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Report by Mr. R. Ago, Chairman of the Sub-Committee on State Responsibility

Topic:
State responsibility

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ANNEXES

ANNEX I

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Report by Mr. Roberto Ago Chairman of the Sub-Committee on State Responsibility (Approved by the Sub-Committee)

[16 January 1963]
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Report by Mr. Roberto Ago, Chairman of the Sub-Committee on State Responsibility (Approved by the Sub-Committee)

1. The Sub-Committee on State Responsibility, set up by the International Law Commission at its 637th meeting on 7 May 1962 and consisting of the following ten members: Mr. Ago (Chairman), Mr. Briggs, Mr. Gros, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Tsuruoka, Mr. Tunkin and Mr. Yasseen, held its second session at Geneva from 7 to 16 January 1963. The terms of reference of the Sub-Committee, as laid down by the Commission at its 668th meeting on 26 June 1962,[1] were as follows:

" (1) The Sub-Committee will meet at Geneva between the Commission's current session and its next session from 7 to 16 Juanary 1963;

" (2) Its work will be devoted primarily to the general aspects of State responsibility;

" (3) The members of the Sub-Committee will prepare for it specific memoranda relating to the main aspects of the subject, these memoranda to be submitted to the Secretariat not later than 1 December 1962 so that they may be reproduced and circulated before the meeting of the Sub-Committee in January 1963;

" (4) The Chairman of the Sub-Committee will prepare a report on the results of its work to be submitted to the Commission at its next session."

2. The Sub-Committee held seven meetings ending on 16 January 1963. All its members were present with the exception of Mr. Lachs, who was absent because of illness. The Sub-Committee had before it memoranda prepared by the following members:

Mr. Jiménez de Aréchaga (ILC (XIV) SC.1/WP.1);
Mr. Paredes (ILC (XIV) SC.1/WP.2 and Add.1, A/CN.4/WP.7);
Mr. Gros (A/CN.4/SC.1/WP.3);
Mr. Tsuruoka (A/CN.4/SC.1/WP.4);
Mr. Yasseen (A/CN.4/SC.1/WP.5);
Mr. Ago (A/CN.4/SC.1/WP.6).

3. The Sub-Committee held a general discussion of the questions to be studied in connexion with the work relating to the international responsibility of States, and with the directives to be given by the Commission to the Rapporteur on that topic.

4. Some members of the Sub-Committee expressed the view that it would be desirable to begin the study of the very vast subject of the international responsibility of the State by considering a well-defined sector such as that of responsibility for injuries to the person or property of aliens. Other members, on the other hand, argued that it was desirable to carry out a general study of the subject, taking care not to confuse the definition of the rules relating to responsibility with that of the rules of international law — and in particular those relating to the treatment of aliens — the breach of which can give rise to responsibility. Some of the members in this second group stressed in particular that, in the study of the topic of responsibility, new developments of

[1] *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9* (A/5209 and Corr.1), paragraph 68

international law in other fields, notably that of the maintenance of peace, ought also to be taken into account.

5. In the end, the Sub-Committee agreed unanimously to recommend that the Commission should, with a view to the codification of the topic, give priority to the definition of the general rules governing the international responsibility of the State. It was agreed, firstly that there would be no question of neglecting the experience and material gathered in certain special sectors, specially that of responsibility for injuries to the person or property of aliens; and, secondly, that careful attention should be paid to the possible repercussions which new developments in international law may have had on responsibility.

6. Having reached this general conclusion, the Sub-Committee discussed in detail an outline programme of work submitted by Mr. Ago. After this debate, it decided unanimously to recommend to the Commission the following indications on the main points to be considered as to the general aspects of the international responsibility of the State; these indications may serve as a guide to the work of a future special rapporteur to be appointed by the Commission.

Preliminary point: Definition of the concept of the international responsibility of the State [2]

First point: Origin of international responsibility.

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

(2) *Determination of the component parts of the international wrongful act:*

(*a*) *Objective element:* act or omission objectively conflicting with an international legal obligation of the State.[3] Problem of the abuse of right. Cases where the act or omission itself suffices to constitute the objective element of the wrongful act and cases where there must also be an extraneous event caused by the conduct.

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

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

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

Must there be fault on the part of the organ whose conduct is the subject of a complaint? Objective responsibility and responsibility related to fault *lato sensu.* Problems of the degree of fault.[4]

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

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

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

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

Problems of participation in the international wrongful act.

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

Consent of the injured party. Problem of presumed consent;

Legitimate sanction against the author of an international wrongful act;

Self-defence;

State of necessity.

Second point: The forms of international responsibility

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

(2) *Reparation.* Its forms. *Restitutio in integrum* and reparation by equivalent or compensation. Extent of reparation. Reparation of indirect damage. Satisfaction and its forms.

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

7. In accordance with the Sub-Committee's decision, the summary records giving an account of the discussion on substance, and the memoranda by its members mentioned in paragraph 2 above, are attached to this report.[5]

[2] The Sub-Committee suggested that the question of the responsibility of other subjects of international law, such as international organizations, should be left aside.

[3] The question of possible responsibility based on " risk ", in cases where a State's conduct does not constitute a breach of an international obligation may be studied in this connexion.

[4] It would be desirable to consider whether or not the study should include the very important questions which may arise in connexion with the proof of the events giving rise to responsibility.

Appendix I

INTERNATIONAL LAW COMMISSION

Sub-Committee on State Responsibility

Summary records of the 2nd, 3rd, 4th and 5th meetings

Summary record of the second meeting

(Monday, 7 January 1963, at 3 p.m.)

Organization of work

The CHAIRMAN welcomed the members of the Sub-Committee and expressed the hope that its deliberations would indicate the road to be followed for the codification of the subject of State responsibility.

He drew attention to the working papers submitted by the members of the Sub-Committee (A/CN.4/SC.1/WP.1-7).[6]

He invited comments on the subject of the organization of the Commission's work.

The first point to be decided was the number of meetings to be held by the Sub-Committee.

The second question was that of observers. In principle, the meetings of Sub-Committees in the United Nations were closed. However, the missions of two countries had informally inquired whether they could send observers to the meetings of the Sub-Committee.

The third question was that of the distribution of summary records. The Secretariat expected to receive requests for the summary records of the Sub-Committee from members of the International Law Commission who were not members of the Sub-Committee and also from delegations.

Mr. GROS said the Sub-Committee could hardly decide at that stage how many meetings its work would require. He suggested that a decision on that question should be deferred until all the members had had an opportunity of speaking,

[5] These summary records and memoranda are reproduced in appendix I and appendix II below.

[6] These working papers are reproduced in Appendix II below.

supplementing the papers submitted by them and commenting upon those submitted by their colleagues. The Sub-Committee would hold one meeting every day and decide later whether more meetings were required.

Mr. JIMENEZ DE ARECHAGA, Mr. de LUNA, Mr. PAREDES, Mr. TSURUOKA and Mr. YASSEEN supported Mr. Gros.

Mr. TUNKIN also supported Mr. Gros, adding that members would require some time to study the papers.

The CHAIRMAN said that, if there were no objection, he would consider that the Sub-Committee agreed to adopt, with regard to the organization of its meetings, the same pattern as the International Law Commission itself.

It was so agreed.

Mr. BRIGGS, speaking on the question of observers, said that, in view of the exploratory character of the Sub-Committee's discussions, it might not be desirable to admit outside observers.

The CHAIRMAN said that, if there were no objection, he would consider that the Sub-Committee agreed that its meetings would not be open to observers; it would be explained, in reply to any requests in that regard, that the discussions were of a preparatory character and that the Sub-Committee regretted its inability to admit observers.

It was so agreed.

The CHAIRMAN invited comments on the question of summary records.

Mr. TUNKIN doubted the necessity of keeping records of the meetings at all.

The CHAIRMAN said that such records would be useful to the members themselves. If there were no objection, he would consider that the Sub-Committee agreed that the provisional summary records would be distributed to its members only.

It was so agreed.

State responsibility

The CHAIRMAN invited discussion on the subject of State responsibility.

Mr. de LUNA said that the fully agreed with Mr. Tsuruoka's view as expressed in his working paper that the Commission should not be over-bold in its innovations and yet should contrive to meet the new needs of the international community, whilst harmonizing the legitimate interests of all members of that community. But, for that very reason, the Commission should not confine itself to what Mr. Tsuruoka had defined as responsibility *stricto sensu*. Mr. Jiménez de Aréchaga had pointed out in his paper that even States which did not permit private ownership of the means of production accepted the principle of compensation for claims by nationals of another country applying the same economic policies, though they did not base it on vested interests or the rights of private property. That had led Mr. Jiménez de Aréchaga to attempt to find a common foundation for the obligation to compensate, based on the principle of unjust enrichment. Mr. Tunkin had said in the Commission in 1960 that the existence of two economic systems was an undoubted fact that had to be borne in mind. It was that state of affairs which had caused Mr. Yasseen in his working paper to conclude — a conclusion with which he (Mr. de Luna) could not agree — that responsibility for injuries to aliens was not a topic that could readily be codified at the present time. On the other hand, he agreed with Mr. Yasseen, Mr. Ago and Mr. Gros that the law of responsibility should not be dealt with piecemeal. The first task should be to evolve the general principles governing international responsibility.

There were certain points that had not been touched on in the papers submitted by members of the Sub-Committee. Would the Commission confine itself to States, as it had done in the case of the law of treaties, and disregard the question of the responsibility of individuals and of international organizations? If it did not would it deal solely with individuals responsible for an international wrongful act or would it also consider the individual as an injured party, as advocated, for example, by some Spanish-American jurists? The latter seemed to him to be a doubtful proposition, although it was true that the recent draft convention of the Organization for Economic Co-operation and Development on the protection of the property of aliens provided that a national of one of the parties to the convention who considered himself injured by measures contravening the convention could bring proceedings before the arbitral tribunal against any other party responsible. Similar provision occured in a draft convention prepared by the World Bank. His view was that the Commission should limit itself to the responsibility of States and postpone consideration of that of individuals or of international organizations.

When dealing with circumstances in which an act was not wrongful, the Commission would have to distinguish between circumstances which, in addition to removing the wrongful character of an act, also exonerated from responsibility, and those which, while removing the wrongful character of the act, were not a defence to a claim for reparation of the injury caused (e.g. state of necessity).

With regard to the consequences of international responsibility, he said the Commission should concern itself not only with reparation and restitution but also with unjust enrichment — not merely in the context in which Mr. Jiménez de Aréchaga had referred to it but also in cases where a State had obtained certain advantages to the detriment of another State.

Lastly, a distinction should be drawn between the violation of a rule and the invalidity of a rule by reason of some defect of form or absence of will. Action under a rule which was void might constitute an international delinquency giving rise to a claim. Hence, there was a connexion between the relatively novel theory of nullity in international law and the law governing international responsibility.

Mr. Tsuruoka said that he had little to add at that stage to the working paper which he had submitted; the paper referred to a number of important points concerning the subject.

With regard to the possible responsibility for acts which were not unlawful, he counselled caution, as he had done in his working paper.

The CHAIRMAN, speaking as member of the Sub-Committee, agreed with Mr. de Luna that the responsibility of international organizations should not be dealt with. It was even questionable whether such organizations had the capacity to commit international wrongful acts, and the subject in any case fell outside the scope of the International Law Commission's present preoccupations.

He also agreed that the Sub-Committee should not consider the question of the individual as a subject of international law in the context of responsibility, though naturally, the topic of State responsibility covered the question of the responsibility of the State for the acts of individuals.

For those reasons, he thought that the Commission should confine its attention to the traditional subjects of international law: States and similar subjects, like, for example, insurgents possessing international personality.

The meeting rose at 3.55 p.m.

Summary record of the third meeting
(Tuesday, 8 January 1963, at 10 a.m.)

State responsibility (continued)

The CHAIRMAN invited the Sub-Committee to continue its discussion on State responsibility.

Mr. YASSEEN said that the first question to be decided by the Sub-Committee was one of method: should the International Law Commission study first the general principles of State responsibility or should it begin with an analysis

of the application of those principles to a particular field of international relations?

He agreed with several other members that the appropriate method was to study first the general principles of responsibility. If the subject of State responsibility was approached piecemeal, the result might well be to give to certain particular rules an importance which they did not have. In addition, such an approach would involve a danger of confusion between the rules governing responsibility and the substantive rules which established international obligations.

It was not advisable to begin work by a consideration of the implementation of the principles governing international responsibility in a specific field of international relations, for example, that of claims for injuries to the person or, more particularly, the property of aliens. The ending of the era of colonialism left many privileged situations which needed revision in a number of the newly independent States.

The changed circumstances called for flexible solutions, and the whole subject of responsibility in relation to those matters did not lend itself readily to codification.

He referred to the discussions which had taken place in the Second Committee of the General Assembly at its seventeenth session on the subject of permanent sovereignty over natural wealth and resources. The many amendments which had been submitted to the draft resolution prepared by the Commission appointed to study that subject [7] showed that views differed widely on questions which might at first sight have appeared uncontroversial.

It was the duty of the International Law Commission to prepare a draft codification. The rules formulated in such a code would require almost unanimous assent. In fact, a two-thirds majority would be required for their approval by an international conference. It was doubtful whether such a majority could be obtained on rules dealing with the treatment of aliens, particularly on the more important points of the subject.

For all those reasons, he urged the Sub-Committee not to adopt a fragmentary approach and in particular not to undertake first a study of State responsibility for injuries to the person or property of aliens.

Mr. PAREDES agreed that the general principles governing the subject of State responsibility should be studied first. However, such a study should embrace the whole field of State responsibility, and cover not only civil but also criminal responsibility.

The time had come to define the criminal responsibility of States and to determine whether States could be tried for breaches of rules of international law. There had been some instances where States had been held to have incurred criminal liability, but in the absence of a legal definition the whole subject was still in a somewhat confused state and was dominated by political rather than legal considerations. He realised that he had raised a very delicate issue but thought that the matter required consideration.

It was necessary to determine whether sanctions could be applied by such organisations as the United Nations and the Organisation of American States. Without wishing to express any view either in favour or against certain recent resolutions adopted and actions taken by those bodies, he felt bound to mention them as illustrating the need to define both the civil and the criminal responsibility of States.

The traditional rules on the subject of State responsibility had undergone a change; it was now admitted that in certain circumstances a State might be held criminally liable; international organisations considered that they had the power to take punitive action in the event of breaches of international law. Unless the legal position in that respect were clarified, the punitive action taken by international organisations could be disputed and it could be asserted that it constituted an abuse of power and a political rather than a legal act.

[7] Report of the Commission on Permanent Sovereignty over Natural Resources (E/3511).

The Nürnberg judgement [8] had shown that it was possible to hold a head of State criminally liable for crimes against humanity. That criminal liability had been acknowledged even in the case where a ruler had acted in the exercise of his constitutional powers. Lastly, a clear distinction should be drawn between the responsibility attaching to the State in the internal political sphere in respect of its acts and the international responsibility of that State for those same acts. The two types of responsibility were governed by different rules of law and were justiciable in different courts.

Mr. GROS said that he was prepared to accept the method suggested by Mr. Yasseen but solely as a method, without prejudice to substance.

He would be prepared to agree that the International Law Commission should study State responsibility without emphasis on the question of responsibility for injuries to the person or property of aliens. However, he could not agree with Mr. Yasseen that the problem of injuries to aliens had become obsolete. In everyday international practice cases occurred where diplomatic protection was given in connexion with injuries to the person or property of aliens. Not only was the subject still alive, but the Commission should not hesitate to draw on the vast experience gained in the matter of State responsibility for the treatment of aliens.

Nor could he agree with Mr. Yasseen that the subject of the treatment of aliens was connected with the problem of decolonization. Mr. Jiménez de Aréchaga, in his working paper (para. 25) mentioned some thirty agreements concluded after the Second World War dealing with compensation for nationalisation measures. None of those agreements concerned decolonization. He mentioned as examples the agreements between France and Czechoslovakia and between France and Canada. The agreements cited by Mr. Jiménez de Aréchaga clearly demonstrated that nationalisation was a continuing problem and one that constituted a source of State responsibility.

The Sub-Committee might do well to discuss the present legal nature and scope of diplomatic protection. The right to give diplomatic protection to nationals abroad was recognized in article 3 of the Vienna Convention on Diplomatic Relations, 1961.[9] Similarly, the right of consular protection would no doubt be recognized by the Convention on consular relations to be prepared by the forthcoming Vienna Conference of 1963. Moreover, the protection of nationals abroad had been recognized by many recent general agreements by which the States concerned had established special machinery, including in some cases arbitration courts, for dealing with matters arising out of injuries to aliens.

Referring to the remarks by Mr. Paredes, he considered that the subject of the criminal responsibility of the State was more of theoretical than of practical importance. Many writers, such as Dumas [10] and Pella, had considered the question of the possible criminal liability of the State; in fact, as early as 1895, Professor de Martens had broached the subject. He did not, however, think that a discussion of the topic would be in its place in a draft intended to be submitted to over one hundred States; the draft should contain material from which those States could immediately deduce practical consequences.

He agreed that the first step should be the study of the general aspects of State responsibility. A first report on that point might be followed by a study of the responsibility of the State in particular circumstances. Such a study would

[8] For an analysis of the judgement, see the memorandum submitted to the International Law Commission by the Secretary-General in 1949: *The Charter and Judgment of the Nürnberg Tribunal — History and Analysis* (A/CN.4/5), United Nations publication, Sales No. 1949 V. 7.

[9] Text in United Nations Conference on Diplomatie Intercourse and Immunities, Vienna, 2 March — 14 April 1961, Official Records, vol. II United Nations publication, Sales No. 62.X.1.

[10] See bibliography annexed to Mr. Ago's working paper, *infra*.

show that the rules in the matter were the result of more than a century of State practice and arbitral case-law.

At the same time, however, it was desirable not to engage in the preparation of a series of monographs divorced from practical experience. It was necessary to maintain a balance so that, in the study of the general aspects of State responsibility, the experience of the past in the application of the rules of State responsibility was not ignored.

Mr. YASSEEN, replying to Mr. Gros, said that he fully recognized the existence of a substancial body of State practice and case-law on the subject of the responsibility of the State for injuries to the person or property of aliens. He maintained, however, that the practice in the matter was not at all uniform; the controversies to which the Calvo Clause had given rise provided clear evidence of that lack of uniformity.

He agreed that decolonization was not the only factor which complicated the present situation; it was, however, an important factor in that respect.

Since the establishment of the United Nations, a large number of new States had become independent, and most of them suffered from the persistence of privileged situations favouring certain other States. The revision of those situations was a very important problem from the point of view of the maintenance of good relations between States.

He was fully aware that the problem of nationalisation was not confined to former colonies. However, nationalisation measures did not create difficult problems between countries which were equal. They created serious problems in connexion with the privileged situations left over from the decolonization process.

Mr. BRIGGS said that the Commission's usual practice had been to leave special rapporteurs free to define the scope of their topics. On the submission of a special rapporteur's first report, the Commission would undertake a critical analysis of the approach adopted by him.

It was only in connexion with the law of treaties that the Commission had departed from that practice and had given instructions to the Special Rapporteur.[11] As he understood it, it was the purpose of the present Sub-Committee to prepare such instructions for the future special rapporteur on the subject of State responsibility.

He considered that those instructions should be most general. It was the purpose of the Sub-Committee to explore various possibilities and to report to the International Law Commission on the scope of the subject. In that respect, he fully agreed with Mr. Gros, who had implied in his working paper that it was undesirable for members to take up any very definite positions on the issues involved, a course which would involve the danger of hardening those positions.

On the whole, he agreed with the approach adopted by Mr. Tsuruoka in his working paper. There was no doubt that a great deal of material existed on the subject of State responsibility for injury to aliens, but that there was very little material on other aspects of State responsibility. Accordingly, any work done on those other aspects would not constitute either a codification or a progressive development of international law; it would be more in the nature of legislation in regard to matters not previously regulated by international law. He would hesitate to suggest that the Commission should embark on the task of creating new rules of international law on matters which had not been regulated in the past.

Turning to the subject of permanent sovereignty over natural wealth and resources — an expression which he thought contained a contradiction in terms — he considered that the subject could be dealt with on the basis of traditional principles. Any problems arising in the matter would involve questions of international responsibility for the treatment of aliens and would not require the formulation of any new rules. He did not think that there was any connexion with the question of decolonization. The subject was simply one of the determination of State responsibility. He agreed, however, that it would be desirable to reinvestigate the applicable rules in the matter.

With regard to the remarks by Mr. Paredes, he said that the whole subject of the criminal liability of the State had been disposed of by the Nürnberg judgement which had made it clear that, as far criminal law was concerned, individuals alone could be held liable. State responsibility was in fact of a civil rather than of a criminal character. For that reason, he thought that the concluding paragraph of Mr. Ago's paper, on santions and reprisals, was out of place.

Mr. Ago's paper somewhat artificially stressed the distinction between the international law of State responsibility and the law relating to the treatment of aliens. He could not agree with some of the statements contained in that paper; for example, neither the draft prepared by the Institute of International Law in 1927[12] nor. The Hague draft of 1930[13] contained anything which was outside the subject of State responsibility. The same was true of the Harvard draft of 1929;[14]; although it was true that that draft employed the term " responsibility " in more than one sense, for the most part it correctly treated State responsibility as a secondary obligation, having its source in the non-observance of a primary obligation under international law.

On the whole, however, the thought that Mr. Ago's outline for the treatment of the subject could be used as a pattern for purposes of discussion, though it was perhaps a little too abstract to form the framework of a draft treaty to be submitted to States.

The section on reparation in Mr. Ago's paper would be adequate as a basis of discussion, though he could not approve of the inclusion of paragraph 3 dealing with sanctions, because the questions of reprisals, war, and collective sanctions mentioned therein had no place in a draft on State responsibility.

Mr. JIMENEZ de ARECHAGA said that he could not agree with the Chairman's opinion that the Commission should give priority to the attempt to codify the general and rather theoretical aspects of State responsibility rather than the responsibility of the State for injuries to the person or property of aliens. Those special aspects had been included under the heading of State responsibility in the draft prepared by the Institute of International Law in 1927 and in The Hague draft of 1930, as well as in the Harvard draft of 1929 and in the various drafts submitted by the Commissions's own Special Rapporteur. Since codification meant recognition of the accepted State practice, and of the rules embodied in existing treaties, he agreed fully with Mr. Tsuruoka that in the codification of such a topic as State responsibility priority should be given to the field in which most of State practice had arisen, namely that of the responsibility of the State towards aliens. With all due respect to Mr. Yasseen, who had also advocated a general approach, those special aspects should not be postponed, since in view of their urgency and practical interest for States it was obvious that, if they were not dealt with by the Commission, they would have to be dealt with by some other United Nations body, whereas the Commission was the one most competent to do so.

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[11] Report of the Commission on its 13th session (A/4843), chapter III, paragraph 35; reprinted in *Yearbook of the International Law Commission, 1961*, vol. II, United Nations publication, Sales No. 61 V. 1, vol. II.

[12] Draft on " International Responsibility of States for injuries on their territory to the person or property of foreigners ", prepared by the Institute of International Law (1927); reprinted in annex 8 to Mr. García Amador's first report on State responsibility (A/CN.4/96) in *Yearbook of the International Law Commission, 1956*, vol. II, United Nations publication, Sales No. 1956 V. 3, vol. II.

[13] Text of articles adopted in first reading by the Third Committee of the Conference for the Codification of International Law (The Hague, 1930), reprinted *ibid.*, annex 3.

[14] Draft Convention on " Responsibility of States for damage done in their territory to the person or property of foreigners " prepared by Harvard Law School (1929), reprinted *ibid.*, annex 9.

The CHAIRMAN, speaking as a member of the Sub-Committee, said that there appeared to be two opposite views in the Sub-Committee: one, that the Commission should concentrate on the general aspects of State responsibility, the other, that is should concern itself with such special fields as the responsibility of the State for injuries to the person or property of aliens. Some of the differences which had appeared in debate might be due to the different meanings attached to the word " responsibility "; in a very general sense, the expression " the State is responsible " was sometimes used as the equivalent of " the State is obliged ". In his opinion, the term " responsibility " more correctly described the situation in which a State subject to international law found itself when it violated an obligation imposed on it by a rule of customary or conventional international law. Use of the word should be restricted to that sense if the Commission was to accomplish its task successfully. Otherwise it would be necessary to extend it to all fields, including, for example, the obligation of the State to see to it that its administration of justice observed certain minimum standards with respect to aliens. That was not really a question of State responsibility, however, but rather a rule of substantive international law concerning the treatment of aliens. The questions really concerning the responsibility of the State were, on the contrary, different ones, such as: Was a State responsible for the action of one of its organs acting outside its competence? When and in what circumstances would a State be responsible for an act committed by an individual? Did the consent of the injured party excuse a State from responsibility?

With respect to Mr. Briggs's observations on the question of sanctions, he could not agree that the international responsibility of the State should be purely civil in character. He had mentioned reprisals in his working paper precisely because reprisals were a form of sanction of a penal character which existed in international law. If a warship of one State torpedoed a vessel belonging to another and the latter sent a cruiser to bombard a harbour of the first State, was that not a form of penalty or sanction? Indeed, the question of sanctions raised a whole series of practical problems. As he had pointed out before, the consequences of State responsibility might be either reparation or punishment. But if a State offered reparation for an injury committed by it, could it compel the injured State to refrain from resorting to sanctions of a penal character against it? Were there certain fields where only reparations, not sanctions, were admissible and others where the use of sanctions had to be envisaged? Could there be collective as well as individual sanctions? A series of questions of that kind might arise in that connexion.

Mr. BRIGGS agreed with Chairman's remarks concerning the meaning of the term " responsibility ". The draft prepared at The Hague in 1930 said that international responsibility was incurred by a State " if there is any failure on the part of its organs to carry out the international obligations of the State which causes damage to the person or property of a foreigner " in its territory. Article 1 of the Harvard draft of 1929 said that a State was responsible " when it has a duty to make reparation to another State for the injury sustained by the latter State as a consequence of an injury to its national ". In the latter sense, responsibility was limited to a duty to make reparation for an injury which had already been committed. Article 4 of the same draft spoke of a different kind of responsibility, *viz.* the duty of a State " to maintain governmental organization adequate, under normal conditions, for the performance of its obligations under international law ". The meaning of " responsibility " for the purpose of the present debate was that attached to it in article 1 of the Harvard draft.

He could not agree with the Chairman's suggestion that the discussion of an international standard for the treatment of aliens would be outside the field of State responsibility. Study of the nature and content of such an international standard might clearly reveal a basis of State responsibility. On the contrary, he fully agreed with Mr. Gros, who stated in his paper that " Agreement on the machinery for making an international claim would be useless if there was no agreement on the general rules of substance concerning such claims." Similarly, in dealing with the question of State responsibility, it was impossible to ignore the content of the situation or act which created that responsibility.

With respect to sanctions, he reserved his right to comment later, but he doubted whether that question really came under the law of State responsibility.

Mr. GROS said that the substantive rules to which he had referred in his paper were those governing responsibility and not the substantive rules of international law, violation of which constituted the source of responsibility.

Mr. Ago had fully met his point about the uselessness of agreement on the machinery for making an international claim if there were no agreement regarding the source of responsibility, since the preliminary point and the first point of Mr. Ago's proposed outline covered precisely what he (Mr Gros) meant by the substantive rules of responsibility. In his view it would be quite inadequate if the Commission were to confine itself to indicating the practical manner in which a State could obtain redress for a violation of international law, without establishing what was the cause of international responsibility. It was necessary to establish what the illegal act was, what it consisted of and how it arose, and those points were dealt with in Mr. Ago's " preliminary point ". To that extent, therefore, he was fully in agreement with him and with certain other members of the Sub-Committee. Moreover, Mr. Briggs's views apparently did not differ very substantially from those of Mr. Ago. The latter agreed with Mr. Briggs that the matter could not be discussed in the abstract and that the basic characteristics of responsibility had to be deduced from the facts of international life, including cases relating to the treatment of aliens. Mr. Ago's paper should be regarded as a kind of table of contents; when the time came to fill in the details, the sections coming under the heading of Mr. Ago's preliminary point and first point, should explain in what way the international responsibility of a State which infringed an international obligation arose. In that way, it would be possible to reconcile the views of those members of the Commission who held that the substantive rules of responsibility could be deduced from a corpus of traditionnal international law and those like Mr. Yasseen who thought that that was no longer the proper approach. He did not think that even Mr. Yasseen would refuse to allow a reference to an arbitration case which had dealt, for instance, with an injury to an alien, if the reference was necessary in order to define what constituted an illegal international act.

Mr. YASSEEN said that it was perfectly natural to evolve a theory from its application in differing fields of human activity. But it would be wrong to generalize from a particular rule or to give the rule a scope which in reality it did not possess.

Mr. PAREDES said that it had not been his intention to introduce any innovation but rather to draw attention to changing circumstances in the modern world and to the practical consequences which would follow the adoption of his point of view. The various papers submitted had made it clear that the principles of State responsibility were not theoretical but could be applied in practice.

With regard to criminal responsibility, he still maintained that it should be understood in the broad sense it had acquired as a result of the creation of the League of Nations. It was only in a society organized as world society now was that the legal notion of responsibility could exist; it was only then that it was possible to establish legally the meaning of the rights and duties of States, which went far beyond the quite simple obligations created by treaty or custom.

Mr. de LUNA said that, as he had argued before, the problem should be considered in general terms: the substantive rules of international law should not be confused with those of State responsibility. Practice in so important a matter as diplomatic protection and the protection of the rights of aliens should, of course, be borne in mind, but the Commission

should not confine itself merely to that subject, when there were so many others which could give rise to State responsibility. For example, nuclear test explosions could pollute the atmosphere of the territory of States which had had no part whatever in the tests.

He did not think that there was anything to be gained by pursuing Mr. Yasseen's point; when the time came to apply the rules it would be necessary merely to say that an unlawful act had taken place, that a State had violated an obligation under international law and that as a result of that violation it was bound to provide some kind of redress.

The meeting rose at 12.25 p.m.

Summary record of the fourth meeting

(Wednesday, 9 January 1963, at 10.15 a.m.)

State responsibility (continued)

The CHAIRMAN invited the Sub-Committee to continue its debate on the treatment of the topic of State responsibility.

Mr. TUNKIN said that all were agreed that the increasing role of international law in international relations and its progressive development were of primary importance for assuring peaceful coexistence and eliminating the threat of war. That thesis had been repeatedly stressed in General Assembly resolutions during the past two or three years.

The principal objectives of international law were the consolidation of international peace and the development of friendly relations among States. An important branch of that law was that concerning State responsibility, which, in turn, could be divided into a number of sectors, distinguishable one from the other, for example, the responsibility of States for acts of aggression, on the one hand, and their responsibility for injuries to the person or property of aliens on the other. The question was: What particular rules governing State responsibility were most important for the cause of peace? If the Commission was not to shrink from its task, it certainly should not disregard, in its study of the topic, responsibility for the gravest violations of international law, such as acts of aggression, the refusal to grant independence to colonial peoples, and the violation of the sovereign rights of States.

Nevertheless, the Commission would first, both for reasons of method and for reasons of substance, have to consider the general principles of State responsibility. With respect to method, the Commissions's experience had shown that without the necessary study of the general principles of State responsibility it would be impossible to complete the study of any particular field of such responsibility. With respect to substance, it was necessary to take into consideration the new developments in international law in general, which had entirely transformed international law. Those developments had certainly had repercussions in the field of State responsibility, particularly with regard to the general principles governing that branch of international law. The Commission's decision to begin its work on State responsibility with a study of the general aspects of the topic was therefore a sound one, and the Sub-Committee should not deviate from it.

He agreed with those members who had suggested that the Commission should leave aside such problems as those relating to the responsibility of international organizations, as well as those relating to the responsibilities of individuals, as formulated in the so-called Nürnberg principles. Mr. Yasseen had suggested that the Commission's study should start with an inquiry into the general theory of State responsibility; but he preferred the expression " general principles ", which did not sound so abstract and purely academic as " general theory ". Moreover, in formulating the general principles of State responsibility, the Commission should, as Mr. Gros and Mr. de Luna had said, take into consideration the field of international law as a whole. In particular, he thought that, in the light of the new developments in international law of which he had spoken earlier, the Commission should consider the most important new subject — that of the responsibility of States for acts of aggression — which was not covered by the old international law concerning State responsibility. In addition, consideration should be given to the legal problems arising from the disintegration of the colonial system, from the acceptance of the principle of the sovereignty of States over their natural resources, which had also been referred to by Mr. Yasseen, and other problems.

Some members had suggested that State responsibility in international law was analogous to civil responsibility in municipal law. That idea had been predominant before the First World War and at the time of the League of Nations, but had not adequately reflected the realities of international life even then. It was significant that even those who asserted that State responsibility in international law came very close to responsibility in civil law admitted by way of exception that an international wrong could give rise not only to a claim for reparations but also to sanctions. Sanctions constituted the most important part of the modern international law of State responsibility, although fortunately they were less frequently resorted to than reparations. If it was agreed that the responsibility of a State in international law was broader than civil responsibility in municipal law, it was still questionable whether that extended responsibility could be described as criminal responsibility. He did not think that the analogy between municipal and international law could be carried so far.

Turning to the more immediate problem of drafting the instructions to be given to the future special rapporteur on the subject, he said that the outline set forth in Mr. Ago's working paper constituted a good basis for discussion. With regard to Mr. Ago's " preliminary point ", however, he considered that as the Commission under its terms of reference had to study the responsibility of States, reference to the responsibility of other subjects of international law should be omitted. With respect to paragraph 2 (*b*) of Mr. Ago's " first point ", concerning the subjective element, he suggested that the words concerning the " capacity " of a State to commit on international delinquency should be omitted. With respect to paragraph 4, concerning the circumstances in which an act was not wrongful, be doubted whether that paragraph properly reflected the modern international law. If a State, for example, acted in self-defence, it was not acting wrongfully, and hence the question of its responsibility did not arise at all in that case. With respect to paragraph 3 of Mr. Ago's " second point ", he would prefer the words " questions relating to war " to be deleted. He also recommended the deletion of the final reference in that paragraph to the United Nations system, since it presupposed a strict division, which was theoretically unfounded, between general international law and the so-called law of the United Nations. Reference should be made only to collective sanctions, which would certainly include those sanctions provided for in the United Nations Charter.

Mr. YASSEEN observed that, in employing the expression " general theory " of State responsibility, he had not meant to speak of abstract rules but rather to express the idea of a systematic and consolidated body of generally applicable rules.

Mr. GROS said that he was prepared to accept the outline proposed by Mr. Ago as a working basis for the Sub-Committee's discussions. It wat his impression that Mr. Tunkin wanted the Commission to study only those substantive rules of international law relating to State responsibility which happened to contain new elements not previously contained in international law. In his own opinion, general international law as a whole, its old as well as its new elements, was the source of all the rules which might be the cause of State responsibility. If, as Mr. Tunkin seemed to think, the Commission was to study only certain topics from the point of view of substance, he (Mr. Gros) would prefer that it should confine itself to the general aspects of State responsibility. It

was always necessary to keep separate the principles of substantive international law in general and those which concerned specifically the field of State responsibility. With respect to Mr. Tunkin's remark that State responsibility was not analogous to liability in private law, he throught that it would be very difficult to formulate international law while ignoring the general rules of comparative private law. International law was not a totally different technique from private law and it was impossible to regard it as an island by itself.

Mr. de LUNA, agreeing with Mr. Gros, said that many of the rules formulated in the course of the development of international law had had their origin in municipal law. The question how far the general rules of comparative private law should or should not be taken into account in cases involving the responsibility of the State would always have to be decided in the light of the particular circumstances.

Mr. BRIGGS said that at the previous meeting it had been suggested that a discussion of international standards in the administration of justice with respect to aliens would be entirely outside the field of State responsibility; at the present meeting, however, it had been asserted that a refusal to grant independence to colonial peoples would constitute a grave violation of the international law governing State responsibility. He could not understand why the latter topic was more appropriate to the Sub-Committee's discussion of general principles than the former. The Sub-Committee had been told that it should not go into questions of substance, but it was difficult to see how the Commission could deal with such new problems without referring to substantive law.

Mr. TUNKIN said, in reply to Mr. Gros, that he had not suggested that the traditional subjects of international law should be ignored. He had merely stressed the need not to lose sight of new developments in international law. Matters that were well-known and well defined were unlikely to be ignored but it was quite common to disregard new developments. That was particularly true in international law, which was evolving rapidly. New principles were emerging constantly; some had by now been well defined and had become established, but others were still in the process of formation. The Commission, while of course considering old-established principles, should not lose sight of those new developments.

Mr. Gros had rightly stressed the need to keep separate the principles of substantive international law from those which belonged specifically to the field of State responsibility. In that connexion, and referring to the remarks by Mr. Briggs, he said he had not suggested that the Commission should engage in a formulation of principles of substantive law. However, although the Commission was not called upon to formulate those principles, it would come into contact with them when studying the principles of State responsibility.

Reference had been made to analogies drawn from municipal law. International law naturally had some points in common with municipal law and therefore analogies with the latter should not be excluded altogether from the debate. It was, however, dangerous to introduce into international law notions drawn from municipal law. Certain outstanding jurists had in fact been led to totally unfounded conclusions by assuming that international law developed along the same lines as municipal law.

Mr. JIMENEZ de ARECHAGA noted that the majority of the members of the Sub-Committee favoured the priority suggested by the Chairman in his paper. Mr. Briggs, Mr. Tsuruoka and he (the speaker) were thus in the minority, and he thought it would not serve any useful purpose to continue the discussion on method. He would co-operate in the work of the Sub-Committee in accordance with the method which the majority preferred.

However, the views of the minority should be made known to the full Commission. Accordingly, the Sub-Committe's report should contain as annexes the summary records of its meetings and the working papers submitted to it; Mr. Tsuruoka's working paper was particularly significant in that respect.

He agreed to the suggestion that the Sub-Committee should consider in detail the various points of the plan formulated by the Chairman in his working paper.

The CHAIRMAN noted, at the end of the general discussion, that the Sub-Committee agreed that the work on State responsibility should be devoted to the general problems of the international responsibility of States. In a commentary it would be explained that the topic also covered such subjects of international law as, for instance, insurgents, which were generally assimilated to States. The question of the possible international responsibility of international organizations would be left out, as had been done by the Commission in connexion with other topics. International organizations were too recent a phenomenon and the question of a possible international responsibility by reason of alleged wrongful acts committed by such organizations was not suited to codification.

There was also general agreement within the Sub-Committee that the problems of State responsibility would alone be considered and that no attempt would be made to discuss and define certain principles of substantive international law, whether those principles related to old-established or to new areas of the law. Of course, all those substantive rules, and in particular the new rules, would have to be borne in mind in order to see whether they had any impact on the rules governing international responsibility.

Speaking as a member of the Sub-Committee, he agreed with Mr. Tunkin that it was unnecessary for the Commission to consider the somewhat theoretical problem whether the expression " criminal responsibility " could be used in connexion with States.

While agreeing that the use of the expression " criminal responsibility of States " should be avoided, he thought that certain realities should be borne in mind. The question arose in international law whether State responsibility did not involve something different from mere reparation. The main purpose of reparation was to re-establish a situation corresponding as far as possible to that which would have existed if the breach of international law had not been committed; it normally involved such remedies as restitution and compensation. International responsibility could, however, produce other consequences, sometimes called sanctions, the purpose of which went beyond the re-establishment of the situation that would have existed if the breach had not been committed. They had the clear character of a sanction, in that they possessed, like *poena*, an afflictive purpose.

If it were admitted that international responsibility could produce consequences of that kind, the further question would arise whether that was true of breaches of all international obligations or only of some of them. Another question to be determined was whether there was to be a choice between reparations and sanctions, and if so, who would be called upon to make that choice.

With regard to the plan put forward in his working paper, he agreed that war was outside the scope of the work of the Commission. He had included a reference to it in the plan only because some writers, e.g. Kelsen, had put forward the theory that war constituted a typical form of sanction for illicit acts in international law. If the members of the Sub-Committee unanimously agreed with him in rejecting that theory, the reference to war could certainly be avoided.

The meeting rose at 12.5 p.m.

Summary record of the fifth meeting

(Thursday, 10 January 1963, at 10 a.m.)

State responsibility (continued)

The CHAIRMAN invited the Sub-Committee to consider the outline set forth in his working paper (A/CN.4/SC.1/WP.6), paragraph by paragraph.

Preliminary point

The CHAIRMAN said that he had included a reference to the responsibility of subjects of international law other than States in order to recall that a decision should be taken as to whether the question of the possible responsibility of international organizations ought to be considered. If the Sub-Committee agreed that that question should be left out, the reference in question could be deleted.

Mr. YASSEEN said that the topic which the Commission had been asked to study was that of State responsibility. The possible responsibility of other subjects of international law was therefore outside the scope of the study.

The CHAIRMAN said that, if there was no objection, he would consider that the Sub-Committee agreed to delete the reference in question.

It was so agreed.

Mr. PAREDES said that the question of imputability should be regarded as a preliminary one. In that connexion, consideration should be given to the imputability to the State of unlawful acts committed with the intention of causing injury and also of acts of negligence; in addition, attention would have to be given to State responsibility in respect of certain circumstances which placed a State in a position to cause injury to other subjects of international law unintentionally and without the performance of an act on its part, e.g. in the case of unjust enrichment to the detriment of another State. Lastly, there were cases in which injury could be caused by the lawful exercise of a right in a way prejudicing the rights of others.

The CHAIRMAN pointed out that the matters to which Mr. Paredes referred were dealt with in paragraph 2 (*b*) of the outline, dealing with the subjective element in the determination of the component parts of an international wrongful act.

Mr. PAREDES thought that the consideration of the subjective element should precede that of the objective element.

The CHAIRMAN said that the question of the order in which the two problems were considered was perhaps not a vital one. On the whole, however, he considered that the study of the objective element, i.e. of the act which gave rise to international responsibility, should logically precede the study of the question of imputability.

Mr. TUNKIN sait that Mr. Paredes's approach would have been appropriate if the Commission's study related to international responsibility in general. However, under its terms of reference, the Commission's task was confined to the study of State responsibility. Since that topic did not embrace the whole field of international responsibility, there was therefore no need to make a preliminary study of imputability.

First point: origin of international responsibility

The CHAIRMAN said that paragraph (1) dealt with an international wrongful act. In his view, the question of reparation in respect of injury arising from lawful acts fell outside the scope of the subject of State responsibility. If the act which caused an injury was not unlawful, it did not give rise to international responsibility. There could well be injury resulting from such an act, and even a voluntary agreement to compensate for the damage, but there was no international responsibility in the true sense of the term.

He had included a reference to the problem of the abuse of rights because, if that concept were to be admitted in international law, then the abusive exercise of a right would constitute a breach of a rule of international law prohibiting the use of a right for the sole purpose of injuring another subject of international law. Responsibility arising from an abuse of right would in such a case originate in an unlawful act.

Mr. de LUNA recalled that, at the second meeting, he had raised the question of responsibility for lawful acts. In particular, he had drawn attention to acts committed in a state of necessity, which involved one of the consequences of responsibility, namely reparation.

Mr. YASSEEN said that it was hardly logical to say that a lawful act could give rise to responsibility. With reference to acts performed under the influence of a state of necessity, he said that such an act could on occasion give rise to State responsibility.

It would be desirable to make a thorough study of the matter in order to determine whether a state of necessity in fact had the effect of removing completely the wrongful nature of an act committed under such conditions.

It was perhaps pertinent in that connexion to recall that, in municipal criminal law, many authorities maintained that a state of necessity could not be pleaded in justification of the act committed; it merely constituted grounds for exoneration from punishment or for the mitigation of the penalty.

Paragraph (1) was approved.

The CHAIRMANN, inviting debate on paragraph 2(*a*), drew attention to the case of certain international obligations which required a State to observe a certain conduct. He mentioned as an example the obligation, laid down in the Vienna Convention on Diplomatic Relations, 1961, to exercise police surveillance in order to prevent attacks against an embassy.

In the case of an obligation of that type, international responsibility did not arise if the State failed to carry out its obligation, unless a further event, caused by the failure of the State, was also present. It was not enough that there should have been a failure in police surveillance; it was also necessary that some persons should have taken advantage of that lack of surveillance in order, for example, to attack the embassy concerned. Among other things, the point was of interest in regard to the determination of the *tempus commissi delicti*.

Mr. de LUNA said that a somewhat similar situation could arise in the event of the enactment of a law which conflicted with international law. The international responsibility of the State would ordinarily not be involved until the law was actually applied and caused an injury to an alien; but in some cases the enactment of a law contrary to international law engendered, without its actual application, an international responsibility because its promulgation by itself caused an injury to an alien, for instance a law devaluing his property.

Mr. GROS said that the discussion showed that in international law there existed some rules which imposed upon the State the obligation to perform some positive act, and other rules which imposed a more general obligation to observe a certain conduct.

The problem to which reference had been made could also arise in regard to the actions of the judiciary. An actual denial of justice would have to occur, affecting a definite person on a certain day, for State responsibility to be involved, even if the reason for the denial had existed on many other occasions but the denial had not in fact taken place. The discussion had drawn attention to the fact that, even if a State failed to observe its obligations, cases could exist in which no injury resulted from that failure and therefore the problem of responsibility did not arise.

Paragraph 2(a) was approved.

The CHAIRMAN invited the Sub-Committee to consider section 2(*b*) dealing with the subjective element. The question arose, in particular, whether reference should be made to the problem of the capacity of the State. He agreed with Mr. Tunkin that it was not desirable to stress the situation of dependent States, a situation which was fast disappearing. However, there still existed certain cases of trust territories. Undoubtedly the question arose whether such subjects had the capacity to commit breaches of international law. A number of writers (e.g. Verdross) [15] had drawn attention to the indirect or vicarious responsibility of the administering Power in respect of acts performed in the administered trust territory.

Another problem of a similar kind arose in connexion with military occupation. If the courts of the occupying Power

[15] Alfred Verdross: " Theorie der mittelbaren Staatenhaftung " in *Zeitschrift für öffentliches Recht*, 21 (1941), pp. 283-309.

committed a denial of justice, should responsibility for that denial of justice attach to the occupying or to the occupied State? A similar problem could also arise in other cases where one State exercised certain powers in the territory of another State with the consent of the latter.

Mr. TUNKIN said that an analogous problem had been discussed in connexion with the law of treaties during the recent session of the Commission. In particular, the problem could arise with regard to the responsibility of federal States. He preferred that no explicit reference should be made to the problem of the capacity of the State, which was reminiscent of colonial situations. The formula " questions relating to imputation " would seem to cover the whole subject.

The CHAIRMAN suggested that the reference to the problem of the capacity of the State should be replaced by a reference to the problems of indirect or vicarious responsibility.

Mr. de LUNA supported that suggestion, which would have the advantage of covering the problems of both active and passive situations.

The Chairman's suggestion was adopted.

Mr. BRIGGS suggested that in the English text of the third sub-paragraph the words " State responsibility for acts of private persons " should be replaced by " State responsibility in respect of acts of private persons ". That change would not affect the French original.

Mr. JIMENEZ de ARECHAGA said that it was perhaps not desirable to introduce a reference to the question of " fault " in the last sub-paragraph. The Chairman and Anzilotti had put forward two different views on the question whether, for purposes of international responsibility, there must have been fault on the part of the organ whose conduct was the subject of a complaint.

Undoubtedly the question was of great interest from a theoretical point of view, but in a codification which was intended to serve a practical purpose it was not desirable to stress it. In the *Corfu Channel* [16] case the International Court of Justice had not attempted to determine whether international responsibility originated in " fault " or in " risk ". The point had been referred to only in the dissenting opinion of one of the judges.

In the *Corfu Channel* case, the International Court of Justice had taken into consideration the influence which the control of a State over its territory had on the question of evidence. Accordingly, the Court had been content with circumstantial evidence.

For those reasons, he thought that the reference to " fault " should be deleted and a reference to the question of evidence of responsibility introduced.

The CHAIRMAN agreed on the desirability of including, at the appropriate place, a reference to the question of evidence of State responsibility.

However, so far as the fourth sub-paragraph of paragraph 2(b) was concerned, he thought that it should not be amended, for it left the question completely open. The passage in question did not suggest that the existence of " fault " was necessary for purposes of international responsibility. It merely indicated that the question whether or not " fault " must exist ought to be considered.

Many examples could be given demonstrating the need to consider that question. One example was that of an airplane which was forced by weather conditions to fly over the territory of a State, or even to land in that territory. The question certainly arose whether State responsibility existed in respect of such an unintentional breach of international law.

Mr. BRIGGS supported Mr. Jiménez de Aréchaga.

As long ago as 1929, Borchard had written: " On the Continent a very considerable literature has developed on the issue whether risk or fault underlies State responsibility in international law," adding, however, that those theories " apparently play little or no part in the determinations of international tribunals or in the work of Foreign Offices . . . International Courts and Foreign Offices do not profess to make any fundamental distinction between wrongful, though perhaps innocent and unintentional, invasion of an alien's rights, and 'fault' — the degree of wilfulness or negligence in the commission of the injury affecting mainly the measure of damages." [17]

Mr. de LUNA urged that the question whether " fault " was necessary for the purpose of establishing responsibility should be left open. The Commission should elucidate the question whether State responsibility on the basis of the theory of risk applied in international law. He considered that if responsibility in the absence of fault were thus to be admitted, very heavy burdens would be placed upon the State.

Mr. GROS pointed out that, with industrial development, an increasing number of situations arose in which a State could be held responsible for damage not attributable to a " fault ". For example, when a State constructed a dam on its territory, it engaged in a perfectly lawful activity. If the dam collapsed as a result of *force majeure*, no liability attached to that State under municipal law. However, the collapse of the dam could cause a flood, and hence damage by water, beyond the frontiers of the State concerned; in that event, the question would arise whether risk or fault underlay that State's responsibility in international law.

It was the duty of the Commission at least to consider the question.

The CHAIRMAN said that, at the time when Borchard had written the passage quoted by Mr. Briggs, the question of international responsibility had been envisaged chiefly in connexion with the responsibility of the State for the acts of private individuals.

Mr. JIMENEZ de ARECHAGA suggested that the last sub-paragraph be replaced by a passage along the following lines:

" Responsibility based on risk, responsibility connected with the objective breach of an international obligation, responsibility connected with 'fault' ".

Mr. YASSEEN objected that the inclusion of a reference to " risk " would prejudge the question whether the doctrine of risk applied in international law. There was considerable divergence among authorities on that point.

Mr. TUNKIN said that the first sentence of the passage proposed by Mr. Ago set forth the issue very clearly: " Must there be fault on the part of the organ whose conduct is the subject of a complaint? " International practice in the matter was not uniform and the Commission would probably be unable to adopt a uniform rule on that point.

He took the opportunity to draw the attention of the future special rapporteur to the fact that the question of responsibility arising from the uses of nuclear energy had been the subject of a number of draft conventions prepared by the International Atomic Energy Agency.

Mr. GROS urged that the formulation proposed in Mr. Ago's working paper for the last sub-paragraph of paragraph 2(*b*) should be retained. That formulation did not imply a choice as between the two opposing views on the question of " fault ".

Mr. JIMENEZ de ARECHAGA withdrew his suggestion. He could accept the Chairman's formulation, with the clarification resulting from the discussion.

The CHAIRMAN said that, if there was no objection, he would consider that paragraph 2(*b*) was approved with the changes made in the first and third sub-paragraphs.

It was so agreed.

The CHAIRMAN invited debate on paragraph 3 (the various kinds of violations). The problem there was what

[16] ICJ Reports, 1949.

[17] E.M. Borchard, " Theoretical aspects of the international responsibility of States ", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1929), Bd. I, T. 1, pp. 224-225.

practical consequences there might be and whether differences between one kind of violation and another were reflected in the reparation and in the determination of the *tempus commissi delicti.*

Paragraph 3 was approved.

The CHAIRMAN invited debate on paragraph 4 (circumstances in which an act is not wrongful). In that connexion he fully agreed that Mr. Tunkin was right from a theoretical point of view. A general right of self-defence was accepted in international law: but it had to be remembered that, under the United Nations system for example, recourse to force was not normally permitted, and accordingly it seemed to him that a special problem of self-defence as an excuse for contravening that rule might arise.

Mr. TUNKIN agreed that the problem of self-defence existed; under Article 51 of the Charter, for example, a State might even use military force for the purpose of defending itself. His doubts related to the manner in which the problem should be treated in the field of State responsibility.

Paragraph 4 was approved.

Second point: consequences of international responsibility

The CHAIRMAN suggested, in the light of Mr. Tunkin's comments on the title of the second point, that it might be altered to read " the forms of responsibility ".

It was so agreed.

The CHAIRMAN said he agreed with Mr. Tunkin that the words " The United Nations system " in paragraph 3 should be deleted. It had already been decided to delete the words " questions relating to war " in the same paragraph.

Mr. de LUNA said that armed reprisals were also forbidden under the Charter and he therefore suggested that the world " pacific " should be inserted before the word " reprisals ".

The CHAIRMAN considered that it would be better not to make such a change as it raised a question of substance.

There remained for consideration the question of proof and where a reference to it should be inserted in the outline. The Sub-Committee was concerned with the problem of proof solely in connexion with a wrongful act; it was a very important problem, covering e.g. proof of conduct, proof that the act had been committed by a particular organ of the government, proof that the organ in question had acted in certain given circumstances and proof of intention.

Mr. YASSEEN thought that the question of proof arose not only in connexion with State responsibility. Surely it was a general question of public international law?

Mr. TUNKIN agreed.

Mr. de LUNA shared the doubts expressed by previous speakers and drew attention to those cases in which an uneasy balance was struck between the notions or " fault " and " objective responsibility " and in which one had to be satisfied with *prima facie* evidence.

Mr. GROS said that he was impressed with the importance of questions of proof in connexion with responsibility; the Chairman's paper would surely be incomplete if that problem were to be omitted. A good deal of time was spent in commissions of inquiry, claims commissions and arbitration tribunals on determining the facts before studying the rights and wrongs of a case, e.g. in disputes between States arising from collisions on the high seas. There was no need to devote a lengthy chapter to the subject, but something should undoubtedly be said about the theory of proof; it could perhaps be inserted appropriately between paragraphs (3) and (4). On the other hand, if it was thought preferable not to mention it in the first report, it could be referred to in connexion with procedural machinery.

The CHAIRMAN said that the question of proof arose more particularly in connexion with two problems — the question of fault, and circumstances in which an act was not wrongful. It would be found that, whereas it was almost universally recognized that there was no wrongful act if there was a genuine state of necessity, it was invariably argued in particular cases that proof of the existence of such a state of necessity had not been produced.

Mr. YASSEEN said that he still thought that the Sub-Committee was not called upon at that stage to express any views on the question of proof. Proof was obviously required in order to set any sort of proceedings in motion, but that had nothing to do with the rules governing State responsibility.

Mr. JIMENEZ de ARECHAGA said that, when the rules of the territorial sea had been codified, many of the articles had been based on the judgements of the International Court, notably the decision in the *Anglo-Norwegian Fisheries* case.[18] He thought that, so far as questions of evidence or proof were concerned, the future special rapporteur on State responsibility could draw on the Court's judgement in the *Corfu Channel* case, in which it would be found that the Court had established a close connexion between the substantive problem and the question of proof. Proof was of decisive importance in questions of responsibility since it was always difficult for the injured party to produce evidence.

In preparing a working plan such as the one the Sub-Committee was discussing, it was always better to cover the whole field. It could be left to the special rapporteur to decide whether proof should be dealt with in a later report.

Mr. TUNKIN said that there were, after all, many problems which were closely connected with those before the Sub-Committee; for example, there was the question of the sources of international law. In his view, it would be somewhat premature to refer to the problem of proof in the outline under discussion.

The CHAIRMAN suggested that the Sub-Committee might make some kind of recommendation to the future special rapporteur, in which it would draw attention to the great importance of proof in international practice and leave it to the special rapporteur to decide, when preparing his report, whether he should mention the problem of proof in connexion with one or two particular chapters or whether he should devote a separate chapter to it. It was important however that the Sub-Committee should not go beyond a simple recommendation to that effect.

It was so agreed.

The meeting rose at 12.15 p.m.

APPENDIX II

Memoranda submitted by members of the Sub-Committee on State Responsibility

THE DUTY TO COMPENSATE FOR THE NATIONALIZATION OF FOREIGN PROPERTY

submitted by Mr. E. Jiménez de Aréchaga [1]

The purpose of the present working-paper is to examine the general rules of international law which, in the absence of specific treaties, govern the international obligations arising for a State as a consequence of measures of nationalization affecting the property owned by foreign States, foreign individuals or foreign companies.

The present paper is divided into three parts, as follows:

(i) a critical examination of various positions advanced and taken by Governments on this question;

(ii) a discussion of the legal foundations which may serve as the basis for the positions taken on this matter; and

(iii) conclusions.

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[18] ICJ Reports 1951.

[1] Originally circulated as mimeographed document. ILC/(XIV)/SC.1/WP.1.

Part I

(1) *The claim for adequate, prompt and effective compensation*

1. One position on the question under consideration is that general international law requires the State which has taken measures of nationalization affecting properties owned by foreigners to accompany such measures by adequate, prompt and effective compensation. Such was, for instance, the position firmly maintained by the United States in the diplomatic discussions which took place with Mexico concerning the measures of nationalization of land and oil properties adopted by the latter country.

2. The main criticism levelled against this requirement of prompt and adequate compensation is that, although it may be applicable to individual expropriations, it would make it impossible to adopt basic reforms or to take nationalization measures in a wide scale and of a general and impersonal character. The Government of Mexico stated in its reply to the United States that " the transformation of a country, that is to say, the future of the nation, could not be halted by the impossibility of paying immediately the value of the properties belonging to a small number of foreigners who seek only a lucrative end ".[2]

3. In some academic circles in the United States, an alternative has been proposed to the requirement of prompt compensation. The 1961 Harvard Research draft convention on the responsibility of States for damage caused to the person or property of foreigners proposes, according to the traditional view in that country, that compensation must be prompt, adequate and effective. However, the draft admits that if property is taken by a State in furtherance of a general programme of economic and social reform, the just compensation may be paid over a reasonable period of years, in the form of bonds bearing a reasonable rate of interest.[3]

4. The practice of States confirms that, in the case of nationalization, the payment of deferred compensation has been offered and accepted, even by countries supporting the traditional doctrine under consideration. France and Great Britain, for instance, have paid compensation for the measures of nationalization of banks, airlines, insurance companies, transportation and steel and coal industries in the form of bonds redeemable, over a number of years, bearing a 3 per cent interest. This formula was accepted by States whose nationals were affected by such nationalization measures, such as Switzerland, United States and Belgium.[4] In the Anglo-Iranian oil case, the United Kingdom admitted before the Court that the payment of compensation might be made over a number of years.[5]

(2) *The thesis of the equality of nationals and foreigners*

5. In the diplomatic controversy between the United States and Mexico mentioned above, Mexico took the view that, because of the complete equality between foreigners and nationals, the former could not claim compensation when it was not paid to the nationals affected.

" The foreigner who voluntarily moves to a country which is not his own, in search of a personal benefit, accepts in advance, together with the advantages which he is going to enjoy, the risks to which he may find himself exposed. It would be unjust that he should aspire to a privileged position safe from any risk, but availing himself, on the other hand, of the effort of the nationals which must be to the benefit of the collectivity ".[6]

6. This is the thesis which the Argentine international lawyer Podestá Costa has called the " community of fortune ": " the foreigner who participates in the material and moral alternatives of the place where he finds himself enjoys its benefits and cannot escape its inconveniences ".[7] It has been observed in support of this view that in most cases the foreign capital invested in an under-developed country, while exposed to greater risks, also obtains higher profits.

7. According to this doctrine, when an expropriation or nationalization measure affects adversely the rights of foreign subjects, those foreigners would possess no specific claim to compensation, other than that which may be recognized with respect to nationals, such as the ordinary remedies conferred by municipal law before national tribunals. The responsibility of the State would only exist if there has been discrimination against the foreigners as such, because of xenophobic feelings or similar reasons.

8. In the above mentioned controversy with Mexico, the United States objected to the extent to which an extreme application of this doctrine of equality of nationals and foreigners might lead, stating: " It is contended, in a word, that it is wholly justifiable to deprive an individual of his rights if all other persons are equally deprived, and if no victim is allowed to escape ".[8] For these reasons, it sustained the view that a minimum standard of treatment for the foreigner should exist, which it would not be legitimate to affect. Where such a minimum standard is not respected, a responsibility would arise for the State which has taken the measures of expropriation or nationalization: " when aliens are admitted into a country, the country is obligated to accord them that degree of protection of life and property consistent with the standards of justice recognized by the law of nations ".[9]

9. The United States jurist Borchard argued against the theory of the community of fortune, pointing out that the equality of treatment for foreigners and nationals would be justified if they possessed exactly the same rights, but in fact foreigners are as a rule deprived of political rights, and as such they cannot influence the measures adopted by the Government, whereas nationals have such means of exerting influence on their Governments.

10. This argument seems to have inspired the following statement made by the Government of the United States when it protested in 1953 against what was termed as inadequate compensation for measures of nationalization adopted by the Government of Guatemala: " International law does not authorize States to do any and every act, so long as such act is imposed on nationals and foreigners on a basis of equality or without discrimination. What a State may do with respect to its nationals or their property is a matter largely between that State and its nationals, for the reason that nationals of a State are presumed to be able to take corrective measures looking to the protection of their rights ".[10]

11. According to the doctrine of complete equality of treatment, the foreign subjects may be totally deprived of protection if the municipal law denies any right of compensation to nationals. Now, the question under consideration is whether there is an international law obligation to compensate for the taking of foreign-owned property. If such an obligation exists, it is obvious that it cannot be disregarded by the unilateral act of a State which under its municipal law denies compensation to its nationals.

12. The Permanent Court of International Justice has stated that a measure against foreign owners which is not authorized by international law cannot become lawful by reason of the fact that the State applies it to its own nationals. In the case concerning certain German interests in Polish

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[2] Note from Eduardo Hay, Foreign Minister of Mexico, dated 3 August 1938, International Conciliation, No. 345, p. 527.

[3] See text of the draft convention in *American Journal of International Law*, July 1961, p. 545. For the rule referred to in the text and the corresponding comment, see pp. 553-563.

[4] Foighel, " Nationalization ", 1957, pp. 120-123.

[5] I.C.J. Reports, 1952, p. 106.

[6] Publication referred to in footnote 2 above, p. 529.

[7] Podestá Costa, *La Responsabilidad International del Estado*, Havana Academy of International Law, vol. 11, p. 207.

[8] Publication referred to in footnote 2 above, p. 541.

[9] *Ibid.*, p. 542.

[10] U.S. *Department of State Bulletin*, 1953, vol. 29, p. 358.

Upper Silesia it decided: " as regards the Polish submission, the Court . . . cannot attach to the fact that articles 2 and 5 of the law of July 14th, 1920, apply to a certain class of property, no matter what the nationality of the owners may be, the importance and effect which are attributed to that fact by Poland. Even if it were proved — a point which the Court does not think it necessary to consider — that, in actual fact, the law applies equally to Polish and German nationals, it would by no means follow that the abrogation of private rights effected by it in respect of German nationals would not be contrary to Heading III of the Geneva Convention. Expropriation without indemnity is certainly contrary to Heading III of the Convention: and a measure prohibited by the Convention cannot become lawful under this instrument by reason of the fact that the State applies it to its own nationals ".[11] It is true that this judgement refers to an expropriation prohibited by a special treaty, but the argument of the Court would be equally applicable to any obligation arising from the exercise of the right to expropriate or nationalize, as for instance, a duty to compensate, which may result from general international law.[12]

13. The doctrine of the equality of nationals and foreigners has not been followed in the recent practice of States. Even those States which have gone further in their nationalization policies, to the extent of denying a right to full compensation to the affected nationals, have discriminated in favour of foreign-owned property, and their own nationalization laws admit the possibility of a greater protection for this foreign property. In France, which recognizes with respect to nationals affected a right to compensation, it was stated during the discussions of the 1945 nationalization laws, that the Government was prepared to grant higher compensation for the property owned by foreigners.[13]

(3) *The thesis that no compensation is due and its practical application*

14. The Government of Mexico, in the above referred diplomatic controversy with the United States also held that " there is in international law no rule universally accepted in theory nor carried out in practice, which makes obligatory the payment of immediate compensation, nor even of deferred compensation, for expropriations of a general and impersonal character like those which Mexico has carried out for the purpose of redistribution of the land ".[14]

15. A similar position had been taken by the Soviet Union at the Genoa Conference, where their representatives stated that the USSR " cannot be forced to assume any responsibility toward foreign Powers and their nationals .... for the nationalization of private property ".[15]

16. In a recent book on the subject of nationalizations, by Konst. Katzarov, this position is justified on the ground that " integral nationalization leads in fact to the reparation of an injustice, and to the restitution in favour of the collectivity of what belongs to it, and therefore, it is not to be expected that the former owners should be indemnified." [16]

17. However, this author, when examining the laws and practice followed on this matter by several communist States points out that " many recent laws relating to nationalization shows a tendency to look for a compromise .... in the sense that they reserve the possibility of granting a freely negotiated indemnity. In acting in such a way, the conflicts which arise between the conception of the nationalizing State and the conceptions of the States interested in such a measure and affected by it, have been taken into account. . . . This has an importance of principle in connexion with the legitimation of the nationalization in International Law and indicates the desire felt by the nationalizing States of not coming in conflict against the international 'ordre public'. It is on this juridical basis that all the international agreements concerning the settlement of indemnities have been concluded. In all these cases, the indemnity has been determined independently of the level of indemnities of municipal law, and it is habitually a higher one. The negotiation, in those international agreements, of a superior compensation is not — or does not represent only — an economic or political compromise, but is founded on the concrete provisions of the laws establishing the nationalization ".[17]

18. This writer adds: " those special provisions in the laws try precisely to make it possible to discuss the amount of the indemnities in the framework of international relations, in order to adapt the nationalization to the international 'ordre public': the legislator seems to have understood that it could not participate in an international discussion invoking as the only argument its sovereign estimation of the indemnity and the denial of judicial control ".[18]

19. Finally, this writer states that " the possibility of solving the questions arising from nationalizations lies in the conclusion of an agreement between the nationalizing State and the States whose subjects are affected by the nationalization. From here it results that the procedure relating to this settlement is transformed into a State-to-State question. In the majority of cases it is in this way that have been settled after the Second World War the relations established by the nationalizations with foreign subjects. A State may always claim that the rules of international law are observed with respect to its subjects, and, in particular, that the right to an appropriate indemnization be recognized in case of nationalization. The evolution of international life leads to more and more frequent use of the negotiation between States of a global compensation, and the hope is often expressed that this procedure should be improved." [19]

(4) *The global compensation agreements*

20. Since the Second World War it has become a widespread practice to settle the international questions arising from nationalization measures in global compensation agreements, the so-called " lump-sum " agreements, of which there had also been some examples in the past.[20] Through these agreements, the State which has adopted nationalization measures pays a global amount as compensation to the State of nationality of the affected owners of nationalized property. In order to determine the amount of compensation, account is taken, totally or partially, of the different individual claims arising on the same grounds, i.e. the nationalization measures, although such claims are presented jointly by the claimant State. This State, as a " quid-pro-quo " of the compensation received, declares in its own name and in that of its nationals that all claims which may arise from such nationalization measures become extinguished or cancelled.

21. These agreements do not provide in all cases for full or even adequate compensation and often they only represent a percentage of the existing claims.[21] Very often such " en bloc " agreements allow for the indemnization being paid over

[11] Series A, No. 7, pp. 32-33.
[12] Schwarzenberger, *International Law*, vol. I, third ed. pp. 206-74.
[13] Foighel, *op. cit.*, p. 60.
[14] Publication cited in footnote 2, p. 527.
[15] Reply of the USSR delegation to memorandum of 2 May 1922, Saxon Mills, *The Genoa Conference*, p. 409.
[16] Konst Katzarov. *Théorie de la Nationalisation*, Neuchâtel, 1960, p. 421.
[17] Katzarov, *op. cit.*, p. 438.
[18] *Op. cit.*, p. 452.
[19] *Op. cit.*, pp. 453, 455, 456.
[20] See Whiteman, *Damages in International Law*, vol. III, p. 2068 and Christensen in *American Journal of International Law*, 1961, pp. 617-8.
[21] See Christensen, *op cit.*, p. 622 and Foighel, *op. cit.*, p. 117; Asian-African Legal Consultative Committee, Report of the fourth session, pp 142-143.

a number of years.[22] Finally, consideration may be taken of the financial capacity of the indemnifying State: for that purpose, they may be accompanied by the granting of credits or by commercial agreements designed to make it possible for the indemnifying State to meet the agreed payments.

22. The State receiving the global compensation may or may not distribute it among the affected individuals or companies " pro-rata " of the values received. In the first case, it is necessary for the damaged parties to submit their individual claims for consideration to organs set up under the municipal law of the State of their nationality.

23. A pre-war example of this type of direct agreements between States settling claims of their nationals for nationalization measures, was the Litvinov assignment, executed in 1933 between the President Roosevelt of the United States and the Soviet Foreign Minister Litvinov. By this agreement, the Soviet Union assigned to the United States, " the amounts admitted to be due or that may be found to be due (to the Government of the Soviet Union), as the successor of prior governments of Russia or otherwise, from American nationals, including corporations, companies, partnerships or associations, and also the claim of the Russian Volunteer Fleet ", as " preparatory to a final settlement of the claims and counterclaims between the Government of USSR and the USA and the claims of their nationals ".[23] It is interesting to note that before 1933, the USSR had accepted, with respect to other States, point 3 of the Cannes Declaration providing for compensation to foreign interests for loss or damage caused to them by nationalization measures.[24]

24. Mexico also reached global compensation agreements with the United States in 1943 [25] and with the United Kingdom and the Netherlands [26] in respect of the nationalization of land and of oil investments.

25. After the Second World War such global compensation agreements have been generalized, and the following examples may be indicated: United States with Yugoslavia (1948), Italy (1948), Czechoslovakia (1946), Poland (1946 and 1960) and Romania (1960); Switzerland with Yugoslavia (1948), Poland (1949), Czechoslovakia (1946, 1947 and 1949), France (1949), Hungary (1950), Romania (1951), Bulgaria (1955); France with Czechoslovakia (1950), Hungary (1950), Poland (1948), Yugoslavia (1951) and Bulgaria; Great Britain with Yugoslavia (1948 and 1949), France (1951), Poland (1948 and 1954), Czechoslovakia (1949 and 1956), Hungary (1954, 1956 and 1959), Bulgaria (1955) and Romania (1961); Sweden with Hungary (1946), Czechoslovakia (1947 and 1956), Yugoslavia (1947), Poland (1949), Hungary (1951) and Bulgaria; Belgium with Poland (1948), France (1949), Czechoslovakia (1947 and 1952) and Hungary (1955); Denmark with Poland (1947, 1949 and 1953); Norway with Bulgaria (1955) and Poland (1948 and 1955); the Netherlands with Czechoslovakia (1949); Turkey with Yugoslavia (1950); Canada with France (1951).[27]

26. Even certain States whose economic policy is based on the national ownership of all the means of production and which have taken wide nationalization measures, have made and accepted " *inter se* " claims for compensation in respect of properties belonging to their nationals which had been nationalized in other countries appyling the same economic policies. Thus on 29 March 1958, an agreement was signed between Poland and Czechoslovakia in which both parties declare " settled as well as liquidated all monetary claims and other proprietary obligations of the legal subjects of one contracting party towards the ... other contracting party ". Such settlement includes " all obligations of the Polish State in connexion with claims which arise out of measures taken up pursuant to Polish nationalization, expropriation or any other legal provision depriving of or restricting rights of ownership by which Czechoslovak properties, rights and interests on the present territory of the Polish People's Republic were affected ". A reciprocal provision makes the same settlement for Polish properties nationalized in Czechoslovakia. A similar treaty, dated 11 February 1956, was entered into between Yugoslavia and Czechoslovakia, providing: " By this treaty are also settled and liquidated: (*a*) all obligations of the Czechoslovak State in connexion with claims arising out of Czechoslovak measures of nationalization, expropriation or other measures limiting or depriving of rights of ownership to which Yugoslav properties, rights and interests were subjected in Czechoslovakia up to the day of the signature of this treaty." A reciprocal provision makes the same settlement for Czechoslovak properties nationalized in Yugoslavia. And on 24 March 1961 a treaty between Czechoslovakia and Romania for the settlement of outstanding financial and property questions was ratified. This treaty liquidates and settles " monetary and all other claims of ... Czechoslovak legal and physical persons against the Romanian State ", as all analogous Romanian claims against Czechoslovakia [28].

27. These treaties also adopt, in most other essential points, the traditional rules as to nationality of claimants and the relevant dates of the measures of dispossession and even the drafting technique is very similar to that of the lump-sum agreements. The treaties referred to in the preceding paragraph imply the recognition by the signatory States of the fact that the nationalization measures they have adopted, affecting foreign owners, give rise to a legal obligation to compensate. The obligation to pay compensation is confirmed by such treaties because they expressly speak of " claims arising out of measures of nationalization ". The fact that both contracting parties waive their mutual claims for compensation only reaffirms this principle. Such mutual waiver is nothing else but another type of the global settlement which has become so customary since 1945 [29].

28. All the above-mentioned " en bloc " compensation-agreements, taken together, constitute a recognition by the various legal systems of the civilized world that the State which nationalizes foreign-owned property has, under general international law, a duty to compensate the State of nationality of those foreign owners. The amount and appropriateness of such compensation cannot, however, be established on the basis of those treaties, for most of them constitute compromise settlements. This duty to compensate has been recognized and executed by the States involved in these questions, whatever may have been the position initially adopted with respect to the existence or non-existence of such a legal obligation.

29. The social and economic basis of this legal duty is obvious and it explains the different treatment given in practice to nationals and to foreigners. The mutual interest in the re-establishment of normal currents of international trade is a strong incentive for States to reach compensation agreements, as soon as the friction originated by the adoption of the

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[22] The agreement between Poland and the United States provided for the payment of $40 millions in 20 annual instalments from 1961. Rode, in *American Journal of International Law*, 1961, p. 455.

[23] *American Journal of International Law*, 1934, Supp. p. 10.

[24] The USSR acceptance of point 3 of the Cannes Declaration and the text of the Declaration itself are recorded in Saxon Mills, *The Genoa Conference*, p. 409 *et seq.*

[25] U.S. *Department of State Bulletin*, 1943, p. 230.

[26] United Nations *Treaty Series*, vol. 3, p. 13 and vol. 6, p. 55.

[27] A list of the agreements made until 1957 appears in Foighel, *op. cit.*, pp. 132-133. For a more up-to-date list, see G. White, *Nationalization of Foreign Property*, London, 1961, p. XIX to XXV. The United States is presently negotiating agreements with Czechoslovakia and Bulgaria: *American Journal of International Law* 1961, p. 619.

[28] Drucker, *International and Comparative Law Quarterly*, vol. 10, April 1961, pp. 246-250 and Oct. 1961, pp. 904, 907. See also United Nations *Treaty Series*, vol. 112. p. 91, for a previous agreement.

[29] Drucker, *loc. cit.*, pp. 251 and 907.

measures is overcome and the positions of principle publicly taken by the Foreign Offices have been forgotten. Capital exporting countries have an obvious interest in favouring a rule of law which protects, at least to a certain extent, their own interests and those of its nationals abroad. And with regard to under-developed countries, although a first reaction might be to deny such an obligation, a more intelligent consideration of their long-range interests soon convinces them of the desirability to recognize and support such a rule, because there is a very strong possibility that, in its absence, the foreign investments which these countries need for their economic development would not be made, at least in the same volume or at the same rate of interest. For such reasons, the rule that the nationalization of foreign-owned property implies a duty to compensate operates in the well-understood self-interest of all States.

30. In the second part of this paper, an examination will be made of the legal foundation of this international obligation. Such an examination might provide useful indications as to the scope, measure and effectiveness of the duty to compensate.

Part II

(1) *The legal basis for the claim to adequate, prompt and effective compensation*

31. The doctrine which asserts the existence of an obligation under international law to make prompt, adequate and effective compensation, is based on the principle of respect for acquired rights, in general, and for private property, in particular. However, in asserting the legal authority of those principles, a confusion is often made. Which acquired rights of private property are referred to? Those recognized and protected by the internal law of the State? If such is the case, then this is not sufficient ground for an international law obligation, since rights granted or protected by municipal law may be modified or suppressed by it without any international responsibility being incurred.

32. In order to prove the existence of an international obligation it would be necessary to demonstrate the existence of a rule of international law which would guarantee, in every State, and against any State, the respect for the acquired right of private property. Such demonstration is intended by the British Professor Wortley, who states:

" The answer to the difficulty would seem to be that what is compensated is the right protected by international law and not that protected by national law. International law has an objective standard of valuation. It is not the right which the 'lex-situs' gives that is compensated, but, it is submitted, the right which, being lawfully acquired, was, until the nationalization, protected by the 'lex-situs'. If the right of property is created by the State, then it can be freely modified or abolished by its creator, if he has not bound himself by special treaty. But if the thesis here maintained is exact, namely, that a right of property is not so much created, as protected by the State as part of its task in securing the rule of law by the administration of justice, then the theory of acquired rights is not 'inexact' or 'erroneous'. If a function of the State, as the present writer has argued, is to protect the property of those subject to its jurisdiction, a right which is recognized in international law, then the claim to seize property for less than its value needs some explanation beyond the mere use of power ".[30]

33. This attempt of justification is clearly unsatisfactory and it does not demonstrate the existence of an international law obligation. Whatever is the political and economic doctrine which may be preferred, to assert that one of the functions of the State is " to protect the property of those subject to its jurisdiction ", obviously does not correspond to present realities, since an important group of States deny the right of ownership over the means of production to individuals and private corporations. It cannot be said either that there is an agreement or understanding among States to support such form of property. On the contrary, the Cannes declaration clearly stated as an international law rule that " Nations can claim no right to dictate to each other regarding the principles on which they are to regulate their system of ownership, internal economy and government. It is for every nation to choose for itself the system which it prefers in this respect " [31].

34. A second attempt at justification is to assert that the right of private property for individuals and corporations is a general principle of law recognized by civilized nations and, as such, that it has validity in international law. This is the position taken by the Swiss writer Bindschedler who states: " the institution of private property is universally recognized, not only at the international level, but also in the municipal law systems. The great majority of modern Constitutions recognize it expressly. This is the case even in the Constitution of communist States. Of course, the scope of the right of private property is different in States of capitalist structure than in those of communist social structure: in the latter, the goods which are susceptible of appropriation by individuals are strictly delimited; means of production are excluded from the system of private property and the legal protection does not encompass them " [32]. But this is precisely the question, since the problems of compensation arise mostly with respect to the nationalization of the means of production.

35. The right of private ownership cannot be considered today as a general principle of law recognized in the domestic forum by all civilized States. A cursory glance at comparative law on the question shows that such a principle has no longer that degree of generality which is required to constitute an international law rule. It is true that some statements by judicial or arbitral organs may be invoked in support of the rule [33], but, as Foighel points out, the decisions in question were made in and belong to a period when liberal economy was the only recognized economic system in the leading States. Respect for vested rights in municipal law, and the uniformity of the economic systems of the leading countries in so far as their views of private property were concerned, were simply the pre-condition for the assumption of the existence in international law of a maximum of protection for vested rights [34].

36. Today it is necessary to take into account the existence of different economic systems, not in order to deny an obligation to compensate, which as pointed out previously, continues to be valid, but in respect to the legal foundation of such an obligation. In this connexion the criticism made in 1960 by the USSR jurist, Professor Tunkin, on the Harvard Draft is justified, when he observed that: " the provisions of the Draft relating to property were formulated in disregard of the fact that two fundamentally different economic systems now existed in the world. . . . For example, paragraph 2, art. 10 (taking and deprivation of use or enjoyment of property), which laid down certain standards for compensation, in effect reproduced the corresponding provisions of the Code Napoleon of 1804 in its concern for the sanctity of private property. While such provisions might still exist in the municipal law of some countries, it was absolutely inadmissible in view

[30] Wortley, B. A. *Expropriation in Public International Law*, 1959, p. 126.

[31] Saxon Mills, *op. cit.*, p. 12.

[32] Bindschedler, " La protection de la propriété privée en Droit International Public " *Recueil des Cours de l'Académie de Droit International*, vol. 90, pp. 198-9.

[33] The Permanent Court of International Justice stated " the principles of respect of acquired rights is a part of general international law " (Series A, No. 7, p. 30). See also *Reports of International Arbitral Awards* (R.I.A.A.), published by the United Nations, vol. II, p. 909, arbitral decision of 27 September 1928, Goldenberg v. Romania.

[34] Foighel, *op. cit.*, p. 53.

of the coexistence of two economic systems, to postulate the principle as a rule of international law." [35]

(2) *Maintenance of the same legal basis on a more restricted geographical scope*

37. In view of the impossibility of basing the rule on a general principle of law recognized by every civilized State, the attempt has been made to circumscribe that foundation of the rule, and the rule itself, to the relations amongst sharing a similar system of respect for private property. Bindschedler says: " The principle of protection of foreign properties was born in a world in which private relations, and the flow of men and capitals, constituted an essential of international relations: such a movement is not possible except with the guarantees and good faith of the interested Governments. Autarchic States, or those which tend to autarchy, such as the Soviet Union and its satellites, as well as other States where an exacerbated nationalism is in force, may disregard those points of view; or rather, such points of view are determining their actions, since their objective is precisely to exclude foreign investments and limit relations with foreigners to official relations. Their denial of the principle of protection for private property does not originate in general consequences before which they withdrew. But the negative conception of those States which, to a certain extent, withdraw themselves from the international society cannot have effect, in those domains in which they cease to cooperate, on the development of the law which regulates the relations in the interior of that same open international society ".[36]

38. However, this attempt at segregating a particular section of the international community where the duty to compensate for the nationalization of foreign-owned property would continue to be in force, on the ground of respect for private property, does not correspond to reality and is devoid of any practical interest.

39. As previously indicated, even those States which do not admit the private ownership of the means of production, have recognized in practice a duty to compensate for the nationalization of foreign property, not only in their relations with " capitalist " States, but also in their mutual relations. This shows that it continues to be necessary to find a legal foundation for the existing rules which would apply to all States, in accordance with general international law. It does not correspond to fact to say either that communist States withdraw from the inter-State economic community or from international trade or that they refuse radically to make or accept foreign investments.

40. Furthermore, such an attempt to restrict the foundation of the rule, and thereby, the rule itself, to a limited group of States sharing the same economic system, deprives such rule of any practical interest and turns the duty under examination into a potestative one. If such a rule became inapplicable to those States denying the private ownership of the means of production, a safety-value would be open for any Government wishing to evade the obligations here examined. It would be sufficient for that purpose to state the nationalization measures are adopted in furtherance of an economic policy which rejects the private ownership of the means of production.

(3) *The principle of unjust enrichment as the legal foundation of the obligation to compensate*

41. The preceding discussion leads to the inescapable conclusion that it is necessary to find a different legal foundation for the obligation to compensate for large-scale nationalizations affecting foreign-owned property. Contemporary international practice shows also that the claiming State, when formulating its claims, when reaching global compensation agreements and waiving rights or claims of its nationals, is in fact exercising powers of its own, and is not acting as mere representative or " diplomatic protector " of claims and interests of its nationals. States have attributed themselves large powers of disposition and settlement with respect to individual claims, relegating to a later stage, governed by municipal law, the distribution of any funds which may be obtained in the compensation agreements as " quid pro quo " for the cancellation of the individual claims. Under municipal law, it is even conceivable that no distribution is made to the affected individuals or companies, without any responsibility being incurred thereby under international law. This confirms that a substantial modification of the traditional principles concerning diplomatic protection and the international responsibility of States for the taking of foreign-owned property, has taken place in connexion with large-scale nationalization measures, and also indicates that the rules in force must be grounded on different principles.

42. The principle which may constitute the legal foundation of the conduct of States in this matter is the principle of unjust enrichment. If no compensation was granted, then the nationalizing State would be enriching itself unjustly, not so much at the expense of foreign individuals or companies, but really at the expense of a foreign State considered as a whole and as another and different political and economic unity. Through the unilateral exercise of its sovereign power to nationalize, a State would be depriving a foreign community of the wealth represented by the investments made and thereby would be taking undue advantage of the fact that economic resources proceeding from another State had penetrated its territorial sphere.

43. This legal foundation of the international duty to compensate for the nationalization of foreign-owned property may have important repercussions on the " quantum " of the compensation due. The extent and scope of compensation would be determined by the enrichment obtained by the nationalizing State rather than measured, as it is traditionally done now, by the loss or impoverishment suffered by the affected foreign individual.[37] It might become legitimate to take into account whether and in what measure the nationalized properties represent additional assets for the economy of the nationalizing State.

44. Considerations of such a nature seem to have been taken into account in the negotiation of global compensation agreements. The statement of the Swiss Federal Council relative to the agreement with Poland dated 25 June 1949, which provides the best account yet published of negotiations leading to this type of agreement, declares that Poland acknowledged her duty to pay compensation for the nationalized property of aliens but that she attached a limitation to this duty: compensation was to be paid only for those investments which had benefited the Polish economy. The Swiss report implies that in the end the valuation of nationalized Swiss property was based on the value which any particular asset had for the Polish State.[38] It may be considered that these reasons also explain why compensation is denied for " goodwill " or " business reputation ", since this element normally does not constitute an enrichment for the State in a nationalized economy. There is a complete absence of any reference to goodwill or business reputation in any of the post-war compensation agreements.[39] By the same token, " lucrum cessans " or the loss of future profits of an enterprise is not included in the compensation.[40] Likewise, the measures which originate a duty to compensate are those which determine a transfer of rights or interests in favour of the nationalizing State or any of its agencies. As Bindschedler indicates, measures

[35] *Yearbook of the International Law Commission*, 1960, vol. I, 568th meeting, para. 42.

[36] *Op. cit.*, pp. 198-9.

[37] *Legal Aspects of Foreign Investment*, Friedmann and Pugh, editors, Chapter 41, by A.A. Fatouros, pp. 723 and 729.

[38] G. White, *Nationalization of Foreign Property*, London, 1961, pp. 223-224

[39] White, *op cit.*, p. 49.

[40] Bindschedler, *op. cit.*, p. 247 and note.

such as the suppression of slavery of the total suppression, for reasons of general policy, of a detrimental or inconvenient industrial or commercial activity, are not subject to compensation. The reason may well be that in those cases no enrichment is gained by the State, although a loss may be incurred by the foreign owner.[41]

45. The fact of basing the duty to compensate on the principle of unjust enrichment also explains some of the solutions adopted in the global compensation agreements concerning the effectiveness of the payment. Effectiveness refers to the possibility of the immediate utilization of the indemnity. With respect to the possibility of the free transfer of any funds abroad, most global compensation agreements deal differently with those cases in which the nationalized funds have originated in a foreign State, and those in which the foreigner acquired the funds in the country, by succession or marriage, for instance.[42] In the Netherlands-Czechoslovakia agreement of 4 November 1949, the compensation was transferable into Netherlands currency to the extent to which the nationalized property represented a capital increment to the Czechoslovak Republic, a provision which occurs in several of these agreements.[43] A capital increment was taken to mean any investment made by a Netherlands subject through the transfer of gold, guilders or other foreign exchange which was freely convertible at the time of transfer, and accumulated profits arising from such investments. Movable property introduced into Czechoslovakia also constituted a capital increment. In general, payment in the currency of the claimant State was granted only where it was considered by the nationalizing State that a comparable benefit had accrued to them at the time of the original investment.[44]

(4) *Unjust enrichment as a general principle of law recognized by civilized nations*

46. In an arbitral decision issued in 1931 it is stated " that the theory of unjust enrichment as such has not yet been transplanted to the field of international law as this is of a juridical order distinct from local or private law ".[45]

47. However, a cursory examination of comparative law shows that the principle of unjust enrichment is today generally, with differences of detail, by all municipal legal systems, whether they belong to common law or to civil law countries. It is expressly embodied in the German, Swiss, Italian, Japanese, Austrian, Turkish, Spanish and Latin-American civil codes. The French, Belgian and Dutch courts have recognized and applied the principle, despite the absence of a specific provision in the Napoleonic Code.[46] The United States Restatement on Restitution provides in article 1 that " a person who has been unjustly enriched at the expense of another is required to make restitution to the other ".[47] This action " in rem verso " is also recognized in Canada and is the law of the Province of Quebec.[48] In the English law, " the various actions for moneys delivered and received 'quantum meruit', constructive trust etc. constitute the elements of a principle of enrichment ".[49] The Civil Code of the USSR in sections 399-401 recognizes this same principle [50] as does Polish law.[51]

48. In fact, all the main legal systems, ancient and modern, have found it necessary to provide relief, in a greater or lesser degree, in order to prevent unjust enrichment. Fundamentally, there is nothing new in the idea of unjust enrichment; it is almost as old as justice.[52] Any civilized system, as Lord Wright has insisted,[53] must recognize the equities of the case and impute to the party enriched an obligation to restore the benefit or its economic equivalent.

49. This principle has also gained recognition in international law. Huber in his arbitration on the British claims against Spain, relating to the Spanish Zone in Morocco, applied this doctrine in a case which referred to the payment of rentals for the use of a property of a British subject by the Spanish authorities. In disposing of the contention that a lease cannot be presumed, and that without a lease agreement there can be no obligation to pay rent, Huber stated " it is a generally recognized principle that obligations 'quasi ex-contractu' may arise from unilateral acts. The prolonged occupation of an immovable property by the authorities, without the consent of the owner, without an expropriation procedure and without excuse of military necessity, certainly constitutes a sufficiently extraordinary fact which has all the characteristics which allow to deduce from it obligations 'quasi ex-contractu' at the charge of the authorities and in favour of the owner ".[54]

50. Finally, in the Lena Goldfield arbitration, the tribunal declared that " when a foreign company, at the request of a foreign government, has invested capital, work and technical capacity in the development of a mining industry, the expropriation of such property without indemnity constitutes an unjust enrichment of the expropriating government at the expense of the foreigner." [55]

Part III — Conclusions

51. As the question of compensation for nationalization is surveyed, the first impression may be one of conflicting claims in the statements of various States; some of them claiming adequate, prompt and effective compensation while others deny, on various legal grounds, any obligation to compensate. But after this discussion subsides, the observer cannot fail to be impressed with the fact that States, mainly interested in maintaining or re-establishing their currents of trade and in receiving or making foreign investments, do usually reach after a time practical agreements.

52. In such agreements, those States which contend that compensation must be adequate and prompt settle for what they may consider inadequate and delayed indemnization, and those States which deny any liability to pay do compensate in fact, taking into account, to an extent compatible with their financial capacity, the interests of foreign States.

53. This long-range trend is reflected in the now prevailing practice of the global or " lump-sum " compensation agreements, which show that the classical picture of the responsibility of a State towards a foreign individual or a foreign company has been changed. The affected individual disappears from the international scene, and he only reappears, if at all, before national organs.

54. This treaty practice has become so widespread that more than fifty of such bilateral agreements have entered into force since the war. Included in this figure are agreements between States which do not accept the private ownership of the means of production, but which have found it necessary to settle all obligations of one State against the other for the measures of nationalization affecting rights and

[41] *Ibid.*
[42] Bindschedler, *op. cit.*, p. 270.
[43] White, *op. cit.*, p. 200.
[44] White, *op. cit.*, p. 241 and examples there indicated.
[45] Dickson Car Wheel Co. v. Mexico, General Claims Commission R.I.A.A., vol. IV, p. 676.
[46] Dalloz, 92.1.596.
[47] Restatement on Restitution, Section 1. See Dawson, " Unjust Enrichment: A Comparative Analysis ", 1951.
[48] Baxter, " Unjust Enrichment in the Canadian Common Law and in Quebec Law ", *The Canadian Bar Review*, Oct. 1954, p. 855.
[49] Friedmann, *Legal Theory*, p. 392 and O'Connell, " Unjust Enrichment " in *American Journal of Comparative Law*, 1956, pp. 2 *et seq.*
[50] Gsovsky, Soviet Civil Law, vol. II, pp. 202-207.
[51] A. Ohanowicz, l'azione d'indebito annrichimiento nel diritto civile polacco, Riv. Dir. Comm. 1961, p. 328.
[52] Baxter, *op. cit.*, p. 881.
[53] *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd* (1943) A.C. 32 at p. 61.
[54] R.I.A.A., vol. II, p. 682.
[55] See Nussbaum A., " The Arbitration between the Lena Goldfield and the Soviet Government ", *Cornell Law Review*, 1950-51, pp. 31 *et seq.*

interests of nationals of one of the parties in the territory of the other.

55. It might be possible to infer certain conclusions from this established treaty practice as to the existence, foundation and scope of a duty to compensate for the nationalization of foreign-owned property.

56. The apparent disagreements in this field may be more of philosophical approach or of legal foundation than of the actual practice and conduct of States. It is evident that it is not possible to assume the existence in general international law of a rule providing for the respect of private property, when obviously this is not a general principle of law recognized now by all civilized States.

57. The possibility of finding and establishing the existence of a certain duty to make a certain compensation — as revealed by the widespread treaty practice — might be based on a different legal ground, namely, on the principle prohibiting unjust enrichment, which all civilized legal systems recognize and accept.

58. This different legal ground of the unjust enrichment of one State at the expense of another might have important repercussions on the scope and extent of the duty to compensate, as well as on the effectiveness of the payment. The compensation that the nationalizing State would have to pay would be assessed on the basis of its gain and not on the basis of the alien's loss, and the free transfer of the indemnity would depend on the extent of that State's own enrichment.

AN APPROACH TO STATE RESPONSIBILITY

submitted by Mr. Angel Modesto Paredes [56]

The law on the international responsibility of States should be fundamentally revised in line with modern ideas regarding the conduct of States, the main novel features of which include the following:

1. The traditional legal principle which exempted collective entities from all criminal liability has been superseded; criminal liability can now be imputed not only to the public representative directly responsible for the injury but also to the entity in whose name he acted. This explains the large number of cases in which rulers have been put on trial by reason of their official acts, even where they had performed these acts in the exercise of their constitutional powers, and the cases in which sanctions have been ordered against the States concerned. It should be noted that the sanctions in question comport the idea of punishment; they do not represent the mere use of force to impose a particular conduct, as in the case of war or action short of war, such as the breach of diplomatic relations.

2. There is a tendency to hold the country which is considered guilty answerable collectively. This is demonstrated not only by the proposition accepted in the various international Charters that an unjustified armed attack against any of the member States is deemed to be an attack upon all, but also by the function entrusted to international bodies of safeguarding the peace and security of members against any conduct or action which may threaten them. This involves a risk for the nations, in that these international bodies may claim excessive powers and invade the domain reserved to the exclusive domestic jurisdiction of States. Another question may well be asked: if a country is deliberately excluded against its will from a particular organization of States, is that country bound by the decisions of that organization and can sanctions be legally applied to that country?

3. In our time, the content of international co-operation has acquired a very special significance, in contrast to the traditional isolation upheld by the former legal postulates of sovereignty and individualism. There is no need for a formal agreement between nations for these to be entitled to mutual co-operation, for that co-operation is implicit in the recognition of identical ends and means for all mankind. As a result, what were formerly considered as purely moral duties are now effectively acquiring a legal character; this happens sometimes hesitatingly and in the form of assistance given without obligation but these situations contain the seeds of future developments.

Firstly: From the foregoing it follows that there are acts and omissions for which a State is answerable both civilly (reparation) and penally, in the same manner as an individual who causes an injury to another person.

Special importance attaches, in this connexion, to matters relating to the fundamental rights of peoples enumerated in the [author's draft] agreement on "The exclusive domestic jurisdiction of States", from which the following rules can be deduced:

1. No one may supplant the government of a people in the exercise of its constitutional functions; any infringement of this rule involves the responsibility both of those who carried out the wrongful act and of those who, being able to resist, tolerated the act.

No agreement, pact or act of compliance can be pleaded in justification of such acts.

Collective assistance can be requested or offered only if the legitimate authority declares itself not competent to discharge its duties, and provided always that no other body claims that competence.

2. An international juridical person possessing full capacity may neither contract nor consent to surrender any part of its exclusive jurisdiction; any agreement entered into to this effect should be deemed to be void and inoperative.

If a government finds that its duties are beyond its means, it should apply to the international organizations of which it is a member for assistance out of the resources of those organizations.

3. Any international juridical person which obstructs the free constitutional development of another thereby commits a violation of international law and is responsible for the injury caused, both civilly (reparation), and, where applicable, criminally as well.

4. The adoption of a particular political system and the choice of the persons to apply it are domestic matters which admit of no outside interference; a country disturbed by such interference may accordingly apply to the international organization responsible for the peace and security of nations.

The object of this application is to cause the intervention to cease, and not to provoke it; accordingly, no individual or collective disturbing action will be permitted and the responsibility for any such action will be imputable to all those who contributed to it.

5. The international economic policy of every government should be conducted by that government itself; however, agreements relating to common markets, mutual benefits, systems of co-operation and preferential treatment are lawful, provided that such agreements do not imply economic warfare, unfair competition or unjust prejudice to others.

6. Prejudicial economic conduct decided upon or carried out unlawfully by a people or a group of peoples against another people, may be impugned by the latter people as punishable aggression.

7. An economic blockade may be ordered only by the competent international organization, as the sanction for an offence duly proved and declared as such by the competent court, or as a means of compelling an international juridical person to carry out duties that may be legitimately imposed upon it, likewise through the agency of the competent collective organ.

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[56] Originally circulated as mimeographed document ILC/(XIV)/SC.1/WP. 2 and Add. 1.

8. Fiscal matters are within the exclusive domestic jurisdiction of the State, and no other international legal entity has any power to supplant the administrator competent to handle State funds.

9. No foreign authority may, either on its own decision or with the consent or even at the request of the government of a country, collect taxes or constitute mortgages or pledges on that country's public revenues or carry out in these matters any other act on behalf of the State. Notwithstanding any treaty provisions to the contrary, the aggrieved party has the right to lodge a complaint with the competent international organ.

10. The supervision and protection of private individuals in a country is the primary duty of its government, and that government may be neither supplanted nor assisted by any other in the fulfilment of that duty; a State may, however, give a guarantee regarding the extent and manner in which it will carry out its obligations towards private individuals.

11. Any injured person may, by virtue of such a guarantee, enter a claim with the competent foreign authorities within the limits and in the form agreed in the relevant treaty.

Rules of competence for the court will be laid down at the time of its establishment and its procedure will be set forth in its statute.

12. In the drafting of the statute of the court of private claims, the protection of private individuals will be taken primarily into account, subject to due regard for the right of governments to stability.

13. An alien living in any territory whatsoever is under the protection of the national authorities and enjoys the same rights and privileges as a national but is subject to the same burdens, both in so far as the alien's personal status permits.

No alien may enjoy a privileged position, and any claim made on his behalf must be strictly subject to the application of the rules of law.

Claims by aliens will be dealt with by the same courts as deal with claims by other inhabitants of the country.

Likewise, any complaint by an alien in the international sphere will be dealt with by the judges who deal with those of nationals.

Secondly: In this century, offensive and defensive alliances have been replaced by a more extensive and durable co-operation between States, which has led to the establishment of international organizations, whether world-wide or regional like the Organization of American States. These organizations propound the following principles in particular:

(*a*) Common aims for all member States, and common means to achieve those aims. Neither the diversity of races nor that of levels of culture, nor the different political systems constitute an obstacle in that respect. These principles are placed above and beyond any temporary agreements, since the United Nations is prepared to entertain claims by non-member States which are prepared to accept its procedures.

(*b*) Peace and joint prosperity can be achieved by means of the understanding between men. This fundamental concept utterly refutes the propaganda according to which the Western and Eastern political systems are so irreconcilable that they cannot co-exist in the world to-day.

(*c*) Disagreements between men give rise to alarm, insecurity and war, the results and ultimate consequences of which do not affect merely those directly and immediately concerned but reach very much further and constitute, to use the words of the San Francisco Charter, a " threat to international peace and security ".

(*d*) It is therefore in the interest of all to avoid conflicts and to try to settle them speedily.

(*e*) In consequence of the foregoing, it is an established contemporary rule of conduct that an aggression against any of the member States is deemed to be an aggression against all of them.

(*f*) For this reason, the main organs of these organisations are ready to protect members against such risks. However, peaceful methods and efforts to reach agreement must first be exhausted before any means of coercion are used.

(*g*) Accordingly, certain powers of adjudication have been established at various levels of jurisdiction.

(*h*) One of the consequences of the foregoing is that many risks are involved, particularly the risk that a particular conduct may be imposed upon a State which is not a member of the organization, on the pretext that there is a threat to the member States or to international peace and security. This is a delicate question which requires very thorough study, lest these prerogatives be exercised in defiance of justice and law.

These doctrines have given rise to a new system of restraint on States, which leaves behind the methods of ordeal by justice exclusively practised previously and replaces it by a judicial system for the enforcement of the rule of law. At present, in international matters, powers of adjudication have been established, with various branches and levels of jurisdiction, so that it is safe to assert that in international matters, as in national matters, no one may take the law into his own hands.

The complexity and novelty of the subject require a thorough examination of the problems which it involves, in order to discern the appropriate and direct relationship between the question to be settled and the jurisdiction of the judge competent to deal with it; it is necessary in this respect to avoid as far as possible all confusion in matters of jurisdiction and to assert the competence of the judiciary to correct where necessary any injustice which may arise from political exigencies. For these reasons, we suggest the establishment of a judicial body based on the following principles:

1. A court to deal with constitutional matters at the international level:

(*a*) The first duty of the court will be to determine whether a particular question is an international matter or a matter within the exclusive domestic jurisdiction of the State concerned;

(*b*) If the matter is recognized as being within the exclusive national jurisdiction, the court will so inform the international organization dealing with the case, so that organization should abstain;

(*c*) If several States are involved in the problem under discussion, the court will render a decision indicating the international organ competent to deal with it;

(*d*) If the case does not involve matters at the national constitutional level but at the international level, the court will likewise determine the competent organ.

2. A court or division of the court, to deal with administrative questions.

The court will, in the first place, at the request of any of the parties concerned, determine the legal nature of the dispute and, if appropriate, refer it to the national authorities.

If the case is found to involve international administrative matters, the court will, at the request of a party having a legitimate interest determine the authority having jurisdiction in the matter.

3. A division of the court will deal with fiscal matters pertaining to the functioning of the international organization concerned.

4. A fourth division of the court will consider and adjudicate upon the civil reparation which may be due in respect of an injury caused by one international juridical person to another.

If an international organ imposes a fine or some form of civil reparation, the party affected may apply to the judicial authority established under this article for a ruling on the question of the jurisdiction of the organ in question.

If the ruling is that there was no jurisdiction, there will be no obligation to pay reparations. On the other hand, if the jurisdiction is upheld, the court may not pronounce upon the amount of damages or upon other aspects of the decision which was competently rendered.

5. No international penal sanction may be applied without a decision of the international criminal court:

(*a*) The court will have exclusive jurisdiction to deal with certain penal matters;
(*b*) The court will have preventive jurisdiction with respect to other aspects of the offence; and
(*c*) The court may and should review the more severe sanctions imposed by other international organs.

6. Claims against States submitted by private individuals to international organs will be dealt with by another judicial body and by different methods.

Thirdly: Duties relating to co-operation between States

Whereas:

the new meaning of international co-operation follows from the recognition of the inter-dependence of peoples for the purpose of the achievement of their objectives and the fulfilment of their destiny;

the equal objectives and destinies reflect the needs of the human race, which are substantially the same for all;

the said objectives are accordingly best achieved through ventures undertaken by the nations acting in common;

such action may take the form of: (*a*) assistance and actual support; (*b*) the avoidance on the part of Governments of acts capable of causing harm to other peoples; (*c*) the prohibition of any positive prejudice to others; and, (*d*) responsibility for omissions which cause prejudice;

the protection to be accorded to a nation needing it, without placing that nation in a position of dependency, can only be given through the collective action of the body representing a community;

a Government may not, even in the legitimate exercise of its powers, cause prejudice to any other international person without incurring the obligation to make reparation, unless it can be proved that the action was unavoidable for the purpose of safeguarding its own needs and that all possible precautions were taken to cause no harm or as little harm as possible to others;

if there is intent to cause prejudice, the act shall give rise to a claim for reparation, even if it is not punishable in itself;

omissions may be malicious or culpable; malicious, if the injury was foreseen and the action necessary to prevent it was not taken, with intent to cause the injury; and culpable, if there is failure to take the necessary precautions, through inattention or negligence.

Now therefore the High Contracting Parties proclaim the following

DUTIES OF STATE SOLIDARITY:

Article 1. Any damage occasioned to one State concerns and affects the others.

Article 2. If the damage is a result of a natural phenomenon, such as earthquakes, floods and other great disasters, nations are under an obligation to provide relief.

Article 3. This relief shall be provided through an international commission of permanent officials appointed for the purpose, to be known as the Relief Commission.

Article 4. The Commission shall inform each State of the amount of its contribution.

Article 5. After a Government has been notified of its contribution it shall be responsible for sending the contribution to the Commission, which shall transmit it to the victim.

Article 6. Duties between States also arise out of their respective geographical positions and out of the inter-dependence resulting from the configuration of the terrain, as happens in the case of international inland waterways and proximity to a sea.

Article 7. The circumstances referred to in the preceding article imply many prohibitions and mutual responsibilities.

Article 8. International trade implies duties of mutual respect and the prohibition of unfair competition.

Article 9. No person, whether individually or jointly with others, is free to use assets owned in common by all in ways which are prejudicial to others.

Article 10. Prejudicial use may occur in the following ways: either because the property is used for a purpose different from that for which it is, by its nature, intended; or because it is exploited inconsiderately and in a way liable to exhaust its resources; or because it is used in a way which is harmful to the user and to others. Anyone proposing to sterilize the atmosphere of a region in such a way as to prevent or impede the biological development of that region would be guilty of the first offence; the mass destruction of the resources of the sea or the use of such resources in an imprudent and unregulated manner come under the second heading; atomic explosions, with all the evils they involve, are examples of the third case.

Article 11. Any person who attempts to change the use of an asset which is *res communis omnium,* or who deprives others of the use of part of that asset, may be forbidden, either temporarily or permanently, to enjoy or use the asset in question, upon proof of the act or acts imputed to that person. In addition, the person concerned shall be liable for compensation for the damage caused.

Article 12. Natural resources which are *res communis omnium* shall be exploited under international control and regulation. The control organ shall be competent to judge violations and to impose penalties.

Article 13. No person may involve himself or others in avoidable dangers, even on the pretext of scientific research. In the latter case, the authorization of the organ to which such authority has been given shall be required, and it shall be given on the basis of a circumstantial report from competent technicians.

Article 14. Any person who performs such an act regardless of an express prohibition, or who does not apply for authorization to carry it out or does not act as he has been instructed to, shall be prosecuted for the commission of an international offence or shall be liable to any penalties resulting from it and shall be responsible for compensation for any injury caused.

Article 15. Any person who causes prejudice to another by acts permitted and carried out under the terms of the authorization shall be responsible for the value of the damage, even though the acts were authorized.

Article 16. Omissions, in the international field, may be malicious or culpable.

Article 17. An omission is malicious if there has been failure to carry out a duty positively imposed by a treaty, a convention, or any other legal instrument; an omission is culpable if it conflicts with the mutual security which States owe to one another; for instance, if one State is aware of imminent danger threatening another and does not inform that State, that is a culpable omission.

Working Paper

prepared by Mr. André Gros [57]

The International Law Commission has decided that the members of the Sub-Committee on State Responsibility should submit to the Secretariat memoranda on the main aspects of the subject.

In the light of the first general debate in the Commission and in order to facilitate the Sub-Committee's initial proceedings, it seems essential to specify rapidly the general conditions for the work to be done in the Sub-Committee.

It is now apparently accepted that the Commission considers it possible to examine the problem of State responsibility by taking into consideration judicial precedents and diplomatic practice bearing on cases of responsibility concerning the treatment of aliens, without, however, making of something which

[57] Originally circulated as mimeographed document A/CN, 4/SC.1/WP.3.

is only a part of international law the sole source of State responsibility. This basic concept being established, it seems to me that the study of State responsibility might be conducted in the following manner:

I. *General definition of the law of responsibility*

While there can be no question of writing a theoretical treatise on responsibility, agreement must be reached on the general aspects of this problem of law. Personally, I would say that, as in any legal system, responsibility in international law has two aspects:

(1) It is a claim for redress against an act which has resulted in an injury.

(2) This claim, in order to be validly made and maintained, has to fulfil certain conditions.

While these two aspects may be distinguished for the purposes of the study, it should be borne in mind that this distinction reflects an academic definition and that these two elements are inseparably connected in constituting the law of State responsibility. Agreement on the machinery for making an international claim would be useless if there was no agreement on the general rules of substance concerning such claims. The existence of these two aspects of the law of responsibility and the connexion between them are perfectly clear in the domestic law of responsibility in every State.

Thus, in French private law, article 1382 of the Civil Code laid down a rule which has become widely known:

" Any human act resulting in injury to another person imposes, on the person whose wrongful act resulted in the injury, a duty to make reparation for it."

This article specifies the " source " of responsibility; as to the machinery for obtaining redress, it consists in the procedures established by the rules of French private law. The Sub-Committee might thus consider whether there was, in international law, an equivalent to this " source " of responsibility which is defined in the various systems of private law. There is a category of cases of State responsibility in which this analogy with private law is all the more justified in that these cases involve persons and the State protecting those persons lays claim to a certain treatment or to reparation on their behalf, even if, as the Permanent Court of International Justice says, in doing so the State acts by invoking its own right. This is the classic theory of diplomatic or consular protection on behalf of a State's nationals (see the Vienna Convention of 1961, article 3, and article 4 of the draft articles on consular relations adopted unanimously by the International Law Commission in 1961). The claim bears on the violation of an interest or the violation of a right, to use the actual words of the texts prepared by the Commission. Protection based on the violation of a right implies a theory of the Commission. Protection based on the violation of the international responsibility of the State. This may be studied and defined.

In a study of this general definition, the essential rule of State sovereignty naturally cannot be disregarded, and there is no question of recognizing a right of intervention by foreign States in the domestic affairs of a State, but it is self evident that all States engage in diplomatic and consular protection of their nationals and, as I have just noted, the two major conventions prepared by the Commission itself recognize this right of protection. That, therefore, can be regarded as a first topic of study, the outcome of which should be a definition of the general conditions, and of the limits, of the international responsibility of the State.

II. *Other problems which should be examined*

It seems unnecessary, with a view to beginning the general debate in the Sub-Committee, that each member should state definitively, in his memorandum, the method of discussion he envisages. Personally, I consider that the order in which the various points listed below are discussed is not of major importance. What is needed is a general outline, but any of the aspects in question may be studied first.

Given this indication of method, it seems that the problems to be examined are:

A. Subjects of law in international responsibility (who bears the international duty?);

B. Scope of the international duty (kinds of duties, procedures for disciplining);

C. The problem of the elements of guilt;

D. Machinery:

(*a*) the condition of nationality;

(*b*) exhaustion of local remedies.

These notes are intended solely to facilitate the opening of the debate in the Sub-Committee and the preparation of general directives for the Special Rapporteur who will be responsible for drafting the report.

WORKING DOCUMENT

prepared by Mr. Senjin Tsuruoka [58]

I. INTRODUCTION

Working Method

1. A State which infringes a right of another State by an act or omission contrary to international law incurs responsibility for restoration of the right infringed or for reparation in respect of the injury caused. That is the principle of State responsibility as established in international law. It is easy to see that such a principle, once it is formulated in clear and comprehensive terms, in its many aspects, will be the more effective in forestalling breaches of international obligations and consequently in ensuring the rule of international law. I am glad the International Law Commission is now able to undertake the codification of this important branch of international law.

2. I think we must turn first of all to the question of the method or organization of the work of the International Law Commission, for in my view this is of greater importance in the codification of State responsibility than in the codification of other topics.

I would suggest to the International Law Commission:

(*a*) that it undertake first the codification of " State responsibility for injury to the person or property of aliens " (hereinafter referred to as " State responsibility *stricto sensu* ") and that it then proceed to codify the general principles governing all aspects of State responsibility in the broad sense of the term;

(*b*) or (and this is a variation of my proposal above) that it undertake the codification of State responsibility both *stricto sensu* and *lato sensu* at the same time.

What is important, in my view, is that the International Law Commission should not omit to codify the system of State responsibility *stricto sensu* and that it should devote its efforts to that end before giving special attention to other individual branches of the law of responsibility *lato sensu*.

Some of the reasons which have led me to adopt the view I have just mentioned are set out in paragraphs 3, 4, 5 and 6 below. At the same time I shall venture to draw the attention of the International Law Commission to a number of points. I hope that it will bear them in mind when it codifies the general principles governing State responsibility *lato sensu*.

3. In considering the method of work to be adopted in the codification of State responsibility, I have been guided by two considerations: respect for the spirit of the United Nations Charter (Article 13, paragraph 1 a) and the Statute of the

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[58] Originally circulated as mimeographed document A/CN, 4/SC.1/WP.4.

International Law Commission, and concern to make the work of the Commission as fruitful as possible.

Let us note in passing, although everyone is aware of it, that the International Law Commission, as an organ of the United Nations General Assembly, has the task of ensuring the progressive development of international law and working on its codification. It is neither an international legislative body nor an academic institution. Its essential purpose is not to renew international law or to establish a purely theoretical legal system. On the contrary, its work should result from research into the rules of positive international law. It should establish a legal system better adapted to the new conditions of international life, but in conformity with positive international law. In other words, it must not be over-bold in its innovations yet must contrive to meet the new needs of the international community, whilst harmonizing the legitimate interests of all members of that community.

With these concerns as my point of departure, I soon found myself confronted by certain salient features which characterize the law of State responsibility. I shall mention them in the pages which follow.

4. State responsibility *lato sensu* is entailed by failure in many ways to fulfil various international obligations. Its aspects, characteristics and mechanisms vary almost infinitely according to the different kinds of failure in question and the variety of the circumstances in which the failure occurs. Furthermore, since in practice State responsibility is most often understood as the duty to make reparation for injuries caused, it cannot be denied that the presence or absence of reparation sometimes decides the question whether or not the responsibility itself can be said to exist. In short, the system of State responsibility *lato sensu* covers a vast field of international law and is highly complicated.

It will therefore be agreed that it would be an arduous undertaking to try to pick out from this vast and complex field the general principles applicable to all aspects of State responsibility *lato sensu*. Still greater difficulties would be encountered if the attempt were made, as it must be, to invest the principles thus isolated not just with theoretical but with real and practical value.

5. If this is true for the codification of the principles embracing all branches of the law of State responsibility, there is one which is well suited to codification; it is that governing the law of State responsibility in the matter of injuries caused to the person or property of aliens. What is more, the codification of the latter will help to meet the pressing needs of the world economic situation. It will have the further effect of greatly facilitating the task of codifying the law of responsibility *lato sensu*, the advantage of which will be all the greater since the difficulties in the way of such a task are considerable.

But why and how does the system of State responsibility *stricto sensu* lend itself so well to codification?

We should first of all point to the great number of precedents, above all in the practice of international tribunals, and the wealth of literature accumulated in the course of history. We should also mention the existence of important works on codification in this branch. In particular it is significant that nearly all the work done so far on the codification of State responsibility relates only to State responsibility *stricto sensu*. It is certainly neither by simple oversight nor by chance that such works have been restricted to this one area of State responsibility; on the contrary, it shows that throughout its history the notion of the law of State responsibility has grown up almost exclusively around the question of the protection of the person or property of aliens. And this subject is still such a burning issue in modern international life that State responsibility in this matter has finally come to be regarded not only as the prototype or kernel of State responsibility but also as the very synonym for it.

In the light of these facts, once we admit that the International Law Commission has no other task than to ensure the progressive development and codification of international law, and that in the way I explained above (see paragraph 3), it will not be disputed that the system of responsibility *stricto sensu* has all the prerequisites for codification. It will also be agreed that the Commission would do well to undertake work specially devoted to this topic. Finally, it will be recognized that the Commission can hardly codify the law of State responsibility *lato sensu* without constant reference to it.

But there is more. Codification of the law concerning the protection of aliens will meet the needs of the international community, the common responsibilities and interdependence of which are becoming daily more pronounced, above all as a result of progress in communications. In particular, it will facilitate economic and technical co-operation between the developing countries and the industrialized nations by giving greater security to the men and property sent abroad for that purpose.

In addition, we cannot pass over in silence another not inconsiderable advantage, to which I referred just now, from which the Commission will be able to benefit: the fact that there are quite a few codification projects, both official and private, bearing on the law of State responsibility. And they do not date back so very far. Moreover, the Commission has its own documents: six reports on the matter submitted by its Special Rapporteur, Dr. F. V. García Amador.

Moreover, a comparison of this sector of the law of State responsibility with other sectors of the same body of law shows even more clearly how much better suited to codification it is than the others.

Of course, no one denies the importance of the questions that arise in connexion with different types of State responsibility which result from violations of principles or rights recognized under international law, such as the principles of the territorial integrity and the political independence of States, the right of peoples to self-determination, and the right of States to work their natural resources. I believe also that the general principle of State responsibility formulated at the very beginning of this report (paragraph 1 above) applies to these different aspects of the question. Leaving aside that general principle, however, legal rules governing these various aspects of State responsibility do not exist at the present stage on the development of international law, in a sufficiently concrete, specific form for suitable codification. If, therefore, in spite of these unfavourable conditions the Commission should attempt the task of codification in this sector, it would be forced to establish a great many new rules. In so doing, it might well exceed the terms of reference laid down in its Statute, since it would then no longer be dealing with the progressive development or codification of international law. That is not true, however, in the case of the codification of the law of State responsibility *stricto sensu*.

I trust that I have now sufficiently explained my main reasons for putting forward the proposal contained in paragraph 2 above.

6. Before concluding this section of my paper, however, I should like to express the hope that, if the International Law Commission should begin its work with the codification of the general principles governing all aspects of State responsibility:

(*a*) it will not depart unduly from established usage and practice and will be cautious in making innovations;

(*b*) it will recognize the fact that the law of State responsibility for injuries caused to the person or property of aliens is a rich source of material for the codification of the general principles governing State responsibility *lato sensu;*

(*c*) it will also recognize that the codification of the aforementioned general principles should be supplemented by the codification of the law of responsibility *stricto sensu;*

(*d*) the members of the Commission will not seek to gain special advantages for any given State or group of States from the work of codification but, on the contrary, will try to harmonize the legitimate interests of all States.

7. I should like to make a further point. Like Sir Humphrey Waldock, I deplore the " decline of the optional clause " (Statute of the International Court of Justice, Article 36, para-

graph 2). However excellent the work of the International Law Commission may be and however many States may accept it, the principles laid down will be ineffective and may even remain inoperative so long as guarantees for their strict application do not exist. I earnestly hope that, in order to provide the international community with such guarantees, the Commission will undertake a study, as soon as possible, of the means of strengthening the system of judicial procedure. Consideration could be given, for example, to the possibility of encouraging acceptance of the optional clause of the Statute of the International Court of Justice and to the necessity of setting up international tribunals.

II. GENERAL PRINCIPLES GOVERNING THE LAW OF STATE RESPONSIBILITY

8. In this section of my paper, I intend to deal with certain questions which, in my opinion, will call for discussion by the International Law Commission when it codifies the general principles governing State responsibility. Needless to say, I shall confine myself, at this preliminary stage of the Commission's work, to observations of a general nature leaving details on one side. The questions to which I shall address myself may be grouped as follows:

(1) The juridical nature of State responsibility;
(2) The constituent elements of State responsibility:
  (*a*) the legal capacity of States incurring responsibility;
  (*b*) the wilful act and fault (*culpa*);
  (*c*) injury to legal interests;
(3) Exoneration from responsibility;
(4) Extinguishment of responsibility previously incurred.

9. The juridical nature of State responsibility is a subject which has been extensively discussed by the authorities. There is general agreement that the juridical nature of the responsibility resulting from breaches of international obligations is similar to that of civil responsibility under municipal law. When a State commits an act which is contrary to a rule of international law, the question which normally arises is that concerning the restoration of the right infringed or of reparation for the injury sustained. In other words, what is usually involved is a responsibility on the part of the State which has caused injury to the legal interest of another State to make reparation for that injury. Of course, it sometimes happens that a breach of an international obligation constitutes an act punishable under international law, as in the case of a crime under municipal law. In such cases, the breach goes beyond the scope of relations between the two States which, respectively, caused and sustained the injury, and the State which caused the injury incurs penal responsibility similar to that under municipal law. It should be noted in that connexion that there is an increasingly pronounced tendency to regard certain types of State responsibility as being penal in nature. This reflects a new development in the international community. Since the Second World War, the latter has tended to centralize certain types of jurisdiction, as is strikingly demonstrated by some provisions of the United Nations Charter. It is held by some, for example, that a breach of international obligations which affects the fundamental rights of the State is to be regarded as a violation of the general interest of the international community as a whole. In such cases, from the point of view of the general interest of the international community as a whole, there is considerable justification for saying that, quite apart from the question of civil responsibility arising between the States directly concerned, there are some grounds for the imposition of a sanction. It should be noted at the same time, however, that, at the present stage of its development, the structure of the international community is not yet so well organized that State responsibility can, as a general rule, be dealt with in these terms.

In my opinion, the International Law Commission should confine itself to stating that, generally speaking, State responsibility is of a juridical nature similar to that of civil responsibility under municipal law and that, in certain exceptional cases, it entails the imposition of a sanction.

10. Consideration of the constituent elements of State responsibility should relate, in the first place, to the commission of an act which is unlawful under international law. The breach or non-performance of the rules of international law normally arises out of an act or omission which are contrary to the material standards of that body of law. I should be noted that such acts or omissions must, in particular, be contrary to international obligations in force between the State committing the act or omission and the State injured thereby. Consideration should next be given to the legal capacity of the State which committed the act or omission. In the case of a State of limited capacity, the imputability of the act or omission should be decided in terms of the delegated powers. In some cases of this nature, there is a form of delegated responsibility within the framework of those powers.

11. The State is a body corporate. Hence, an unlawful act by a State is in reality an act or omission by an individual which is deemed to be the unlawful act of the State whose responsibility is involved. The question of the imputablility of responsibility to a State by reason of an act committed by an individual is one which needs clarification. Normally, an act committed by the agent of a State constitutes an act of that State. Thus, a State incurs responsibility for any act committed by one of its agents acting within the real or apparent limits of his competence. That is true irrespective of whether the agent in question is the Head of State, the Head of Government, the Minister for Foreign Affairs or some other person belonging to the legislative, judicial or administrative organs.

12. Does the State incur international responsibility for the action of a private person and, if so, to what degree? That is a subject of controversy among the authorities and of uncertainty in practice. But what is certain is that the State is bound to some extent to prevent any action by a private person likely to cause injury to aliens on the territory in which it exercises its sovereignty. The rule applies both in the case of an individual and in the case of a group. Consequently, the State incurs international responsibility for an injury caused by the act of an individual if it does not exercise due diligence to prevent such an action. The degree of diligence which it should exercise, I believe, is that which may be expected of a civilized State.

13. Anyone who infringes the right of another by an intentional act or negligence is required to repair the injury sustained. That is a general principle of private law recognized throughout the civilized world.

But how can it be introduced, in a modified form, into the law of State responsibility? The question is not a simple one. According to traditional notions, since the intentional act or negligence is regarded as a constituent element of international responsibility, the principle of *culpa* is the basis for international responsibility. In my opinion, however, in international law, the principle of *culpa* should be examined from a somewhat different point of view from that of municipal law. In international law, the question of due diligence is not necessarily related to the notion of negligence. International responsibility may sometimes arise from the mere fact that injury has been caused. In some cases, therefore, we would have to recognize an objective responsibility related to the injured right.

But I do not go so far as to say that the principle of responsibility without fault recognized in some national laws should be *generally* recognized in international law. The subject would require scrutiny by the International Law Commission.

14. It is a precondition of State responsibility that there must be an injured interest of a subject of international law and that that interest must have been injured as a result of an act committed by another subject of international law. The question of the injured legal interest arises primarily on the bilateral level, between the State committing the injury and

the State sustaining it. The injury is usually of a material nature. But, in some instances, injuries of a non-material nature may also involve State responsibility. For example, State responsibility is involved if the State offends the honour of another State. On the other hand, I find it difficult to speak of State responsibility deriving from a non-observance of general international law which does not cause any real injury.

15. Even if a State has caused injury to the legal interests of another State by an act normally regarded as unlawful, it is exonerated from responsibility for that act if the State sustaining the injury has waived the right to claim reparation or if the act in question was carried out in circumstances justifying the exercise of the right of self-defence or the right of reprisal.

16. A State discharges its responsibility resulting from its violation of an international obligation by making good the injury caused. The methods of discharging responsibility or releasing itself from such responsibility vary according to the injured interests and to the circumstances in which the illegal act was committed. As a general rule, responsibility is discharged by one of the following methods or by several of them combined: restoration of the *status quo ante*, reparation of the injury sustained, apologies and punishment of the offender. The question which of those methods is applicable in a given case is determined by the juridical nature of the injured interest; the State sustaining the injury is not entirely free in its choice of the means of asserting its right. Moreover, the amount of the reparation or compensation should be commensurate with the injury sustained.

17. The recent development in the ideas of jurists on the question of subjects of international law will necessitate some changes in the traditional theories concerning the matter. The question will arise with respect to the active and passive subjects of responsibility. But account should be taken of the fact that in positive international law, in its present state of development, private persons and international organizations are not in the same position as the State, so far as international responsibility is concerned, unless so recognized in an international agreement. I am inclined to think that, in that connexion, the International Law Commission would be well-advised to deal primarily with the State and to refer only incidentally to the other subjects of international law.

III. STATE RESPONSIBILITY WITH REGARD TO THE TREATMENT OF ALIENS

18. In part I of this paper, I explained why the International Law Commission should not fail to undertake the codification of the law of State responsibility for injury caused to aliens. I also pointed out that there are a number of draft codifications, both official and private, covering this subject matter. Moreover, I think there is general agreement on the important factors to be clarified. I shall therefore confine myself here to presenting a rapid sketch of the essential features which those various drafts have in common. I shall also draw attention to certain new developments in that branch of law.

19. In many cases that have occurred in international practice and precedents, I believe the principle of the nationality of the party bringing the claim has been recognized as an established principle of international law. But there is some uncertainty regarding the scope of its application and its tenor, and hence a thorough study should be made in order to work out adequate standards.

20. Greater difficulties are encountered in defining the notion of " nationality ", which constitutes a preliminary question in diplomatic protection. The nationality of a juridical person endowed with an international structure, the applicability of the theory of the " genuine link ", the protection of stateless persons — all these questions are still to be clarified.

21. The meaning to be attributed to the so-called " Calvo " clause and its scope should also be discussed in detail, because there is confusion and uncertainty on the subject both in the writings of learned authors and in the practice of international tribunals where those questions are arousing new interest owing to the recent expansion of trade and communications between States.

22. The significance of the waiver of the right to bring a claim or the meaning of the waiver of diplomatic protection is a relatively new problem. Such problems have arisen primarily in connexion with property settlements following the First and Second World Wars. But, in my view, the juridical scope of such clauses still remains to be defined.

23. In the municipal law of many States a distinction is made between two categories of responsibility: responsibility to repair or indemnify an injury caused by a wrongful act of an official of the State, that is, an act performed outside the scope of his competence, and responsibility to indemnify a loss sustained as a result of a measure of expropriation or nationalization, that is, a measure authorized by law. I feel that caution should be exercised before adopting such a distinction in international law. I think it particularly important to maintain a fair balance between the various interests involved if such a distinction should be accepted.

24. Finally, before concluding this paper, I should like to dwell for a moment on the criticism that the customary rules governing State responsibility which have been developed in connexion with matters relating to the protection of the person and property of aliens are merely a product of the capitalist and imperialist system. Consequently, they are not acceptable to States which have adopted other systems.

It is not my intention to refute that argument here. But one thing seems certain: the customary rules in question, as applied at the present time, constitute a neutral juridical system. They form a juridical machinery which functions independently of political coloration.

Furthermore, all the members of the international community are required to respect the international law in force; that law applies to old States as well as to newly-independent States.

Neither changes in the political system of a State nor the emergence of an independent State can have the legal effect of destroying the juridical value of the international law in force. To maintain the contrary is to run the risk of destroying the stability of the legal order which should prevail in the international community.

The progressive development of international law should be encouraged. But in order to ensure that development, it is important to recognize the value of the international law in force, as established by agreement and by practice, for it is the very basis for development.

WORKING PAPER

prepared by Mr. Mustafa Kamil Yasseen [59]

The Sub-Committee on State Responsibility has to deal with a problem of method and planning. It has to determine the proper approach to the topic " State responsibility ", the scope of the International Law Commission's task in the matter as defined in General Assembly resolution 799 (VIII) and the manner in which the Commission should proceed, and the main divisions of the topic.

The scope of the Commission's task

According to resolution 799 (VIII) the subject to be discussed is the international responsibility of States, and the

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Commission's task would not seem to be limited to any particular aspect or aspects of that responsibility to the exclusion of others. In my opinion, the first step must be to define the general theory of responsibility. That theory exists. Its application in practice has yielded uneven results; it has proved more fruitful and effective in certain fields of international relations than in others. But that is no reason for denying that it exists or that certain principles have a general scope transcending the particular case of responsibility to which they are applied. State responsibility should therefore be considered as a whole.

There are some, however, who think that the law of responsibility should be dealt with piecemeal and that it is preferable to consider first the international responsibility of States for injury to the person or property of aliens. I do not find that argument convincing; the method they propose might complicate matters. The codification of the law of responsibility in a limited field of international relations might invest particular solutions with an importance which they do not really possess. Furthermore, responsibility for injury to aliens does not seem to me to to be a topic that can readily be codified at the present time. While it is true that there exist numerous precedents in this field, they are far from being unanimous; the conflicting doctrines on many fundamental issues are too well known to need mentioning. The positions of States in this matter differ widely and are firmly held. In the present period of the liquidation of the colonial regime and the correction of certain privileged situations obtained under that regime, it is difficult to ensure a calm atmosphere for working out a generally accepted code of law. Our era of rapid evolution, or, rather, of revolution, is in my opinion the least favourable for the defining of general rules capable of governing these matters which are directly affected by this rapid evolution. These questions encompass an infinite number of slightly differing cases which require flexible solutions; these should be based first and foremost on the idea of justice, the principle of State sovereignty over natural resources and wealth, and the economic and social conditions prevailing in certain societies.

The interests of States are sometimes too conflicting in this field, and it would not seem an easy matter to find a compromise solution on certain points, particularly with regard to agreements which might be described as unequal, often imposed under the pressure of difficulties encountered by the community concerned and mortgaging its future even after independence.

What can be noted is a growing tendency to confirm the sovereignty of States over their national resources.

In my opinion, therefore, the best approach to the law of State responsibility is first to define the general theory. That theory may have to be adapted to some extent in its application in the different areas of international relations, and this, too, should be a task for the International Law Commission.

The main divisions of the topic

The first step must be to consider the general theory of State responsibility; for this purpose the following questions must be studied:

1. *The unlawful act.* This is the failure to carry out an international obligation, in other words a departure from a rule of international law, irrespective of its source (treaty, custom). It should be stressed here that the unlawful act may be one of commision or of omission.

Although fault seems, in principle, to constitute the basis of State responsibility, the question whether that responsibility may in exceptional cases be based to some extent on risk should also be considered.

2. *The injury.* It should be noted that moral injury is also a factor to be considered; it is desirable, however, to study the conditions in which State responsibility could result in moral injury.

3. *The cause and effect relationship.* It is an essential condition of responsibility that the injury must be caused by the unlawful act. It is desirable here to take up the problem of indirect injury.

4. *Reparation.* Under this heading, the nature of the reparation, its forms in the international sphere and, above all, the role of moral reparation should be studied. Consideration should be given to the scope of *restitutio in integrum* and to the question whether the injured party or the party committing the unlawful act may opt freely between *restitutio in integrum* and other forms of reparation. It is especially important to decide whether reparation should also include loss of earnings.

5. *The subjects of responsibility.* The party committing the unlawful act is the active subject; the injured party is the passive subject. According to positive law the subject (active or passive) must be a State.

It is arguable, however, that in consequence of the evolution of the notion of the individual as a subject of law he should be regarded as a direct subject of responsibility and able, as such, to institute proceedings in international tribunals.

Without wishing to enter into the substance of the question, I thing it hardly tenable to advance this proposition as a general rule of international law. There is no reason, however, why the notion of the individual as a passive subject of responsibility should not be accepted in certain cases, exceptionally, by virtue of a special rule of law.

6. *Excuse; ground for limitation of or exoneration from reparation of the injury.* The problem here is to define the grounds which excuse an act and deprive it of its unlawful character: self-defence, and even *force majeure* in general, and the case of neccessity.

The grounds for the limitation of or exoneration from reparation have to be defined. Thus, the effect of fault on the part of the injured party, the effect of the waiver of the claim, and the possibility of laying down a time limitation extinguishing the obligation to make reparation must all be studied.

Once the general theory of responsibility has been defined, it will be possible to study its application in particular areas of international relations, but we should not confine ourselves to responsibility for injuries to aliens; that question is important, but there are others equally and even more important in our time. The priority to be given to these questions may be considered at a later stage.

WORKING PAPER

prepared by Mr. Roberto Ago [60]

At its first meeting on 21 June 1962, the Sub-Committee on State Responsibility of the International Law Commission decided that for its second series of meetings, from 7 to 16 January 1963, which was to be devoted to the organization of the Sub-Committee's work and to determining the main points to be considered, especially in relation to the general aspects of State responsibility, the members of the Sub-Committee should if possible prepare some working papers describing what they regarded as the fundamental aspects of the subject.

Two working papers, one by Mr. Jiménez de Aréchaga and one by Mr. Paredes, were submitted to the Sub-Committee at its June meeting. Recently, another working paper, prepared according to the criteria laid down by the Sub-Committee, was sent in by Mr. Gros.

Now I venture to submit to the members of the Sub-Committee these few pages, whose sole purpose is to summarize some general considerations on the subject of the international

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responsibility of the State, at least some of which I have previously expounded orally in the Commission, and to draw attention particularly to certain points which I think ought to receive priority in any attempt to codify the international law on the subject. I also attach to this short paper a bibliography of works from the legal literature of several countries concerning specifically State responsibility or some of its aspects, for I believe that, especially in the case of less recent works or articles in periodicals, an indication of the place and date of publication might sometimes help the members of the Sub-Committee in their research. To avoid making this bibliography unnecessarily long, I have not mentioned the numerous text books and general treatises on international law, almost all of which contain chapters, and sometimes very long ones, on State responsibility; and I also apologize in advance for the gaps and omissions which the members of the Sub-Committee will certainly notice in my list of specialized works.

I

If there is any branch of general international law the codification of which is particularly desirable, and even necessary, it is surely that dealing with the international responsibility of States. Few questions recur so frequently in disputes between States as those relating to responsibility; in few subjects are the repercussions of the development of international law in every other respect felt so automatically as in that of responsibility; few chapters of international law are regarded with so much interest, and sometimes concern, by States, and particularly by new States; and in no branch of international law; perhaps, is the fundamental requirement that the law should be clear and certain felt so greatly as in that of State responsibility.

At the same time, the codification of the international law concerning State responsibility is unquestionably a particularly difficult undertaking.

It might of course be argued that the material available in this field is exceptionally abundant. Cases of State responsibility are very frequent in international practice, most international arbitral awards or judicial decisions have touched upon problems of responsibility either directly or indirectly, and furthermore, jurists have devoted many studies to the international responsibility of the State, and some of these studies are regarded as among the most searching and famous in the whole body of learned writing on international law.

This imposing mass of material and research does not, however, always facilitate the task of clarifing the principles governing the subject, firmly tracing the main lines of the concept of international responsibility and clearly determining the circumstances and consequences of such responsibility. Furthermore, despite the exceptional quantity of the available material as a whole, the fact remains that this material is concerned chiefly with particular points and aspects, while many others, on the contrary, have been only very incompletely explored and not very fully described.

For example, a great deal has been written on the problem of the responsibility of the State for acts of private persons or for acts of organs performed outside their competence; much has been said about the aspect of the responsibility arising out of the action of judicial bodies, and particularly about the definition of denial of justice; many pages have been devoted to responsibility for damage caused during uprisings or civil wars; and scholars have discussed amply the opposition between the idea of an objective responsibility and that of responsibility by reason of fault, and have debated the determination of such concepts as indirect responsibility and the exhaustion of local remedies. Nevertheless, the research done into other no less important subjects has not been sufficient. There is a lack of balance due to the fact that while some parts of the subject have been elucidated, others have been left in obscurity. What is more, the numerous studies on particular points are not accompanied by an equally large number of general studies of the international responsibility of the State assigning to each element its true place in a systematic whole.

One point in particular seems to me to deserve further emphasis in this connexion, even though it has been the subject of very relevant comment by several members of the International Law Commission during the preliminary discussions on the topic. Many of the best known and most penetrating individual or collective studies carried out in the field of international responsibility, and, in general, several of the tentative and draft codifications so far produced on the subject, have dealt with State responsibility only in the limited sector where this responsibility arises out of injury caused in the territory of the State to the person or property of aliens and in the related field of the diplomatic protection of injured aliens by their national State.

It was not the only consequence of this approach that some at least of the aspects stressed were held to be special features of responsibility within the sector mentioned rather than truly general characteristics of international responsibility, and that some confusion has occasionally arisen in this connexion: the most obvious, and actually the virtually inevitable consequence of this partial approach has been that people have endeavoured simultaneously — as though the principles involved were *ejusdem generis* — to determine rules which genuinely relate to responsibility and other rules which rather constitute fundamental standards and sometimes even principles of international arbitral or judicial procedure.

A very clear illustration of this will be found in the conclusions of the sub-committee of the League of Nations Committee of Experts for the Progressive Codification of International Law. A first article providing that international responsibility can only arise out of the violation, by the State, of an international duty established by treaty or by a customary rule, is followed by other articles laying down the obligations of the State for the judicial protection of aliens or for their protection in case of a riot. The same approach will be found in the Lausanne draft (1927) of the Institute of International Law, in the drafts prepared by the Association of International Law of Japan in 1926, by the American Institute of International Law in 1927, by the International Commission of Jurists of the Conference of American States in 1928, and in the very well-known draft convention prepared in 1929 by the Harvard Law School for the first Conference for the Codification of International Law held in 1930. To give only one example, in the Harvard draft the rule that the State must provide the same judicial protection for aliens as for its own citizens appears side by side with the provisions defining the specific aspects of the violation of the rules of law and the consequences thereof. The same arrangement is noticeable in the six very learned, well documented and very remarkable reports submitted to the International Law Commission by Mr. F. V. García Amador, its distinguished special Rapporteur, which deal, side by side, with the typical problems of responsibility (e.g. the distinction between different categories of wrongful international acts, or the determination of the duty to make reparation and the various forms of reparation) and with the problems relating rather to the definition of the duties of States in the treatment of aliens and also, particularly in the earlier reports, with the obligations of the State regarding the protection of human rights.

For such a juxtaposition of questions belonging to intrinsically separate categories we should certainly not blame the learned jurists or the institutions which prepared the reports cited above and others. It was the more or less inevitable consequence of the fact that, when the subject matter assigned for study or placed on the agenda was defined, a division was not made " horizontally " between the rules of substance laying down the international rights and duties of States in the various fields and the aspects and consequences of the violation, by States, of the obligations deriving from these rules; instead, the division was made " vertically ", the subjects being classi-

fied according to sector. This explains why even in a study which was to deal merely with the question of responsibility in relation to a particular sector it became almost inevitable to determine, in addition, the content of the rules of substance whose violation one meant to discuss; this happened particularly in the case of ill-defined and often controversial rules such as those relating precisely to the duties of States regarding the treatment of aliens.

As a result, however, the border line between two distinct fields of law tended inevitably to become somewhat blurred. A more precise definition of the duties imposed by international law on States regarding the treatment of aliens is no doubt a most important objective; but whoever wishes to attain this objective ought to proceed by a direct route, not by a circuitous one, in connexion with the determination of rules relating to international responsibility for wrongful acts. Also, as partial study, undertaken by sectors, of problems of responsibility cannot provide a true view of the whole of the subject. The international responsibility of the State is a situation resulting not only from the violation of particular international obligations, but from the infringement of any international obligation, whether established by rules covering a specific matter or by other rules. To achieve such a general view, complete and at the same time free of all extraneous matter, appears to be the indispensable condition for any useful effort of codification in this field.

I do not wish to imply that certain specific aspects of responsibility, in cases where the obligations violated by the State concern the treatment of aliens, may be neglected and should not receive due prominence. Even less do I wish to appear to be suggesting that the very valuable material and experience gathered concerning this aspect of international responsibility should not be utilized to the full. My point is merely that any discussion of international responsibility should take into account the whole of responsibility and nothing but responsibility.

Besides, this subject by itself is beset by a good many difficulties and controversial points; there is no need to add others arising out of the much debated subject of the law relating to aliens or out of any other branch of international law, however important. For example, nobody can deny the present importance of the principles concerning the maintenance of peace and the protection of the sovereignty and territorial integrity of States against any undue interference. But the determination of the rules relating to that subject is likewise a separate undertaking, which should be approached by a direct and independent route, not indirectly in conjunction with an attempted definition of rules concerning responsibility, for otherwise the difficulties peculiar to one field will be added to those of another and, above all, the disadvantages of a study of responsibility by separate sectors, as criticized by me, will recur.

Here, too, I hasten to add that I do not wish to give the impression of thinking that every distinction between the violation of certain rules and the violation of others is immaterial for the purpose of the consequent responsibility, or of believing that the consequences of the infringement of a rule essential to the life of the international community should not be much serious than those arising out of lesser infringements. I believe, on the contrary, that logically this must be so. Once again, what I wish to emphasise is merely that the consideration of the contents of the various rules of substance should not be an object in itself in the study of responsibility, and that the contents of these rules should be taken into account only to illustrate the consequences which may arise from an infringement of the rules.

It seems to me, in conclusion, that the International Law Commission acted wisely in deciding that the general and necessarily uniform aspects of State responsibility should be studied first; the Sub-Committee should therefore strictly adhere to this decision when selecting the various points to be considered. In my view, only in this way can we hope, step by step, to accomplish a difficult task, which is essential both for the definition and clarification of existing rules and for the development to be aimed at in several respects.

II

Turning now more specifically to the main points which should be considered under the heading of the general aspects of the international responsibility of the State, I believe that the Sub-Committee should concentrate mainly on two basic points: firstly, the definition of the acts which give rise to the international responsibility of the State, that is to say international wrongful acts and the component parts and different types of such acts, etc.; and, secondly, the consequences of international responsibility. These two fundamental points might be examined in the manner outlined below, though I should add that my suggestions are tentative and provisional and by no means aspire to exhaust the subject.

Preliminary point — Definition of the concept of *international responsibility.*

Responsibility of States and responsibility of other subjects of international law.

First point — *Origin of international responsibility*

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

(2) *Determination of the component parts of the international wrongful act:*

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

(*b*) *Subjective element:* imputability to a subject of international law of conduct contrary to an international obligation. Questions relating to imputation. Problem of the capacity of the State to commit an international delinquency. Relationship between this capacity and the capacity to act. Limits. Imputation of wrongful act and of responsibility.

Questions relating to the requirement that the act or omission contrary to an international obligation should emanate from a State organ. What system of law is applicable for the purpose of determining what is a State organ? Legislative, administrative and judicial organs. Organs acting *ultra vires.* State responsibility for acts of private persons. Question of the real origin of international responsibility in such cases.

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

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

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

International wrongful acts and omissions. Possible consequences of the distinction, particularly so far as *restitutio in integrum* is conserved.

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

Problems of participation in the international wrongful act.

(4) *Circumstances in which act is not wrongful*

Consent of the injured party. Problem of presumed consent.

Legitimate sanction against the author of an international wrongful act.

Self-defence.

A State of necessity.

Second point — Consequences of international responsibility

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

(2) *Reparation.* Its forms. *Restitutio in integrum* and reparation by equivalent or *compensation.* Extent of reparation. Reparation of indirect damage. Satisfaction and its forms.

(3) *Sanction.* Individual sanctions provided for in ordinary international law. Reprisals and their possible role as a sanction for an international wrongful act. Questions relating to war. Collective sanctions. The United Nations system.

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THE SOCIAL NATURE OF PERSONAL RESPONSIBILITIES

Working paper prepared by Mr. Angel Modesto Paredes [61]

In every process of imputing responsibility for an act to a person it is possible to consider two aspects: the psychological (that is to say, the decision attributed to the person concerned) and the sociological (that is to say, the social consequences of the act).

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I. *Psychological responsibility*

The agent's psychological responsibility arises out of his clear recognition of the relations affected and out of his will to act in the way in which he in fact acted. Accordingly, the simultaneous existence of the following requirements or elements are evidence of his intention to produce the full consequence of his act: an accurate discernment of the outcome and of the objects comprised in the judgement as to the relations between the subject and the act — a judgement which may regard those relations good, indifferent or bad; and a will which, aware of those relations, translates the intent into action.

The absence or partial absence of one or more of these elements implies the absence, or the existence only in a diminished degree, of the efficacy of the decision, and hence a modification of the agent's responsibility (the consequence of the act decided upon and performed). If the plan was vague, or if judgment was impaired, or if the volition flagged, then the gravity of the offender's responsibilities will be affected in like measure. It may be asserted that the degrees of psychological imputability constitute a vast scale of differentiation, as varied, perhaps, as the personality of the agents.

The foregoing concords with the philosophical view that, if a man chooses evil he does so through an error of appreciation and not through a propensity of the will, and that the prevalence of right conduct will be the immediate result of the enlightenment of truth. This principle is erroneous, for it ignores the circumstantial attributes of each of the factors; in the first place, the social value attaching to the object may not coincide with the individual's assessment of it, with the consequence that a conflict of values arises; secondly, the agent's judgement may be at fault, in that he overestimates the worth of what is his own and in doing so underestimates the worth of what belongs to others; and thirdly, he may suffer from some innate or acquired perversity, accounted for by many social factors and in particular by the collapse of ethical standards at times of transition, when ethical standards have not yet been replaced by well-defined and firmly-rooted social precepts.

The will as the impulse behind conduct and behind the choice of means to give effect to that conduct is weakened by various circumstances of everyday occurrence; sometimes by purely organic, nervous or intellectual inner tensions; or it may crumble under the impact of external causes or of outside wills to which we submit either because duty so requires or because they overpower us; sometimes weakness and submission reach such a point that there can be no question of any freedom or spontaneity of will on the part of the person who performs the act, but rather of the replacement of one will by another.

It is thus seen that personal decisions lose a good deal of their autonomy and certainty, and only in a limited way can the act or behaviour be said to have been willed deliberately by the person to whom it is attributed. It follows that a truly voluntary act and a genuinely independent decision are the rarest things in real life.

But if our analysis has led us to this whittling away of the individual's responsibility, what can we say about collective acts and the responsibilities for such acts?

First, we should inquire: To whom can the decisions affecting the conduct of collective persons be traced?

By reason of the very nature of the extremely grave and complex decisions taken daily in every community, it is difficult to consult each of the associated individuals, and impossible in the case of a large political community like the State. Consequently, so far as knowledge and judgement are concerned, the group has to be represented, as a rule, by individuals who act for it, i.e. by authorized agents; this is the correct concept of public office. It is those who govern who have direct knowledge of a matter and form judgements concerning it. Not infrequently, moreover, they are empowered to take the relevant decisions, or the decisions are taken on behalf of the State by various public servants appointed for the purposes. The result takes the form of public acts performed by associated persons. The process thus breaks down into the actions of many agents — sometimes individuals and sometimes groups — who intervene at different stages.

Let us take the case of a census. Specialists in ethnography have realized that the basis for any sound administration is the recognition of the country's human and economic conditions, and, they call upon the government to carry out a census. The government acknowledges the justice of the request and decides to put it into effect: it makes available the necessary human and material resources and appoints census committees to conduct the census with the aid of the population.

However, there are cases and aspects in which the intervention of the group as such at various stages of conduct is manifest. Let us assume the case of the twofold referendum — the " initiative " advocating the adoption of a law or other measure, and the subsequent consultation for its approval or rejection. In the history of the small nations there have been governments which relied on a continuous succession of referendums, and even today this practice is resorted to at times when the issue at stake is of great moment, the organized political forces being to some extent by-passed by an appeal to the public, as was done recently in France by de Gaulle, with excellent results from the point of view of his policy. Apart from this, there are the ordinary popular elections prescribed by democratic constitutions for certain purposes, such as the appointment of executives.

In this way, many decisions in the life of a State are reached by this process, and it becomes necessary to determine what person or persons bear the responsibility for what has been done; for we know that at the various stages in a particular action the executive or the public may play a part and take a decision. And the characteristics we have noted at the various stages of the decision-making process are the variables which the nature of the decision imposes on the participants. For example, a people may have a sufficient awareness of a matter when it decides in favour of it, without achieving the fullness of knowledge of a very gifted individual. The judgements which a people forms are often sensible even though the people lacks the knowledge and wisdom to be expected of a distinguished executive; the generosity of will of a nation can never equal in quality the wisdom of a just man.

It would be necessary to carry out very penetrating research to define precisely the field of influence of the persons taking part and the consequences attributable to each of their acts; we do not propose to do this here, except in a very restricted field — with a view to the application of our findings to the international responsibilities of States.

For this purpose, we must first ask ourselves: Did the agent act within his term of reference, or did he exceed them? If he acted within his terms of reference, then it is his principal who is bound by the act; if he exceeded them, the principal is not bound. In the present context we are concerned with the first of these two situations.

But if the principal is committed, does this mean that the agent is relieved entirely of his responsibility? Not in every case; both may be answerable, though as we shall see, the consequences are not the same for both.

In the case where the injury is occasioned by the decision of the agent acting within the limits of his terms of reference, the question arises whether the act was indispensable for the defence of the State's overriding interests.

(*a*) If the act, though not indispensable, was useful to the country, then the State has a direct responsibility, and the official who ordered the act has a subsidiary responsibility;

(*b*) if the act was neither necessary nor useful, then the official is answerable, the State's responsibility being only subsidiary.

If the damage was unavoidable in the safeguarding of matters of paramount importance to the people's highest aspirations, then the idea of the governing body's fault vanishes

and is replaced by the responsibility of the State, though this is subject to qualification by many circumstances (e.g. self-defence, state of necessity) which diminish the wrongfulness of the act.

If, on the other hand, the official acted *ultra vires*, usurping functions not vested in him, then, because in so doing he did not act as his people's representative and hence could not commit that people, the responsibility is his, and his alone.

II. *The requirements of equity*

From another point of view, responsibility is grounded in ethics or equity: whoever causes an injury, even unintentionally, has a duty to make good the injury. In this sense, the risk is the same for individuals and for nations.

This is in line with the traditional theory of quasi-delict, but goes further by reason of the extension of the social system of co-operation among men. It is a kind of morality evolved in the doctrine — and infrequent in practice — which nowadays blends and mingles the usefulness and the duty of assistance: the damage sustained by any one affects all others. The idea owes its origin to the recognition of the identity of needs and ends for mankind and to the competition for means in a limited market.

Mere equity would require reparations, in cases where the injury done to another is due to our negligence in the performance of an act which it was our duty to perform, or to our carelessness, lack of skill or inexperience, or where we have derived some advantage from another's prejudice. But the solidarity which modern life imposes also requires us to give assistance further afield.

III. *Social rules*

In any organized human society the association cannot subsist unless its members are mutually answerable for their acts and conduct towards each other. The complete autonomy of each is compatible only with absolute isolation. Hence there are both advantages and duties for the participants, in that the different social limitations on behaviour have their counterpart on the one hand in the greater solidarity and in common benefit and, on the other, in interdependence, which implies many responsibilities.

Perhaps the isolation in which nations lived in the past — so long as they were not impelled to action by the desire to dominate others — and the deceptive prospect of self-sufficiency pursued by some great Powers enabled them to exist without rules governing responsibility, albeit with the ever-present risk that their differences would be settled by war. But if peace is the aim and if war is to be abolished, the world needs a system of responsibilities which are legally enforceable, in other words judicial process and judicial decision. This means a system relying on courts possessing the necessary competence.

If this is what effective peace means, then the association of peoples is bound to be strengthened and to prosper if the law is recognized as the sole formula of co-existence above the transience and violence of political rivalries.

These, then, are the relationships to be considered: in the modern world, the peoples can live in plenty through a partnership for extracting the maximum yield from natural resources; partnership means the carrying on of competing activities having one or many purposes; any competition involves the danger of rivalry, disagreement about means or at least about the part which each should play; hence it becomes indispensable to regulate conduct, through rules governing action, requiring each one to do his duty, and this means in effect that each is held answerable for his acts. If his conduct conforms with what is agreed upon or just, the person is called responsible; if he departs from that conduct, he is called to order by the means available to society.

In our analysis of the various aspects of responsibility, we started with psychology, which is concerned with individual intention, in other words with the acts decided upon and carried out by the individual — subjective reality — and finished with the actual event and its social implications — objective responsibility, which in the final analysis is nothing other than the discipline of the members of an association.

IV. *The determination of responsibility and penalties in law*

As far as those responsible are concerned, the remedy for injuries caused takes the form of financial reparation and of penalties ordered for the purpose of punishing the wrongful conduct; the object is to enforce conduct conforming to law.

But what should be the attributes of the penalties in order to be styled legal?

So long as no true society of nations had been organized, one could not speak of a stable legal system governing their reciprocal relations, except in the rare cases where parties took their disputes to the established international courts. The usual remedy for whoever considered that he had suffered prejudice or that his claims were neglected consisted of recourse to force, and more particularly to war. One metaphysical philosophy, it is true, maintained that God rewarded the just cause with victory. But a superficial reading of history shows the hollowness of such metaphysics. Often, victory was won by fortuitous circumstances, and at other times the issue was decided by the preparations for war and by the volume and quality of the forces, which reminds us of the cynical popular saying that God gives victory to the good when they are more numerous than the wicked. There remained the mere moral sanction of public opinion, which is so vacillating and uncertain, or the supposed judgement of history.

What is so novel and remarkable about international relations in our time is the *possibility* of establishing courts adjudicating according to law on the conduct of peoples and holding responsible those causing an injury, theoretically even the most powerful State.

And so we discern the idea taking shape that all Powers have a duty to abandon policies based on selfish interests and instead to apply the policy based on law which is required by justice and equity. We are still far from protecting and satisfying such needs, when questions fundamental for States are at issue, particularly among the great Powers; but there can be no doubt that important advances have been made which are bound to culminate in a better system of relationships, with full confidence, among the disputants, in the rectitude and wisdom of the judge.

It should, however, be pointed out that the effective establishment of international courts ought to be preceded by a clear conception and statement of the reciprocal rights and duties of nations, the precise definition of the character and scope of those rights and duties. This is what is meant by the theory of fundamental and derived rights and duties: delimiting the proper sphere of the exclusive jurisdiction of States; defining with certainty what the principle of non-intervention implies and adhering firmly to this definition; organizing the high courts and providing them with the strongest guarantees of independence and respect for their opinions and with the necessary means for enforcing their decisions.

V. *Subjects of international responsibility*

As explained earlier in this paper, the responsibility for governmental acts at the international level may attach to the public officials who decided upon or executed the injurious acts, or also to the people which consented to the acts.

The Nürnberg trials and other later trials, in so far as they are not to be regarded as acts of vengeance, gave prominence to two important legal concepts: firstly, officials who, acting in the name and on behalf of a people, perform acts of cruelty — even if in so doing they act within the limits of their functions — are answerable for the injury caused; and secondly, crimes which show evidence of depravity on the part of those committing them can be tried and punished without the need for a pre-existing law. Both aspects merit careful study, though in view of our present purpose, we cannot examine them at this stage.

We also know that the people itself is answerable — in some circumstances directly and as a principal, and in others, indirectly. In the first case, in order that the people may be held responsible, certain acts, apart from any referendum, must have been performed, even though the acts are initiated and carried out by the appropriate official. And as regards the second case, indirect responsibility arises from any act decided upon by a competent authority.

What is the true rationale of this responsibility?

Of the three aspects of responsibility which we have mentioned — psychological, ethical and social — it can be said that in the normal course of the exercise of public functions, the last two primarily and directly involve the State, whereas the first involves the official concerned.

Where the intent or purpose is reprehensible or the conduct depraved, one tries to correct and counteract them by exerting an influence on the person. The object is the psychological betterment of the offender, which is sought by means of personal penalties. To correct his anti-social propensities, efforts are made to discipline the subject's conduct. In this very particular and very special instance, however, the setting is international and the subjects are States, though the analogy with individual conduct is not wholly excluded, since history has known countries which in their psychological make-up have been persistently militarist, aggressive or interventionist, irrespective of the regime in power. In one of my works I spoke of international bullying, and that is what must be done away with. In these very special cases of which I am speaking, then, the personal penalties intended to amend conduct might be applied to States, even though they are really meant for individuals. But if they are to be applied to peoples, it must be borne in mind that the penalties will affect guilty and innocent alike, and everything possible should be done to protect the innocent. Furthermore, the enforcement measures applied should be of various kinds.

Where the responsibility is founded in equity, and in cases of sociological responsibility, the remedy is a claim to financial compensation, and this can be easily satisfied by the State. Besides, this compensation is in conformity with the reparation claimed; injury caused unintentionally or harm caused as a result of adverse circumstances must be compensated.

War as a means of coercion should be generally outlawed and force should be used only as a last resort, after all other methods have failed.

Lastly, no penalty of any kind should be imposed without a decision by the competent court.

General principles of international responsibility

1. Imputation is the judgement attributing an act or occurrence to a specific person.

2. Responsibility implies an imputation and the obligation to repair the damage caused.

3. International responsibility differs in nature from responsibility under municipal law.

4. There is an active subject of responsibility, who may claim reparation, and a passive subject, who has the duty to make reparation.

5. Both the active subject and the passive subject may be collective or individual.

6. Responsibility attaches to the passive subject where any of the following circumstances exist:

(*a*) if he intentionally committed the act, or if he conceived and planned it, whether or not he participated in its execution (psychological responsibility);

(*b*) if he caused injury to another person, even unintentionally (responsibility in equity);

(*c*) if the responsibility is the result of the risks, rivalry and conflicts inherent in life in society and of the solidarity and co-operation among associates (sociological responsibility).

7. Responsibility gives rise to punitive and civil damages.

8. Punitive damages are applicable primarily to the social disturbance caused by the event and their main object is to check the anti-social impulses of the offender.

Civil damages relate to the material damage caused.

9. Individual persons or entities may be jointly or severally responsible for a particular act, in varying forms and degrees.

10. Ordinarily, the officials who order and prepare the commission of punishable acts incur criminal liability, and the people concerned is liable for the civil damages for the act imputable to it.

11. Exceptional cases of the criminal responsibility of States are those in which their habitual — or at least their frequently repeated — conduct shows a tendency towards aggression and violence which disturbs normal international relations.

Once this tendency has been established by a long succession of events, the State in question will be held responsible for any recurrence of its unlawful acts.

12. Penalties consist of measures of constraint directed against the person or property of the offenders.

13. Where States are involved, constraint of persons should be avoided as far as possible.

14. War may be resorted to only in extreme cases, in the case of persistent refusal to submit, and only by decision of a competent court, to be carried into effect by the international executive agency established for this purpose.

15. Any judgement concerning international responsibility should answer the following questions:

(*a*) who were the individuals who should be held responsible for the decision taken?

(*b*) in what capacity did the individuals in question act: (a) as administrative authorities or as private persons? (b) in the first case, did they or did they not act within their constitutional powers?

(*c*) was the international person lawfully represented for the purpose of the decision?

(*d*) did the injury occur in consequence of a state of necessity?

(*e*) was the injury not necessary or useful for the State?