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

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STATE RESPONSIBILITY
(Agenda item 3)

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

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

ADDENDUM *

[5 April 1971]

ANNEX XXIV

Restatement of the law, by the American Law Institute *

Original text : English

165. *When conduct causing injury to alien
is wrongful under international law*

PART IV

Responsibility of States for injuries to aliens

CHAPTER 1

GENERAL PRINCIPLES OF RESPONSIBILITY

TOPIC 1. CONDITIONS OF RESPONSIBILITY

164. *General rule of state responsibility*

(1) A state is responsible under international law for injury to an alien caused by conduct subject to its jurisdiction, that is attributable to the state and wrongful under international law.

(2) As used in this Part (sections 164-214), "injury" means any kind of loss, detriment, or other damage for which a legal remedy is afforded under the principles of justice generally recognized by states that have reasonably developed legal systems.

(3) As used in this Part, "conduct" includes both action and failure to act.

* The present document completes the Special Rapporteur's first report on State responsibility (A/CN.4/217 and Add.1), published in *Yearbook of the International Law Commission, 1969*, vol. II, p. 125.

* American Law Institute, *Restatement of the Law, Second, Foreign Relations Law of the United States* (St. Paul, Minn., American Law Institute Publishers, 1965), pp. 497 *et seq.* The *Restatement* is divided into sections with accompanying comments, illustrations, etc. This annex reproduces only the text of the sections (164-214) of part IV of the *Restatement*.

(1) Conduct attributable to a state and causing injury to an alien is wrongful under international law if it

- (a) Departs from the international standard of justice, or
- (b) Constitutes a violation of an international agreement.

(2) The international standard of justice specified in subsection (1) is the standard required for the treatment of aliens by

(a) The applicable principles of international law as established by international custom, judicial and arbitral decisions, and other recognized sources or, in the absence of such applicable principles,

(b) Analogous principles of justice generally recognized by states that have reasonably developed legal systems.

(3) The rules that follow as to specific types of conduct, attributable to a state and causing injury to an alien, that are wrongful under international law because they depart from the international standard, are illustrative, not exclusive. Conduct, attributable to a state and causing injury to an alien, that is not covered by any such rules may be, but is not necessarily, wrongful under international law as a departure from the international standard.

166. *Discrimination against alien*

(1) Conduct, attributable to a state and causing injury to an alien, that discriminates against aliens generally, against aliens of his nationality, or against him because he is an alien, departs from the international standard of justice specified in section 165.

(2) Conduct discriminates against an alien within the meaning of subsection (1) if it involves treating the alien differently from nationals or from aliens of a different nationality without a reasonable basis for the difference.

167. *Effect of violation of domestic law*

Conduct, attributable to a state and causing injury to an alien, that violates the law of the state does not depart from

the international standard of justice specified in section 165 merely by reason of such violation. Such conduct departs from the international standard only if it would depart therefrom in the absence of the state law.

168. *Responsibility for injury and for failure to make reparation distinguished*

When conduct attributable to a state and causing injury to an alien is wrongful international law, the state is responsible for the injury under the rule stated in section 164 and has a duty to make reparation for it. When conduct attributable to a state and causing injury to an alien is not wrongful under international law, the state is not responsible for this injury under the rule stated in section 164, but, in the case of certain economic injuries, it nevertheless has a duty to make reparation, and is responsible, under the rules stated in sections 186, 195, and 196, for failure to do so.

TOPIC 2. ATTRIBUTION OF CONDUCT TO STATE

169. *General rule as to attribution*

Conduct of any organ or other agency of a state, or of any official employee, or other individual agent of the state or of such agency, that causes injury to an alien, is attributable to the state within the meaning of section 164 (1) if it is within the actual or apparent authority, or within the scope of the functions, of such agency or individual agent.

170. *Conduct of local authorities*

If conduct of an agency or agent of a political unit that is included in a state causes injury to an alien, such conduct is attributable to the state to the same extent as conduct of an agency or agent of the state, subject to the special rule stated in section 193 (3) as to a contract of a political subdivision of a state.

TOPIC 3. WHO IS AN ALIEN FOR PURPOSES OF STATE RESPONSIBILITY

171. *Alien defined*

A person is an alien for purposes of the responsibility of a state for injury to an alien, if

- (a) He is not a national of the respondent state,
- (b) He is a national of the respondent state and of another state, and the respondent state, for purposes of the conduct causing the injury, treats him as a national of the other state, or
- (c) He is a national of the respondent state and of another state, provided (i) his dominant nationality, by reason of residence or other association subject to his control (or the control of a member of his family whose nationality determines his nationality) is that of the other state and (ii) he (or such member of his family) has manifested an intention to be a national of the other state and has taken all reasonably practicable steps to avoid or terminate his status as a national of the respondent state.

172. *Alien shareholder of domestic corporation*

When a domestic corporation, in which an alien is directly or indirectly a shareholder, is injured by action attributable to a state that would be wrongful under international law if the corporation were an alien corporation, the state is not responsible under international law for the injury to the corporation. The state is however, responsible for the consequent injury to the alien to the extent of his interest in the corporation, if

- (a) A significant portion of the stock of the corporation is owned by the alien or other aliens of whatever nationality,
- (b) The state knows or has reason to know of such ownership at the time of the conduct causing the injury to the corporation,
- (c) The corporation fails to obtain reparation for the injury,
- (d) Such failure is due to causes over which the alien or other alien shareholders cannot exercise control, and
- (e) A claim for the injury to the corporation has not been voluntarily waived or settled by the corporation

173. *Alien shareholder of corporation having nationality of third state*

When an alien corporation, in which an alien of a different nationality is directly or indirectly a shareholder, is injured by conduct attributable to a state that is wrongful under international law the state is responsible for the consequent injury to the alien to the extent of his interest in the corporation, if

- (a) A significant portion of the stock of the corporation is owned by the alien or by other aliens who are not nationals of the state to which the conduct is attributable or of the state of which the corporation is a national,
- (b) The corporation fails to obtain reparation for the injury,
- (c) Such failure is due to causes over which the alien or such other alien shareholders cannot exercise control, and
- (d) A claim for the injury to the corporation has not been waived or settled by the corporation or by the state of which it is a national.

TOPIC 4. TO WHOM STATE IS RESPONSIBLE

174. *Responsibility to state of nationality*

The responsibility of a state for injury to an alien may be invoked by a state of which the alien is a national. It cannot be invoked by any other state.

175. *Responsibility to alien*

The responsibility of a state under international law for an injury to an alien cannot be invoked directly by the alien against the state except as provided by

- (a) The law of the state,
- (b) International agreement, or
- (c) Agreement between the state and the alien.

176. *Responsibility to international organization*

(1) If an individual is injured in connection with the performance of his functions as an agent of the United Nations by conduct attributable to a state, the state is responsible to the United Nations to the same extent that it would be responsible to another state if the individual were an alien with reference to the first state and a national of the other state. Such responsibility arises even if the agent of the United Nations is a national of the respondent state.

(2) In the case of any other international organization having a constitution that provides for an independent staff, the same responsibility arises if the respondent state is a member of the organization or has consented to the performance of the functions in question.

177. *Responsibility to state of which alien is official or member of national services*

An official of a state, or a member of its national services, who is not a national of the state and is injured in the performance of his functions as such official or member by conduct attributable to another state, of which he is not a national, is treated as if he were a national of the first state for purposes of determining state responsibility for the injury.

CHAPTER 2

INADEQUATE ADMINISTRATION OF LAW

TOPIC 1. DENIAL OF PROCEDURAL JUSTICE

178. *Denial of procedural justice defined*

As used in the Restatement of this subject, "denial of procedural justice" means conduct, attributable to a state and causing injury to an alien, that departs from the international standard of justice specified in section 165 with respect to the procedure followed in enforcement of the state's law as it affects the alien in criminal, civil, or administrative proceedings, including the determination of his rights against, or obligations to, other persons.

179. *Arrest and detention*

- (1) The arrest of an alien is a denial of procedural justice if
 - (a) He is not informed of the cause of the arrest, or
 - (b) The arrest is for a cause not recognized as justifying liabilities is a denial of procedural justice.
- (2) The detention of an alien constitutes a denial of procedural justice if he is not, without unreasonable delay,
 - (a) Informed of the charges against him,
 - (b) Afforded access to a tribunal or other authority having jurisdiction to determine the lawfulness of his detention and to order his release if such detention is unlawful,
 - (c) Permitted during detention to communicate with a representative of his government,
 - (d) Afforded access to counsel, or
 - (e) Granted a trial.
- (3) Mistreatment of an alien in the course of arrest or during detention is a denial of procedural justice.

180. *Denial of trial or other proceeding*

- (1) Failure to afford to an alien an appropriate trial or other legal proceeding for the determination of his rights or liabilities is a denial of procedural justice.
- (2) Application of the principle of sovereign immunity to dismiss an action by an alien against a state is not a denial of procedural justice if the principle is applied in a manner consistent with the law of states that have reasonably developed legal systems. If the action is based on an injury that is wrongful under international law, the state remains responsible for the injury.

181. *Fairness of trial or other proceeding*

In order to conform to the requirements of sections 179(2)(e) and 180, a trial or other proceeding to determine the rights or liabilities of an alien must be fair. In determining whether the proceeding is fair, it is relevant to consider, among other factors whether the alien has had the benefit of

- (a) An impartial tribunal or administrative authority,
- (b) Adequate information with respect to the nature of the proceedings so as to permit the alien to present his claim or defense,
- (c) Adequate interpretation and translation into his own language at all stages of the proceeding,
- (d) Reasonable opportunity to contest evidence against him,
- (e) Reasonable opportunity to obtain and present witnesses and evidence in his own behalf,
- (f) Reasonable opportunity to communicate with a representative of his government with respect to the proceedings,

(g) Reasonable opportunity to consult counsel and time to prepare for the proceeding, and

(h) Reasonable dispatch by the tribunal or administrative authority in reaching a determination.

182. *Unjust determination*

An adverse determination that is manifestly unjust in a proceeding determining criminal charges against an alien, or determining his rights and liabilities of a civil nature, is a denial of procedural justice.

TOPIC 2. FAILURE TO PROTECT FROM PRIVATE INJURY

183. *Responsibility for failure to protect*

A state is responsible under international law for injury to the person or property of an alien caused by conduct that is not itself attributable to the state, if

- (a) The conduct is either (i) criminal under the law of the state, (ii) generally recognized as criminal under the laws of states that have reasonably developed legal systems, or (iii) an offense against public order, and
- (b) Either (i) the injury results from the failure of the state to take reasonable measures to prevent the conduct causing the injury, or (ii) the state fails to take reasonable steps to detect, prosecute, and impose an appropriate penalty on the person or persons responsible for the conduct if it falls within clause (a) (i).

CHAPTER 3

INJURIES TO ECONOMIC INTERESTS OF ALIENS

TOPIC 1. GENERAL PRINCIPLES

184. *Relationship to international standard of justice*

Conduct attributable to a state and causing injury to the economic interests of an alien is wrongful under international law if it departs from the international standard of justice specified in section 165. Sections 185-196 describe particular types of such conduct that *per se* depart from the international standard. Other types of conduct causing injury to the economic interests of an alien may or may not depart from the international standard, depending on the circumstances.

TOPIC 2. TAKING OF PROPERTY

185. *When taking is wrongful under international law*

The taking by a state of property of an alien is wrongful under international law if either

- (a) It is not for a public purpose,
- (b) There is not reasonable provision for the determination and payment of just compensation, as defined in section 187, under the law and practice of the state in effect at the time of taking, or
- (c) The property is merely in transit through the territory of the state, or has otherwise been temporarily subjected to its jurisdiction and is not required by the state because of serious emergency.

186. *Failure to pay just compensation for taking*

Failure of a state to pay just compensation for taking the property of an alien is wrongful under international law, regardless of whether the taking itself was wrongful under international law.

187. *Just compensation defined*

Just compensation as required by section 186 must be

- (a) Adequate in amount, as indicated in section 188,
- (b) Paid with reasonable promptness, as indicated in section 189, and
- (c) Paid in a form that is effectively realizable by the alien, to the fullest extent that the circumstances permit, as indicated in section 190.

188. *Adequacy of compensation*

(1) Compensation, to be adequate in amount within the meaning of section 187, must be in an amount that is reasonable under the circumstances, as measured by the international standard of justice indicated in section 165. Under ordinary conditions, including the following, the amount must be equivalent to the full value of the property taken, together with interest to the date of payment

(a) If the property was acquired or brought into the jurisdiction of the state by the alien for use in a business enterprise that the alien was specifically authorized to establish or acquire by a concession, contract, license, or other authorization of the state, or that the alien established or acquired in reasonable reliance on conduct of the state designed to encourage investment by aliens in the economy of the state,

(b) If the property is an operating enterprise that is taken for operation by the state as a going concern,

(c) If the taking is pursuant to a program under which property held under similar circumstances by nationals of the state is not taken, or

(d) If the taking is wrongful under international law as stated in section 185.

(2) In the absence of the conditions specified in subsection (1), compensation must nevertheless be equivalent to full value unless special circumstances make such requirement unreasonable.

189. *Promptness of compensation*

Payment with reasonable promptness, within the meaning of section 187, means payment as soon as is reasonable under the circumstances in the light of the international standard of justice specified in section 165.

190. *Effectiveness of compensation*

(1) Compensation, to be in effectively realizable form, within the meaning of section 187, must be in the form of cash or property readily convertible into cash. If not in the currency of the state of which the alien was a national at the time of the taking, the cash paid must be convertible into such currency and withdrawable, either before or after conversion, to the territory of the state of the alien's nationality, except as indicated in subsection (2).

(2) Such conversion and withdrawal may be delayed to the minimum extent necessary to assure the availability of foreign exchange for goods and services essential to the health and welfare of the people of the taking state.

191. *Meaning of property*

As used in this chapter (sections 184-196), "property" includes tangible property, whether real or personal, movable or immovable, and intangible property. It also includes any interest in property if such interest has a reasonably ascertainable value.

192. *Meaning of taking*

Conduct attributable to a state that is intended to, and does, effectively deprive an alien of substantially all the benefit of his interest in property, constitutes a taking of the property,

within the meaning of section 185, even though the state does not deprive him of his entire legal interest in the property.

TOPIC 3. BREACH OF CONTRACT

193. *When breach of contract is wrongful under international law*

(1) The breach by a state of a contract with an alien, except as indicated in subsections (2) and (3), is wrongful under international law if either

(a) The breach is effected in an arbitrary manner without bona fide claim of excuse,

(b) The law and practice of the state in effect at the time of the breach do not make reasonable provision for reparation for the breach,

(c) The state entered into the contract with the alien (or an alien assignor of the contract) in his capacity as an alien, or

(d) The circumstances indicate that, when the alien became a party to the contract, the parties contemplated that performance of the contract would involve to a substantial degree foreign commerce, use of foreign resources, or activity outside the territory of the state.

(2) Subsections (1)(a) and (1)(b) are not applicable to a contract for the repayment of money borrowed on the domestic market of the state.

(3) Breach by a political subdivision of a state, whether or not it is a federal state, of a contract to which the central government or an agency of that government is not a party, does not, as such, give rise to responsibility on the part of the state under international law.

(4) A breach of a contract within the meaning of this section is any conduct attributable to the state that is contrary to its obligations under the contract. Such obligations are determined by the governing law as specified in section 194 and are subject to termination with just compensation as stated in section 195.

194. *Law determining breach of contract*

The law governing a contract between a state and an alien, for purposes of determining whether conduct constitutes a breach of the contract as defined in section 193(4), is the law indicated by the applicable law of conflict of laws, except that if the governing law departs from the international standard of justice specified in section 165(1), it governs only as modified to comply with that standard.

195. *Termination of contract obligations by state*

(1) If a state takes such action as is effective, under governing law as indicated in section 194 and subsection (3) of this section, to terminate an obligation of the state under a contract with an alien, subsequent failure of the state to comply with the terms of the contract to the extent so terminated does not constitute a breach of the contract within the meaning of section 193(4).

(2) Failure of a state to pay just compensation for terminating a contract with an alien is wrongful under international law, regardless of whether the termination itself was wrongful.

(3) To the extent that the law of a state permits it to terminate a contractual obligation to an alien without reasonable provision for the determination and payment of just compensation, such law departs from the international standard of justice and therefore governs only as modified in accordance with the rule stated in section 194 in determining whether the state's failure to perform the obligation constitutes a breach of the contract within the meaning of section 193(4).

TOPIC 4. PROHIBITION OF GAINFUL ACTIVITY

196. *General rule*

(1) Conduct attributable to a state that forbids an alien to engage in previously lawful gainful activity is wrongful under international law unless either

(a) The alien receives reasonable notice and opportunity to engage in other gainful activities or to depart from the territory of the state,

(b) The prohibition is promulgated for bona fide reasons of public policy of the state and is equally applicable to nationals and to aliens similarly situated, or

(c) Under the law and practice of the state in effect when the prohibition becomes effective there is reasonable provision for the determination and payment of just compensation.

(2) Failure of a state to pay just compensation under the circumstances indicated in subsection (1)(c) is wrongful under international law.

CHAPTER 4

JUSTIFICATION

197. *Police power and law enforcement*

(1) Conduct attributable to a state and causing damage to an alien does not depart from the international standard of justice indicated in section 165 if it is reasonably necessary for

(a) The maintenance of public order, safety, or health, or

(b) The enforcement of any law of the state (including any revenue law) that does not itself depart from the international standard.

(2) The rule in subsection (1) does not justify failure to comply with the requirements of procedural justice stated in sections 179-182 except as stated in section 199 with respect to emergencies.

198. *Currency control*

Conduct attributable to a state and causing damage to an alien does not depart from the international standard of justice indicated in section 165 if it is reasonably necessary in order to control the value of the currency or to protect the foreign exchange resources of the state.

199. *Emergencies*

Conduct attributable to a state and causing damage to an alien does not depart from the international standard of justice indicated in section 165 if it is reasonably necessary to conserve life or property in the case of disaster or other serious emergency.

200. *Retaliation*

When an alien is injured by conduct attributable to a state for which the state would otherwise be responsible under international law, the state is not excused from responsibility merely because its conduct is in retaliation for conduct of the state of the alien's nationality, even if the conduct of the state of his nationality is wrongful under international law. However, in determining whether conduct that affects an alien otherwise than similarly situated nationals, or aliens of other nationalities, discriminates against him in violation of the rule stated in section 166, it is relevant to consider the relationship between such conduct and conduct of the state of nationality.

201. *Relationship to international agreement or discrimination*

The rules stated in sections 197-200 do not relieve a state of responsibility under the rule stated in section 165 for conduct that is contrary to an international agreement or of responsibility under the rule stated in section 166 for conduct that discriminates against an alien.

CHAPTER 5

WAIVER AND SETTLEMENT

202. *Waiver by prior agreement: the "Calvo Clause"*

(1) If an alien, as a condition of engaging in economic activity in the territory of a state, agrees with the state that he is to be treated as if he were a national in respect to such activity, and that his only remedy for injury in this respect is that available under the law of the state, such agreement, commonly called a "Calvo Clause", relieves the state of responsibility for injury to the economic interests of the alien in respect to such activity, if

(a) The alien is in fact treated as favourably as if he were a national,

(b) The conduct of the state causing injury to the alien does not constitute violation of an international agreement under the rule stated in section 165 (1)(b), and

(c) The law of the state affords the alien a bona fide remedy for such injury that satisfies the requirements of procedural justice stated in sections 180-182.

(2) A Calvo Clause does not relieve a state of responsibility for injury to an alien except as stated in subsection (1).

203. *Waiver or settlement by alien after injury but before espousal*

A waiver or settlement by an alien of a claim against a state, made after an injury attributable to that state but before espousal of the claim by a state of which the alien is a national, is effective as a defense on behalf of the respondent state, provided the waiver or settlement is not made under duress.

204. *Waiver or settlement by alien after espousal*

A waiver or settlement by an alien of a claim against a state, made after espousal of the claim by a state of which the alien is a national, is not effective as a defense on behalf of the respondent state, but may be taken into account in determining the amount of reparation payable for the injury.

205. *Waiver or settlement by state of nationality*

A waiver or settlement made by a state of which an injured alien is a national, whether made before or after espousal of the claim by that state, is effective as a defense to an international claim asserted by that state against the state responsible for the injury.

CHAPTER 6

EXHAUSTION OF REMEDIES

206. *General rule*

(1) A state is not required to make reparation on a claim presented on behalf of an alien injured by conduct wrongful

under international law and attributable to the state, if the alien has not exhausted the remedies made available by the state, unless such exhaustion is excused under the rule stated in section 208.

(2) Such remedies include not only proceedings available under the law and practice of the state for the redress of injuries, but also any remedies that are available by agreement between the state and the alien, or by international agreement.

207. *Meaning of exhaustion*

An injured alien has exhausted the remedies made available by a state, within the meaning of the rule stated in section 206, when he has taken all steps that could reasonably be expected of him to

(a) Present his claim to the appropriate court or other tribunal or agency,

(b) Support his claim with all appropriate evidence and points of law, and

(c) Avail himself of all appropriate procedures, including appeals.

208. *Exhaustion excused*

An alien is excused from exhausting an available remedy if either

(a) It is apparent that the remedy would not satisfy the requirements of procedural justice stated in sections 180-182,

(b) Exhaustion would be clearly ineffective in view of one or more prior determinations made, on substantially identical claims, by the highest agency of the state that has authority to grant relief, or

(c) The state of the alien's nationality, which has espoused his claim, is asserting on its own behalf a separate and preponderant claim for direct injury to it arising out of the same wrongful conduct.

209. *Waiver of exhaustion*

A state may, by appropriate manifestation of intention, waive the exhaustion of available remedies.

210. *Determination as to exhaustion*

To the extent that a determination as to whether domestic remedies have been exhausted depends on the law of the

respondent state, an international tribunal will refrain from making that determination if procedures are available for determination by an authoritative tribunal of the respondent state. If they are not available, the tribunal will make its own determination.

CHAPTER 7

UNITED STATES LAW AS TO INJURIES BY FOREIGN STATES TO UNITED STATES NATIONALS

211. *National's rights before espousal by government*

When a foreign state is responsible for an injury to a national of the United States, the resultant claim for reparation, until and unless espoused by the United States, and except as otherwise provided by law, is subject to the control of the national who has suffered the injury, and he is entitled to any reparation paid to him by the foreign state.

212. *Discretion as to espousal of claim*

The Government of the United States has discretion as to whether to espouse the claim of a United States national for injury caused by conduct attributable to a foreign state that is wrongful under international law. This discretion is vested in the President and exercised on his behalf by the Secretary of State.

213. *Power to waive or settlement claims*

The President may waive or settle a claim against a foreign state based on the responsibility of the foreign state for an injury to a United States national, without the consent of such national.

214. *Distribution of reparation received by United States Government*

When the United States Government receives reparation from a foreign state in the form of a lump sum in settlement of claims arising from injuries to numerous nationals of the United States, and distributes such sum in compliance with reasonable procedures prescribed by a statute that provides that such distribution shall not be subject to judicial review, the distribution is conclusive as to the United States nationals affected.