part of its organs or officials which contravenes the State's international obligations. However, "there are cases in which an act, wrongful in itself, does not produce the effects of a wrongful act, or completely loses its wrongful character, or even constitutes the exercise of a right that takes precedence over the right which

² *Official Record of the General Assembly, Second Session, Sixth Committee*, annex 1, para. 10.

the act violates or disregards".³ The intrinsic wrongfulness or illegality of an act or omission, i.e. the mere fact of its contravening the State's international obligations, does not, of itself, always suffice to make the State responsible for the injuries caused. What is required, in addition, is the absence of any grounds or circumstances, wholly unconnected with the State's volition, which imposed the act or omission on the State or which directly provoked the injurious act. Hence, what the above provisions are concerned with is not exactly an ingredient of international responsibility but rather a special situation in which the State can, if the circumstances described are present concurrently with the injurious act imputed to it, decline responsibility. In this sense, there can be no responsibility unless there are no grounds or circumstances which justify the State's conduct or which provoked the injurious act, as the case may be. In short, to give rise to responsibility, the act or omission must be both illegal and unjustified.

2. While the foregoing refers primarily to grounds of absolute exoneration from responsibility, it also explains what, by analogy with municipal law, might be termed "*extenuating circumstances*". Sometimes, the presence of such a circumstance, while not wholly justifying the illegal act, nevertheless makes it possible to consider that the responsibility is not of the same degree as that which would have been imputable to the State had that circumstance not been present.

3. On the other hand, inasmuch as this report speaks of exonerating and extenuating circumstances, it should also deal with the converse—"*aggravating circumstances*", i.e. circumstances which involve the State in a greater degree of responsibility. Here, however, there are bound to be certain difficulties, for even the expression "*aggravating circumstances*" is not current in international law with reference to civil responsibility. Still, if the codification of this topic is not to be incomplete, it will have to include, under this or some other description, not only extenuating and exonerating circumstances but also those which manifestly aggravate the State's responsibility. Besides, the compelling reason for including provisions relating to extenuating and aggravating circumstances is that the reparation of the injury must be fair, and that the State may be required to do something more than merely make reparation, as will be shown later on.

4. "FORCE MAJEURE" AND STATE OF NECESSITY

4. Article 12 of the draft contemplates a typical case of *force majeure*, that of the injuries caused to an alien by measures taken by the armed forces or other authorities for the purpose of preventing or suppressing an insurrection or any other internal disturbance. Under the provisions of article 12 the international responsibility of the State is not involved unless the measures taken affect the alien directly or individually. As was explained in the earlier commentary on this article, it is necessary to make a distinction between the two different situations which occur in practice: sometimes the measures are exclusively of a general character (for example, an attack by fire-arms, or the bombardment of a locality), whereas at other times they directly or individually affect private persons (for example, the seizure of a railway, aqueduct or electric power station). In the first case there is no question of responsibility because the State is only carrying out one of its essential functions, that of maintaining public order

and the stability of the constituted Government. The second case is different, even though there, too, the measures constitute an exercise of the same function and the same right. From the internal point of view, the State will be under a duty to return the property it has requisitioned or occupied and in general to indemnify the owners for any injuries it may have caused. Although this is an internal rather than an international responsibility, it would assume the character of international responsibility if there was discrimination between nationals and aliens, and if reparation was limited to the injuries caused to the former. (See A/CN.4/106, chap. V, para. 30).

5. This is why article 13 of the draft contains a proviso excepting the second of the two situations referred to above from the case of *force majeure* covered by the article. On the other hand, the first situation is somewhat analogous to that resulting from an earthquake, flood, fire, epidemic, etc. There is, of course, no question of the State's having a duty to repair injuries of aliens caused by the elements or by the forces of nature, although one writer has suggested the possibility of such a responsibility.⁴ The analogy with the case covered by article 12 would be applicable not to the injuries caused directly by such natural disasters but to those resulting from measures taken by the authorities of the State for the purposes of counteracting them or dealing with the situation they created. If these measures do not affect the alien's person or property directly and individually, then, for reasons similar to those already indicated, there will likewise not be any responsibility. The *force majeure* is so obvious that it is impossible to conceive of either an internal or an international duty to make reparation.

6. The international case-law contains at least three cases in which it has been recognized that the defence of *force majeure* is admissible in international law as capable of exonerating the State from responsibility or of extenuating the responsibility imputable to it. In two of these cases the respondent State pleaded the financial position in which it had been placed by war as a circumstance preventing it from discharging its pecuniary obligations. One of these is the *Russian Indemnity case* (1912), which came before the Permanent Court of Arbitration of The Hague. The arbitral tribunal stated that "*The exception of 'force majeure' . . . may be pleaded in opposition in public as well as in private international law*".⁵ Turkey had disclaimed its responsibility by alleging financial difficulties of the utmost seriousness. The tribunal held that "It would clearly be exaggeration to admit that the payment (or obtaining of a loan for the payment) of the comparatively small sum of about six million francs due the Russian claimants would imperil the existence of the Ottoman Empire or seriously compromise its internal or external situation".⁶ On those grounds, the tribunal declared that the exception of *force majeure* could not be admitted.

7. The second of these cases is the *Case concerning the payment of various Serbian Loans issued in France* (1929), decided by the Permanent Court of International Justice. Yugoslavia pleaded *force majeure*, as well as impossibility of performance with respect to certain obligations connected with loans and bearer bonds issued

⁴ Clyde Eagleton, *The responsibility of States in International Law* (New York, The New York University Press, 1928, p. 125).

⁵ *The Hague Court Reports*, James Brown Scott (ed.) (New York, Oxford University Press, 1916), p. 317.

⁶ *Ibid.*, p. 318.

³ Dionisio Anzilotti, *Corso di diritto internazionale*, 4th ed. (Padua, Societa Poligrafica Editoriale, 1955), vol. I, p. 413.

by the Serbian Government before 1914. As to the question of *force majeure*, the Court declared that:

"It cannot be maintained that the war itself, despite its grave economic consequences, affected the legal obligations of the contracts between the Serbian Government and the French bondholders. The economic dislocations caused by the war did not release the debtor State, although they may present equities which doubtless will receive appropriate consideration in the negotiations and—if resorted to—the arbitral determination for which Article II of the Special Agreement provides".⁷

The plea of "impossibility of performance" does not come within the purview of this study, since it was put forward on the ground that it was illegal, under the French Act of 5 August 1914, to effect payment in gold francs.

8. The third is the *Société Commerciale de Belgique* case (1939), also decided by the former Permanent Court of International Justice. In this case it was argued that the Greek Government had been obliged, on account of the general financial crisis, to abandon the gold standard and to default in the service of its debt. In its judgement, the Court stated that it could declare itself on that contention only after having itself verified that the alleged financial situation constituting *force majeure* "really existed" and after having ascertained the effect which the execution of the arbitral awards already made would have on that situation. The Court also indicated that the Parties were in agreement that the question of Greece's capacity to pay was outside the scope of the proceedings before the Court.⁸

9. To sum up, the foregoing supports the view that the defence of *force majeure* is recognized in principle by international law; that in this law its validity or admissibility is contingent on conditions which are no less strict, or even stricter, than those governing the defence of *force majeure* in municipal law; that the most important of these conditions, and that which dominates the notion of *force majeure*, is "uncontrollableness";⁹ and that where *force majeure* is not valid or admissible as a ground exonerating from responsibility, it may be valid or admissible as an extenuating circumstance for the purposes of fixing the quantum of reparation of the injury sustained.

10. Article 13 also mentions "state of necessity" as one of the grounds permitting a State to disclaim the responsibility imputed to it, or as one of the circumstances which may be considered extenuating for the purposes of reparation. Some writers deny that this ground or circumstance can have any of these consequences in positive international law. Basdevant, for example, says:

⁷ Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 20, pp. 39-40.

⁸ *Idem*, *Judgments, Orders and Advisory Opinions*, series A/B, No. 78, pp. 21-22.

⁹ See in this connexion Marcel Sibert, *Traité de droit international public* (Paris, Librairie Dalloz, 1951), vol. I, p. 334. Article 4, paragraph 1, of the Draft Covenant on Civil and Political Rights provides as follows:

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties hereto may take measures derogating from their obligations under this Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin." (*Official Records of the Economic and Social Council, Eighteenth Session, Supplement No. 7, annex I, B*).

"There does not appear to be a rule of positive international law which would justify the non-observance of a rule of that law on the alleged ground of necessity. A State may take the view that, in a particular case, the circumstances override strict adherence to the law; it may consider that it has political or moral reasons for departing from the observance of international law. Nevertheless, there would still be a violation of positive international law capable of engaging the responsibility of the State to which it is imputable."¹⁰

However, the weight of opinion among the learned writers is decidedly on the other side. According to Anzilotti, a study of diplomatic documents shows that States are very far from denying that necessity may justify acts which *per se* contravene international law. He adds:

"While interested States have challenged, very often with justice, the existence [in a particular case] of an alleged necessity to act in a certain way, they have also specifically declared, or clearly implied, that in other circumstances the defence would have been completely valid. In other words, the defence is accepted in the abstract although rejected in specific cases. On the other hand, one would look in vain for a single statement challenging the principle of necessity as a general proposition".¹¹

Thus, state of necessity, which is sometimes similar to, and may even be indistinguishable from, *force majeure*, is a principle which is recognized in the practice of States and is not limited to so-called "international law in time of war".¹²

11. State of necessity has sometimes been linked to self-defence. That is the case, in particular, in one of the bases of discussion prepared by the Preparatory Committee of the Conference for the Codification of International Law (The Hague, 1930). In view of the vagueness and contradictions encountered in the observations submitted by Governments, the Committee drafted the following text:

"Basis of discussion No. 24

"A State is not responsible for damage caused to a foreigner if it proves that its act was occasioned by the immediate necessity of self-defence against a danger with which the foreigner threatened the State or other persons.

"Should the circumstances not fully justify the acts which caused the damage, the State may be responsible to an extent to be determined."¹³

12. The basis of discussion, in referring to a "danger" provoked by the very alien who is injured, is rather more concerned with a case of the kind covered by article 13, paragraph 2, of the draft. So far as "self-defence" is concerned, this is notion which, as presently defined, falls outside the limits of this codification, as will be seen later. What is of interest here is the fact that this basis of discussion foresaw that a situation might arise in which

¹⁰ Jules Basdevant, "Règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international*, 1936, IV, p. 553.

¹¹ Anzilotti, *op. cit.*, p. 416. See also his separate opinion in the *Oscar Chinn* case (1934) (Publications of the Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions*, series A/B, No. 63, pp. 107 ff.).

¹² Cf. L. Oppenheim, *International Law—A Treatise*, vol. II, *Disputes, War and Neutrality*, 7th ed., H. Lauterpacht (ed.) (London, Longmans, Green and Co., 1952), pp. 232 and 233.

¹³ League of Nations publication, *V. Legal, 1929.V.3* (document C.75.M.69.1929.V), p. 128.

the circumstances alleged by the State could, if not fully justify its acts, extenuate the responsibility imputed to it.

13. It is undeniable that great uncertainty surrounds the subject of necessity; in other words, it is a controversial question what circumstances have to attend the imputable act or omission in order that the state of necessity can justify full exoneration from responsibility or extenuate responsibility for the purposes of reparation. Nevertheless, it is precisely and principally because of this uncertainty, and because of the contradictions encountered in diplomatic and other documents, that necessity ought to be mentioned as a defence in the draft. If state of necessity is recognized in international law, as in fact it is, it needs a definition to forestall as far as possible a recurrence of past controversies concerning the circumstances in which it is admissible as a defence. And it is the purpose of the concluding part of paragraph 1 of article 13 to provide a definition.

14. In the first place, the peril must be one which threatens some vital interest of the State. Strupp defines states of necessity as

“... a situation, objectively judged, in which a State is threatened by a grave peril, present or imminent, capable of affecting its territorial status or identity, its Government or its form of government, or of curtailing or destroying its independence or international capacity to act and from which it cannot escape except by violating foreign interests protected by the law of nations”.¹⁴

Though the enumeration is quite comprehensive, it is possible that it does not cover all the interests which come within the category of those justifying the plea of state of necessity. That is why the article uses the expression “some vital interest”. At the same time, the peril must be one which a State “did not provoke”, for any fault or culpability on its part would rob the plea of all substance. Secondly, the peril must be “grave and imminent”, and not a simple threat. In the *Neptune* case (1797) the arbitration tribunal held that “the necessity which can be admitted to supersede all laws and to dissolve the distinctions of property and rights must be absolute and irresistible . . .”.¹⁵ And the third condition is that the State must have been “unable to counteract [the peril] by other means”; in other words there must be “impossibility of proceeding by any other method than the one contrary to law”.¹⁶

15. One last problem to be considered here is that of “self-defence”, traditionally a plea admitted in international law as a ground for exoneration from responsibility. Today, there is at least one reason against its inclusion in this codification. Since the adoption of the United Nations Charter, the right of self-defence, at all times recognized as one of those exercisable by the State for its own preservation, has become subject to the conditions laid down in Article 51 of the Charter. Naturally, acts performed by a State which come within the terms of Article 51 do not engage that State’s responsibility with

regard to the injuries resulting therefrom. However, this situation is one of armed conflict, which must exist before the right of self-defence may properly be exercised, whereas this draft is concerned exclusively with cases of responsibility in peacetime. Besides, the plea of “state of necessity”, within the meaning of article 13, would cover the cases which have hitherto been classed as instances of “self-defence”.

5. FAULT ON THE PART OF THE ALIEN

16. Any fault attributable to the injured alien in the occurrence of the injurious act may also operate as a ground for exoneration from international responsibility or as an extenuating circumstance, as the case may be. This has been recognized as a valid ground by international case-law, some codifications and the writers who have dealt with the subject. First, the case-law will be considered below.

17. According to the award of the arbitration tribunal in the *Delagoa Bay Railway* case (1900), all the circumstances imputable to the concessionary company and favourable to the [Portuguese] Government extenuate the responsibility of the latter and justify a reduction in the amount of reparation.¹⁷ In the *García and Garza* case and the *Lillie S. Kling* case, which came before the General Claims Commission (United States and Mexico) established by the Convention of 8 September 1923, it was explicitly recognized that the fault or culpability imputable to the injured alien should influence the amount of the reparation to which he is entitled.¹⁸ Other cases, in particular the *Costa Rica Packet* case (1897), in which the fault imputable to the injured alien operated as a circumstance extenuating the respondent State’s responsibility, are cited in chapter IX in connexion with the rules governing the measure of reparation.

18. In the draft approved at its session, held at Neuchâtel, the Institute of International Law recognized that “the obligation to indemnify disappears if the injured persons are those who caused the act which gave rise to the injury . . . for example, in the case of a particularly provocative attitude towards the mob”.¹⁹ This draft, in referring to the responsibility of the State in cases of internal disturbance, recognizes that the fault of the injured alien, if it is the cause of the injurious act, wholly exonerates the State from the duty to repair the injury.

19. In the light of the replies received from Governments relating to the conduct of aliens injured by acts of private individuals, the Preparatory Committee of the Conference of The Hague drafted basis of discussion No. 19:

“The extent of the State’s responsibility depends upon all the circumstances and, in particular, upon whether the act of the private individual was directed against a foreigner as such and upon whether the injured person had adopted a provocative attitude.”²⁰

This text reflects the doubts and the differing opinions expressed by Governments on the question whether the hypothetical circumstance could operate solely as a circum-

¹⁴ Karl Strupp, *Eléments du droit international public universel, européen et américain*, 2nd ed. (Paris, Les Editions internationales, 1930), vol. I, p. 343.

¹⁵ Georg Schwarzenberger, *International Law*, vol. I, *International Law as applied by International Courts and Tribunals*, 2nd ed. (London, Stevens and Sons Limited, 1949), p. 244.

¹⁶ See the separate opinion of Anzilotti in the *Oscar Chinn* case (Publications of the Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions*, series A/B, No. 63, pp. 107.).

¹⁷ Sibert, *op. cit.*, p. 334.

¹⁸ J. G. De Beus, *The Jurisprudence of the General Claims Commission, United States and Mexico under the Convention of September 8, 1923* (The Hague, Martinus Nijhoff, 1938), pp. 311 ff.

¹⁹ *Annuaire de l’Institut de droit international*, vol. 18 (1900), p. 255.

²⁰ See League of Nations publication, *V. Legal, 1929V.3* (document C.75.M.69.1929.V), pp. 99-102.

stance extenuating the State's responsibility or, in some cases, as a ground for absolute exoneration.

20. Article VI of project No. 16 of the American Institute of International Law on "Diplomatic Protection" deals with two other possible cases of fault on the part of the alien:

"The American republic to which the diplomatic claim is presented may decline to receive this claim when the person in whose behalf it is made has interfered in internal or foreign political affairs against the Government to which the claim is made. The republic may also decline if the claimant has committed acts of hostility toward itself." (A/CN.4/96, annex 7).

This is substantially the situation which has just been examined. If the alien has conducted himself in an improper manner or in a manner that is contrary to the laws of the State in which he resides, he must of necessity accept the consequences of his conduct. In the cases envisaged in the American Institute's draft, if the alien's conduct was the cause of the injurious act, what basis would there be for diplomatic protection?

21. The hypothetical instances mentioned above do not, of course, constitute an exhaustive catalogue of the grounds or circumstances which exonerate the State from responsibility or extenuate responsibility for the purposes of reparation. There may be others, equally admissible, either as grounds for exoneration or as extenuating circumstances. And that is why in article 13, paragraph 2, of the draft general terms are used in preference to language referring to specific situations (the latter having been the practice in past codifications). Its essence is the recognition, in principle, of this additional exonerating or extenuating circumstance, for it is inconceivable that the State should have an unqualified duty to make reparation if the injury is the result of acts provoked by the alien himself. The only thing that has to be specified is the nature of the conduct imputable to the alien, namely culpable conduct, because it is the common element in all the possibilities. A vague reference to some act on the part of the alien would not do, for the conduct of the alien may not always justify the injurious act even if it was provoked by his conduct. It must be a culpable act, i.e. an act the consequences of which could or should have been foreseen by the alien.

6. AGGRAVATING CIRCUMSTANCES

22. Although this terminology may be an innovation in the international law relating to State responsibility, there is really no objection to its adoption if the word "aggravating" is used to describe those circumstances which, by analogy with municipal law, tend to involve a greater degree of responsibility on the part of the State. As article 14 of the draft shows, the specific reference here is to cases of responsibility connected with acts of private individuals or with the internal disturbances mentioned in articles 10 and 11 in which imputability depends on whether there has been "manifest negligence" on the part of the authorities in taking the measures normally taken to prevent or punish the injurious acts. On the other hand, article 14 deals with the case of connivance (or deliberate and intentional failure to prosecute or to punish) or complicity of the authorities of the State in the injurious acts of private individuals. It should be noted that this is not the same thing as the failure of the authorities to exercise "due diligence", the criterion applicable in these cases of responsibility in assessing the conduct of the State; article 14 deals, rather, with circum-

stances which denote an attitude utterly at variance with that which the competent organs and authorities would be expected to observe. In cases in which there has been such an attitude on the part of the State's organs or officials, the degree of the State's responsibility cannot be the same as in those in which all that can be imputed to the State is manifest negligence in preventing or punishing the injurious acts. On the contrary, apart from the nature of the injury to the alien, the responsibility must be greater, in keeping with the gravity of the imputable act or omission.

23. The question might also be considered from another point of view: such acts or omissions might be treated on a par with those which engage what is known as the "direct" responsibility of the State, i.e. acts or omissions of its organs or officials which directly cause the injury to the person or property of the alien. The analogy might be patent in a case where the conduct of the authorities or their participation in the injurious acts was such as to become indistinguishable from one of the acts or omissions directly engaging the State's international responsibility. In practice, however, it will not always be easy to maintain this analogy, not even in the case of complicity, since complicity depends on the degree of material or effective participation imputable to the authorities. In any event, the salient feature in these cases of responsibility is still the act of the private individual, which is the direct cause of the injury, although the presence of the other element (the connivance or complicity of the authorities) would necessarily create a special responsibility on the part of the State. This approach has the further advantage of enabling certain difficulties encountered in the past by arbitration tribunals and commissions in deciding cases of responsibility of this kind to be avoided in the future, and, as will be seen later, or facilitating a solution for the purpose of determining what reparation is proper in such cases.

24. It is of course realized that in considering this type of conduct as an "aggravating circumstance" one may be straying from the notion of civil responsibility to which the Commission has decided to confine itself for the time being. The expression "aggravating circumstance" has, it is true, a frankly penal flavour, and its use in connexion with the cases indicated would logically suggest the idea of punitive reparation. Nevertheless, the problem can be resolved without resort to penal provisions in the draft. It would suffice to class these cases of responsibility among the acts or omissions the consequences of which extend beyond the specific injury caused to the person or property of the alien to the point of affecting what in the first report is called "the general interest". In this way, the State of nationality bringing the international claim for reparation of the injury caused to the alien would be able, if there was connivance or complicity of the authorities in the injurious act, to require the respondent State to take the steps referred to in article 25. This question will be touched on again in the comments on article 25 and, before then, in the discussion of the right of the State of nationality to bring an international claim under article 20, paragraph 2.

7. INADMISSIBLE GROUNDS OR CIRCUMSTANCES

25. The Special Rapporteur's first report mentioned certain grounds or circumstances which cannot be admitted as exonerating or extenuating (A/CN.4/96, sect. 25). One of these is reprisals; the questionnaire sent to Governments in connexion with The Hague Con-

ference invited observations on the subject of reprisals and the Preparatory Committee formulated basis of discussion No. 25 in the following terms:

"A State is not responsible for damage caused to a foreigner if it proves that it acted in circumstances justifying the exercise of reprisals against the State to which the foreigner belongs."²¹

Nowadays it would be difficult to admit, as the Preparatory Committee did, that reprisals can constitute grounds for exoneration from responsibility. Reprisals, as the term is understood in theory and in practice, imply a State conduct essentially contrary to the rules of international law. The term describes, furthermore, very different measures the object or purpose of which may, in many cases, be achieved by means consistent with international law. Where action reconcilable with that law is impossible, then possibly reprisals should be admissible, if the action in question was in fact taken in circumstances so grave as to constitute the state of necessity which is provided for in article 13.

26. Nor is the non-recognition of a State or of a Government or, by analogy, the severance or the suspension of diplomatic relations admissible as an exonerating circumstance. In the first place, in all these cases, the political factor is predominant, and consequently any legal solution that might be suggested would run the risk of being ineffective in practice. In any case, from a purely objective point of view, a State can hardly be relieved of responsibility simply because it or its Government has not been recognized by the claimant State, or because diplomatic relations with the claimant State are broken or suspended. As recognition has a declaratory effect, it is not possible to plead absence of international personality as a defence to responsibility, on the theory that the State concerned lacks the capacity to be a subject of those obligations which international law imposes upon the State or the Government. For obvious reasons, the severance or interruption of diplomatic relations does not even raise this issue. Naturally, it may be difficult in practice to assert the international responsibility successfully, for recognition may be a condition that has to be fulfilled before a claim can be pursued; indeed, recognition may actually be the consequence of the exercise of diplomatic protection. These are, however, purely procedural matters; they do not affect the principle of responsibility, if the imputable act or omission itself constitutes the non-observance of an international obligation.

CHAPTER VII

Exhaustion of local remedies

Article 15

1. An international claim brought for the purpose of obtaining reparation for injuries alleged by an alien, or for the purposes contemplated in article 25, shall not be admissible until all the remedies established by municipal law have been exhausted.

2. For the purposes of the provisions of the previous paragraph, local remedies shall be deemed to have been "exhausted" when the decision of the competent body or official is final.

3. Except in the cases of "denial of justice" provided for in article 4 of the draft, the absence, delay or inefficacy of local remedies, or the inadequacy of the reparation for the injury, shall be incapable of furnishing grounds for the international claim.

Article 16

1. Notwithstanding the provisions of the preceding article, if two or more States restrict by agreement the right to bring an international claim, such claim shall be admissible only in the cases and circumstances specified in the said agreement.

2. Similarly, in cases where an alien claims to have suffered injury as a result of the non-performance of obligations stipulated in a contract entered into with the State, or in a concession granted to him by the State, the international claim shall not be admissible if the alien concerned has agreed not to seek the diplomatic protection of the State of his nationality; the exoneration shall operate in accordance with the terms of the waiver.

3. The waiver mentioned in the previous paragraph shall not deprive the alien's State of nationality of the right to make an international claim in the case provided for in article 20, paragraph 2, of the present draft.

Article 17

Article 15 shall not apply if the State has expressly agreed with the alien, or, as the case may be, with the State of his nationality, to dispense with local remedies.

Article 18

Disputes between the respondent State and the alien, or, as the case may be, between that State and the State of his nationality, regarding the admissibility of an international claim shall be submitted to the methods of settlement provided for in articles 19 and 20 in the form of a preliminary question and resolved by means of a summary procedure.

Commentary

1. The four articles in this chapter relate to various aspects and problems of the "exhaustion of local remedies". Article 15 lays down the general principle that the admissibility of an international claim depends on the exhaustion of these remedies and indicates the point at which and the circumstances in which local remedies are deemed to have been "exhausted". Article 16 deals with the waiver of diplomatic protection and also with the case in which such a waiver, if made by the alien, does not deprive the State of nationality of the right to make an international claim. Article 17 concerns a special situation which may be the consequence of an agreement between two States, or between the alien and the respondent State, and in which the general principle does not apply. Lastly, article 18 provides for a mode of settling disputes which concern the interpretation or application of the provisions contained in the previous three articles.

8. FUNCTION OF THE PRINCIPLE

2. For more than one reason, practice has established the principle that an international claim to obtain reparation for injuries alleged by an alien is not admissible until all the remedies offered by municipal law have been exhausted. The reason is that so long as the private claimant has not brought and exhausted all the actions and proceedings provided for in the legislation of the State of residence, it is impossible to say whether an injury in fact exists and what is its extent, or whether the injury is the consequence of an act or omission truly imputable to the State, or whether the alien has or has not obtained appropriate reparation by resorting to these remedies. Borchard has explained the operation of the principle in a paragraph which is worth reproducing textually:

"The principle of international law by virtue of which the alien is deemed to tacitly submit and to be subject to the local law of the State of residence implies as its corollary that the remedies for a violation of his rights

²¹ *Ibid*, p. 130.

must be sought in the local courts. Almost daily the Department of State of the United States of America has occasion to reiterate the rule that a claimant against a foreign Government is not usually regarded as entitled to the diplomatic interposition of his own Government until he has exhausted his legal remedies in the appropriate tribunals of the country against which he makes claim. There are several reasons for this limitation upon diplomatic protection: first, the citizen going abroad is presumed to take into account the means furnished by local law for the redress of wrongs; secondly, the right of sovereignty and independence warrants the local State in demanding for its courts freedom from interference, on the assumption that they are capable of doing justice; thirdly, the home Government of the complaining citizen must give the offending Government an opportunity of doing justice to the injured party in its own regular way, and thus avoid, if possible, all occasion for international discussions; fourthly, if the injury is committed by an individual or minor official, the exhaustion of local remedies is necessary to make certain that the wrongful act or denial of justice is the deliberate act of the State; and fifthly, if it is a deliberate act of the State, that the State is willing to leave the wrong unrighted. It is a logical principle that where there is a judicial remedy, it must be sought. Only if sought in vain and a denial of justice established, does diplomatic interposition become proper."²²

It is by reason of this multiple function that the principle of the exhaustion of local remedies is regarded as one of the fundamental principles in the matter of international responsibility. And the reason is undoubtedly that, otherwise, any internal claim would be capable of being converted into an international claim by the mere fact that the claimant is an alien, independently of any participation by the State in the acts which caused the injury or of its attitude at the time of reparation.

3. In connexion with the foregoing, as was stated in the Special Rapporteur's first report, the question has often been asked whether the rule concerning the exhaustion of local remedies constitutes a mere procedural requirement or whether it is, rather, a substantive condition upon which the very existence of the State's international responsibility hinges.²³ While one aspect of the question is quite academic, and with that the Commission is naturally not concerned, it has one practical aspect and

²² Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (New York, The Banks Law Publishing Co., 1915), pp. 817-818.

²³ For a discussion of and precedents concerning the question, see the Special Rapporteur's first report (A/CN.4/96, paras. 170-173).

Since the publication of this report the Institute of International Law has considered the question at its session at Granada in 1956 and adopted the following text:

"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 irreceivable if the internal means of redress available to the injured person which appear to be effective and sufficient 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." (*Annuaire de l'Institut de droit international*, vol. 46 (1956), p. 364.)

it is this which is really relevant to the purpose of the codification. So far as this practical aspect is concerned, neither theory nor practice leaves room for the slightest doubt: the responsibility or duty to make reparation for an injury caused to an alien is not exigible by means of an international claim so long as the local remedies have not been exhausted. In this sense, the rule implies a suspensive condition, which may be procedural or substantive, but to which the right to bring international claims is subordinated. Responsibility as such may or may not exist, but unless and until the condition is fulfilled, the State of the nationality of the alien has only a potential right.

4. These considerations are reflected in the wording of article 15, paragraph 1, of the draft. In other words, the admissibility of the international claim for any of the purposes contemplated by the draft is contingent on the exhaustion of local remedies. Now, it is not enough, for the purpose of solving the problems arising out of its application, simply to set down the bare principle. Of all these problems the one which has caused major difficulties, both in the text-books and in practice, is this: at what point or in what circumstances should the local remedies be deemed to have been exhausted for the purposes mentioned?

9. WHEN ARE LOCAL REMEDIES DEEMED TO BE "EXHAUSTED"?

5. From the sources cited in the first report (A/CN.4/196), which include both writings of learned jurists and diplomatic and judicial practice, it appears that there are three main schools of thought, three ways of answering this question. According to one view, "There can be no need . . . again to resort to those [the municipal] courts if the result must be a repetition of a decision already given." (*Ibid.*, para. 165). A different view has been expressed in these words: "The duty of the State as regards legal protection must be held to have been fulfilled if it has allowed foreigners access to the national courts and freedom to institute the necessary proceedings whenever they need to defend their rights." (*Ibid.*, para. 166).

6. Clearly, the first of these pronouncements tends frankly to limit the principle of the exhaustion of local remedies, while the second reflects an excessively liberal conception of the principle. The third view is in a way an intermediate one; it is the one which finds expression in article 15, paragraphs 2 and 3, of the draft. For purposes of illustration, there are quoted immediately below some of the provisions adopted in first reading by the Third Committee of The Hague Conference (1930):

"Article 4

"1. The State's international responsibility may not be invoked as regards reparation for damage sustained by a foreigner until after exhaustion of the remedies available to the injured person under the municipal law of the State.

"2. This rule does not apply in the cases mentioned in paragraph 2 of Article 9."

"Article 9

"International responsibility is incurred by a State if damage is sustained by a foreigner as a result of the fact:

. . .

"(2) That, in a manner incompatible with the said obligations, [i.e. the international obligations of the State], the foreigner has been hindered by the judicial authorities in the exercise of his right to pursue judicial remedies or has encountered in the proceedings unjustifiable obstacles or delays implying a refusal to do justice."²⁴

7. Though expressed in different words, this is substantially the position taken by the Seventh International Conference of American States (Montevideo, 1933) in its resolution on "International responsibility of the State":

(3) [The Conference] reaffirms equally that diplomatic protection cannot be initiated in favour of foreigners unless they exhaust all legal measures established by the laws of the country before which the action is begun. There are excepted those cases of manifest denial or unreasonable delay of justice which shall always be interpreted restrictively, that is, in favour of the sovereignty of the State in which the difference may have arisen. Should no agreement on said difference be reached through diplomatic channels, within a reasonable period of time, the matter shall then be referred to arbitration.²⁵

8. In view of these different conceptions of the rule of the exhaustion of local remedies, the adoption of any extreme position would obviously be incompatible with its true function and purposes. In the first place, to accept the view that the condition to which the rule subordinates the bringing of an international claim may be deemed to be fulfilled if the exhaustion of local remedies is considered of no avail would be tantamount to allowing the State of nationality to prejudge the efficacy of these remedies and to authorizing that State to exercise diplomatic protection before it knows the attitude of the respondent State. On the other hand, the idea of excluding diplomatic protection if the aliens have had free access to the municipal courts for the purpose of defending their rights—irrespective of the comportment of the courts and of the outcome of the judicial proceedings—seems equally inadmissible.

9. It follows that the third of the views mentioned is the one most consistent with the purposes of the rule. The alien has a duty to exhaust all the remedies open to him under municipal law, and the State of his nationality (or the alien himself in the case provided for in article 19 of the draft) has a duty to refrain from bringing the international claim until that condition has been fulfilled. Its fulfilment is an event which can be verified objectively, for it will be sufficient to know whether the decision of the competent body or official is "final" within the meaning of draft article 15, paragraph 2. So long as a "final" decision has not been given, it cannot be argued, either in fact or in law, that the remedies open to the alien alleging the injury have been exhausted, nor can it be said with certainty what is the form or scope of the act or omission of the State on which the international claim is founded.

10. The last question to be considered in this context is what would happen if it is alleged that the local remedies are ineffective, non-existent or dilatory, so that they may be deemed to have been "exhausted" for the

purposes of the right to bring an international claim, or if, these remedies having in fact been exhausted, the reparation is regarded as insufficient or inadequate. How are these (in practice not uncommon) situations to be dealt with? Here, again, the difficulties are not insuperable if one looks for a solution to the idea underlying the codifications cited above. For if the proceedings instituted for the purpose of seeking local remedies suffered an unjustified delay or any other interruption which patently demonstrates the inefficacy of these remedies, then the case would be one of "denial of justice" within the meaning of draft article 4, paragraph 2. Similarly, if the reparation of the injury is insufficient or inadequate, then either the decision is "manifestly unjust" within the meaning of paragraph 3 of the same article, or else the case is one of those, relatively frequent in litigation under municipal law, in which the plaintiff is not satisfied with the form or amount of the reparation. In this latter case, since there is actually no unlawful act or omission imputable to the State, there cannot be any international responsibility either.

10. WAIVER OF THE RIGHT TO BRING AN INTERNATIONAL CLAIM

11. In his first report, the Special Rapporteur considered with some care, though in more general terms, the two cases of waiver of the exercise of diplomatic protection: waiver by the State of nationality itself, and waiver by the private individual of the right to request that State to bring a claim on his behalf, in both cases the waiver being stipulated in an agreement with the State to which responsibility is imputed (A/CN.4/96, sect. 24). These two cases, which obviously are closely related to the rule of the exhaustion of local remedies, are the subject of the first two paragraphs of article 16 of the draft.

12. It will be recalled that the first case refers to the practice, which originated in the nineteenth century, of concluding bilateral treaties limiting the right of diplomatic protection to a few expressly specified situations. As a rule, a saving clause was inserted concerning cases of denial of justice, though different treaties interpret "denial of justice" very differently. As is known, the propriety and even the validity of these stipulations have at times been questioned.²⁶ Nevertheless, apart from the doubtful character of the alleged "duty" of the State to protect its nationals abroad, there are really no serious grounds, whether legal or otherwise, for denying the propriety of waiving a right which is intrinsically capable of being waived, particularly if the waiver does not affect the principle upon which the diplomatic protection is based. An examination of the terms and scope of the treaties to which reference has been made will show that the principle in question is not affected by them. Their purpose is simply to limit the exercise of the right of diplomatic protection, not to abolish that right; this is also true, as will be seen later, in the case of a waiver by the alien. As to the duty of the State to protect aliens in its territory, the State of residence is not relieved of this duty by these stipulations which limit its international responsibility; the latter are meant, rather, to define that

²⁴ League of Nations publication, *V. Legal, 1930 V.17* (document C.351(c)M.145(c).1930.V), pp. 236 and 237. Cf. the similar language of basis of discussion No. 27 prepared by the Preparatory Committee of The Hague Conference (*idem, V. Legal.1929.V.3* (document C.75.M.69.1929.V), p. 139).

²⁵ *The International Conferences of American States, First Supplement, 1933-1940* (Washington, D.C., Carnegie Endowment for International Peace, 1940), p. 92.

²⁶ At its session at Neuchâtel in 1900, the Institute of International Law expressed the opinion that "... these clauses err inasmuch as they exonerate States from their duty to protect their nationals abroad and from their duty to protect aliens in their territory." (*Annuaire de l'Institut de droit international*, vol. 18 (1900), pp. 253-254). See also Alwyn V. Freeman, *The International Responsibility of States for Denial of Justice* (New York, Longmans, Green and Co., 1938), pp. 40 ff.

duty in clear and precise terms, not only for the benefit of that State but also for the benefit of the aliens. These are the considerations on which paragraph 1 of article 16 is based.

13. Paragraph 2 of the same article deals with the waiver of diplomatic protection commonly known as the Calvo Clause. For reasons which are easy to understand, a provision relating to this clause is even more necessary than that contained in paragraph 1. In the first place, there is still a difference of opinion on the true scope of the waiver by the alien in the contract entered into with the State or in the concession granted to him by the State. Secondly, doubts are still voiced concerning its actual validity or, at least, the validity of certain forms of the waiver. And, lastly, if the draft remained silent on this point, the only provisions applicable would be those of article 15, and the consequence would be a conflict between a general principle and a particular rule, the presence and intrinsic validity of which it would be unrealistic to disregard.

14. The Calvo Clause may and, in fact, does take in practice several forms. Sometimes, it merely consists of a stipulation that the foreign individual concerned will be satisfied with the action of the local courts. In other cases, both the alien and the local Government concerned mutually undertake to submit any disputes which may arise between them to arbitrators appointed by both parties. On occasion, the Calvo Clause embodies a more direct and broader waiver of diplomatic protection, as when it provides that disputes which may arise shall in no circumstances lead to an international claim, or else that the foreign individuals or corporate bodies are to be deemed to be nationals of the country for the purposes of the contract or concession.²⁷ In several countries, there exist constitutional or legislative provisions whereby contracts entered into by the State with aliens are only valid if they include a clause of this type, i.e., it is deemed to be an implicit term of all these contracts.²⁸ One further point should be added: whatever form it may take, the Calvo Clause invariably relates to a contractual relationship, and only operates with regard to disputes concerning the interpretation, application or performance of the contract or concession.

15. What, then, is the true purpose or object of the Calvo Clause? In other words, what is in fact the scope

²⁷ An example of such a provision may be found in article 18 of the contract which was in issue in the well-known *North American Dredging Company* case (1926); the article read:

"The contractor and all other persons who, as employees or in any other capacity, may be engaged in the execution of work under this contract, either directly or indirectly, shall be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of such work and the fulfilment of this contract. They shall not claim nor shall they have, with regard to the interests and the business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the Republic to Mexicans, nor shall they enjoy any other rights than those established in favour of Mexicans. They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of any foreign diplomatic agents be permitted in any matter related to this contract." See A. H. Feller, *The Mexican Claims Commissions, 1923-1934* (New York, The Macmillan Company, 1935), p. 187.

²⁸ For examples of these various forms of the Calvo Clause see Eagleton, *op. cit.*, pp. 168-169, and the comment to article 17 of the draft by Harvard Law School in Supplement to the *American Journal of International Law*, vol. 23 (1929), pp. 203 ff.

of the alien's waiver of diplomatic protection? It will be recalled that, according to some learned authors, it is merely a reaffirmation of the rule requiring local remedies to be exhausted before the right of diplomatic protection can be exercised, because, in so far as it may purport to prevent the State [of nationality] from exercising that right in accordance with international law, the Calvo Clause will be ineffective in law; in other words it will be void *ab initio* in so far as it is framed so as to involve a complete waiver of that protection. Nevertheless, it would be wrong to consider the Clause, even conceived in this way, as useless or superfluous, for in practice it has, within this limited scope, enabled States to resist successfully international claims which, but for the presence of the Clause, would have been admissible.²⁹ But this is not really the question at issue here, for the object or purpose of the Clause is much broader in the majority of cases where it generally operates, in effect, as a complete and absolute waiver of diplomatic protection. In these cases the Calvo Clause would not limit the right of the State of nationality but would bar an international claim to obtain reparation for an injury, whatever may have been accomplished by the exhaustion of local remedies.

11. THE PROBLEM OF THE VALIDITY OF THE CALVO CLAUSE

16. International case-law has not yet recognized the validity of the Calvo Clause to the same extent. In its decision in the *North American Dredging Company* case (1926)—which was the first to construe the true juridical effect of the Clause and which examined its various aspects most thoroughly—the United States-Mexican General Claims Commission held that this validity was not absolute. Under article V of the Convention of 8 September 1923, the United States and Mexico agreed that "no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim".³⁰ When the claim was submitted, the Commission held it to be inadmissible on the grounds that there had been a valid contractual stipulation to resort to local remedies (article 18 of the contract, quoted in footnote 27). In its opinion:

"... where a claimant has expressly agreed in writing, attested by his signature, that in all matters pertaining to the execution, fulfilment, and interpretation of the contract he will have resort to local tribunals, remedies and authorities, and then wilfully ignores them by applying in such matters to his Government, he will be held bound by his contract and the Commission will not take jurisdiction of such claim."³¹ At the same time, however, the Commission stated:

"Where a claim is based on an alleged violation of any rule or principle of international law, the Commission will take jurisdiction notwithstanding the existence of

²⁹ See, in this connexion, a recent work which is both thorough and objective: Donald R. Shea, *The Calvo Clause, A Problem of Inter-American and International Law and Diplomacy* (Minneapolis, University of Minnesota Press, 1955) p. 31.

³⁰ Feller, *op. cit.* (footnote 27 above), p. 326.

³¹ *Opinions of Commissioners under the Convention concluded 8 September 1923 between the United States and Mexico—4 February 1926 to 23 July 1927* (Washington, U.S. Government Printing Office, 1927), pp. 31-32.

such a clause in a contract subscribed by such claimant."³²

In its summing up, the Commission referred specifically to a claim for "denial of justice".³³ Some of the writers who have commented on the decision in the *North American Dredging Company* case have described the Commission's reasoning as inconsistent and even contradictory,³⁴ and it would certainly seem that, at least in so far as the above distinction is concerned, the Commission's line of thought is not entirely clear.

17. By contrast, the wording of article 16, paragraph 2, of the draft removes all doubt on this point and thus disposes of the crucial issue raised by the Calvo Clause. Under article 7, paragraph 3, of the draft, none of the provisions governing the international responsibility of the State for injuries caused by the non-performance of obligations stipulated in a contract "shall apply if the contract or concession contains a clause of the nature described in article 16, paragraph 2". It is thus explicitly admitted that if the waiver of diplomatic protection is absolute, no international claim can be entertained even in the case of denial of justice. This provision of course applies only to a specific case of denial of justice, that connected with the interpretation, application or execution of a contract, and not in cases where some other rights of the alien of interests of another kind were affected. At first sight, this exception to the principle which governs international responsibility for acts and omissions of this nature might appear unjustified. In reality, however, it is not unjustified. Contractual interests and rights are not, so to speak, in the same class as the other rights enjoyed by the alien in international law. Not only are they of an exclusively monetary character, but the alien acquires them by virtue of a contract or concession the acceptance of which depends solely on his own volition.

18. The writer is not seeking to minimize the importance of this category of rights and interests, but to stress that, by their very nature, they can form the subject of an infinite variety of operations and transactions which can be effected merely by the consent of the contracting parties. In brief, these are rights and interests in respect of which the alien may waive diplomatic protection in whatever terms he considers most conducive to the acquisition of the benefits which he expects to derive from the contract or concession. Nor can it be admitted that, in such cases, the alien agreed to the waiver with a knowledge of the rights vested in the State of his nationality, for this would imply that he entered into an undertaking in bad faith.³⁵ It should be noted, moreover, that from the strictly juridical standpoint, the Calvo Clause does not even constitute an exception to the principle establishing international responsibility in cases of denial of justice. An alien who agrees not to seek the diplomatic protection of the State of his nationality and to rely on local remedies in seeking satisfaction of any claim he may have against the host State places himself, in fact and in law, on exactly the same footing as a national. Thus the Clause creates a juridical situation in which, technically, there can be no problem of denial of justice of interest to international law.

19. Furthermore, even international case-law has on occasion gone so far as to attribute to the Calvo Clause a binding force very similar to that envisaged in the draft. An example can be found in the *Interoceanic Railway* case (1931), in which the British-Mexican Claims Commission held that vain efforts to secure redress over a period of almost eight years did not constitute a denial or undue delay of justice. Similarly, the Commission's decision in the *North American Dredging Company* case and the *International Fisheries* case (1931) established that, by reason of the Calvo Clause, there could be no question of a denial of "immediate" justice relieving the claimant of his duty to seek local remedies. It has rightly been said regarding these rulings that the Commission, undoubtedly influenced by the Calvo Clause commitment, required a "more patent or flagrant denial of justice".³⁶

20. There is no need to dwell again on the alien's capacity to waive a right which, like the right of diplomatic protection, belongs not to him but to the State of his nationality. Apart from the points developed in the first report, there is another aspect of the question which requires clarification. An analysis of the stipulation contained in the Calvo Clause and of the judicial decisions cited above, as well as of other precedent, shows quite clearly that what the alien is waiving is not, strictly speaking, the right of diplomatic protection by the State of his nationality but his power to request the exercise of that right in his favour.³⁷ That being so, can it still be contended that the said State may exercise diplomatic protection without a request from the alien and even against his will? Normally, diplomatic protection is exercised only when invoked by the alien who claims that he has sustained an injury; but if the State wishes to intervene on its own initiative, what reasons, rights or interests can it cite as the basis of its claim? In this connexion, it has been said: "It is patent that to recognize the right of the State to require the alien not to invoke the aid of his Government is effectively to extinguish the right of that Government to intervene in his behalf."³⁸ This, however, is in fact what happens when the alien, without being compelled to do so, voluntarily and freely enters into a contractual commitment of that nature, subject to an exception in cases where the imputable act or omission has consequences extending beyond the injury sustained.

21. Article 16, paragraph 3, of the draft is expressly designed to provide for those cases where the consequences of the act or omission extend beyond the specific injury caused to the alien. The alien's waiver cannot cover anything but the injuries caused to him by the act or omission, and cannot therefore apply to the consequential damage which might be caused by the unlawful act to interests superior to his own. In such cases, the alien's waiver, regardless of the terms in which it is expressed, cannot deprive the State of his nationality of the right to protect those interests. We shall revert to this question, however, in the commentary on article 20, paragraph 2 of the draft.

12. CASES IN WHICH THERE IS AN AGREEMENT TO DISPENSE WITH LOCAL REMEDIES

22. Article 17 of the draft provides for a special situation which sometimes arises in practice and affects

³² *Ibid.*, p. 31.

³³ *Ibid.*, pp. 32 and 33.

³⁴ See Shea, *op. cit.* (footnote 29 above), pp. 211 ff.

³⁵ See in this connexion Antonio Sánchez de Bustamante y Sirvén, *Derecho internacional público* (Havana, Carasa y Cia, 1936), vol. III, pp. 505-506.

³⁶ See Shea, *op. cit.* (footnote 29 above), p. 265.

³⁷ *Ibid.*, pp. 261-264.

³⁸ John P. Bullington, "The Land and Petroleum Laws of Mexico," *American Journal of International Law*, vol. 22 (1928), p. 67.

the principle of the exhaustion of local remedies. This occurs when the State to which unlawful acts or omissions are imputed agrees that the claim for reparation of the injuries allegedly sustained by the alien should be brought at the international level before local remedies have been exhausted. At first sight this article may appear unnecessary, and hence superfluous, for it is an implication of the local remedies rule that the respondent State has a right, and that it can freely waive this right. In practice, however, doubts and difficulties have arisen in connexion with the question whether such a waiver can ever be presumed. Some arbitral tribunals have, in fact, dispensed with the requirement of exhausting local remedies on the basis of the presumption that, by the submission of the claim to arbitration, the States must have intended to supersede such remedies.³⁹

23. The prevailing opinion, however, as the award in the *Salem Claim* (1932) seems to show, is that the mere existence of a treaty providing for the arbitral settlement of disputes does not in itself justify a presumption that the parties have agreed to dispense with the local remedies rule.⁴⁰ Naturally, there can be no hard and fast rule applicable to every case, for it will always have to be ascertained whether the true purpose of the treaty was to exclude the application of the principle in the claim under consideration. In order to avoid the difficulties inherent in any interpretation, States have adopted the practice of including in the *compromis* express provisions to the effect that the respondent State consents to the arbitral tribunal's (or commission's) adjudicating on the claim although local remedies have not been exhausted. An example of such a clause can be found in article V of the Convention of 8 September 1923 between the United States and Mexico, to which reference has already been made (sect. II, para. 16). The full text of that article reads as follows:

"The High Contracting Parties, being desirous of effecting an equitable settlement of the claims of their respective citizens thereby affording them just and adequate compensation for their losses or damages, agree that no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim."

24. Article 17 of the draft specifically envisages this express form of consent by a State to dispense with local remedies. Inasmuch as the local remedies rule is a fundamental principle governing international claims, constituting a condition *sine qua non* which must be satisfied before any such claim is admissible, no exceptions to the application of the principle can be presumed. The article also provides for the possibility of such a waiver of the application of the principle being included in an agreement with the private foreign national who claims to have sustained the injury; such a clause could well appear in agreements of the type referred to in article 19 of the draft.

13. SETTLEMENT OF DISPUTES ON PRELIMINARY POINTS

25. Among the various problems encountered in the application of the local remedies rule are the disputes

which often arise in practice regarding the admissibility of an international claim. For example, the State to which the wrongful act is imputed may oppose the submission of the claim on the grounds that all local remedies have not yet been exhausted, while the claimant may base his case on the "denial of justice" referred to in article 15, paragraph 3, of the draft. The respondent State, for its part, may resist an international claim brought under article 17, contending that the specific case by reason of which the claim is brought does not come within the terms of the agreement to dispense with local remedies. Difficulties may also arise in connexion with article 16 concerning the scope of the alien's undertaking not to seek the protection of the State of his nationality. And naturally, as between States parties to an agreement of the type referred to in article 16, paragraph 1, there may be disputes concerning the question whether the claim arises out of any of the "cases and circumstances" envisaged in that agreement:

26. All these problems, it will be realized, raise a question which may be either procedural or substantive but which is in any case a preliminary question: is the international claim admissible or not in accordance with the various forms in which the local remedies rule can be applied? In like circumstances, article 18 of the draft would perform an analogous function in the determination of the admissibility of a claim under article 20, paragraph 2, in cases where there is controversy regarding the nature or consequences of the act or omission imputed to the respondent State. And, similarly, article 18 makes provision for any other case in which a prior ruling is required on the controversy that has arisen. For obvious reasons, as these are problems which touch on the actual substance of the claim, any such preliminary question should be resolved by means of a summary procedure.

27. This article of the draft is not entirely novel. Article XI of project No. 16 of the American Institute of International Law on "Diplomatic Protection" contains the following provision:

"All controversies arising between American Republics regarding the admissibility of a diplomatic claim under the present convention shall be determined by arbitration or by the decision of an international court when not settled by direct negotiation." (A/CN.4/96, annex 7).

Though the text does not indicate with sufficient clarity what exactly the scope of the provision was intended to be, there can hardly be any doubt as to its essential import or purpose; it means that any dispute concerning the admissibility of an international claim is to be referred to an international body if not settled by direct negotiation between the parties.

28. In a recent article, Professor Briggs has developed a similar idea for the solution of a certain type of dispute. The relevant passage of the text he proposes reads as follows:

"3. Should a dispute arise as to whether available local remedies have been exhausted or as to whether available local remedies are effective, sufficient and timely, an international claim may be brought in order to permit the determination of this preliminary question; and the exhaustion of local remedies as a condition of the receivability of such an international claim may be waived by any international tribunal having

³⁹ Borchard, *op. cit.*, p. 819.

⁴⁰ Herbert W. Briggs (ed.), *The Law of Nations: Cases, Documents and Notes*, 2nd ed. (New York, Appleton-Century-Crofts, Inc., 1952), p. 636.

jurisdiction over the parties and before which the claim is brought."⁴¹

In the author's opinion, the text would allow a State, as an exception, to bring an international claim before the local remedies are exhausted, in cases where the existence, effectiveness, efficacy or timeliness of these remedies is in dispute.

29. The differences between the procedure suggested by Professor Briggs and that proposed in the Special Rapporteur's draft are not hard to perceive. According to Professor Briggs' draft provision, the application or observance of the local remedies rule depends on the attitude which the alien's State of nationality chooses to adopt, inasmuch as it allows that State to interrupt the local process if it alleges the non-existence or insufficiency of the local remedies. While this may be justified in some cases, surely it would be most dangerous to empower the State to prejudice the issue? At any rate, the disadvantages of Professor Briggs' suggested procedure outweigh the advantages offered by the method of the Special Rapporteur's draft, which is based on the idea that one of the purposes of the exhaustion of the local remedies is precisely to test the efficacy of those remedies. Besides, one might add, it should be possible not only for the State of nationality but also for the State to which responsibility is imputed to resort to the procedure proposed in the draft, for any of the purposes referred to above.

30. One possible objection to the procedure proposed in article 18 is that the problems it is meant to resolve may equally be disposed of in the course of the proceedings relating to the international claim itself (that is, the claim dealt with in the next chapter). There is some substance to this objection, and it is quite true that, in practice, such problems are normally dealt with at that stage; unquestionably, however, it is very desirable that, if possible, at this preliminary stage the question of substance of a claim (which involves delays and other technical and political difficulties) should not be touched upon. If the controversy relates solely to the eminently preliminary question of the admissibility of the claim, then the procedure should likewise be preliminary. In that way it will certainly be possible to prevent the bringing of groundless international claims, so frequent in the past.

CHAPTER VIII

Submission of the international claim

Article 19

1. The alien may submit an international claim to obtain reparation for the injury suffered by him to the body in which competence for this purpose has been vested by an agreement between the respondent State and the alien's State of nationality or between the respondent State and the alien himself.

2. If the body mentioned in the previous paragraph was established by an agreement between the respondent State and the alien, the authorization of the State of nationality shall not be necessary for the purpose of submitting the international claim.

3. In the event of the death of the alien, the right to bring a claim may be exercised by his heirs or successors in interest, provided that they did not possess and have not acquired the nationality of the respondent State.

4. The right to bring claims to which this article refers shall not be exercised by foreign juristic persons in which

nationals of the respondent State hold the controlling interest.

5. For the purposes of this article, the term "alien" (or "foreign") shall be construed as applying to any person who did not possess and has not acquired the nationality of the respondent State.

Article 20

1. The State of nationality may bring the international claim to obtain reparation for the injury sustained by the alien:

(a) If there does not exist an agreement of the type referred to in article 19, paragraph 1;

(b) If the respondent State has expressly agreed to the subrogation of the State of nationality in the place and title of the alien for the purposes of the claim.

2. The State of nationality may, in addition, bring an international claim, for the purposes contemplated in article 25 of the present draft, in the case of acts or omissions the consequences of which extend beyond the specific injury caused to the alien, and it may bring a claim in these circumstances irrespective of any agreement entered into by the alien with the respondent State.

Article 21

1. A State may exercise the right to bring a claim referred to in the previous article on condition that the alien possessed its nationality at the time of suffering the injury and conserves that nationality until the claim is adjudicated.

2. In the event of the death of the alien, the right of the State to bring a claim on behalf of the heirs or successors in interest shall be subject to the same conditions.

3. A State shall not bring a claim on behalf of foreign juristic persons in which nationals of the respondent State hold the controlling interests.

4. In cases of dual or multiple nationality, the right to bring a claim shall be exercisable only by the State with which the alien has the stronger and more genuine legal and other ties.

Article 22

1. The right of the State of nationality to bring a claim shall not be affected by an agreement between the respondent State and the alien if the latter's consent is vitiated by duress or any other form of pressure exerted upon him by the authorities of the respondent State.

2. The said right shall likewise not be affected if the respondent State, subsequently to the act or omission imputed to it, imposed upon the alien its own nationality with the object of resisting the international claim.

Article 23

1. Except where the parties concerned have agreed upon a different time limit, the right to bring an international claim shall lapse after the expiry of two years from the date when local remedies were exhausted.

2. Notwithstanding the provisions of the preceding paragraph, the international claim shall be admissible if it is proved that the delay in its submission is due to reasons not connected with the will of the claimant.

Commentary

1. As was pointed out in the Special Rapporteur's first report, according to the traditional view an international claim, even though it may have its origin in another, earlier claim under municipal law, and hence is in reality no more than a continuation of that claim, is regarded as an "entirely new and distinct claim". An international claim, whatever its initial cause or its object, has a "public character", i.e. it involves a legal relationship between sovereign political entities. It is immaterial that the original claimant was a foreign private person and that the reparation of the injury caused to him continues to be the sole object of the international claim; this is precisely what generally happens in case of responsi-

⁴¹ Herbert W. Briggs, "The local remedies rule: a drafting suggestion", *American Journal of International Law*, vol. 50 (1950), p. 926.

bility for injuries caused to the person or property of aliens. As the Permanent Court of International Justice said in a well-known judgement: "Once a State has taken up a case on behalf of one of its subjects . . . the dispute then entered upon a new phase; it entered the domain of international law and became a dispute between two States." (A/CN.4/96, paras. 219-221).

14. THE LEGAL CHARACTER OF INTERNATIONAL CLAIMS

2. Viewed in this light, international claims certainly have a peculiar legal character. An international claim, even though it may have its origin in a local claim, and even though its sole purpose is to obtain reparation of the local injury, must invariably be regarded as an "entirely new and distinct claim". As the State is deemed not to be acting, in fact, on behalf of or as agent for the alien who suffered the injury, but rather to be acting in subrogation in the place and title of the alien for the purposes of the claim, logically that State appears as the sole true claimant. Nevertheless, this is such an obvious fiction and the technical and political difficulties to which it has given rise in practice are so patent, that the Commission should, as far as is feasible, circumvent it in its draft.

3. In this connexion, it is of fundamental importance to appreciate fully the function of the local remedies rule, and also its implications regarding the admissibility of the international claim. Under this rule, the claim is not admissible until the remedies available under the laws of the State to which the unlawful act or omission is imputed have been exhausted. After what was said in the preceding chapter concerning the multiple function of the rule, how is it possible to divorce the international action so sharply from the proceedings which had to be instituted and exhausted internally that the former can be thought of as an entirely new and distinct claim? Does the mere fact that the claimant changes, because the State of nationality has espoused the case, really affect in its essentials the action brought against the respondent State? Besides, if it were true that the claim is really always new and distinct, why should the alien concerned, who is not or is deemed not to be a party to the claim, be required to exhaust local remedies? In other words, to admit that international claims, whatever their origin or purpose, always constitute entirely new and distinct claims, would make it technically possible to dispense with local remedies.

4. What lends additional force to the foregoing considerations is the reflection that the traditional view in this matter is based on another fiction which is no less transparent, particularly in the light of international law at its present stage of development. This is the idea—which has the backing of the case-law and of the opinion of learned authors—that in all cases of international responsibility it is the State of nationality which is the sole true owner of the injured interest or right, even in the case of acts or omissions the consequences of which do not extend beyond the specific injury caused to the person or property of the alien. In various judgements the Permanent Court of International Justice has upheld the doctrine that "By taking up the case of one of its subjects . . . a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law". (A/CN.4/96, para. 98). This theory was evolved at a time when the conception of the subject capable of possessing or acquiring international rights was identified with that of the sovereign State, or, in any case, where this conception did not cover individuals as such, independently of their status as nationals or aliens.

5. The Special Rapporteur's first report, too, pointed out the serious drawbacks, in practice, of this likewise traditional notion, not only from the point of view of the respondent State, but also from the point of view of the genuine interests of the aliens themselves and the general interests of the State of their nationality, not to mention the position of stateless persons and the issues raised in cases of double or multiple nationality (A/CN.4/96, sect. 15). This, then, is a legal fiction the implications of which have produced many difficulties and very few advantages. At the present time, as it has been admitted that the individual as such has capacity to possess and acquire international rights, there would be no valid reason for continuing to uphold the traditional view. Besides, a revision of the old theory would not rule out the possibility, even in these cases of responsibility by reason of injury to the person or property of aliens, of the State's pleading the "general interest" (referred to already in the first report) and bringing an entirely new and distinct international claim. For if the consequences of the act or omission extend beyond the specific injury caused to the alien, the purpose of the claim would of course not be solely to obtain reparation of the injury, but also to secure that right or interest which is not vested in the individual. In any case, as will be explained below, nothing that has been said reflects any intention of excluding altogether the exercise of diplomatic protection, even in the case of claims the only object of which is to obtain reparation of the injury caused to the person or property of the alien.

15. SUBMISSION OF THE CLAIM BY THE ALIEN

6. Article 19 of the draft sets forth the basis of a procedure which would enable the alien himself, once local remedies have been exhausted, to submit an international claim to obtain reparation for the injury suffered by him. As will be seen below, this procedure is not a completely new departure from current practice. In the Special Rapporteur's first report, reference was made to the Central American Court of Justice, the Arbitral Tribunals set up pursuant to articles 297 and 304 of the Treaty of Versailles (1919-1920), the Arbitral Tribunal of Upper Silesia set up by the German-Polish Convention regarding Upper Silesia of 15 May 1922 and to other more recent instruments which confer *locus standi* upon private persons (independently of the State of their nationality) before these international bodies (A/CN.4/96, para. 124). The advantages of this system have been so widely recognized by legal experts that the Institute of International Law at its New York session (1929) expressed the view that ". . . there are certain cases in which it may be desirable to grant to private persons the right of direct recourse to an international tribunal, under conditions to be determined, in respect of their disputes with States".⁴²

7. The procedure outlined in the draft neither precludes the application of the traditional practice, under which the right to bring an international claim was reserved to the State of nationality, nor automatically confers international *locus standi* on individuals. Before the individual can have *locus standi* there has to be a body with jurisdiction; and even then the right of the State of nationality to bring an international claim would not, in view of the terms of article 20, paragraph 2, be barred altogether. In conformity with past practice, moreover, the body in question would normally come into being by virtue of an agreement between that State and the respondent

⁴² *Annuaire de l'Institut de droit international* (1929), vol. II, p. 311.

State, and this agreement would specify the conditions governing the exercise of the right of aliens to bring claims. The only element that might, at first glance, appear to be an innovation is the second possibility envisaged in article 19, paragraph 1, namely, the possibility that the international body is established by an agreement between the respondent State and the alien himself. Actually, however, so far as contractual obligations are concerned, past practice again offers examples of agreement of this kind. Some of these will be examined below for purposes of illustration.

8. Two agreements of this type figured in cases dealt with by the former Permanent Court of International Justice. The first was the agreement or contract concluded on 2 March 1929 between the Government of Yugoslavia and the Orientconstruct Company, a United States corporation, whose rights were assigned to the Société anonyme Losinger et Cie. of Berne by agreements signed in 1930-1931. Article XVI of the contract contained an arbitration clause which stated that any differences of opinion or disputes which arose between the Contracting Parties in connexion with the carrying out or interpretation of the clauses and conditions of the contract would be settled by "compulsory arbitration, if a friendly settlement cannot be reached by the Contracting Parties".⁴³ The second agreement of this type was the Convention concluded between the Government of Greece and the Société commerciale de Belgique on 27 August 1925, under which the two parties undertook to submit to an arbitral commission any differences of opinion regarding the execution of the Convention. The decisions of that commission were to be "sovereign and final".⁴⁴ Of more recent date is the Iran-Consortium Agreement (19-20 September 1954), the parties to which are: The Government of Iran; a corporation organized under the laws of Iran; and a number of foreign companies of different nationalities. The Agreement provides conciliation and compulsory arbitration machinery for the determination of any differences and disputes arising between the parties and relating to the performance of the obligations stipulated in the agreement, its interpretation or execution.⁴⁵

9. The advantages which would result if this practice became general are obvious. In particular, the agreements envisaged in article 19 of the draft could have an important effect on the application of the Calvo Clause. In the first place, this new stipulation between a State and an alien would have the same legal validity as contracts which these two parties commonly conclude concerning certain matters or rights and obligations and which would formerly have been regarded as inconceivable between any but sovereign bodies. Under a Calvo Clause, if embodied in an agreement, the right and duty provided for would be in essence the right and the duty to continue internationally a claim which was submitted under municipal law and in respect of which all local remedies have been exhausted. This is one and the same claim, and therefore, if the consequences of the act or omission do not extend beyond the specific injury caused to the alien, for what reasons or on what grounds could the State of nationality honestly ob-

ject to the direct exercise of this right by the private person concerned? It should be borne in mind that the entire traditional theory of diplomatic protection rests on the premise that no international action whatsoever could be taken by the individual and that, after the exhaustion of local remedies, the individual was completely without recourse if the State from which he has claimed reparation denied him justice. In those circumstances the protection of the individual by the State of nationality was, for better or for worse, the only possible solution. But at present, now that States themselves have agreed voluntarily to the appearance of their nationals as direct claimants before international bodies, surely there can be no objection to a provision authorizing such persons to agree with the respondent State, as regards matters and objects of interest to these nationals exclusively, that disputes should be submitted to an international body for settlement?

10. The argument that this would involve negotiations concerning a right vested not in the individual but in the State of nationality would in this case have no more (and perhaps less) weight than when it was used to contest the validity of the Calvo Clause. From a purely legal point of view it cannot be proved that this right—the right to bring an international claim—belongs to the State except by reference to the simple historical fact that this right has invariably been exercised by the State, and that whenever it was exercised directly by an individual, it was so exercised because the State itself had authorized its nationals to do so. Furthermore, the only party affected would be the State against which the claim is brought, and if the State agrees voluntarily with the private person to confer competence on an international body to deal with disputes between the two parties, no objection can be raised so long as the interests or rights of third parties are not affected. This is actually a form of the Calvo Clause, but in this case there is not the slightest possibility that the waiver made by the alien will be abused. Clearly, therefore, this new stipulation might complement the waiver of diplomatic protection in so far as it provides for a method of international settlement in cases where local remedies have failed to settle the dispute concerning the interpretation, application or performance of the contract. In that way it would certainly be possible to overcome many technical and political difficulties inherent in the traditional procedure. In cases not involving responsibility for non-performance of a contractual obligation, agreements between the respondent State and the alien who alleges injury would certainly solve many of the difficulties which generally arise as soon as the State of nationality intervenes and begins to exercise diplomatic protection.

11. The other paragraphs of article 19 should not present any difficulty. Paragraph 2 deals with a case concerning which little need be added to what has already been said. For once the validity of the agreements provided for in this article of the draft is admitted, the authorization of the State of nationality should not be required as a condition of the alien's capacity to bring the international claim. This is so obvious that paragraph 2 might almost be thought superfluous. Yet it is not superfluous, for allowance should be made for cases in which the State's authorization ought to be obtained. These are the cases (referred to several times above) in which, in addition to the specific injury alleged by the alien, the State of nationality may plead to the "general interest". In these circumstances, it would be desirable perhaps, in order to forestall the difficulties which might arise if both claims—that of the alien and that of the State of his nationality—were submitted simultaneously, to

⁴³ See Publications of the Permanent Court of International Justice, *Pleadings, Oral Statements and Documents*, series C, No. 78, p. 7.

⁴⁴ *Ibid.*, No. 87, p. 13.

⁴⁵ See articles 42-44. The complete text of the Iran-Consortium Agreement is reproduced in J. C. Hurewitz, *Diplomacy in the Near and Middle East, A Documentary Record*, vol. II, 1914-1956 (Princeton, N. J., D. Van Nostrand Company, Inc., 1956), pp. 348 ff.

allow the State of nationality to prevent its national from bringing the claim. Of these two interests, the "general interest" claimed by the national State should have precedence as it is a superior interest, and that is the purport of the final passage of article 20, paragraph 2, of the draft. Apart from this specific case, however, it would be quite unjustified to make the exercise of the individual's right conditional on the authorization of the State of nationality.

12. Article 19, paragraph 3, deals with a case to which international case-law from the point of view of the right of the State of nationality to bring a claim, has applied, by analogy, the rule of the "continuity of nationality", as defined particularly in the *Stevenson Claim* (1903).⁴⁶ The problem does not, of course, take this form if the claim is brought directly by the individual. In the case under consideration there is no reason to invoke this rule since the claim with which article 19 of the draft is concerned is neither based nor depends on the nationality of the individual, as is the case when the State makes the claim on behalf of its nationals (the injured party being either the victim himself or his heirs or successors in interest). The only condition that should be stipulated—and that is in fact the condition laid down in paragraph 3—is that the persons bringing the claim did not possess and have not acquired the nationality of the respondent State. Moreover, the right, recognized in the agreement with the said State, to bring a claim would be exercisable by the heirs or successors in interest even in the absence of an express stipulation.

13. Article 19, paragraph 4, is based on the same considerations. In some cases, juristic persons, and in particular joint-stock companies organized under the laws of a State other than that in which they operate, are not "foreign" except in name only, because the controlling interest is held by nationals of the respondent State. In these circumstances it would certainly be wrong to allow such persons to exercise the right to bring a claim which, under the agreements referred to in this article, is recognized in cases where the juristic person is foreign both in name and in fact. Paragraph 4 does not, of course, affect whatever right may, under the agreement, be vested individually in members, partners or stockholders who are not nationals of the respondent State. Nor does it affect, for obvious reasons, the right of the State of their nationality to bring claims under the relevant provisions of the draft.

14. Lastly, a few words may be said about article 19, paragraph 5. It will be remembered that in the first report attention was drawn to the precarious position of stateless persons in the matter of international claims, owing to the strict application of certain traditional principles. In fact, in consequence of the rule of the "nationality of the claim", persons having no nationality have been deprived of the benefit of the "treatment recognized by the generally accepted principles of international law" concerning aliens—to use the well-known language employed by the former Permanent Court of International Justice—although the position of such persons in municipal law is, for all practical purposes of the law of responsibility, that of aliens (AC/N.4/96, para. 103). This state of affairs, which is absurd and unjust, can and should be remedied, particularly in view of the fact that the difficulties resulting from the traditional doctrine of diplomatic protection do not even arise with respect to persons having no nationality. The legal relationship is one in which the interest of the "State of nationality"

cannot be involved, either directly or indirectly. The only parties are the State to which certain unlawful acts or omissions are imputed and a stateless person, wholly bereft of the benefits of the protection of a nationality. If that State agrees with the stateless person that an international jurisdiction should be established to settle disputes between them, then no other interest is affected. Such an agreement, on the other hand offers the only means of guaranteeing the interests of persons who do not enjoy the diplomatic protection of any State.

16. SUBMISSION BY THE STATE OF NATIONALITY

15. Article 20 of the draft deals with the right of the State of nationality to bring an international claim to obtain reparation for the injury sustained and, as is explained below, provides for the two possible ways in which this right may be exercised, namely, the representation, pure and simple, of the interests of the national, and the assertion of the State's own rights or interests. Article 20, paragraph 1, does not establish any specific mode of settlement, the only [implied] condition being that the claim is to be brought before a competent body. As in certain other cases, the Special Rapporteur does not know what are the limits which the Commission wishes to set to the codification of this topic. That being so, it suffices for the time being to refer simply to the mode of settlement which exists, or on which the States concerned agree, after the dispute has arisen, without prejudice to a subsequent examination of a more suitable system and procedure for the settlement of disputes of the kind referred to in the draft.

16. Before further comments are made on this article, a word should be said about the meaning of the term "international claim" as used here. The term "diplomatic protection", at least in its broad sense, covers any action taken by the State to obtain reparation for injuries suffered by its nationals abroad. In this sense, diplomatic protection covers informal or semi-official representations made by one State to another to help in the settlement of the question, so that its national can obtain reparation for the injury. In certain cases the State does not take this kind of action but makes formal representations to the respondent State, and demands, as of right, reparation due in respect of the non-performance of an international obligation. Once this stage of diplomatic protection has been reached, one of two things may happen if the representations made by the State have not produced any result: (a) one of the States may invite the other to submit the dispute to any one of various methods of peaceful settlement, in accordance with the general obligation that modern international law imposes on all States when direct negotiations have been exhausted, or, (b) the State of nationality may refer the dispute to a competent international body with compulsory jurisdiction over both States.

17. Informal or semi-official representations are not, of course, covered by the term used in article 20, paragraph 1, and elsewhere in the draft. The term "international claim" can be used only in a more advanced stage of diplomatic protection. While it is, of course, open to the Commission to decide, in the course of its deliberations, that this codification should contain provisions concerning methods and procedures of peaceful settlement, which would make it possible to restrict the use of the term to claims brought before such bodies, in the present state of international law action taken by the State of nationality after the formal representations made to the

⁴⁶ Briggs, *op. cit.*, p. 735.

other State can hardly be excluded from the scope of this term, whatever the results that may be achieved in the absence of a body competent to deal with the controversy and having compulsory jurisdiction over the parties.

18. Article 20, paragraph 1 (a), is a consequence of the procedure provided for in article 19. If the alien or the State of his nationality has agreed with the respondent State to set up a body before which the alien can bring the international claim directly, it would not be logical to assume that the alien retains his right to diplomatic protection. The very purpose of this procedure is to prevent the State from exercising that right in connexion with claims which, it was felt, could be settled or adjusted more suitably by continuing the legal relationship established between the alien and the respondent State. The question of the validity of an agreement concluded between the alien and the respondent State was so fully discussed in the comments on article 19, paragraph 1, that no further observation is called for. At most it should be noted that in this case, unlike the two other cases referred to in article 20, the State brings the claim in the name or on behalf of its national; in other words, the State is not a claimant "asserting its own rights". As was pointed out at the beginning of this chapter, this kind of claim is not "entirely new and distinct" but rather a continuation, at the international level, of the claim which the injured alien brought initially under municipal law. This distinction is extremely important, particularly from the point of view of the character and measure of reparation, inasmuch as, in the traditional theory, the reparation was regarded as due to the State. This question will be discussed again in the comments on the provisions of the draft concerning the measure of reparation.

19. Article 20, paragraph 1 (b), provides for one of the cases in which the national State brings a claim neither in the name or on behalf of the alien, nor in defence of his rights and interest, but in its *own* name and behalf and asserts interests or rights which it has acquired from its national. The so-called "guaranty agreements", which the United States has in recent years concluded with various countries under the Economic Cooperation Act of 1948, may be used to illustrate this point. These instruments contain the following provisions:

"That if the Government of the United States of America makes payment in United States dollars to any person under any such guaranty, the Government of the Philippines will recognize the transfer to the United States of America of any right, title or interest of such persons in assets, currency, credits, or other property on account of which such payment was made and the subrogation of the United States of America to any claim or cause of action of such person arising in connection therewith. The Government of the Philippines shall also recognize any transfer to the Government of the United States of America pursuant to such guaranty of any compensation for loss covered by such guaranties received from any source other than the Government of the United States of America."⁴⁷

This text is quite explicit: it provides for an assignment or transfer, in favour of the State of nationality, of the rights, titles or interests etc., as well as of the claims or causes of action of the alien, and for the consequent subrogation of the said State for the purposes of the agreement. In practice, it is also conceivable that the

subrogation might be agreed to *ex post facto*, that is, after the occurrence of the event giving rise to the claim or after the exhaustion of local remedies. It may even happen that the alien transfers, and that the respondent State consents to the transfer of, the right to bring a direct claim recognized under an agreement of the type referred to in article 19 of the draft. All that matters is the express consent of the State against which the claim is brought, for only on that condition can there be a valid subrogation in the rights or interests of which the alien is the titular owner.

20. Article 20, paragraph 2, provides for another case where the national State may bring an international claim to assert its rights and interests. This is the case involving what, since the first report, has been called the "general interest" for want of a better term. In any of the cases in which responsibility arises by reason of an injury caused to the person or property of the alien, the consequences of the acts or omissions may, owing to their gravity or to their frequency or because they indicate a manifestly hostile attitude towards the foreigner, extend beyond this specific or personal injury. Article 14 of the draft states that the connivance or complicity of the authorities of the State in the injurious acts of private individuals constitute an aggravating circumstance for the purposes contemplated in article 25; in other words, these are circumstances involving acts or omissions the consequences of which extend beyond the specific injury caused to the alien. In more precise language it might be said that, for the reasons indicated, there are acts or omissions which are evidence of a danger or potential threat to the safety of the person or property of nationals of the foreign State.

21. In this context, it should be recalled that Professor Brierly, interpreting the traditional doctrine regarding the passive subjects of responsibility, states that it merely expresses the plain truth that the injurious results of a denial of justice are not, or at any rate are not necessarily, confined to the individual sufferer or his family, ". . . but include such consequences as the 'mistrust and lack of safety' felt by other foreigners similarly situated". Summing up, he says that, in an international claim, "a State has a larger interest than the mere recovery of damages".⁴⁸ Furthermore, one Claims Commission has held that the national State ". . . frequently has a larger interest in maintaining the principles of international law than in recovering damages for one of its citizens".⁴⁹ Clearly, therefore, from a purely legal point of view, a distinction can and should be drawn between two categories of interests—the private interest of the injured alien and the "general interest"—and, consequently, between two categories of acts or omissions, according to whether they affect only the former or have consequences affecting the general interest as well. In the latter case, the national State, as the titular claimant of this "general interest", may bring the international claim for the purpose of requiring the State to which the act or omission is imputed to take the action described in article 25 of the draft. Moreover, as the interest involved is superior to that of the individual alien, the State's right to submit a claim transcends any agreement between the alien and the

⁴⁸ J. L. Brierly, "The Theory of Implied State Complicity in International Claims", *The British Year Book of International Law*, 1928, p. 48.

⁴⁹ Schwarzenberger, *op. cit.*, p. 74. See also document A/CN.4/96, para. 112, with reference to the award of Judge Huber concerning the British claims in the Spanish Zone of Morocco (1924).

⁴⁷ United Nations, Treaty Series, vol. 177, 1953, No. 2330, pp. 308 and 310.

respondent State; this is the principle laid down in the final passage of article 20, paragraph 2.

17. NATIONALITY OF THE CLAIM

22. Article 21 states a principle established by international practice: that a State may not bring a claim in the name of a person who does not possess its nationality. Although, as the International Court of Justice has admitted explicitly, "... there are cases in which protection may be exercised by a State on behalf of persons not having its nationality",⁵⁰ such exceptions are so rare and the circumstances surrounding them so special that it would be undesirable, and certainly of no advantage, to make provision for them in the draft. The important point here is to determine how far the general principle should be interpreted or applied. In Project No. 16 concerning "Diplomatic protection" the American Institute of International Law stated in article 8:

"In order that a diplomatic claim may be admissible, the individual in whose behalf it is presented must have been a national of the country making the claim at the time of the occurrence of the act or event giving rise to the claim, and he must be so at the time the claim is presented." (A/CN.4/96, annex 7).

While it cannot be denied that this is the position adopted by a number of arbitral tribunals, the predominant opinion both in diplomatic practice and in international case-law is unquestionably the one expressed by the Preparatory Committee of The Hague Conference (1930) in its basis of discussion No. 28, the first paragraph of which reads as follows:

"A State may not claim a pecuniary indemnity in respect of damage suffered by a private person on the territory of a foreign State unless the injured person was its national at the moment when the damage was caused and retains its nationality until the claim is decided."⁵¹

As the Preparatory Committee indicated in its observations, the wording of this principle was drafted in the light of the replies received from Governments and of international case-law.⁵² This is, moreover, the more logical interpretation or application of the principle, since the more liberal criterion mentioned above is inconsistent with the fundamental idea which forms the basis of and justifies the entire doctrine of the diplomatic protection of nationals abroad. Indeed, how could it be explained or admitted that, the nationality of the injured person having changed after the claim was submitted, a State can continue the action it had begun to obtain reparation for injury on behalf of a person who is no longer one of its nationals? Alternatively, would this situation be compatible with the right of a third State whose nationality the person concerned has acquired? Article 21, paragraph 1, was drafted in the light of these considerations.

23. Article 21, paragraph 2, describes the procedure to be followed in the event of the death of the alien and stipulates that the right of the State of nationality to bring a claim on behalf of the heirs or successors in interest is subject to the same conditions. The purpose of the paragraph is to set forth what may be considered to be

the consensus of opinion on the subject, as expressed particularly in the *Stevenson Case* referred to in the commentary on article 19, paragraph 3 (see para. 12 above), and in the last paragraph of basis of discussion No. 28 of the Preparatory Committee of The Hague Conference, which states that:

"In the event of the death of the injured person, a claim for a pecuniary indemnity already made by the State whose national he was can only be maintained for the benefit of those of his heirs who are nationals of that State and to the extent to which they are interested."⁵³

As was stated in the commentary on article 19, paragraph 3, on the subject of the right of the State to bring claims on behalf of its nationals, it is a fundamental condition that the heirs or successors in interest must possess the same nationality. If they should possess a different nationality, then only the State or States of which they are nationals would be able to bring a claim. Naturally, article 19, paragraph 3, by requiring "continuity of nationality", *ipso facto* bars claims on behalf of persons who were or have become nationals of the respondent State, a situation that has arisen frequently in practice.⁵⁴

24. Article 21, paragraph 3, deals with the case of a juristic person whose nationality is more fictitious or nominal than real. As was pointed out in the comments on the relevant paragraph of article 19, neither the conditions nor the basis for any international claim are present in this case, for to hold otherwise would be to recognize a right to bring such a claim on the part of bodies the controlling interest in which is held by nationals of the State against which the claim is brought. In the case of the claims provided for in article 20, this would make a mockery of the principle of the "nationality of the claim" on which the doctrine of diplomatic protection is based, and produce a situation absurd in law from the point of view both of the respondent State and of the claimant State. Even in this case, however, the paragraph does not affect whatever right the claimant State may have to bring a claim on behalf of shareholders or other stockholders having its nationality, in respect of injuries which they suffered individually in their interests in the company or juristic person in question.

25. Article 21, paragraph 4, dealing with cases of dual or multiple nationality, specifies what State really has the right to bring an international claim in keeping with the principle on which the doctrine of diplomatic protection is based. On this point the reasoning of the International Court of Justice in the *Nottebohm Case* (1955) indicates what is the rule in such situations. In this case the Court, ruling that the claim submitted by the Principality of Liechtenstein was not admissible, said:

"According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."

In the opinion of the Court:

"... a State cannot claim that the rules it has thus laid down [with regard to nationality] are entitled to

⁵⁰ *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949*, p. 181.

⁵¹ League of Nations publication, *V. Legal, 1929.V.3* (document C.75.M.69.1929.V), p. 145.

⁵² *Ibid.*, pp. 140-145.

⁵³ *Ibid.*, p. 145.

⁵⁴ See Fred K. Nielsen, "Some Vexatious Questions relating to Nationality", *Columbia Law Review*, vol. XX (1920), No. 8, p. 840, and Edwin M. Borchard, "The Protection of Citizens Abroad and Change of Original Nationality", *Yale Law Journal*, vol. 43 (1934), No. 4, pp. 359-392.

recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States."⁵⁵

This is the idea which finds expression in paragraph 4; this clause provides that the right to bring a claim is exercisable only by the State with which the alien has the stronger and more genuine ties of nationality.

26. Article 22 of the draft provides guarantees to ensure the exercise of the right of the State of nationality in the face of action or measures taken by the respondent State to prevent the submission of the international claim. Paragraph 1 deals with the case of an agreement entered into by the alien for the purposes of article 19, but under duress or some other form of pressure exerted upon him by the authorities of the respondent State. A case of this kind is not very likely to occur in practice but it is not entirely inconceivable. The purpose of the article is to prevent the respondent State from pleading article 20, paragraph 1 (a), for the purpose of contesting the admissibility of the claim brought by the State of nationality. Article 22, paragraph 2, deals with a case which is more likely to occur than the previous one. The practical application of the Calvo Clause has produced a somewhat similar situation, but with the difference that, though the contracting aliens are deemed to be nationals for the purposes of diplomatic protection, no form of pressure is exerted upon them, the Calvo Clause being one of the terms of the contract stipulated by the State which the aliens are free either to accept or to reject. The paragraph in question deals with the case of the unilateral imposition of nationality, after the occurrence of the unlawful act, where the purpose of the imposition of the nationality is precisely to prevent the bringing of the international claim.

18. LAPSE OF THE RIGHT TO BRING A CLAIM

27. Verykios, and many other writers on international law have stated that the principle of the [extinctive] prescription of claims is recognized by international law and has been applied by arbitral tribunals in a number of cases.⁵⁶ In the *Sarropoulos v. Bulgaria* case (1927), the Bulgarian-Greek Mixed Arbitral Tribunal held that "prescription, being an essential and necessary part of every legal system, deserves to be admitted in international law."⁵⁷ The Institute of International Law itself has recognized that practical considerations of order, of stability and of peace, long accepted in the case-law of arbitral tribunals, favoured the acceptance of the principle of limitation of actions in international law.⁵⁸ Indeed, if prescription in general is to be admitted as part of international law, there can be no doubt that extinctive prescription, for its part, can perform in international relations a function as important as that which it fulfils in municipal law. Just as private individuals cannot remain subject to obligations indefinitely and under the permanent threat of legal action without any limitation of time, so the State

likewise cannot be held responsible for an indefinite duration of time, or remain under the threat of an international claim which is subject to no limitation.

28. The problem here is not, therefore, the admissibility of the principle but rather the length of the time after the expiry of which the claim lapses. On this point no rule has in fact been established by international practice. In connexion with this question, in article 9 of the text adopted in first reading by the Third Committee of The Hague Conference (1930) it is stated:

"The claim against the State must be lodged not later than two years after the judicial decision has been given, unless it is proved that special reasons exist which justify extension of this period."⁵⁹

This text contains the essential elements on which article 23 of the draft is based. First, the time limit is short, in keeping with modern procedure and with the changed conditions of international life; the parties are free, of course, to agree on a different time limit. The second element is the date from which the two-year period is reckoned. Since the exhaustion of local remedies (if not dispensed with by agreement) is the condition *sine qua non* of the admissibility of the international claim, it is logical that the period should begin to run as from the date on which the right to bring the claim arises. Lastly, this period, precisely because it is short, should not be absolute. If the alien or the claimant State, as the case may be, can prove that there are grounds justifying the delay in its submission, the claim will be admissible.

CHAPTER IX

Character and measure of reparation

Article 24

1. The reparation of the injury caused to an alien may take the form of restitution in kind (*restitutio in integrum*) or, if restitution is not possible or does not constitute adequate reparation for the injury, of pecuniary damages.

2. The measure or quantum of the pecuniary damages shall be determined in accordance with the nature of the injury caused to the person of property of the alien, or, in the event of his death, of his heirs or successors in interest.

3. In the determination of the measure or quantum of the reparation the extenuating circumstances referred to in article 13 of the present draft shall be taken into account.

Article 25

In the case of acts or omissions the consequences of which extend beyond the specific injury caused to the alien, the State of nationality may demand, without prejudice to the reparation due in respect of the said injury, that the respondent State take all necessary steps to prevent a repetition of acts of the kind imputed to it.

Commentary

1. In the Special Rapporteur's first report the question of "reparation" was discussed in its broadest sense; in other words the question was treated not only as covering the various issues to which the character and extent of the reparation would give rise but also from the point of view of the punitive function of damages, particularly when they take the form of "satisfaction". In deference to the general opinion expressed in the Commission when the report was examined, the draft contains no mention of criminal liability for the failure to comply with certain

⁵⁵ *Nottebohm Case (second phrase), Judgment of April 6th, 1955: I.C.J. Reports 1955, p. 23.*

⁵⁶ P. A. Verykios, *La prescription en droit international public* (Paris, Editions A. Pedone, 1934), pp. 192-193. See also De Beus, *op. cit.*, pp. 304 ff.

⁵⁷ Schwarzenberger, *op. cit.*, pp. 246-247.

⁵⁸ See *Annuaire de l'Institut de droit international*, vol. 32 (1925), pp. 559-560.

⁵⁹ League of Nations publication, *V. Legal, 1930.V.17* (document C.351(c).M.145(c).1930.V), p. 237.

international obligations, even in those cases where the criminal aspect may have some effect on the strictly civil responsibility. Hence the articles dealt with in this chapter are concerned solely with reparation *stricto sensu*, to the exclusion of "satisfaction" and of other forms of reparation which may, to a lesser or greater extent, have punitive aspects or elements. The Special Rapporteur would repeat that he still holds the view he maintained in the Commission (See A/CN.4/96, chap. III; A/CN.4/106, Introduction and sect. 1).

19. THE FORM OF REPARATION

2. Reparation *stricto sensu* (or, in the terms of article 1 of the draft, the "duty to make reparation" for the injury) may, as indicated in article 24, take the form of restitution in kind (*restitutio in integrum*) or, if restitution is not possible or would not constitute adequate reparation for the injury, of pecuniary damages (*daños y perjuicios* in Spanish; *dommages-intérêts* in French). These two forms or methods of reparation have been formally recognized in international case-law, and particularly by the Permanent Court of International Justice in its judgement on the *Case concerning the Factory at Chorzów*:

"The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."⁶⁰

This distinction between the two forms of reparation and the purpose it is intended to serve is to be found sometimes in the agreements setting up claims commissions and tribunals, as in the Convention concluded on 8 September 1923 which set up the General Claims Commission (United States and Mexico).⁶¹

3. These two forms or methods, as is the case under municipal law, have a common purpose: the reparation should "... as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed". In some cases this is achieved by the simple restitution of the article or right of which the alien has been deprived, by making an exception to or amending a legislative provision at variance with international law, by failing to enforce a manifestly unjust judgement, and so forth. If by taking any of these steps the *status quo ante* can be restored so that all the

⁶⁰ Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 17, p. 47.

⁶¹ Article IX of the Convention states in the second paragraph:

"In any case the Commission may decide that international law, justice and equity require that a property or right be restored to the claimant in addition to the amount awarded in any such case for all loss or damage sustained prior to the restitution."

See Feller, *op. cit.* (footnote 27 above), pp. 328-329.

harmful consequences of the act or omission which gave rise to the international responsibility of the State will be removed, the damage suffered by the alien will have been made good by means of restitution.

4. In other cases, however, sufficient or adequate reparation for the injury cannot be made by the simple restitution of the article or right. This happens when the act or omission has had other consequences as, for example, when the expropriation of property, the cancellation of a contract or a concession or deprivation of liberty is the cause of specific damage to the alien. In such cases restitution pure and simple would not constitute adequate or sufficient reparation, and the payment of additional compensation in accordance with the character and measure of the injury really suffered by the alien becomes necessary. In this case pecuniary damages are complementary to restitution in kind and ensure that reparation is sufficient or adequate. There is yet a third case, which is the most common in practice, where pecuniary damages constitute the only feasible form of reparation, since restitution in kind, for one reason or another, is impossible or cannot be demanded from the State.

5. How, then, can reparation be determined in cases other than those relatively rare cases in which the simple restitution of the article or right is sufficient to make good the injury? In other words, how should the amount of pecuniary damages be determined? In this respect international case-law has, in general, been guided by the principles and standards of municipal law, and by certain principles which it has introduced to correct certain inconsistencies in traditional international law. This question forms the subject of article 24 of the draft, which is commented on below.

20. CRITERION FOR DETERMINING THE MEASURE OF REPARATION

6. Above all, the Commission ought to dismiss from its mind, once and for all, the idea which has governed traditional thought on this matter, the idea that, even if all that is in issue is an injury to the person or property of an alien, the obligation to make reparation must be conceived in terms of a "reparation due to the State". In the judgement of the former Permanent Court of International Justice cited above, it is stated that:

"The reparation due by one State to another does not however change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure. The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage. Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State."⁶²

The artificiality of this system or criterion for calculating and determining the reparation is obvious. To assume that when a State brings a claim against another it is always

⁶² Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 17, p. 28.

“asserting its own rights” is to regard all reparation, regardless of the real titular subject of the injured right or interest, as a “reparation due to the State.” And on that basis, the reparation will logically tend to correspond, not to the injury suffered by the individual but to that which, by virtue of that fiction, the State of his nationality is deemed to have suffered. The injury suffered by the private foreign individual which, in the majority of these cases of responsibility is the only injury alleged, merely affords a convenient scale for the calculation of the reparation due to the State, for it “is never . . . identical in kind with that which will be suffered by a State”.

7. In addition to being artificial, the system leads to injustices, both from the point of view of the State against which the claim is being brought as well as from that of the private foreign individual himself who has suffered the injury in his person or property. As the Special Rapporteur stated in his first report, in international relations, political and moral considerations are of special importance, generally carrying more weight than economic or other considerations or interests. Economic considerations often play a secondary part, being in a way subordinate to such political and moral considerations as the “honour and dignity of the State”, which has been wronged either directly or in the person of one of its nationals. On occasions, these latter considerations are so weighty that a claim for reparation is held justified even though no material wrong has occurred (A/CN.4/96, para. 211). And all this may be the result of insisting that the national State is the entity which has suffered the injury. This situation can also adversely affect the interests of the individual whose person or property has in fact been injured by the illegal act or omission. It is the State of nationality which decides what reparation is to be asked, and it is to it, too, that reparation is paid. The amount received by the alien depends on the discretionary will of the State itself, for “the individual does not acquire any title to the sum which is awarded, except under the assignment made in his favour”.⁶³

8. The foregoing and also other considerations, which will be given at the end of this chapter, concerning the unnecessary difficulties and complications which the system entails, lead the Special Rapporteur to believe that it should be abandoned in favour of another which conforms more closely to reality and meets the real needs of international life. Article 24 of the draft contains a criterion which is very simple but is designed at the same time to protect the interests that are really affected. According to this criterion, the extent or quantum of reparation (pecuniary damages) is to be determined by reference to the nature of the injury caused to the person or property of the alien, or, in the event of his death, of his heirs or successors in interest. It is true, and it has been repeatedly admitted in the Special Rapporteur's earlier reports, that sometimes the specific injury suffered by the alien is not the sole consequence of the act or omission imputable to the State, and that there are also situations where the gravity of this injury is relatively slight in comparison with the consequences which affect the “general interest” that may be pleaded by the State of nationality. But this is another matter which will be

⁶³ See Anzilotti, *op. cit.*, pp. 428-429. According to basis of discussion No. 29 of the Preparatory Committee of The Hague Conference, “In principle, any indemnity to be accorded is to be put at the disposal of the injured State.” (League of Nations publication, *V. Legal, 1929.V.3* (document C.75.M.69. 1929.V), p. 151.)

gone into at the end of the chapter. Here the only point of interest is the injury actually suffered by the alien in his person or property, and the fairest and most appropriate way of making reparation when it is necessary to have recourse to pecuniary damages because restitution is not impossible or would not constitute adequate reparation. For the purpose of determining the measure or extent of such reparation there is no other criterion than that of the nature of the damage, that is to say the sum total of the injuries in fact suffered by the alien in his person or in his property.

9. Admittedly, the rule laid down in article 24 is too general or too vague in that it does not make it possible to foretell the quantum of compensation corresponding to the different categories of damage, whether reparation must include the costs and expenses incurred by the alien in exhausting local remedies, or whether interest should be charged on the amount of the compensation in the event of a delay in payment of the compensation. Nevertheless, in conformity with the method of codification followed in the preparation of the draft, the rule was deliberately formulated in terms of a general principle. There is, further, a particular reason why one should not depart from this method—the lack of uniformity, indeed, the marked uncertainty in diplomatic practice and international case law in this respect. In this connexion, Eagleton expressly recognizes that “international law provides no precise methods of measurement for the award of pecuniary damages”.⁶⁴ The same view has been expressed by many others, among them Feller, who points out how fragmentary and confused is this part of the law of international claims owing to the fact that arbitral awards are very often the result of compromise behind closed doors in which no attempt was made to work out any consistent theory.⁶⁵

10. Nevertheless, if the Commission would prefer detailed provisions, rules could be made laying down criteria for determining the quantum of compensation to be paid for the different categories of injury. These criteria would serve, for instance, to determine the amount of any damage to the property or possessions of the alien, as well as any loss in income or profits resulting from such damage. Similarly, as regard these property rights it would be necessary to know how to fix the quantum when “indirect” injuries are alleged and in what cases or conditions such injuries have been recognized in practice. In the case of personal injury, either physical or moral, the factors would be different. This is also applicable when the injury was the consequence, not of an action imputable to the State but of the acts of an individual, with respect to whom, however, the authorities have conducted themselves in a manner contrary to international law.

11. It seems essential to mention, in this part of the draft, the extenuating circumstances discussed in chapter VI. As was stated there, even if the act or omission is the same or the injury is of the same kind, the degree of responsibility imputable to the State may vary, according to circumstances. Of course, where there are causes entirely exonerating the State from responsibility, there will be no difficulty under article 24 of the draft, but that does not apply if there are circumstances extenuating the responsibility imputed to the State. Paragraph 3 of this article is intended to provide for such cases, for it states that such circumstances (enumerated in article 13

⁶⁴ Eagleton, *op. cit.*, p. 191.

⁶⁵ See Feller, *op. cit.* (footnote 27 above), p. 290.

of the draft) are to be taken into account in the determination of the measure or quantum of the reparation. The general problem having been examined in chapter VI, it only remains to explain the intended scope of article 24, paragraph 3.

12. With regard to the extenuating circumstances, Professor Salvioi has indicated cases where in international case-law, by the application of certain principles, it has been deemed justifiable to reduce the amount of reparation sought from the State responsible for an injury. He quotes a number of arbitral awards in which the fault imputable to the party which alleged the injury resulted in a diminution of the reparation. One of them is that given in the *Fabiani* case in which it was considered that the existence of an illicit act ought not to constitute a source of unjustifiable gain for the injured party; in other words, a source of "undue enrichment". In the *Costa Rica Packet* case the arbitrator drew a distinction, in determining the amount of reparation, between the losses suffered through the unjustified detention of the master of the vessel and those resulting from the fact that neither the owners nor the master himself had authorized the vessel's departure to resume its whaling operations.⁶⁶ As was stated in chapter VI, the same circumstance (a fault on the part of the alien) was taken into account by the arbitral tribunal when it considered a reduction in the amount of reparation in the cases of the *Delagoa Bay Railway*, *García and Garza* and *Lillie S. Kling*. Any other extenuating circumstances recognized in international case-law and in codifications must be considered to have similar consequences, *mutatis mutandis*, with regard to the measure of the reparation claimed.

21. CASES IN WHICH THE "GENERAL INTEREST" IS AFFECTED

reference has been made repeatedly to the case where the consequences of the act or omission imputed to the State

13. In this report and in the two previous reports transcend the loss suffered by the alien, where, that is, beyond such loss, the "general interest" is affected. In fact, in article 20 of the draft, the situations in which the national State may bring an international claim in this case have been included in these terms. In the commentary on that article a definition was attempted which, although not entirely satisfactory, at least gives an idea of this legal verity which has at various times been recognized both by publicists and by international case-law. It only remains, then, to consider this circumstance from the point of view of this chapter of the draft, from the point of view, that is, of the "reparation" which ought to be made in such a case.

14. It is not difficult to see that this problem is much more complex although, naturally, it is not impossible to find a solution. The fact is, simply, that if the form of reparation for the injuries which the State of nationality alleges is to be appropriate, one will undoubtedly have to

⁶⁶ See Gabriele Salvioi, "La Responsabilité des Etats et la fixation des dommages et intérêts par les tribunaux internationaux", *Recueil des cours de l'Académie de droit international*, 1929, III, pp. 265-267.

depart from the type of reparation envisaged in the draft. For reparation for these "injuries" (that is, the danger or threat to the safety of the person or property of aliens which is involved in the act or omission imputed to a State) cannot be made in the same manner as in the case of a specific injury suffered by an alien in his person or property. In short, the "general interest" alleged by the national State is not susceptible, unlike the injured interests of the alien, of reparation *stricto sensu*; that is to say, with regard to this category of interests there can be no question of reparation in the sense of restitution in kind or pecuniary damages. There can be no doubt that this interest calls for legal protection equal to that afforded to the interests of the alien, but of a character so different that the question of analogy cannot be entertained for one moment when thinking of "reparation". It would in fact be illogical and unrealistic—although this view has been held in the past—to think of making reparation for this interest through the award of a pecuniary compensation to the State of nationality, and this would still be inadmissible even if it were thought of as compensation granted in favour of the alien in addition to that awarded in reparation for the injury he has really suffered. The latter would permit the alien to gain undue profit from his own injury, while the former would enable the State concerned to benefit as a result of an injury which it had not really suffered. As other aspects of this question were examined at the beginning of this chapter it is unnecessary to go into it any further.

15. The only point which should be brought out is that, for the reasons which have just been indicated in a case in which the "general interest" is affected, there is no alternative but to consider measures which could really help to provide an effective legal protection for this interest. In accordance with the traditional notion it was possible to think only in terms of that form of reparation known as "satisfaction" with the "idea of punishment" inherent in it, to use Anzilotti's phrase. But the matter must be considered in accordance with more modern notions and we must think, not in terms of "punishing" the State but rather in terms of providing effective guarantees for the safety of the person and property of aliens. The only possible way of ensuring such guarantees would be to demand that the respondent State should take all necessary steps to avoid the repetition of acts of the kind imputed to it, as, for instance, the suspension or removal from their duties of the officials at fault when dealing with the acts or omissions of any body of authority of the State or the reinforcement of its security authorities when dealing with the acts of ordinary private individuals or internal disturbances.

16. These considerations have led to the drafting of article 25 of the draft. It cannot be denied that this provision departs from the idea of the "duty to make reparation" *stricto sensu* for it contains characteristic elements of "satisfaction" from which the imputation of criminal responsibility might be presumed, as explained in the first report (A/CN.4/96, sect. 8 and chap. VIII). But if the Commission were to persist in isolating this aspect of the matter from the codification, it would still fail to succeed, even if it were to adjust itself to the traditional notion and draw up a rule in accordance therewith.

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

CHAPTER I

NATURE AND SCOPE OF RESPONSIBILITY

Article 1

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

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

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

CHAPTER II

ACTS AND OMISSIONS OF ORGANS AND OFFICIALS OF THE STATE

Article 2

Act and omissions of the legislature

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

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

Article 3

Acts and omissions of officials

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

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

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

Article 4

Denial of justice

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

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

3. For the same purposes, a "denial of justice" shall also be deemed to have occurred if a judicial decision has

been rendered, or an order of the court made, which is manifestly unjust and which was rendered or made by reason of the foreign nationality of the individual affected.

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

CHAPTER III

VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS

Article 5

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

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

Article 6

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

- (a) The right to life, liberty and security of person;
- (b) The right of the person to the inviolability of his privacy, home and correspondence, and to respect for his honour and reputation;
- (c) The right to freedom of thought, conscience and religion;
- (d) The right to own property;
- (e) The right of the person to recognition everywhere as a person before the law;
- (f) The right to apply to the courts of justice or to the competent organs of the State, by means of remedies and proceedings which offer adequate and effective redress for violations of the aforesaid rights and freedoms;
- (g) The right to a public hearing, with proper safeguards, by the competent organs of the State, in the determination of any criminal charge or in the determination of rights and obligations under civil law;
- (h) In criminal matters, the right of the accused to be presumed innocent until proved guilty; the right to be informed of the charge made against him in a language which he understands; the right to speak in his defence or to be defended by a counsel of his choice; the right not to be convicted of any punishable offence on account of any act or omission which did not constitute an offence, under national or international law, at the time when it was committed, the right to be tried without delay or to be released.

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

CHAPTER IV

NON-PERFORMANCE OF CONTRACTUAL OBLIGATIONS AND ACTS OF EXPROPRIATION

Article 7

Contractual obligations in general

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

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

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

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

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

3. None of the foregoing provisions shall apply if the contract or concession contains a clause of the nature described in article 16, paragraph 2.

Article 8

Public debts

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

Article 9

Acts of expropriation

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

CHAPTER V

ACTS OF INDIVIDUALS AND INTERNAL DISTURBANCES

Article 10

Acts of ordinary private individuals

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

Article 11

Internal disturbance in general

The State is responsible for injuries caused to an alien in consequence of riots, civil strife or other internal disturbances, if the constituted authority was manifestly negligent in taking the measures which in such circumstances, are normally taken to prevent or punish the acts in question.

Article 12

Acts of the constituted authority and of successful insurgents

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

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

CHAPTER VI

EXONERATION FROM RESPONSIBILITY; EXTENUATING AND AGGRAVATING CIRCUMSTANCES

Article 13

1. Notwithstanding the provisions of the article last preceding, the State shall not be responsible for injuries

caused to an alien if the measures taken are the consequence of "force majeure" or of a state of necessity due to a grave and imminent peril threatening some vital interest of the State, provided that the State did not provoke the peril and was unable to counteract it by other means.

2. Similarly, the State shall not be responsible for the injuries caused if the injurious act was provoked by some fault on the part of the alien himself.

3. "Force majeure", state of necessity and the fault imputable to the alien shall, if not admissible as grounds for exoneration from responsibility, constitute extenuating circumstances in the determination of the quantum of reparation.

Article 14

In the cases of responsibility provided for in articles 10 and 11, the connivance or complicity of the authorities of the State in the injurious acts of private individuals shall constitute an aggravating circumstance for the purposes contemplated in article 25 of the present draft.

CHAPTER VII

EXHAUSTION OF LOCAL REMEDIES

Article 15

1. An international claim brought for the purpose of obtaining reparation for injuries alleged by an alien, or for the purposes contemplated in article 25, shall not be admissible until all the remedies established by municipal law have been exhausted.

2. For the purposes of the provisions of the previous paragraph, local remedies shall be deemed to have been "exhausted" when the decision of the competent body or official is final.

3. Except in the cases of "denial of justice" provided for in article 4 of the draft, the absence, delay or inefficacy of local remedies, or the inadequacy of the reparation for the injury, shall be incapable of furnishing grounds for the international claim.

Article 16

1. Notwithstanding the provisions of the preceding article, if two or more States restrict by agreement the right to bring an international claim, such claim shall be admissible only in the cases and circumstances specified in the said agreement.

2. Similarly, in cases where an alien claims to have suffered injury as a result of the non-performance of obligations stipulated in a contract entered into with the State, or in a concession granted to him by the State, the international claim shall not be admissible if the alien concerned has agreed not to seek the diplomatic protection of the State of his nationality; the exoneration shall operate in accordance with the terms of the waiver.

3. The waiver mentioned in the previous paragraph shall not deprive the alien's State of nationality of the right to bring an international claim in the case provided for in article 20, paragraph 2, of the present draft.

Article 17

Article 15 shall not apply if the State has expressly agreed with the alien, or, as the case may be, with the State of his nationality, to dispense with local remedies.

Article 18

Disputes between the respondent State and the alien, or, as the case may be, between that State and the State of his nationality, regarding the admissibility of the international claim shall be submitted to the methods of settlement provided for in articles 19 and 20 in the form of a preliminary question and resolved by means of a summary procedure.

CHAPTER VIII

SUBMISSION OF THE INTERNATIONAL CLAIM

Article 19

1. The alien may submit an international claim to obtain reparation for the injury suffered by him to the body

in which competence for this purpose has been vested by an agreement between the respondent State and the alien's State of nationality or between the respondent State and the alien himself.

2. If the body mentioned in the previous paragraph was established by an agreement between the respondent State and the alien, the authorization of the State of nationality shall not be necessary for the purpose of submitting the international claim.

3. In the event of the death of the alien, the right to bring a claim may be exercised by his heirs or successors in interest, provided that they did not possess and have not acquired the nationality of the respondent State.

4. The right to bring claims to which this article refers shall not be exercised by foreign juristic persons in which nationals of the respondent State hold the controlling interest.

5. For the purposes of this article, the term "alien" (or "foreign") shall be construed as applying to any person who did not possess and has not acquired the nationality of the respondent State.

Article 20

1. The State of nationality may bring the international claim to obtain reparation for the injury sustained by the alien:

(a) If there does not exist an agreement of the type referred to in article 19, paragraph 1;

(b) If the respondent State has expressly agreed to the subrogation of the State of nationality in the place and title of the alien for the purposes of the claim.

2. The State of nationality may, in addition, bring an international claim, for the purposes contemplated in article 25 of the present draft, in the case of acts or omissions the consequences of which extend beyond the specific injury caused to the alien, and it may bring a claim in these circumstances irrespective of any agreement entered into by the alien with the respondent State.

Article 21

1. A State may exercise the right to bring a claim referred to in the previous article on condition that the alien possessed its nationality at the time of suffering the injury and conserved that nationality until the claim is adjudicated.

2. In the event of the death of the alien, the right of the State to bring a claim on behalf of the heirs or successors in interest shall be subject to the same conditions.

3. A State shall not bring a claim on behalf of foreign juristic persons in which nationals of the respondent State hold the controlling interest.

4. In cases of dual or multiple nationality, the right to bring a claim shall be exercisable only by the State with which the alien has the stronger and more genuine legal and other ties.

Article 22

1. The right of the State of nationality to bring a claim shall not be affected by an agreement between the respondent State and the alien if the latter's consent is vitiated by duress or any other form of pressure exerted upon him by the authorities of the respondent State.

2. The said right shall likewise not be affected if the respondent State, subsequently to the act or omission imputed to it, imposed upon the alien its own nationality with the object of resisting the international claim.

Article 23

1. Except where the parties concerned have agreed upon a different time limit, the right to bring an international claim shall lapse after the expiry of two years from the date when local remedies were exhausted.

2. Notwithstanding the provisions of the preceding paragraph, the international claim shall be admissible if it is proved that the delay in its submission is due to reasons not connected with the will of the claimant.

CHAPTER IX

CHARACTER AND MEASURE OF REPARATION

Article 24

1. The reparation of the injury caused to an alien may take the form of restitution in kind ("restitutio in integrum") or, if restitution is not possible or does not constitute adequate reparation for the injury, of pecuniary damages.

2. The measure or quantum of the pecuniary damages shall be determined in accordance with the nature of the injury caused to the person or property of the alien, or, in the event of his death, of his heirs or successors in interest.

3. In the determination of the measure or quantum of the reparation the extenuating circumstances referred to in article 13 of the present draft shall be taken into account.

Article 25

In the case of acts or omissions the consequences of which extend beyond the specific injury caused to the alien, the State of nationality may demand, without prejudice to the reparation due in respect of the said injury, that the respondent State take all necessary steps to prevent a repetition of acts of the kind imputed to it.