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**Report on International Responsibility by Mr. F.V. Garcia-Amador, Special Rapporteur**

Topic:  
**State responsibility**

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# STATE RESPONSIBILITY

## DOCUMENT A/CN.4/96

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

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## CHAPTER I

**The traditional view and the development of international law**

1. The International Law Commission decided, at its seventh session, to undertake the codification of the "principles of international law governing State responsibility" and appointed the author of the present report Special Rapporteur on that topic.<sup>1</sup> As indicated in an earlier memorandum by the author (A/CN.4/80), the inclusion of that topic in the Commission's programme of work inevitably and immediately raises a preliminary question concerning method, namely, the question of examining, in the light of the international law in its present stage of development, the principles which have traditionally governed the responsibility of the State. Before, however, reverting to this question of method, the author will first discuss General Assembly resolution 799 (VIII) and its immediate pre-history.

**1. RESOLUTION 799 (VIII) OF THE GENERAL ASSEMBLY**

2. At its eighth session the General Assembly adopted on 7 December 1953 a resolution requesting the International Law Commission to undertake, as soon as the Commission considered it advisable, the codification of

<sup>1</sup> *Official Records of the General Assembly, Tenth Session, Supplement No. 9, para. 33.*

the principles of international law governing State responsibility. The full text of resolution 799 (VIII) follows:

*"Request for the codification of the principles of international law governing state responsibility*

*"The General Assembly,*

*"Considering that it is desirable for the maintenance and development of peaceful relations between States that the principles of international law governing State responsibility be codified,*

*"Noting that the International Law Commission at its first session included the topic 'State responsibility' in its provisional list of topics of international law selected for codification,*

*"Requests the International Law Commission, as soon as it considers it advisable, to undertake the codification of the principles of international law governing State responsibility."*

3. It will be noted that the foregoing text casts no light on the exact scope of such codification, except for the expression "State responsibility", but even this expression cannot, in the present state of development of international law, be literally and narrowly construed. Nor do the discussions in the Sixth Committee of the General Assembly offer much guidance, for these were concerned only with defining the terms of reference to be given to the International Law Commission with

respect to the timing of the codification of the topic in question.<sup>2</sup>

4. The pre-history of the General Assembly resolution does, however, throw some light upon the true content or scope of the codification and, at least in some respects, illuminates the question of method mentioned above. At an early stage the Commission, in conformity with article 18 of its Statute, surveyed the whole field of international law with a view to selecting topics for codification. In the relevant memorandum submitted by the Secretary-General, it was said that the codification of the law relating to State responsibility "must take into account the problems which have arisen in connexion with recent developments such as the question of the criminal responsibility of States as well as that of individuals acting on behalf of the State".<sup>3</sup> Although, of course, the Commission considered primarily whether or not the topic of State responsibility was suitable for codification, some speakers referred, incidentally, to the way in which, in certain novel respects, the recent development of international law had influenced the matter of State responsibility. (A/CN.4/SR.6).

5. While in the discussion concerning the suitability of the topic for codification, or concerning the timing of its codification, the novel features of State responsibility were referred to incidentally; the existence of these features becomes the central problem when the topic itself is studied with a view to its future codification. Considered in this light, the codification of the topic involves something else than a definition of its content or scope pursuant to the terms of resolution 799 (VIII). In fact, just as the International Law Commission did when it included State responsibility in the provisional list of topics suitable for codification, the General Assembly used the expression which had been traditionally employed to denote international responsibility. The question of the novel features which State responsibility might possess in the present stage of development of international law was not prejudged in any sense. Accordingly, the method of work adopted in the present report is not merely permissible but indeed fully justified.

## 2. METHOD OF WORK

6. In the first place, as the Commission realizes, the subject of responsibility has always been one of the most vast and complex of international law; it would be difficult to find a topic beset with greater confusion and uncertainty. The cause lies not so much in the dominant part played by political factors in the shaping and development of this branch of international law, as in the glaring inconsistencies of traditional doctrine and practice. Perhaps because of the existence and influence of extraneous factors which are not always compatible with the law, artificial legal concepts and principles have been evolved which often appear markedly incongruent.

7. It is not, however, this particular feature that makes

it necessary now to adopt a new method of inquiry and legal analysis for the codification of this topic. Notwithstanding the inconsistencies and incongruities referred to above, traditional doctrine and practice have arrived at the formulation of a number of fundamental concepts and principles which have so far constituted the generally accepted international law on the subject. Except in a few cases, the doubts and differences of opinion have related to particular questions or points of detail rather than to the validity of the concepts and principles themselves. The present problem is quite different, for the question to be considered now is what validity can continue to be attached to some of those concepts and principles in contemporary international law.

8. Several authorities have referred to the problem and pointed out the different forms in which it arises. Professor Jessup was one of the first to discuss it in general terms, when he dealt with the international law relating to the responsibility of the State for injuries to aliens in the light of two developments: the growing tendency to accept the individual as a subject of international rights and obligations, and the increasing acknowledgement of a community interest in breaches of the law.<sup>4</sup> Likewise, Professor H. Rolin has said that the question of responsibility in international law, more than any other, should be re-examined and reassessed on new bases in the light of the evolution which has taken place in the nature of that responsibility, in the personality of the subjects and beneficiaries, in its effects and in its machinery or procedure.<sup>5</sup> Other writers have dealt with particular cases or specific aspects of international responsibility. Bustamante, for example, forecast developments concerning the possible responsibility of certain international organizations for acts or omissions attributable to them;<sup>6</sup> and in a recent course of lectures Eagleton discusses the position of international organizations not only as subjects of responsibility but also as the claimants in respect of the interests or rights which have been infringed.<sup>7</sup> For his part, Professor Eustathiades has described how profoundly traditional ideas have been changed by the Second World War, particularly with regard to criminal responsibility.<sup>8</sup>

9. It is easy to understand why it is necessary to adopt a special approach in order to fulfil in a satisfactory manner the terms of reference given by the General Assembly. As in the case of other topics and institutions of international law, the codification of "the principles which govern State responsibility" is not a task that can

<sup>4</sup> Philip C. Jessup, "Responsibility of States for Injuries to Individuals", *Columbia Law Review*, Vol. XLVI (November, 1946), p. 904.

<sup>5</sup> Henri Rolin, "Les principes de droit international public", *Recueil des cours de l'Académie de droit international*, 1950, II, p. 441.

<sup>6</sup> Antonio Sánchez de Bustamante y Sirvén, *Derecho internacional público* (Havana, Carasa y Cía, 1936), Vol. III, p. 483.

<sup>7</sup> Clyde Eagleton, "International Organization and the Law of Responsibility", *Recueil des cours de l'Académie de droit international*, 1950, I, pp. 335-423.

<sup>8</sup> Constantin Th. Eustathiades, "Les sujets du droit international et la responsabilité internationale, nouvelles tendances", *Recueil des cours de l'Académie de droit international*, 1953, III, pp. 401-404.

<sup>2</sup> *Ibid.*, Eighth Session, Sixth Committee, 393rd and 394th meetings.

<sup>3</sup> *Survey of International Law in Relation to the Work of Codification of the International Law Commission* (United Nations Publications, Sales No. 1948.V.1(1)), p. 57.

be confined today to the mere enumeration and analysis of the various legal rules which theory and practice have established. The Commission cannot limit itself to a task of this kind, for what we are concerned with is not codification pure and simple. The relevant rules came into being and developed in accordance with certain concepts and principles which have undergone a profound transformation in contemporary international law. In particular, this transformation has affected in a very substantial manner the legal nature of international responsibility, with regard to which traditional doctrine did not establish a clear differentiation between civil and criminal responsibility as two distinct concepts or factors. Changes which have taken place in the conception of international personality must also of necessity affect the traditional view concerning active and passive subjects of responsibility. The emergence and the recognition of new subjects capable of having or contracting international obligations and of possessing or acquiring international rights, will naturally affect earlier ideas concerning the imputability of responsibility and also the views held in the past concerning the parties entitled to the interest or right which is infringed by the non-performance of an international obligation. For the same reasons, or else owing to the impact of other legal doctrines and principles, traditional doctrines and principles concerning the exercise of diplomatic protection over nationals abroad may also have been affected, as may those concerning grounds for exoneration from responsibility, the nature, purpose and extent of compensation, and the method and procedure for the settlement of international claims.

10. General Assembly resolution 799 (VIII) refers specifically to the *codification* of the principles of international law governing State responsibility. Apart from differences in approach, according to whether the "development" or the "codification" of a given subject is contemplated, the international bodies which discharge both functions, and in particular the Commission, have generally, when concerned with *codification*, construed the term very liberally. In the codification of the law relating to "State responsibility" it is surely both necessary and proper to apply such a liberal interpretation. A pure or strict codification of the legal principles which have traditionally governed the various cases of responsibility would not accomplish at all satisfactorily what is invariably the object of a request for codification. It can be said that it is necessary to do something more than "to codify"; it is necessary to change and adapt traditional law so that it will reflect the profound transformation which has occurred in international law. In other words, it will be necessary to bring the "principles governing State responsibility" into line with international law at its present stage of development.<sup>9</sup>

11. The foregoing remarks explain both the contents of this report which is submitted to the Commission and the nature of the conclusions arrived at. The topic is vast, owing to the practically unlimited number and variety of the circumstances which can give rise to inter-

national responsibility, but the fundamental questions and principles are common to all. This report confines itself to discussing these questions and principles, which have to be settled before the Commission decides, at its next session, to undertake the codification proper of the topic. To facilitate discussion by the Commission, the Special Rapporteur has departed from the usual practice and, instead of presenting preliminary draft articles, puts forward, in the form of "basis of discussion", a summary of his researches and the conclusions arrived at in certain cases. In this way, the Commission will be able to discuss the various fundamental questions and principles and to settle them, unhampered by the difficulties which are inevitably present when it deals with the more rigid framework of preliminary draft articles.

12. The following chapter sketches the history of the codification of the topic. This historical analysis will facilitate the work of the Commission both with respect to the present report and with regard to its future work. The annexes and bibliography at the end of the report serve the same purpose. The texts of the various drafts prepared by official conferences or organizations and by scientific bodies are reproduced in the annexes; and the bibliography, though not exhaustive, contains bibliographical material sufficient for the work immediately before the Commission.

13. As the Commission is aware, the Director of the Codification Division of the Office of Legal Affairs of the United Nations suggested to the Harvard Law School that it should revise and bring up to date the draft convention on the responsibility of States which Harvard Research had prepared and published in 1929.<sup>10</sup> The Director of the Codification Division said that the revision of the draft would be of great assistance to the International Law Commission when it came to examine the topic. The Harvard Law School accepted the suggestion, and entrusted the organization of the work to the Director of International Legal Studies.

14. In the course of writing his report, the Special Rapporteur visited the Harvard Law School for the purpose of arranging for co-operation, which he considered of great value to the Commission's future work. In this connexion, he wishes to say how valuable has been for him the exchange of ideas, which he had on a number of occasions with Professor Milton Katz, Director of International Legal Studies, and with Professor Louis B. Sohn and Mr. Richard R. Baxter concerning the different aspects and problems of the subject. He also wishes to acknowledge the co-operation which he has received from the Department of International Law and Organization of the Pan American Union; he found it most profitable to exchange views with Professor Charles G. Fenwick, the Director of that Department, in view of the relationship established between the Commission and the inter-American bodies concerned with the development and codification of international law.

## CHAPTER II

### Past efforts to codify the topic

15. Resolution 799 (VIII) of the General Assembly

<sup>9</sup> F. V. García Amador, "State Responsibility in the Light of the New Trends of International Law", *The American Journal of International Law*, Vol. 49 (1955), pp. 339-346.

<sup>10</sup> See annex 9.

does not mark the commencement of a new work of codification. It constitutes rather the resumption of the many efforts made in the past to codify the "principles of international law governing State responsibility". Some of these efforts produced positive results but an entire codification of the topic never materialized. Seen in that light, the purpose underlying the General Assembly resolution appears to be that the United Nations should continue and complete the work of predecessor organizations. Another way of looking at the codification of the topic of State responsibility is to regard it as historically an integral part of and inseparable from the codification of international law in general. As a consequence, it has shared all the vicissitudes of the latter, but at the same time owes many of its advances to the steps taken and the machinery established with a view to codifying other subjects of international law. The account which follows illustrates this phenomenon and, at the same time, indicates to what extent past accomplishments can assist in the future task of codification.

### 3. CODIFICATION UNDER THE AUSPICES OF THE LEAGUE OF NATIONS

16. With the object of increasing the contribution of the League of Nations to the progressive codification of international law, the League Assembly adopted its resolution of 22 September 1924 requesting the Council to convene a committee of experts to prepare a provisional list of the subjects of international law "the regulation of which by international agreement would seem to be most desirable and realizable at the present moment". The Secretariat was to communicate that list to the Governments, and the committee, after examining the replies received, was to report to the Council on the questions which appeared sufficiently ripe to be dealt with by conferences.<sup>11</sup>

17. The Committee of Experts for the Progressive Codification of International Law met at Geneva from 1 to 8 April 1925 and appointed several sub-committees to deal with the various subjects provisionally selected by it. The subject of State responsibility was one of them; it was referred to in the following terms:

"(f) The Committee appoints a Sub-Committee to examine:

"(i) Whether, and in what cases, a State may be liable for injury caused on its territory to the person or property of foreigners;

"(ii) Whether, and, if so, in what terms it should be possible to contemplate the conclusion of an international convention providing for the ascertainment of the facts which may involve liability on the part of a State and forbidding in such cases recourse to measures of coercion before the means of pacific settlement have been exhausted".<sup>12</sup>

<sup>11</sup> For full text of the resolution see League of Nations Publications, *V. Legal*, 1927.V.1 (document C.196.M.70.1927.V), p. 5; also reproduced in *The American Journal of International Law, Special Supplement*, Vol. 20 (1926), pp. 2 and 3.

<sup>12</sup> League of Nations document C.275.1925.V, p. 5; see also *The American Journal of International Law, Special Supplement*, Vol. 20 (1926), p. 14.

18. The Committee held its second session in January 1926 and drafted questionnaires to be circulated to Governments. Questionnaire No. 4 concerned the "Responsibility of States for Damage done in their Territories to the Person or Property of Foreigners". The report of the Sub-Committee, composed of Mr. Guerrero, Rapporteur, and Mr. Wang Chung-Hui, was attached to the questionnaire as an annex.<sup>13</sup>

19. At its third session, held in March and April 1927, the Committee of Experts examined the replies received from Governments and informed the Council that those replies confirmed the view that the subjects selected were "sufficiently ripe" for codification. With regard to Questionnaire No. 4, twenty-four Governments had replied affirmatively and without reservations; five had replied affirmatively but with certain reservations; and four had expressed the view that the conclusion of a convention was neither possible nor opportune. In its general report on procedure, the Committee recommended that the Council should call a conference, or two or several conferences, to consider and take action with respect to the formulation and submission to Governments of general treaties embodying provisions relating to the subjects concerned.<sup>14</sup>

20. In June 1927, the Council of the League of Nations considered the Committee's reports and decided to place the consideration of these documents on the agenda of the Assembly.<sup>15</sup> In September of the same year, the Assembly decided that a first Codification Conference should be held to examine, *inter alia*, the question of the "Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners". By the same resolution it entrusted the Council with the task of appointing a Preparatory Committee with instructions to prepare a report comprising "sufficiently detailed bases of discussion on each question".<sup>16</sup>

21. The Preparatory Committee for the Codification Conference met at Geneva in January, and again in May, of 1929. At its first session, it examined the replies of Governments in response to the request which had been addressed to them for information upon the three questions on the programme of the proposed Conference, and it drew up bases of discussion. At its second session, the Committee reviewed the bases of discussion and drafted them in final form. It was pointed out by the Committee in its second and final report that these bases of discussion were not in any way proposals; they were merely the result of the Committee's examination of the Government replies and the classification of the views expressed therein. The bases of discussion relating to the question of State responsibility covered a wide range of cases of acts or omissions capable of engaging the responsibility of the State, and also certain questions or

<sup>13</sup> League of Nations publication, *V. Legal*, 1926.V.3 (document C.46.M.23.1926.V). (The text of the questionnaire and the conclusions of the report of the Sub-Committee are reproduced in annex 1).

<sup>14</sup> *Ibid.*, *V. Legal*, 1927.V.1 and *V. Legal*, 1927.V.2 (documents C.196.M.70.1927.V., pp. 7 and 267-271, and C.197.M.71.1927.V).

<sup>15</sup> *Ibid.*, *V. Legal*, 1927.V.15 (document A.18.1927.V).

<sup>16</sup> *Ibid.*, *Official Journal, Special Supplement No. 53* (October 1927), p. 9, para. 5.

problems of a general character. The report reproduced, together with the text of the bases of discussion, the points submitted to the consideration of Governments and their comments and observations thereon.<sup>17</sup>

22. The Codification Conference met at The Hague from 13 March to 12 April 1930. The question of the responsibility of States was entrusted to the Third Committee which reported to the Conference that it "was unable to complete its study of the question".<sup>18</sup> Nevertheless, the Committee discussed the question fully and even adopted in first reading a text consisting of ten articles.<sup>19</sup> As stated by the Rapporteur in his draft report: "In the course of its discussions, the Committee was obliged to recognize that the time assigned for its work was not sufficient to allow it to bring to a conclusion the studies which it had pursued with such assiduity. In point of fact, owing to the comprehensive nature and extreme complexity of the problems raised, it was only able to discuss ten out of the thirty-one bases submitted to it. The fact, moreover, that the various questions were closely interdependent, each being subordinated to the others, precluded any attempt to reach a partial settlement. The Committee accordingly, though in agreement as to certain fundamental principles, was unable, owing to lack of time, to determine the exact limits of their application. It therefore decided to refrain from any endeavour to embody them in definite formulae."<sup>20</sup>

23. After The Hague Conference, the League of Nations did not abandon its efforts to promote the progressive codification of international law, but it did not take any further action to continue that task so far as the question of State responsibility is concerned.<sup>21</sup> Although it concerns a different subject, the study made by a Committee of the League of Nations of the question of international loan contracts should be mentioned, particularly its suggestion for the establishment of an international tribunal competent to deal with disputes concerning rights and obligations under such contracts.<sup>22</sup>

#### 4. CODIFICATION BY INTER-AMERICAN BODIES

24. The subject of State responsibility has contributed one of the most significant chapters to the history of codification in the Americas. Although the decision to undertake a complete codification of the topic was not taken until later, the First International Conference of American States, and nearly all the subsequent Conferences, studied the problem of State responsibility and some of them adopted resolutions or conventions relating to the subject. The work was sometimes carried out in

co-operation with the technical bodies concerned with the codification of international law, but on other occasions, particularly during the earlier Conferences, the Conference itself formulated certain principles and rules which gave expression to the political and legal outlook of the Continent.

25. The first Conference (Washington, 1889-1890) adopted a recommendation concerning "Claims and Diplomatic Intervention" which referred to the enjoyment by foreigners of civil rights and legal remedies open to natives, and to the obligations and responsibilities of the State.<sup>23</sup> The Second Conference (Mexico City, 1902) adopted a "Convention Relative to the Rights of Aliens".<sup>24</sup> At the same Conference a "Treaty of Arbitration for Pecuniary Claims" was signed, which deals with the obligation to submit claims of that nature to arbitration.<sup>25</sup> The Third Conference (Rio de Janeiro, 1906) adopted another Convention which extended the period of validity of the Convention of 1902.<sup>26</sup> The same Conference resolved "To recommend to the Governments represented therein that they consider the point of inviting the Second Peace Conference, at The Hague, to examine the question of the compulsory collection of public debts, and, in general, means tending to diminish between nations conflicts having an exclusively pecuniary origin".<sup>27</sup> At the Fourth Conference, (Buenos Aires, 1910) yet another Convention was signed which was to enter into force upon the expiry of the Convention of 1902 as extended.<sup>28</sup>

26. The codification of the law relating to State responsibility in the Americas is closely bound up with the development and codification of a kindred subject, namely, the legal status of aliens. Apart from the instruments referred to in the foregoing paragraph, which deal with the question strictly from the point of view of responsibility, there are other instruments which relate to the subject and therefore form part of the inter-American codification with which this chapter is concerned. At the invitation of the Fifth Conference (Santiago de Chile, 1923), the International Commission of Jurists,<sup>29</sup> at its second session (Rio de Janeiro, 1927), prepared a draft convention relating to the "Status of Aliens"<sup>30</sup> the provisions of which were in substance incorporated in the Convention signed at the Sixth Con-

<sup>17</sup> *Ibid.*, V. Legal, 1929.V.3 (document C.75.M.69.1929.V). The text of the bases of discussion is reproduced in annex 2.

<sup>18</sup> *Ibid.*, V. Legal, 1930.V.7 (document C.228.M.115.1930.V), p. 17.

<sup>19</sup> For the text of these articles see annex 3.

<sup>20</sup> League of Nations publication, V. Legal, 1930.V.17 (document C.351(c).M.145(c).1930.V).

<sup>21</sup> See in this connexion "Historical Survey of Development of International Law and its Codification by International Conferences", document A/AC.10/5, Part III, D.

<sup>22</sup> See *Report of the Committee for the Study of International Loan Contracts*, League of Nations Publications, II. Economic and Financial, 1939.II.A.10 (document C.145.M.93.1939.II.A).

<sup>23</sup> *The International Conferences of American States, 1889-1928*, (New York, Oxford University Press, 1931) p. 45. (The text of the recommendation is reproduced in annex 4).

<sup>24</sup> *Ibid.*, pp. 90 and 91. (The text of the Convention is reproduced in annex 5).

<sup>25</sup> *Ibid.*, pp. 104 and 105.

<sup>26</sup> *Ibid.*, pp. 132 and 133.

<sup>27</sup> *Ibid.*, pp. 135 and 136. (At the Peace Conference held at The Hague in 1907 a "Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts" was signed. For the text of the pertinent articles see chapter IX, section 30).

<sup>28</sup> *Ibid.*, pp. 183-185.

<sup>29</sup> The Commission was established by the Third Conference (*ibid.*, p. 144) and held its first session at Rio de Janeiro in 1912.

<sup>30</sup> See Bustamante, *La Comisión de Jurisconsultos de Rio de Janeiro y el Derecho Internacional* (Havana, 1927), pp. 206 and 207, concerning the draft prepared by the Commission.

ference (Havana, 1928).<sup>31</sup> The first three articles of the "Bustamante Code" (annexed to the Convention on Private International Law, also signed at the Sixth Conference) deal with the same subject.<sup>32</sup>

27. One of the items dealt with at the Seventh Conference (Montevideo, 1933) was "the study of the entire problem relating to the international responsibility of the State". The Conference reaffirmed certain principles which had been laid down at previous Conferences and resolved that the study in question should be entrusted to the competent agencies concerned with codification "and that their studies be co-ordinated with the work of codification being done under the auspices of the League of Nations".<sup>33</sup> The Inter-American Conference for the Maintenance of Peace (Buenos Aires, 1936) dealt once again with the problem of pecuniary claims and adopted a resolution requesting the Committee of Experts which had been established by the Seventh Conference to undertake the co-ordination and study of the principles of the subject.<sup>34</sup> The Committee held its first session in Washington in 1937 to organize its work; it met again at Lima on the eve of the Eighth Conference. At that second session, the Committee prepared a report the annex to which reproduced the drafts and memoranda submitted by its members.<sup>35</sup> The Eighth Conference (Lima 1938) only adopted a resolution concerning procedure, to the effect that all the documents submitted be referred back to the Committee of Experts for further study and reports and for submission first to the International Conference of American Jurists which was to meet shortly thereafter and then to the Ninth Conference.<sup>36</sup>

28. The Ninth Conference did not meet till 1948 (Bogotá). The question of State responsibility was not dealt with at that Conference, except in certain declarations and isolated provisions which were adopted concerning specific points. The Tenth Conference (Caracas, 1954), however, adopted the following resolution con-

cerning "Principles of International Law governing the responsibility of the State".

*Whereas:*

The General Assembly of the United Nations, during its Eighth Session, requested the International Law Commission to proceed to the codification of the principles of international law that govern the responsibility of the State;

Pursuant to the provisions of the pertinent instruments, closer relations and co-operation between the International Law Commission of the United Nations and the inter-American organs charged with the development and codification of international law should be encouraged; and

The American Continent has made a notable contribution to the development and codification of the principles of international law that govern the responsibility of the State,

The Tenth Inter-American Conference

*Resolves:*

To recommend to the Inter-American Council of Jurists and its permanent committee, the Inter-American Juridical Committee of Rio de Janeiro, the preparation of a study or report on the contribution the American Continent has made to the development and to the codification of the principles of international law that govern the responsibility of the State.<sup>37</sup>

29. At its third session, which opened in Mexico City on 17 January 1956, the Inter-American Council of Jurists is considering this resolution and will decide how to proceed in order to prepare promptly and efficiently, the study or report mentioned in it.

## 5. CODIFICATION BY PRIVATE BODIES

30. Private bodies have played a very important part in the history of official codification, particularly so far as the subject of State responsibility is concerned. Not only have jurists in the course of a general codification produced individual drafts, but also learned societies or institutions have drafted texts relating to State responsibility. Owing to limitations of space, only the drafts belonging to the second group will be referred to in this report; they will be mentioned in chronological order. The drafts in question are, moreover, of special significance, because they were prepared with a view to the codification work being undertaken under the auspices of the League of Nations or by inter-American conferences and bodies.

31. In 1925 the American Institute of International Law, at the invitation of the Governing Board of the Pan American Union, prepared thirty "projects" dealing with various subjects of (public) international law. Two of them are concerned with questions relating to State responsibility. One, entitled "Responsibility of Governments", gives a brief indication of the fundamental premises on which that responsibility rests. The other, entitled "Diplomatic Protection", is a systematic and

<sup>31</sup> *The International Conferences of American States, 1889-1928*, pp. 415 and 416.

<sup>32</sup> *Ibid.*, p. 327. Under the auspices of the League of Nations, an International Conference on Treatment of Foreigners was held in Paris in 1929 but it did not arrive at any agreement. See League of Nations Publications, *II. Economic and Financial, 1930.II.5* (document C.97.M.23.1930.II). For a reference to the draft convention prepared by the Economic Committee of the League of Nations, see chap. VI, section 21, below.

<sup>33</sup> *The International Conferences of American States, First Supplement, 1933-1940* (Washington, Carnegie Endowment for International Peace, 1940), p. 91. (The text of the resolution is reproduced in annex 6 below. The Codification Conference held at The Hague adopted, *inter alia*, a recommendation that the "work undertaken with this object [a co-ordination of all the efforts made for the codification of international law] under the auspices of the League of Nations and that undertaken by the Conferences of American States... be carried on in the most complete harmony with one another". See League of Nations Publications, *V. Legal, 1930.V.7* (document C.228.M.115.1930.V), p. 18).

<sup>34</sup> *Ibid.*, pp. 165 and 166. The Committee of Experts was established by the Seventh Conference when it reorganized the work of codification. *Ibid.*, pp. 84-87.

<sup>35</sup> *Informes y Proyectos Sometidos por la Comisión de Expertos* (Washington, D.C., Pan American Union), p. 41.

<sup>36</sup> *The International Conferences of American States, First Supplement, 1933-1940*, pp. 249 and 250.

<sup>37</sup> *Tenth Inter-American Conference, Final Act* (Pan American Union, Washington, D.C., 1954), p. 103.

much more elaborate statement of the principles which govern State responsibility in the various possible cases, and of the methods of pacific settlement of the international controversies which may arise.<sup>38</sup>

32. The Institute of International Law, as will be seen hereunder, has dealt with the problem of State responsibility on several occasions. At its Lausanne session in 1927 it adopted a complete draft concerning "International responsibility of States for injuries on their territory to the person or property of foreigners", in contemplation of the Codification Conference to be held at The Hague. The draft deals with numerous contingencies in which acts or omissions on the part of organs of the State, or acts committed by private persons, or internal disturbances, can give rise to responsibility on the part of the State; it also contains provisions concerning the nature and extent of "reparation", and a *voeu* concerning the pacific settlement of international disputes which may arise in connexion with any cases of State responsibility.<sup>39</sup>

33. The draft convention prepared by Harvard Research (1929) was meant, like that of the Institute, to be a contribution, at the technical level, to the codification which had been entrusted to The Hague Conference. For this reason, the two drafts deal broadly with the same questions and the Harvard draft concurs with the Institute's draft in many of its conclusions. It is presented in the form of a restatement; hence, each article is followed by extensive comments which cite the treaties, judicial decisions and writings of authors relied on.<sup>40</sup>

34. Lastly, though they form part of a general declaration, it is also pertinent to mention the provisions which have a bearing on the topic of State responsibility in the *Déclaration sur les données fondamentales et les grands principes du droit international moderne*, submitted by Alejandro Alvarez and approved by the International Law Association, the Académie diplomatique internationale and the Union juridique internationale. In particular, section VII deals with the rights and duties of aliens, lays down in what measure the State is responsible for acts or omissions, and specifies in which case the alien's remedy is to apply to the internal authorities and in which cases the proper course for disposing of claims made through the diplomatic channel is judicial settlement by an international body.<sup>41</sup>

### CHAPTER III

#### Legal content and function of international responsibility

35. The legal content of international responsibility did not give rise to any major difficulties in traditional doctrine and practice. It was regarded as a consequence of the breach or non-performance of an international obligation, the State being then under a "duty to make reparation" for the injury occasioned. In this sense, the

<sup>38</sup> The text of both projects is reproduced in annex 7.

<sup>39</sup> The text of the draft is reproduced in annex 8.

<sup>40</sup> The text of the draft is reproduced in annex 9.

<sup>41</sup> The text of the relevant draft provisions is reproduced in annex 10.

term "responsibility" was identified with the "liability" (*responsabilité civile, responsabilidad civil*) of municipal law. Contemporary international law, however, similar in this respect to municipal law, considers that the notion of responsibility covers not only the duty to make reparation for damage or injury, but also the other possible legal consequences of the breach or non-performance of certain international obligations; the obligations in question are those the breach of which is punishable. In the event of the breach of obligations of this type, the immediate consequence is criminal responsibility, which carries with it the punishment of the offender; upon proof of criminal responsibility, in the proper manner and form, the next consequence is reparation of the injury caused to the victim or to his successors in interest. To sum up, in international law in its present stage of development, the term "responsibility" can include both civil and criminal responsibility, according to the nature of the obligation the breach or non-performance of which gave rise to the responsibility.

36. It is true that both resolution 799 (VIII) of the General Assembly and the resolution adopted at the Conference of Caracas deal only with the principles of international law governing *civil* responsibility, and that therefore *criminal* responsibility as such falls outside the scope of both resolutions. But it is no less true that the recognition by contemporary international law of the concept of criminal responsibility, clearly defined in certain cases, must perforce affect in some measure the views and principles traditionally held with respect to civil responsibility. This is all the more true since, even in the traditional conception of that responsibility, the "duty to make reparation" has been influenced by ideas concerning criminal responsibility. The writer of the present report remains within the bounds of his terms of reference, and is indeed carrying them out more fully, by studying the legal nature of civil responsibility in the light of the recent development of international law relating to criminal matters.

#### 6. RESPONSIBILITY AS THE "DUTY TO MAKE REPARATION"

37. In point of fact, traditional doctrine and practice saw in international responsibility a duty to make reparation for the injury sustained, a duty incumbent upon the State which violated, or did not comply with, an international obligation. This view is the prevailing one in the abundant legal literature existing on the subject of responsibility. It was reflected in the judgement in the *Chorzów Factory* case, in which the former Permanent Court of International Justice stated that "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form". In a later judgement concerning the same case, the Court reiterated this view in similar terms: "It is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation".<sup>42</sup> In effect, the ruling of the Court means that the responsibility for the breach

<sup>42</sup> See Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 9 (Leyden, A. W. Sijthoff), p. 21; and series A, No. 17. p. 29.

of an engagement and the duty to make adequate reparation for the injury are, in law, coterminous.

38. The same fundamental view appears in the draft codifications concerning State responsibility. The Harvard Research draft (1929) sets it out in clear and unequivocal terms in its article 1: "A State is 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".<sup>43</sup> The same view is taken in the articles adopted in first reading by the Third Committee of the Codification Conference (The Hague, 1930): "The international responsibility of a State imports the duty to make reparation for the damage sustained in so far as it results from failure to comply with its international obligation".<sup>44</sup> The authors of both drafts accordingly considered responsibility as identifiable with, or at least inseparable from, the duty to make reparation for the injuries occasioned. In this view, wherever responsibility lies, there also lies a duty to make reparation: that is the only consequence which may be derived from failure to comply with an international obligation.

39. Learned authors tend to agree in viewing responsibility in the same light. Eagleton, for example, commences his well-known work on the subject with the following words: "The study of the responsibility of States in international law involves an examination of the theory upon which reparation may be demanded by one State of another, and of the processes by which it may be obtained". In a later passage he expresses the same idea in more explicit terms: "Responsibility is simply the principle which establishes an obligation to make good any violation of international law producing injury, committed by the respondent State".<sup>45</sup> Anzilotti, also a leading exponent of the traditional doctrine, was an even stronger advocate of this manner of viewing responsibility. He says:

"When a wrongful act—by which is meant, as a rule, the violation of an international right—is committed, the consequence is that a new relationship comes into existence, in law, between the State to which the act is imputable (that State being under a duty to make reparation) and the State with respect to which there exists an unperformed obligation (this State having a claim to reparation). This is the only effect that the rules of international law, as laid down in the reciprocal undertakings of States, can attribute to the wrongful act . . .".<sup>46</sup>

Thus, according to Anzilotti, a breach or non-performance of an obligation has no other consequence in international law than that of giving rise to a duty to make good the damage.

40. Is it really true that, in law, the sole consequence of a breach or non-performance of an international obligation is that it gives rise to a duty to make reparation

for the injury occasioned? This question cannot be studied and dealt with adequately if we rely only on the criteria and arguments which have traditionally guided practice and theory. Other considerations must be taken into account, and the subject must be studied in the light of certain ideas and principles which underlie the present structure of international law. These ideas and principles are concerned with precisely the possible consequences of a breach or non-performance of certain international obligations. A study in this light is essential as being the only manner of determining how far the traditional view of responsibility tallies with international law in its present stage of development. For this purpose, however, it is necessary first to consider the nature of the acts or omissions which give rise to international responsibility.

#### 7. ACTS OR OMISSIONS WHICH GIVE RISE TO INTERNATIONAL RESPONSIBILITY

41. An analysis of the traditional doctrine and practice shows that the acts or omissions which give rise to international responsibility fall into the one or other of the following two categories of wrongful acts: (a) acts which affect a State as such, i.e., those which injure the interests or rights of the State as a legal entity; and (b) acts which produce damage to the person or property of its nationals. The first category comprises the most diverse acts or omissions, some being ill-defined or even undefinable. Acts in this category include failure to comply with the terms of a treaty, whatever the nature or purpose of the treaty, failure to respect diplomatic immunities and, in general, the violation of any of the rights which are intrinsic attributes of the personality of the State—political sovereignty, territorial integrity, property rights. The second category includes acts or omissions which give rise to the "responsibility of States for damage done in their territories to the person or property of foreigners". This is the principal subject of the literature, private and official codifications and judicial decisions which treat of the responsibility of States.

42. As will be seen hereunder, the above classification, from the traditional point of view, is more concerned with form than with substance, for it has been said that, whichever category they fall into, the acts or omissions in question have this in common: they damage interests which, in the final analysis, vest in the State exclusively. Apart from this aspect of the question, which will be examined in its proper context in a later chapter (chapter V) the classification may become meaningless in some cases which come within the scope of both categories. An example of such a case would be the non-performance of a treaty, where the interests of the nationals of one of the contracting States are prejudiced and the claim is based on this prejudice. In any case, for the specific purposes of the present chapter, we shall now consider what acts or omissions are more generally regarded as giving rise to an international responsibility on the part of the State.

43. Acts in the second category have been subdivided into: (i) acts or omissions on the part of the authorities of the State; and (ii) acts of private persons, which

<sup>43</sup> See annex 9.

<sup>44</sup> See article 3 in annex 3.

<sup>45</sup> Eagleton, *The Responsibility of States in International Law* (New York, The New York University Press, 1928), pp. 3 and 22.

<sup>46</sup> Dionisio Anzilotti, *Corso di Diritto Internazionale*, 3rd ed. (Rome 1928), Vol. I, pp. 416 ff.

include internal disturbances. Within the first subdivision, a further distinction is drawn according to whether it is the legislature, the judicature or the executive which has committed the wrongful act. The acts of the legislature may give rise to international responsibility on the part of the State, for example if a measure is enacted which discriminates between nationals and aliens, or if nationalization and compulsory expropriation legislation is passed which affects the property of aliens in a manner contrary to the rules established by international law. The judicature may involve the State in responsibility if it acts, or fails to act, in such a way that a "denial of justice" to an alien may be said to have occurred (e.g., unwarranted delay in the proceedings, or judgement manifestly unjust or arbitrary from the point of view of international law). In practice, however, wrongful acts or omissions on the part of the executive offer perhaps the commonest and the most varied instances. These include abuses by police officers, which can be very serious (physical ill-treatment; killing without any death sentence having been pronounced; the improper collection of fines or illegal contributions; illegal confiscation of property). Lastly, this group of wrongful acts or omissions includes the non-performance by the State—through the agency of any of its organs—of a contract entered into by the State with an alien, in which case the State is responsible for non-performance.

44. Within the second subdivision, too, the wrongful acts capable of giving rise to responsibility on the part of the State are not all of the same character. Although in these cases the international responsibility does not originate in the act itself but rather in the conduct of the State in relation to the act (failure to exercise due diligence, connivance, manifest complicity, etc.), the nature of the act committed by a private person or of acts committed during internal disturbances is bound to influence the way in which the law regards the State's conduct as a source of international responsibility. Typical examples of wrongful acts which can be committed by private persons are: attacks or insults against a foreign State, in the person of the head of that State, its agencies or diplomatic representatives; acts offensive to its national flag; and illegal acts—whatever their degree of seriousness may be—which cause damage to the person or property of the nationals of a foreign State. When disturbances occur in a State, the acts concerned are usually of a more serious character; in some cases, they are specifically intended to cause damage to the property or person of foreigners.

45. Although not exhaustive, the foregoing enumeration presents a fairly accurate picture of the acts and omissions which according to traditional doctrine and practice, give rise to international responsibility on the part of the State. In any case, it makes it possible to define the character of those acts and so to determine the type of responsibility to which they can give rise.

## 8. CIVIL RESPONSIBILITY AND CRIMINAL RESPONSIBILITY

46. According to the idea which prevailed in the traditional doctrine, the various acts or omissions mentioned in the preceding section cannot have any other effect than that

of giving rise to a "duty to make reparation" for the injuries occasioned; in other words, they only involve the State in *civil* responsibility. This restrictive view of international responsibility is attributable principally to the way in which the acts or omissions giving rise to responsibility were formerly regarded for the purpose of the law. They were regarded as simply "wrongful" or "unlawful", i.e., as contrary to international law and incompatible with the rules of State conduct prescribed by that law. All those acts and omissions, whatever their intrinsic or specific nature, were dealt with judicially and defined in identical manner; consequently, identical legal consequences were ascribed to them.

47. Anzilotti, who was one of the few writers of the traditional school to examine this aspect of the question, based his view (which is cited earlier in this chapter) on the following arguments:

"This is the only effect that the rules of international law, as laid down in the reciprocal undertakings of States, can attribute to the wrongful act. Within the State, by contrast where relations between individuals and the community are likewise governed by rules of law, an unlawful act may give rise to two distinct legal relationships: a relationship between the person committing it—or rather the person to whom the law imputes the act—and the person sustaining the injury; and also, as between the former of the two and the community represented by the State. Hence the distinction between civil responsibility and criminal responsibility, between damages and punishment. These distinctions are unknown to international law and repugnant to it; the situation recalls, in this respect as in others, an earlier stage of social history in which the State was at yet powerless to assert itself as the guardian of the law, so that the latter found its expression in the reaction of the individual or of the group which had sustained the injury against the author of it; compensation was also a penalty, and the commonest penalty was reparation of the injury caused."<sup>47</sup>

48. The stage of development reached by international law at that time explains, and up to a certain point justifies, this kind of reasoning.<sup>48</sup> In point of fact, according to traditional international law, no distinction was drawn between *civil* responsibility and *criminal* responsibility (the idea of reparation proper and the idea of punishment), because strictly speaking, they were an integral part of one and the same rule, namely, "the duty to make reparation" for the injury occasioned.

49. It is certainly of importance to note, however, that the traditional conception of responsibility already contained not only the idea of reparation in the strict sense of the word but also the idea of punishment. In a later chapter dealing with the legal nature and function of

<sup>47</sup> *Ibid.*

<sup>48</sup> In the same sense, see Ladislas Reitzer, *La réparation comme conséquence de l'acte illicite en droit international* (Paris, Librairie du Recueil Sirey, 1938), p. 209; and Georges Berlia, *De la responsabilité internationale de l'Etat*, in *La technique et les principes du droit public, Etudes en l'honneur de Georges Scelle* (Paris, Librairie générale de droit et de jurisprudence, 1950), Vol. II, p. 886.

reparation, it will be shown that in practice some of the forms of reparation had a distinctively punitive purpose, so much so that the view has recently gained currency that in the traditional practice reparation sometimes in effect took the form of "punitive damages". In other words, reparation has on occasions been claimed or ordered as a punishment for the breach or non-observance of an international obligation (chapter VIII, section 27, *below*). If this view is correct, it is logical to assume that traditional practice was familiar with the notion of criminal responsibility in so far as reparations were intended to be punitive; only on that basis can the existence of punitive damages be explained. Actually, the existence of "damages of a punitive character" implies the imputation of responsibility of a criminal nature. The extent to which "criminal" has become segregated and distinct from "civil" responsibility is another matter, which does not necessarily affect the intrinsic notion of criminal responsibility.

50. If the foregoing is true even of traditional international law, the present state of that law does not admit of any doubts whatsoever. Particularly since the Second World War, the idea of international criminal responsibility has become so well defined and so widely acknowledged that it must be admitted as one of the consequences of the breach or non-observance of certain international obligations. Therefore, while international criminal responsibility *per se* is outside the scope of the present codification, there are important reasons why it should not be ignored completely in the study of some at least of the cases of responsibility with which this codification is concerned. If even while it was an undistinguishable element in the "duty to make reparation" it had a bearing on civil responsibility, then *a fortiori* criminal responsibility is bound, now that it has become something distinct, to affect in novel ways the ideas and principles on which civil responsibility has traditionally rested. This is not hard to understand if one remembers what, in law, is the root of criminal responsibility: the definition of certain acts as offences or the transformation of certain other acts, until then regarded as merely wrongful, into punishable acts. In short, the matter becomes clear if one thinks of the criminal quality which now attaches to the breach of certain international obligations.

51. Thus, a re-examination of the acts or omissions (as enumerated in the preceding section) which according to traditional international law gave rise to civil responsibility will show that they are not all *eiusdem generis*. International law in its present stage of development does not enable us to distinguish in every case between punishable acts properly so called and acts or omissions which are merely wrongful, but the distinction can be drawn without difficulty in most cases. For example, the non-performance of a contract entered into by a State with an alien and, in general, a denial of justice, clearly constitute acts of omissions which are merely wrongful, that is, contrary to international law but not involving criminal responsibility. On the other hand, certain violations of fundamental human rights of foreigners (if the violation is so serious that it corresponds or is analogous to what is now known as a "crime against

humanity"), besides being wrongful, now involve international responsibility of a criminal character. Moreover, States have undertaken a certain type of obligations the non-observance of which may also have new implications. For example, under articles I and V of the Convention on the Prevention and Punishment of the Crime of Genocide,<sup>49</sup> the contracting parties explicitly undertake to "prevent and punish" acts of genocide, the authors, instigators or accomplices of which, in the words of the Convention, may be either private individuals or the rulers and public officials of the State itself. Without exhausting the list of new situations, it may be recalled that the General Assembly of the United Nations has described as "aggression" the act of "fomenting civil strife in the interests of a foreign Power" (resolution 380 (V))—an act which is regarded as merely wrongful by the Convention on the Duties and Rights of States in the Event of Civil Strife (Havana, 1928)—and that a similar change has occurred in the case of some of the acts which the International Law Commission has defined in its draft code as "offences against the peace and security of mankind".

52. From the foregoing, certain conclusions can be drawn which may materially affect the present codification and which should perhaps at this stage be formulated in general terms. In the first place, the consequences of a breach or the non-fulfilment of an international obligation may be either criminal responsibility or civil responsibility, or both, according to the character of the obligation. The character of the obligation concerned depends, in turn, on whether international law regards the act in question as a criminal or as merely a wrongful breach or omission. Lastly, in the cases in which both a criminal and a civil responsibility exist, the first involves punishment while the second involves reparation properly so called of the damage occasioned. None of these conclusions concerning the criminal character which may attach to responsibility in contemporary international law implies in any way, however, an unwarranted departure from the one real purpose of this codification. Rather, the implication is that it is necessary to take them into account in so far as they affect the traditional concepts and principles of civil responsibility.

53. Furthermore, it will be easily understood that the recognition of these two types of international responsibility can affect this branch of the law as a whole, and, in a special manner, the question of imputability (i.e., which subject or subjects of international law should be considered internationally responsible) as also, the form and object of reparation (whether reparation will invariably be determined in the same manner, irrespective of which type of responsibility is involved). The second problem will be dealt with in a later chapter of this report (chapter VIII). The chapter which follows deals with the problem of imputability. It will be useful, however, to deal briefly first with another problem which is of equally great importance in the study of the foundations on which the law of international responsibility rests.

<sup>49</sup> General Assembly resolution 260 A (III), annex.

### 9. FUNCTION OF THE PRINCIPLES GOVERNING INTERNATIONAL RESPONSIBILITY

54. In keeping with one of the most characteristic tendencies of the traditional doctrine, the study of international responsibility has been concerned primarily with the content of that responsibility and with questions relating thereto, neglecting its purposes or objects, or else dealing with the latter indirectly as something incidental to the former. As is the case with any other branch of international law, however, a study of the functions which responsibility performs is just as important as and, in a certain sense, even more important than all the other questions usually discussed in connexion with its content.

55. Dunn, who was perhaps the first to concern himself with this question of the object of State responsibility, noted that the traditional approach to its study had taken the form of a "juristic" analysis of the rules and principles of international law governing the subject; but, he said, it was necessary to study "the practice of diplomatic protection as a man-made institution designed for particular social ends". In his opinion, concentrating exclusively on legal rules and principles produces only a very incomplete and often inaccurate picture of the process by which decisions were actually reached on questions of diplomatic protection. He adds in this connexion that the "problem is ultimately connected with the possibility of maintaining a unified economic and social order for the conduct of international trade and intercourse among independent political units of diverse cultures and stages of civilization, different legal and economic systems, and varying degrees of physical power and prestige."<sup>50</sup> Jessup also points out that the history of this branch of international law during the nineteenth and twentieth centuries exemplifies the way in which a body of customary law develops in response to the need for adjustment of clashing interests. He stresses that the driving force behind the legal phenomenon was the desire of Governments for political influence in certain countries, the scramble for markets and for sources of raw materials. "The history of the development of international law on the responsibility of States for injuries to aliens is thus an aspect of the history of 'imperialism', or 'dollar diplomacy'". Concurring with Dunn, he says: "The function of the law of responsibility of States for injuries to aliens, in terms of the modernization of international law, is to provide, in the general world interest, adequate protection for the stranger, to the end that travel, trade, and intercourse may be facilitated."<sup>51</sup>

56. Examining the same question from another point of view, Eagleton says that the responsibility of the State has been acknowledged only in relation to other States; that "the law of responsibility was not conceived of in terms of duties to the community of nations; there was no thought that an injury to one State might be an injury to the whole community of nations... The re-

sponsibility of State (legal person) to State (legal person) will not disappear; but I hope, it will be more clearly delimited, and that procedures will appear, so that we move in the direction of a legal order able to punish disobedience in the name of the organized community of nations."<sup>52</sup> Similarly, Eustathiades argues that the effects of an international wrong are no longer limited to the reaction of the State which is directly injured, but impinge on the whole community as well. In his opinion, recent events demonstrate that international offences can no longer be considered merely in terms of the reparation due to the injured State, but should rather be treated as a general question.<sup>53</sup>

57. It will be noted that the study of the function of the law of State responsibility discloses novel aspects which may influence decisively our inquiry into the traditional rules and principles governing this responsibility. As indicated in chapter I with reference to the question of method, these rules and principles came into being and development in accordance with other rules and principles which have undergone a profound transformation in contemporary international law. And it is precisely the purposes of international law which have been most profoundly affected by this transformation. International law is not now concerned solely with regulating relations between States, for one of the objects of its rules is to protect interests and rights which are not truly vested in the State. Hence it is no longer true, as it was for centuries in the past, that international law exists only for, or finds its sole *raison d'être* in, the protection of the interests and rights of the State; rather, its function is now also to protect the rights and interests of its other subjects who may properly claim its protection. Likewise, States are no longer the only subjects of the obligations prescribed by international law. It is not difficult to understand, therefore, how greatly this new situation can influence the function performed by the law of international responsibility. This approach to the topic will be the central idea of the discussion of its diverse aspects in the chapter which follow.

### CHAPTER IV

#### The active subjects of responsibility and the problem of imputability

58. It has been shown in the previous chapter that international responsibility, of whatever specific type, is invariably the consequence of the breach or non-performance of an international obligation. This statement, however, refers only to the act or omission which gives rise to international responsibility, whereas there is another condition which must necessarily be fulfilled before the act or omission in question can bring into operation the law of international responsibility with all its consequences. It is this: in order to give rise to international responsibility, the wrongful act or omission must also be legally imputable to the subject of the obligation.

<sup>50</sup> Frederick Sherwood Dunn, *The Protection of Nationals* (Baltimore, The John Hopkins Press, 1932), pp. 1 to 3.

<sup>51</sup> Jessup, *A Modern Law of Nations* (New York, Macmillan, 1948), pp. 95-96 and 105.

<sup>52</sup> Eagleton, "International Organization and the Law of Responsibility", *Recueil des cours de l'Académie de droit international*, 1950, I, p. 423.

<sup>53</sup> Eustathiades, *loc. cit.*, p. 433.

Thus, imputability is an indispensable condition for the existence of international responsibility, whatever the act or omission may be, and irrespective of who is the subject of the obligation. There are, of course, other conditions which vary according to the different cases of responsibility, but the condition of imputability is common to all of them. Very understandably, therefore, the question of imputability has been one of the crucial problems in the doctrine and practice of international responsibility.

59. Traditional doctrine and practice had, however, considered the problem solely with the object of determining international responsibility so far as imputable to the State; consequently, earlier treatment of the subject was concerned only with those aspects which had a bearing on that object, to the exclusion of all others. It is, of course, still necessary to deal with the cases in which the responsibility of the State is engaged; indeed, these are still the most numerous and, as a rule, the most important cases. But it is necessary also to consider the question of imputability in relation to other cases of responsibility and in these cases, too, to inquire how far traditional rules and principles accord with international law in its present stage of development. Although General Assembly resolution 799 (VIII) and the resolution of the Tenth Inter-American Conference only refer to the principles which govern the responsibility of the State, a complete reappraisal of the entire problem is necessitated by the emergence of new subjects of international law, capable of possessing or assuming international obligations, some of which were formerly attributed to the State. Such a reappraisal is essential for the purposes of the present report, because only in that manner is it possible to determine, in accordance with contemporary international law, who is, in any particular case, the actual active subject of responsibility.

#### 10. IMPUTABILITY AS AN ESSENTIAL CONDITION OF INTERNATIONAL RESPONSIBILITY

60. First, what is meant by "imputability"? Anzilotti's definition related it to the theory of the juridical personality. He says: "To impute a deed to a subject of the law implies an assumption that that subject has duties and rights peculiar to it; therefore, imputation presupposes juridical personality, or rather, is coterminous with it: a subject of legal imputation and a person (in the legal sense) are synonymous terms".<sup>54</sup> Kelsen defines imputability by distinguishing it from legal obligations; he says: "Legal responsibility for the delict is upon the person against whom the sanction is directed, whereas legal obligation is upon the one who by his own behaviour may commit or refrain from committing the delict, the actual or potential delinquent. Legal obligation and legal responsibility are two different concepts; but the subject of the obligation and the subject of the responsibility may—but not necessarily do—coincide".<sup>55</sup>

61. Anzilotti and Kelsen concur with the majority of

the writers who have studied the question in the view that imputability is the condition which determines the responsibility of a legal person, irrespective of the possibility that the injury giving rise to that responsibility may have been caused by a third party. In international law, the "subject of legal imputation", the "subject of the responsibility", is the State, upon which that law lays obligations, and for whose acts or omissions no other party can therefore be considered as internationally responsible.<sup>56</sup>

62. It will now be clear why the traditional treatment of the imputability of international responsibility was so narrow. Because traditional doctrine admitted only the responsibility imputable to the State, it dealt with only a few aspects of the general problem of imputability: the vicarious "indirect" responsibility of the State for the acts of individuals and for injuries caused during internal disturbances; and the equally vicarious responsibility of the State for acts or omissions on the part of subdivisions (in the case of a federal State) or of its colonies and dependencies, or else for acts or omissions committed on its territory by another State. Outside these cases, the State has a "direct" responsibility which, accordingly, presented no problems other than those relating to the wrongfulness of the acts or omissions of its agencies.

63. It is true that, as stated above, the General Assembly resolution and the resolution of the Tenth Inter-American Conference at Caracas refer to "the principles of international law governing State responsibility". If this phrase were to be interpreted in accordance with traditional doctrine and practice, our only task would be to codify the principles governing the responsibility directly or indirectly imputable to the State. For according to traditional doctrine and practice it is immaterial who committed the wrongful act which causes the injury that gives rise, directly or indirectly, to responsibility: only the State is capable of incurring international responsibility and only the State has an international duty to make reparation for the injuries.

64. The position, however, is not so simple in the present stage of development of international law. Responsibility is a consequence of the breach or non-observance of an international obligation. Its imputability therefore necessarily depends upon who is or are the subject or subjects of that obligation. International doctrine and practice have developed in accordance with a conception of international law in which the State is the only subject capable of possessing or assuming international obligations. In contemporary international law, however, the State is no longer the sole subject upon which international law directly lays obligations. The individual has now also definitely become the direct subject—and sometimes the sole subject—of certain international obligations. This development naturally must have some bearing upon the imputation of the international responsibility which in the past was ascribed entirely to the State.

<sup>54</sup> Anzilotti, *op. cit.*, pp. 230 ff.

<sup>55</sup> Hans Kelsen, "Collective and Individual Responsibility for Acts of State in International Law", *The Jewish Yearbook of International Law*, 1948, p. 226.

<sup>56</sup> See also Bustamante, *Derecho internacional público*, Vol. III, p. 481; and J. G. Starke, "Imputability in International Delinquencies", in *The British Year Book of International Law*, 1938, pp. 104 ff.

65. The position is similar with respect to traditional doctrine and practice regarding the imputation of international responsibility for acts or omissions of certain political entities which enjoy internal autonomy but the international relations of which continue to be in the hands of a sovereign State. The fact that the international responsibility of some of these entities is now being in some measure recognized may perhaps also involve a reappraisal of the traditional idea that, in these cases, responsibility is imputable only to the sovereign State in question.

66. Nor can the problem of the imputation of responsibility, in contemporary international relations, be circumscribed to those cases in which a State may directly or indirectly be called upon to perform the duties resulting from that responsibility. It is true that traditional international law did not have to deal with, nor was it indeed aware of, any other cases of responsibility, and that General Assembly resolution 799 (VIII) does not contemplate any other cases. Nevertheless, certain international organizations may, by reason of their character or of the nature of their functions, find themselves in a certain sense and in some measure in a position analogous to, or even identical with, that of a State, inasmuch as they may commit acts or omissions giving rise to international responsibility. With reference to this case, Bustamante very properly stresses that "if the political action of its higher representative organs or the administrative conduct or action of one of the agencies of international co-operation wilfully and consciously causes injury, it is inconceivable that the victims thereof should be deprived of all recourse or remedy, and that the agencies concerned should enjoy absolute impunity".<sup>57</sup> This new form of international responsibility, as will be seen hereunder, is not without its practical precedents at least so far as some of its aspects are concerned.

67. The foregoing shows how necessary it is to abandon the traditional view concerning imputability and to consider the law of international responsibility in its widest scope, as warranted by the present stage of development of international law, even though the General Assembly and the Tenth Inter-American Conference did not make any explicit reference to the new cases mentioned above. To refuse to admit that this broad treatment is necessary would mean ignoring the fact that, in contemporary international law, the State is no longer the only subject to which the international responsibility arising out of a breach or non-observance of international obligations, as well as the international obligation to make reparation in certain cases for injuries, can be imputed.

#### 11 INTERNATIONAL RESPONSIBILITY IMPUTABLE TO THE STATE

68. For the purpose of determining in what cases and circumstances international responsibility is imputable to a State the acts or omissions enumerated in the previous chapter must be grouped in four great categories: (a) acts or omissions of the legislative, judicial and executive

branches of the State; (b) acts or omissions on the part of political subdivisions of a State, its colonies or other dependencies; (c) acts or deeds committed by private persons, including those occurring during internal disturbances; and (d) acts committed in the territory of a State by a third State or by an international organization. This classification, which is the one usually followed, makes it possible to discern the conditions under which, and the circumstances in which, responsibility may be imputed to a State in the various cases and situations which may occur in practice.

69. The cases in the first category are those which involve the State directly in international responsibility, but even in these cases there is no universal test of imputability. The situation varies according to the authority or organ to which the particular act or omission is traceable. If the legislative branch (or, where applicable, the constitution-making authority) is involved, imputability is generally based on the fact that legislative (or constitutional) measures have been adopted which are contrary to, or incompatible with, the international obligations (under a convention or otherwise) of a State, or else on the failure to adopt or to apply the measures which are necessary for the purpose of discharging such obligations. Whatever the legality or the validity of those acts or omissions from an internal point of view, international responsibility may arise and be imputable to the State as a consequence of any of those acts or omissions which constitute a breach or non-performance of an international obligation.

70. The problem of imputability becomes much more complex when we come to consider the acts or omissions of the judiciary. Here again the first step is to differentiate among the situations which are the most common in practice; these are known generically as cases of "denial of justice". If the denial of justice takes the form of the refusal on the part of a judge or court to act in a certain matter, or to deal with a certain case, then one has to determine whether the reason for the refusal is lack of jurisdiction, or whether the judicial authority has declined to act even though it possesses jurisdiction. In the first case, the problem would amount to determining whether such lack of jurisdiction is contrary to international law, in other words whether it implies an omission on the part of the constitution-making authority or of the legislature, inasmuch as the State is under an obligation to make provision for such jurisdiction. In the second case, to which can be added the analogous cases of unwarranted or unjustified delay in the proceedings or in reaching a judgement, the situation is simpler: in the majority of these cases "denial of justice" will exist. But perhaps the most difficult question, for the purposes of imputing responsibility, is that of unjust decisions. Clearly, of course, one cannot inquire into the intrinsic merits of a judicial decision, nor can one debate whether it is reconcilable with the municipal law of the State concerned; the only issue is this: Is the decision compatible or incompatible with international law? And for the purpose of answering this question the usual test is to ask: Does the decision, independently of all other factors, constitute an action comporting a breach or non-observance of an international obligation incumbent upon the State?

<sup>57</sup> Bustamante, *Derecho internacional público*, Vol. III, p. 483.

71. In the case of acts or omissions on the part of the executive or of public officials, where the problem of imputability is equally complex, other principles apply. In the first place, three different situations may arise: the case of an official acting in the performance of his public duties and within the limits of his competence; the case of an official acting in the performance of his duties but exceeding the powers with which he has been invested; and, finally, the case of an official acting as a private person. The first case is, of course, a straightforward one if the act or omission concerned violates an international obligation of the State. The same is true of the third case, in which the status of the official as such is immaterial, for an act committed by him in his private capacity would be on a par with the act of a private person, which does not directly involve the international responsibility of the State. The case which really presents difficulties is the second, for there the factor determining imputability might be either the status of the official *qua* official or the capacity in which he acted (objective responsibility), or else some other circumstance or consideration of the type occasionally admitted in practice.

72. In the case of acts or omissions on the part of political subdivisions of the State, or its colonies or dependencies, the problem of imputability naturally arises in a different manner. In essence, it has been said, there are two decisive considerations: the degree of control or authority exercised by the State over the internal affairs of its political subdivision, colony or dependency; and the extent to which the State responsible for the international relations and representation of the entity is concerned. It is apparent, however, that the mere application of these two tests does not dispose of all the possible cases, as is shown by the conflicting decisions arrived at in practice and by the divergent opinions held on the subject. Each case has in reality to be examined and dealt with on its own merits. Nevertheless, in a case involving a protectorate or like entity (these being the only cases presenting serious difficulties) one must determine whether, in addition to enjoying full internal autonomy, the entity in question has a measure of international personality and whether this personality carries with it the capacity to enter directly into international commitments with other States. This legal phenomenon, which is to be observed with increasing frequency in contemporary practice, is of great significance when the issue to be decided is: To whom should responsibility be imputed for the acts or omissions of those semi-sovereign entities?

73. The case of acts of private persons, acting either individually or as members of a group (internal disturbances), is in a way the most complex. In accordance with the more generally accepted doctrine in practice, the State's responsibility is not involved directly by such wrongful acts or deeds, but is rather the consequence of the conduct of its authorities with respect to them. The principle is that the State can only be held answerable for "its own acts". Viewed in these terms, the imputation of international responsibility will necessarily depend on the existence of factors and conditions extraneous to the actual event which caused the injury. This explains why, in doctrine and in practice, there has been so much argu-

ment, and such divergence of opinions, concerning the conditions which have to be present in order that the State can be truly said to be responsible. Here again the problem is whether the State should be treated as *objectively* responsible, or whether it is a condition of its responsibility that its conduct with respect to the act of the private person (failure to exercise due diligence to prevent it, failure to enforce the relevant penalties, etc.), must imply a certain deliberate attitude on the part of the State organ concerned (fault, *culpa*). Where imputability is determined by this indirect process, it is easy to see that what is in essence imputed to the State is not really the act or deed which causes the injury, but rather the non-performance of a duty, a duty which on occasions is very difficult to define and is sometimes quite undefinable. This peculiar process of legal reasoning may produce the consequence, among others, that responsibility is imputed for one reason and the decision concerning reparation relies on another, totally different, reason.

74. The last case to be considered in this context is that of the international responsibility of a State for acts committed in its territory by another State. This case, which is less frequent in practice than those discussed above, is in some respects analogous to that examined in the foregoing paragraph, inasmuch as what is involved is some act the commission of which cannot be directly imputed to the State. Hence once again it will be necessary to be guided by extraneous considerations in deciding whether the State is involved in international responsibility by reason of its conduct with respect to the wrongful act in question. Naturally, one will have to consider what degree of authority and control the State exercised in its territory and whether in fact the State in question had any authority or control at all (e.g., where both are exercised by the State committing the act or even by a third State). A similar situation, though not necessarily in identical terms, may arise as the result of the activities performed by international organizations in the territory of a State. Since the contingency is not dealt with in traditional doctrine and practice, it should, it is thought, be studied in the light of the character of the acts which may be committed by such organizations and which may give rise to indirect responsibility on the part of the State.

75. The foregoing gives a general idea of the difficulties involved in determining when a State is internationally responsible. These difficulties still exist, but they are no longer the only ones. A study of international responsibility should deal with, and solve, in addition to the above difficulties, those which have come into being in consequence of the recent development of international law and which are concerned with the nature of certain international obligations and the subjects of those obligations. Neither traditional doctrine nor traditional practice drew any distinction between acts and omissions which are merely unlawful and those which, in addition to being unlawful, are also punishable, or, if they drew such a distinction, they did not attach any special significance to it; neither did they admit that international responsibility might be imputable to a subject other than the State. International responsibility was regarded as something indivisible, and the State as the

only responsible subject. It has, however, been shown in the previous chapter that contemporary international law draws, in certain cases, a distinction between civil responsibility *stricto sensu* and criminal responsibility. Consequently, it will be necessary in each particular case to determine who is the real subject of the international obligation in question.

## 12. THE RESPONSIBILITY IMPUTABLE TO INDIVIDUALS

76. The idea that the State is the only subject capable of having or assuming international obligations was one of the fundamental premises of the report adopted by the Sub-Committee of the Committee of Experts for the Progressive Codification of International Law of the League of Nations (Guerrero report):

“As we have shown, the body of law established by the will of international society is the only law which can govern the mutual relations of States, in other words, the rights and duties which States have accorded to or imposed upon themselves in their relations *inter se*. The violation of any of these rights involves the international responsibility of the offending State... Under this system, States alone possess international rights and duties.

...

“According to the above definitions, therefore, the individual is not a subject of international law, and the violation of a rule of international law does not involve the individual in any responsibility.

“Similarly, as international law imposes duties on States only, the individual is incapable of committing an offence against that law.”<sup>58</sup>

77. It is not hard to see that the premise upon which that report was based is not correct so far as the active subjects of certain international obligations are concerned. Even in traditional international law, piracy and the other *delicta juris gentium*, as also the so-called “war crimes”, are punishable offences which only individuals can commit. As indicated in the previous chapter, the position in contemporary international law is not open to any doubts whatsoever: an individual may be the subject of international obligations the breach of which is punishable; indeed, one modern view holds that the individual is the only subject or beneficiary of the rules which make provision for those obligations.

78. For the purposes of the present codification, however, there are certain other questions which must be dealt with. When once it is admitted that the individual is capable of having or contracting international obligations, the first question is whether the *civil* responsibility arising out of the breach or non-observance of an international obligation, or of an obligation of a penal character (if the act is punishable at international law), can or cannot be imputed to the individual who committed the act or omission. Lauterpacht states that strictly speaking all obligations, as well as any responsibility for non-fulfilment, are attributable to human

beings and to human agencies. He admits, however, with regard to the fulfilment of normal obligations of treaties or of customary international law in matters of commerce, finance, or international administration, that “it is just and proper that, in law, responsibility should be imputed to the State as a whole and that the State should appear exclusively as the subject of international law for that purpose”. In his opinion, however, the position is not identical with regard to tortious responsibility, as for instance in the case of the denial of justice. In practice, the subject of international responsibility in the matter of tort has been the State, and responsibility has on occasions assumed the form of penal damages. He adds in this connexion: “But, intrinsically, there is nothing—save the traditional doctrine on the question of the subjects of international law—to prevent the tortious responsibility of the State from being combined, in the international sphere, with the responsibility of the organs directly liable for the act or omission in question”. Enlarging upon these ideas, Lauterpacht maintains that there would appear to be no reason why the official responsible should not be made jointly liable with the State; criminal responsibility, however, should be imputed solely to the official.<sup>59</sup>

79. This appears to be the consensus of those writers who have dealt with the question. Berlia, for example, inclines to the view that civil responsibility should be imputed to the State and criminal responsibility, where applicable, to the individual, on the ground that attempts to impute the latter to the State have failed; he adds that the system he suggests would tend to prevent international offences.<sup>60</sup> Rolin, on the other hand, considers that the idea of criminal responsibility on the part of State organs or officials cannot be admitted in international law, at least in its present stage of development.<sup>61</sup>

80. Different opinions have, however, been expressed on the subject. In the two Committees on International Criminal Jurisdiction which met at Geneva (1951) and New York (1953) respectively, the question was discussed whether the proposed international criminal court should be competent to award damages. Some members of the 1951 Committee proposed that the court should be competent to decide the civil responsibility of an accused person for the crimes of which he might be found guilty, and to adjudicate damages. In addition, it was proposed that the court should be competent to declare a State or other legal entity jointly liable for the payment of damages which the court might impose upon a convicted individual who acted on behalf of the State or other legal entity. These proposals were put forward again in the 1953 Committee. In both cases, however, it was agreed that, since the draft statute for the court was concerned exclusively with the criminal responsibility of individuals,

<sup>58</sup> Sir Hersch Lauterpacht, *International Law and Human Rights* (London, Stevens and Sons, 1950), pp. 40-43. See also chapter VIII, section 27 below.

<sup>60</sup> Berlia, *loc. cit.*, pp. 889 and 891.

<sup>61</sup> Rolin, *loc. cit.*, p. 450. The same opinion is held by Dautricourt (A/CN.4/39, section 79) and Stefan Glaser, *Introduction à l'étude du droit international pénal* (Brussels, Etablissements Emile Bruylant, 1954), p. 70.

<sup>58</sup> League of Nations Publications *V. Legal, 1926.V.3* (document C.46.M.23.1926.V), p. 4.

it was unnecessary to make any reference to those civil actions.<sup>62</sup> In this connexion, a recent instance may be mentioned, that of the Court provided for by the Treaty of 18 April 1951 constituting the European Coal and Steel Community. Under article 40 of that Treaty, this Court has jurisdiction to give rulings concerning the interpretation and the application of its provisions and the implementing regulations; it also has jurisdiction to assess damages against any official or employee of the Community, in cases where injury results from a personal fault of such official or employee in the performance of his duties. Furthermore, if the injured party is unable to recover damages from such official or employee, the Court may assess an equitable indemnity against the community.<sup>63</sup>

81. It will be seen that, although the traditional doctrine is no longer tenable, it cannot be said either that a definitive doctrine has evolved concerning the type of responsibility to be imputed to the individual. The reason is that the problem, when examined with care, raises other issues. In point of fact, it is not sufficient to determine to whom *civil* responsibility should be imputed and to whom *criminal* responsibility (if any). The more logical and practical course is to impute civil responsibility in international law to the State; if it is urged that individuals should be considered as subject to civil responsibility, the individual's responsibility should be supplemented by the joint responsibility of the State lest, owing to the insolvency of the individual concerned, insufficient reparation, or no reparation at all, be made for the injury. But even if one were to admit that the State is the sole subject of *civil* responsibility, this would not answer all the problems which may arise. The "duty to make reparation" which civil responsibility implies, varies according to the character and function of reparation in particular cases.

82. As will be explained later, "reparation" does not always take the same form, nor does it in every case have the same purpose. In cases of reparation *stricto sensu* (restitution, damages, or both) there is no problem. But in the case of punitive damages, as pointed out in the previous chapter, reparation contains in it at least some element of criminal responsibility. Thus, even within the scope of the law of *civil* responsibility, the problem of imputability arises too, inasmuch as it is necessary to determine who shall be the object of the sanction, or the measure of penalty, embodied in the reparation. Viewed in this light, the problem of imputability raises issues the study of which has to be postponed until a later chapter in which the character and function of reparation are discussed (chapter VIII below). As pointed out by some writers, however, the two types of responsibility are not mutually incompatible; to impute the one does not mean that the other is necessarily excluded or that its

imputability is prejudged.<sup>64</sup> This view is reflected in the charter and judgement of the Nürnberg Tribunal. It was also endorsed by both the 1951 and the 1953 Committees on International Criminal Jurisdiction mentioned above, and by the International Law Commission when it prepared its Draft Code of Offences against the Peace and Security of Mankind.

### 13. THE RESPONSIBILITY IMPUTABLE TO INTERNATIONAL ORGANIZATIONS

83. A brief reference will be made to the cases in which responsibility is imputable to international organizations; in a sense, these cases do not present complications and difficulties as to other subjects of international law. In the first place, the international personality of these organizations, particularly of some of them, is no longer in doubt, especially so far as their rights and their capacity to exercise them are concerned, as will be seen in the next chapter. Nor can there be any doubt concerning their duties, for some of these are explicitly prescribed in their constitutions or rules and regulations. Accordingly, it cannot be denied that the non-performance of those obligations, like the breach or non-observance of any other international obligation, necessarily involves them in responsibility. In some respects, it is even possible to establish a definite analogy with the responsibility imputable to the State.

84. It will simplify the study of the responsibility of international organizations if the following three cases are treated separately: (a) responsibility towards officials or employees or towards persons or legal entities having contractual relations with the organization; (b) responsibility for acts or omissions on the part of the organization's administrative organs, or in respect of injury arising from its political or military activities; and (c) responsibility for damage to third parties (indirect responsibility). This classification will doubtless be improved upon when an exhaustive study is made of the practice, although the latter is not as yet sufficiently developed to allow of a complete systematic analysis of the rules and principles which govern the responsibility of international organizations. Meanwhile, however, the above classification may serve as the point of departure for a future and more elaborate study.

85. The first type of responsibility is the one best illustrated by practice. The first Assembly of the League of Nations adopted a recommendation to the effect that all members of the Secretariat and of the International Labour Office appointed for a period of five years or more would, in the case of dismissal, have the right of appeal to the Council or the Governing Body of the International Labour Office, as the case might be.<sup>65</sup> In 1927, the Assembly established an Administrative Tribunal which by its Statute was competent *inter alia* to hear and to decide upon any dispute between officials and the Secretariat of the League (or the International Labour Office) concerning compensations payable to the

<sup>62</sup> See Report of the Committee on International Criminal Jurisdiction on its session held from 1 to 31 August 1951, *Official Records of the General Assembly, Seventh Session, Supplement No. 11*, para. 95, and Report of the 1953 Committee on International Criminal Jurisdiction, *Official Records of the General Assembly, Ninth Session, Supplement No. 12*, para. 88.

<sup>63</sup> *The American Journal of International Law*, Supplement, Vol. 46 (1952), p. 120.

<sup>64</sup> See Eustathiades, *loc. cit.*, p. 493.

<sup>65</sup> League of Nations, *The Records of the First Assembly, Plenary Meetings* (1920) pp. 663-664.

officials under the staff regulations. The Tribunal decided twenty-one cases but left twenty pending.<sup>66</sup>

86. In the United Nations, an Appeals Board was set up as early as 1947 to advise the Secretary-General, with whom the final decision rested, with respect to appeals by members of the staff.<sup>67</sup> By resolution 351 (IV) of 9 December 1949, however, the General Assembly established an Administrative Tribunal competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members. After the Tribunal had given certain judgements in 1953, ordering the Secretary-General to pay a large indemnity (and costs) to officials whose appointment had been terminated, the question was raised in the Assembly whether the latter had the right to refuse to give effect to an award of compensation made by the Tribunal and, if so, what were the principal grounds upon which the General Assembly could lawfully exercise such a right. By resolution 785 (VIII), both these questions were submitted to the International Court of Justice for an advisory opinion. The advisory opinion given by the Court naturally dealt primarily with the various aspects of these two questions, but in one of the passages setting forth its reasoning the Court states that the contract of service is concluded between the staff member concerned and the Secretary-General in his capacity as the chief administrative officer of the United Nations Organization, acting on behalf of the Organization as its representative. The Court added that "the Secretary-General . . . engages the legal responsibility of the Organization, which is the juridical person on whose behalf he acts."<sup>68</sup>

87. This type of responsibility only affects the Organization internally. It is international in character because of the legal relationship from which it springs but it does not arise from the obligations which that Organization has or may acquire with respect to private individuals outside it or with respect to other political entities—which is the case of the two other types of responsibility referred to above. An international organization can, of course, be involved in responsibility towards third parties for injuries due to acts or omissions on the part of its agents. For example, in connexion with the implementation of the technical assistance programme the Secretary-General of the United Nations disclaims responsibility for the recommendations made and reports drafted by its experts in the performance of their duties, though he does accept responsibility if he revises these recommendations and reports and adopts them as his own. Likewise, in the agreements relating to technical assistance, the Secretary-General only accepts re-

sponsibility for injuries which are directly attributable to a United Nations official acting in the performance of his duties and within the limits of his competence. As the activities of the United Nations, and indeed of any other international organization, are essentially carried on in the territory of States, this and similar cases of responsibility have given rise to problems that must be dealt with in conformity with the peculiar situation which results from those activities.<sup>69</sup> The necessity for this was strikingly demonstrated during the United Nations action in Korea, in connexion with certain claims alleging violations of neutral rights on the part of the forces of the Unified Command.<sup>70</sup>

88. The third type of responsibility mentioned in the above classification presents problems of a similar nature. There can be no doubt that, however small or limited in scope the territorial jurisdiction exercised by international organizations may be, the inviolability enjoyed by the premises of their headquarters and offices makes it possible for acts to be performed therein which are outside the competence of the local authorities. If such an act causes injury, and if it was possible for the act to occur by reason of the failure of the security services of the Organization to take action, then the Organization would be involved in responsibility on account of its failure to exercise due diligence. *A fortiori*, if the Organization should be responsible for the administration of a territory (as would have been the case if Trieste or Jerusalem had been actually placed under an international regime, as was originally contemplated), its position would be virtually that of a State. The Organization would then, in effect, have the same duties as a State with regard to the action to be taken by its organs and officials for dealing with the wrongful acts of third parties.<sup>71</sup>

#### 14. THE IMPUTATION OF RESPONSIBILITY AND THE DEFENCE OF "MUNICIPAL LAW"

89. The problem of imputability is not fully disposed of when once it is decided who is the subject of an international obligation, and hence whose responsibility is involved by the breach or non-observance of such an obligation. With regard to the State in particular, the further question arises whether it can avoid responsibility by pleading, in defence, provisions of its municipal law, under which the act or omission in question, said to be contrary to international law, is not wrongful. The question is of general importance, but has a special bearing on the validity and application of three fundamental principles: the principle of the international standard of justice; the principle of the equality of nationals and aliens; and the rule of local redress (chapters VI and VII, below.)

<sup>66</sup> See Manley O. Hudson, *International Tribunals, Past and Future* (Washington, Carnegie Endowment for International Peace and Brookings, 1944), chap. XIX, and E. F. Ranshofen-Wertheimer, *The International Secretariat* (Washington, Carnegie Endowment for International Peace, 1945), pp. 259-262.

<sup>67</sup> *Official Records of the General Assembly, Second Session, Supplement No. 1*, p. 77.

<sup>68</sup> See *Effect of awards of compensation made by the U.N. Administrative Tribunal, Advisory Opinion of July 13th, 1954: I.C.J. Reports 1954*, p. 53.

<sup>69</sup> Cf. Eagleton, "International Organization and the Law of Responsibility", *Recueil des cours de l'Académie de droit international*, 1950, I, pp. 385 *et seq.*

<sup>70</sup> See R. R. Baxter, "Constitutional Forms and Some Legal Problems of International Military Command", *The British Year Book of International Law*, 1952, p. 336.

<sup>71</sup> For a discussion of this type of responsibility, see Eagleton, "International Organization and the Law of Responsibility", *Recueil des cours de l'Académie de droit international*, 1950, I, pp. 393-401.

90. Point I of the bases of discussion drawn up by the Preparatory Committee of the Codification Conference of The Hague deals with this specific problem under the title: "Distinction between the responsibility of the State under municipal law and its responsibility under international law"; it says:

"The responsibility of a State in international law for damage caused in its territory to the person or property of foreigners must be distinguished from the responsibility which under its laws or constitution such State may have towards its nationals or the inhabitants of its territory. In particular, a State cannot escape its responsibility under international law, if such responsibility exists, by appealing to the provisions of its municipal law."<sup>72</sup>

91. The statement in the first sentence of the paragraph cited above was not disputed at the Conference; indeed, it had been accepted before by traditional doctrine and practice. In its conclusions, the Sub-Committee of the Committee of Experts for the Progressive Codification of International Law (Guerrero report) had already said:

"Since international responsibility can only arise out of a wrongful act, contrary to international law, committed by one State against another State, damage caused to a foreigner cannot involve international responsibility unless the State in which he resides has itself violated a duty contracted by treaty with the State of which the foreigner is a national, or a duty recognized by customary law in a clear and definite form."<sup>73</sup>

The Governments, in their comments concerning this point of the bases of discussion, agreed with the opinion of the Preparatory Committee.<sup>74</sup>

92. Admitting for the moment the distinction drawn between the two types of responsibility and, naturally, the assertion that the only one with which international law is concerned is that which arises out of the breach or non-observance of obligations imposed by international law upon the State, we shall now consider the second statement in the text prepared by the Preparatory Committee, namely, that "a State cannot escape its responsibility under international law, if such responsibility exists, by appealing to the provisions of its municipal law." This idea, expressed in similar or identical terms, has met with general acceptance in the literature, in codifications and in arbitral awards; it has been repeatedly upheld in decisions of the former Permanent Court of International Justice.<sup>75</sup> It has, however, been and often still is, received with reserve in certain quarters; on occasions it has even been rejected as a matter of

principle.<sup>76</sup> The reason for these strictures and objections is, in effect, the refusal to admit the fundamental implication of this principle in law, which is that international prevails over municipal law, with all the consequences which necessarily derive from the admission that the latter is the inferior order in the hierarchy of legal norms.

93. Strangely enough, upon close examination, these objections appear not to be totally unfounded. Indeed, to accept a formal distinction as between two types of responsibility, and as between two types of obligations, is to admit implicitly that there exists a distinction between the two legal orders (the internal and the international) with the consequence that one can argue and differ about their "hierarchical" position. This is precisely the approach of the so-called "dualistic" theory, which holds that international responsibility cannot be imputed unless responsibility exists under municipal law. For the above-mentioned principle to be valid, therefore, any distinction which may lead to or imply the "dualistic" character of the relations between municipal law and international law must be rejected.

94. It would therefore appear necessary, in strict legal logic, to drop the distinction drawn by the Preparatory Committee which traditional doctrine and traditional practice have explicitly or tacitly accepted. Obligations and responsibilities under international law are surely at the same time internal obligations and responsibilities. Where the State is under an international obligation to perform, or to desist from performing, a certain act, it cannot be suggested that a provision of its internal legislation which is contrary to, or incompatible with, that obligation, can possibly be valid. Such a provision would in fact be null and void; and hence it could not even be relied on internally as a defence to an international obligation. From the international point of view, there do not exist two systems of obligations (one internal and the other international), for international obligations bind the State internally no less than internationally; those which do not have this double effect are only concerned with the internal order of the State.

95. In connexion, therefore, with the question of the two alleged types of responsibility, the present writer adopts the "monistic" approach, and holds, moreover, that in the case of a conflict between an international obligation and an internal obligation, that is, between the responsibility which may be imputed to the State under international law and that imputable to it under municipal law, the international obligation prevails. Strictly speaking, there can be no question of a State escaping its responsibility by appealing to the provisions of its municipal law, for there cannot exist international obligations and internal obligations prescribing different rules of conduct. What is more, this "monistic" con-

<sup>72</sup> League of Nations publication, *V. Legal*, 1929.V.3 (document C.75.M.69.1929.V), p. 16.

<sup>73</sup> See annex I.

<sup>74</sup> League of Nations publication, *V. Legal*, 1929.V.3 (document C.75.M.69.1929.V), pp. 16 ff.

<sup>75</sup> See Georg Schwarzenberger, *International Law*, vol. I, *International Law as Applied by International Courts and Tribunals*, 2nd ed. London, Stevens and Sons, 1949), pp. 27-29.

<sup>76</sup> See, for example, the comments by Poland and Romania concerning the Preparatory Committee's text (League of Nations publication, *V. Legal*, 1929.V.3 (document C.75.M.69.1929.V), p. 18); and the observations made, concerning article 13 of the draft declaration on rights and duties of States prepared by the International Law Commission, in the summary records of the Sixth Committee (*Official Records of the General Assembly, Fourth Session, Sixth Committee*, pp. 186 ff.).

ception of the obligations of the State is the only one which is consistent with the principle, formulated by the Sub-Committee of the Committee of Experts, by virtue of which obligations having an international character prevail, so that this conception can be considered as implicitly contained in that principle, in spite of its apparent ties with the "dualistic" doctrine.<sup>77</sup>

## CHAPTER V

### The passive subjects of responsibility and the capacity to bring an international claim

96. The two previous chapters have dealt with the legal content and function of international responsibility as well as with the problem of its imputability in the various cases which may occur. The present chapter deals with the law of international responsibility so far as it relates to the parties that can assert the right or interest which is injured by the breach or non-performance of an international obligation, in other words, the passive subjects of responsibility. Traditional theory and practice were concerned with this question to a limited extent only. They regarded the State as the only entity capable of qualifying for this legal status, whether the State, as a legal person, was the direct object of the injury, or whether the injury was suffered by one of its nationals. This doctrine likewise has its origin in the traditional view concerning the subjects of international law, according to which only the State can have or acquire international rights. Consequently, it was held, international responsibility could only arise *vis-à-vis* the State.

97. It is not hard to see how greatly this view concerning the subjects of international rights, as well as the principles derived from it, are at variance with the rules of modern international law. International law today recognizes that individuals and other subjects are directly entitled to international rights, just as it places upon them certain international obligations. Accordingly, for an understanding of the development of international law in this direction it is again necessary to review, in their entirety, the traditional views and principles concerning the passive subjects of responsibility. The question in whom the interest or right vests, in any particular case in which responsibility for injury to an interest or right is to be determined, naturally raises important issues of substance, and especially the issue of the international capacity to claim reparation. This will be one of the matters discussed in the present chapter.

#### 15. THE STATE AS CLAIMANT

98. It is an established principle of international case law that, in all cases of responsibility, the interest or right

<sup>77</sup> With reference to the traditional distinction, Maúrtua points out that "it cannot be said that there are two different conceptions of responsibility, according to whether individuals or States are concerned... There can only be one conception of legal responsibility. Its basis is the same whether it is in municipal law or in international law. This basic unity of the law has now been acknowledged by learned jurists..." "La Responsabilidad de los Estados por Daños Causados en su Territorio a la Persona o Bienes de los Extranjeros", in V. M. Maúrtua, *Páginas Diplomáticas* (Lima, Librería e Imprenta Cie, S.A., 1940), vol. I, p. 523.

injured as a result of the wrongful act or omission is always an interest or right belonging to the State. This principle has been frequently stated by courts in explicit terms. In one of its first judgements, the former Permanent Court of International Justice held as follows:

"By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.

"The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint."<sup>78</sup>

99. Codifications have also drawn inspiration from this same principle and have sometimes proclaimed it explicitly. The report adopted by the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law (Guerrero report) did not acknowledge that any subject other than the State could have or acquire international rights. It states that individuals "move on a lower plane, where their lives are regulated in accordance with standards set up by a single will—the will of the State. In their own sphere individuals possess rights and duties and can accordingly incur responsibility, or, correlatively, invoke the responsibility of the State to which they belong."<sup>79</sup> Consequently, the conclusions of the report only referred to "...a wrongful act, contrary to international law, committed by one State *against another State*..."<sup>80</sup> Article 1 of the Harvard Research draft affords another example of the same trend. It refers to the duty of a State to make reparation to another State "for the injury *sustained* by the latter State as a consequence of an injury to its national."<sup>81</sup> In this connexion the comment to the article states:

"The injury for which a State is responsible is always an injury to another State. Such injury to the State arises from what was originally loss or damage inflicted upon its national."<sup>82</sup>

100. Writers have endorsed this theory concerning the passive subjects of international responsibility. Borchard was one of the first to state it. In his opinion, any omission in the duties of a State towards aliens involves the responsibility of the delinquent State not only toward the individual directly (if so provided by municipal law), but also towards his home State, "which in international

<sup>78</sup> See Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 2 (The Mavrommatis Palestine Concessions), p. 12. The Court reaffirmed this principle in later judgements: see series A, Nos. 20/21 (Case concerning the payment of various Serbian loans issued in France), p. 17, and *Judgments, Orders and Advisory Opinions*, series A/B, No. 76 (The Panevezys-Saldutiskis Railway Case), p. 16.

<sup>79</sup> League of Nations publication, *V. Legal*, 1927.V.1 (document C.196.M.70.1927.V), p. 93.

<sup>80</sup> Annex 1.

<sup>81</sup> Annex 9.

<sup>82</sup> Harvard Law School, *Research in International Law*, II. *Responsibility of States* (Cambridge, Mass., Harvard Law School, 1929), p. 141.

theory is considered as injured in the person of its citizen". He adds:

"The national State enforces its own right, therefore, in presenting an international claim, although the pecuniary benefits of an indemnity may ultimately be awarded to the injured individual himself."<sup>83</sup>

Anzilotti is equally categorical, in his opinion, if a State does not fulfill its duty to treat aliens in a particular manner, "... it is not the right of the individual which is violated, but rather the right of the State to see that the individual be treated in accordance with international law."<sup>84</sup>

101. Some exponents of the traditional doctrine, while accepting this theory, have tried to explain it otherwise, and to base it on other reasons. Thus Brierly says that, even if we reject its supposed justification in the dogma that individuals cannot have rights or duties at international law, it is still possible to hold that the theory itself is sound as reflecting the essential facts of the situation in which an international claim arises. Such a view, according to Brierly, does not, as it sometimes suggested, introduce any fiction of law; nor does it rest on anything so intangible as "the wounding of national honour"; rather it merely expresses the plain truth that the injurious results of a denial of justice are not, or at any rate are not necessarily, confined to the individual sufferer or his family, "... but include such consequences as the 'mistrust and lack of safety' felt by other foreigners similarly situated." He sums up his view by stating that, in an international claim, "a State has a larger interest than the mere recovery of damages."<sup>85</sup>

102. This reasoning on the part of Brierly is defensible and is in fact justified in a large number of practical instances, but in essence it amounts to expressing the same views as the traditional theory which considers the State as the only entitled claimant in respect of the injured interest, in spite of Brierly's implicit admission that there are two interests involved in the cases of international responsibility. As will be seen in a later chapter, however, this new idea affords some indirect assistance in the recognition of the individual, jointly with the State, as a passive subject of international responsibility in cases of injury to the person or property of foreigners.

103. The traditional view concerning the passive subjects of international responsibility has its obvious drawbacks. It will be shown below that the right of the State to claim damages in respect of injury caused to aliens is subject to the rule of the "nationality of the claim". In consequence of this rule, persons having no nationality have been deprived of the benefit of the "treatment recognized by the generally accepted principles of international law" concerning aliens, to use the terms employed by the Permanent Court of International

Justice,<sup>86</sup> although the position of such persons in municipal law is, for all practical purposes of the law of responsibility, that of aliens. The treatment of these "foreigners without any nationality" is absurd from the legal point of view. One Claims Commission even went so far as to say:

"A State... does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently no State is empowered to intervene or complain on his behalf either before or after the injury."<sup>87</sup>

104. This artificial view concerning the passive subjects of international responsibility also accounts for many problems and difficulties in cases of dual or multiple nationality. The principles which have been evolved for the application of the rule of the "nationality of the claim" sometimes lead to situations similar to that described in the previous paragraph. Not only is it difficult to say what test should be applied for the purpose of determining which of the nationalities in question shall prevail, but the rule itself becomes inoperative if one of the nationalities attributed to the injured party is the nationality of the respondent State. As will be seen in a later chapter, the application of this rule raises other difficulties, particularly when "continuity of nationality" is insisted upon as one of its corollaries.

105. These are not, however, the only drawbacks of the traditional view. When we come to consider what tests should be applied for the purpose of determining the character and the measure of reparation (chapter VIII, section 28, below) we shall find that because the State is deemed to be enforcing its own right, reparation is also considered as "a reparation due to the State", the consequence being that the injury sustained by the private individual will only serve to "indicate the adequate measure" of such reparation. According to this view, it is again the State (and not the aggrieved individual or his successors in interest) that is held entitled to fix the reparation of the injury. The traditional doctrine has yet other defects from the point of view of the foreign individual (these will become evident in chapter VI, below, which deals with the theory of diplomatic protection), and also from the point of view of the rights of the State in which the injured party resides (chapter IX).

## 16. OTHER SUBJECTS OF INTERNATIONAL LAW AS CLAIMANTS

106. It is undeniable that the State can be in certain cases the true and only claimant entitled to assert the right or interest which has been injured. In the case of acts or omissions which affect the State as such, that is, which injure its rights and interests as a legal entity

<sup>83</sup> Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* (New York, The Banks Law Publishing Co., 1915), p. 178.

<sup>84</sup> Anzilotti, *op. cit.*, p. 461.

<sup>85</sup> J. L. Brierly, "The Theory of Implied State Complicity in International Claims", *The British Year Book of International Law*, 1928, p. 48.

<sup>86</sup> See chap. VI, section 20, below, and Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 7 (Case concerning certain German interests in Polish Upper Silesia), p. 21.

<sup>87</sup> *Opinions of Commissioners under the Convention concluded September 8, 1923, as extended by subsequent Conventions, between the United States and Mexico, (October 1930 to July 1931)* (Washington, United States Government Printing Office, 1931), p. 188.

(for examples, see chapter III), only the State itself can be considered as the passive subject of the international responsibility to which these acts give rise. But in circumstances other than these, the traditional view, besides being incompatible with certain contemporary legal realities and theories, is patently inconsistent with itself.

107. For to argue that in the cases of responsibility for injury to the person or property of foreigners, the right which is violated is not that of a private individual but rather the right of the State of which he is a national, is to uphold an idea which conflicts with certain other fundamental principles recognized by international doctrine and practice. Podestá Costa points out that, in these instances, "the right violated is, primarily, the right of the injured individual"; he adds, in support of this view, that "according to a universally accepted rule, the corresponding legal action must be taken in the first place by the injured individual himself in the courts of the local State."<sup>88</sup> In a later chapter, dealing with the legal character of international claims, it will be shown that the existence of the rule mentioned by Podestá Costa discloses a manifest inconsistency as regards the subject who, after local remedies have been exhausted and an international claim has been lodged, appears as the claimant in respect of the injured right (chapter IX, section 29). In view of this, and of the consequences of the rule requiring "continuity of nationality of the claim", Politis, Dumas and other members of the Institute of International Law have described the theory that the State "is injured in the person of its nationals" as obsolete, on the grounds that it ignored the fact that, in making the claim, the State acts as the advocate of its nationals "whose interests are primarily involved". Although the Institute did not adopt any resolution on the subject, it voted against the traditional rule.<sup>89</sup>

108. In cases of responsibility for the breach of contractual rights, only a mere fiction of law, intended mainly to safeguard the political prestige and other interests of the claimant State, can buttress the argument that the rights in question do not belong to the private foreign individual who has entered into a contract with the State in the territory of which he resides. One Claims Commission, in admitting the validity of a waiver of diplomatic protection through the operation of the *Calvo Clause*, has said:

"... To acknowledge that under the existing laws of progressive, enlightened civilization a person may voluntarily expatriate himself but that short of expatriation he may not by contract, in what he conceives to be his own interest, to any extent loosen the ties which bind him to his country is neither consistent with the facts of modern international intercourse nor with corresponding developments in the field of inter-

national law and does not tend to promote goodwill among nations."<sup>90</sup>

109. Surely, the rights which a foreign private individual acquires by virtue of a contract with the State of his residence cannot be converted, by the mere fact of their violation, into rights belonging to the State of his nationality. Quite apart from the question of the validity of the *Calvo Clause*, which will be dealt with in a later chapter (chapter VII, section 24), if those rights are violated and a case of international responsibility arises, the beneficiary of the rights cannot change by reason of the fact that the State whose nationality he possesses espouses the claim; this is particularly true if—as is logical and usual—the sole object of the claim is to secure performance of the contract on the part of the State of residence, or damages in lieu of performance.

110. Nor is it consistent with other tenets and principles of traditional international law to argue, in the other cases of responsibility for injury to the person or property of foreigners (including that just mentioned) that the injured right or interest belongs to the State and not to its national. These tenets and principles are the rule concerning "treatment recognized by the generally accepted principles of international law", which has been repeatedly proclaimed by the former Permanent Court of International Justice, and the rule of the "international standard of justice", which has also been pleaded and applied precisely in order to show that an alien has certain fundamental rights which the State wherein he resides cannot violate without incurring international responsibility. Without prejudice to the relevant comments made below (chapter VI, section 20), it may be said at this point that both rules are undoubtedly concerned with the international recognition of certain specific rights of aliens. How, then, could it be said that these rights, if violated, came to vest, not in the individual concerned, but in the State of his nationality?

111. The traditional view is *a fortiori* incompatible with the present international recognition of the fundamental human rights and freedoms. At a time when a private person's status as an alien was considered an essential condition of his enjoyment of certain international rights, it was not implausible that these rights should be thought of as identical with, or at any rate inseparable from, the rights of the State of the nationality. Strictly speaking, the nationality link was the basis of those rights, and their only *raison d'être*. But the position in contemporary international law is completely different. Aliens (and even stateless persons) are on a par with nationals in that all enjoy these rights not by virtue of their particular status but purely and simply as human beings. In the recent international recognition of the right of the individual, nationality does not enter into consideration. This means that the alien has been internationally recognized as a legal person independent of his State: he is a true subject of international rights.<sup>91</sup>

112. Now, in what has been said above there is nothing to rule out the possibility that, in certain circumstances,

<sup>88</sup> Podestá Costa, "La Responsabilidad Internacional del Estado" in "Cursos Monográficos de la Academia Interamericana de Derecho Comparado e Internacional" (Havana, 1952), Vol. II, p. 206.

<sup>89</sup> See *Annuaire de l'Institut de droit international* (1931), Vol II, pp. 201-212, and (1932), pp. 479-529.

<sup>90</sup> *The American Journal of International Law*, Vol. XX, (1926), p. 802.

<sup>91</sup> See chapter VI.

the State of nationality may have a concurrent interest in a case in which the rights of its nationals have been violated. In his award of October 1924 concerning the British claims in the Spanish Zone of Morocco, Judge Huber pointed out that every law aims at assuring the coexistence of interests deserving of legal protection, and referred to "... the interest of the State in seeing the rights of its nationals in a foreign country respected and effectively protected"<sup>92</sup> With respect to the application of the *Calvo Clause*, one Claims Commission has similarly held that the State of the nationality "... frequently has a larger interest in maintaining the principles of international law than in recovering damage for one of its citizens"<sup>93</sup> These decisions show what the factual and legal situation may be in certain cases of responsibility for injury to the person or property of foreigners. In all of them, the injured right is the right of an individual, but in some of them the national State may claim a "general interest" separate from, and supplementary to that of the private individual. It will, of course, not always be easy to determine whether this duality and concurrence of interests and rights should be admitted, for everything depends on the circumstances of each particular case. The tribunal dealing with the case may be guided, in deciding this point, by such factors as the gravity of the act or omission, the frequency of the wrongful acts, and evidence of a manifestly hostile attitude towards the foreigner. This view conforms with the legal realities of these cases, and furthermore considerably facilitates their practical solution, as will be seen in the following section.

113. The recognition of the private individual as a passive subject of international responsibility does not dispose of all the problems connected with the question under examination. There are instances of responsibility in which other subjects of international law, namely international organizations, are similarly subjects of responsibility. The General Assembly by its resolution 258 (III), requested an advisory opinion of the International Court of Justice on the subject of "Reparation for injuries suffered in the service of the United Nations"; the specific questions were:

"I. In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible *de jure* or *de facto* Government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him?

"II. In the event of an affirmative reply on point I (b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?"

114. While reserving the other questions dealt with by the Court for discussion at a later stage, we shall deal here with the specific question of the capacity of international organizations to assert the interests or rights

which have been injured in those instances of responsibility.

115. On this point, the Court admitted the possibility of "damage caused to the interests of the Organization itself, to its administrative machine, to its property and assets, and to the interests of which it is the guardian".<sup>94</sup> With respect to the measure of reparation, the Court stated that it "should depend upon the amount of the damage which the Organization has suffered as a result of the wrongful act or omission of the defendant State and should be calculated in accordance with the rules of international law".<sup>95</sup> Accordingly, the Court held that the Organization, as a legal entity, was capable of possessing interests and rights of its own, and that their violation gave rise to a duty to make reparation. Establishing a further analogy with the traditional conception of the responsibility of State to State, the Court said:

"The obligations entered into by States to enable the agents of the Organization to perform their duties are undertaken not in the interest of the agents, but in that of the Organization. When it claims redress for a breach of these obligations, the Organization is invoking its own right, the right that the obligations due to it should be respected... In claiming reparation based on the injury suffered by its agent, the Organization does not represent the agent, but is asserting its own right, the right to secure respect for undertakings entered into towards the Organization".<sup>96</sup>

116. It should be noted, of course, that the analogous instance which the Court had in mind was that in which a State makes a claim in respect of injury caused to its officials or agents, and not the case of injury to nationals who are private individuals (the former Permanent Court of International Justice considered these, too, as injuries to the State itself).<sup>97</sup>

#### 17. THE CAPACITY OF THE STATE TO APPEAR AS CLAIMANT

117. Where an act or omission directly and solely affects the State as a juridical person, there is naturally no doubt concerning its international capacity to claim damages in respect of the injury sustained. The State, being the only beneficiary of the injured interest or right, is consequently the only subject to which such capacity may be attributed; and when we say "State" we do not, of course, exclude those semi-sovereign political entities which have acquired a sufficient degree of international personality for these purposes. It is the cases of injury to foreigners or private persons which present difficulties. A further complication has cropped up in modern times: the foreigner or private person

<sup>94</sup> *I.C.J. Reports 1949*, p. 180.

<sup>95</sup> *Ibid.*, p. 181.

<sup>96</sup> *Ibid.*, p. 184.

<sup>97</sup> For a fuller treatment of this question, see *Reparation for injuries suffered in the service of the United Nations: Oral Statements by Dr. Ivan S. Kerno, Agent, and A. H. Feller, Counsel, on behalf of the Secretary-General of the United Nations, 7-8 March 1949*, pp. 19 and 30; and Eagleton, "International Organization and the Law of Responsibility" in *Recueil des cours de l'Académie de droit international*, 1950, I, pp. 352 ff.

<sup>92</sup> Lauterpacht, *The Function of the Law in the International Community*, (Oxford, Clarendon Press, 1933), p. 121.

<sup>93</sup> Schwarzenberger, *op. cit.*, p. 74.

concerned may have suffered the injuries in the service of an international organization, in which case it will be necessary to reconcile the claim with "such rights as may be possessed by the State of which the victim is a national". We shall deal with this particular case when examining the question of the capacity of international organizations to bring claims for damages; for the moment, we shall consider the other problems.

118. Traditional international law tried to solve all these problems by conferring the international capacity to bring the claim upon the State of the nationality of the private individual who had sustained the injury, in accordance with the familiar principle of the "nationality of the claim", to which reference has been made above. The question is also related to the so-called doctrine of the diplomatic protection of nationals abroad, which will be examined in the following chapter. The Preparatory Committee of the Hague Conference of 1930, in the light of the replies received from Governments and of the abundant international case law, enunciated the principle in its Basis of Discussion No. 28, as follows:

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

"Persons to whom the complainant State is entitled to afford diplomatic protection are for the present purpose assimilated to nationals.

"In the event of the death of the injured person, a claim for a pecuniary indemnity already made by the State whose national he was can only be maintained for the benefit of those of his heirs who are nationals of that State and to the extent to which they are interested."<sup>98</sup>

119. In one of its last awards, the former Permanent Court of International Justice related the principle of the "nationality of the claim" to the right of the State to afford diplomatic protection:

"... This right is necessarily limited to intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond or nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged. Where the injury was done to the national of some other State, no claim for which such injury may give rise falls within the scope of the diplomatic protection which a State is entitled to afford nor can it give rise to a claim which that State is entitled to espouse."<sup>99</sup>

120. As the second paragraph of the basis of discussion of the Preparatory Committee implies, the rule of the

"nationality of the claim" is not an absolute one; in fact, the advisory opinion of the present International Court of Justice which is referred to in the preceding section explicitly admits that "... there are cases in which protection may be exercised by a State on behalf of persons not having its nationality".<sup>100</sup> It constitutes, however, the general rule, and must be taken as the basis of the capacity of the State to appear as claimant in the cases of responsibility which are being examined here. The first difficulty that we encounter is the condition of the "continuity of nationality", for this condition has received two different interpretations both in theory and in practice: one view is that the nationality must continue unchanged until the claim is decided upon, while another view holds that it is sufficient if the nationality subsists until the time when the claim is made.<sup>101</sup> The greatest difficulties are, naturally, those traceable to the condition laid down in the third paragraph of the Basis of Discussion. Thus, in the *Stevenson claim* the British-Venezuelan Commission of 1903, even though the claim had arisen during the lifetime of Stevenson, only made the award on behalf of the two children who possessed the nationality of the claimant State (Britain).<sup>102</sup>

121. In another respect, the rule of the "nationality of the claim" is open to serious objection both from the point of view of the protection of the foreign individual concerned and from the point of view of the general interests of the national State. As has been said before, the State does not act in the name and on behalf of the private individual concerned when affording diplomatic protection and making an international claim, but it rather acts in its own name and asserts "its own rights". In consequence of this "public character" of an international claim the person really interested is not a party to it, while at the same time an unjustifiable and unnecessary burden is placed on his country of origin. Besides, owing to the intervention of the national State, a claim acquires a political tinge, so that frequently international friction with the State of residence develops. As will be seen in a later chapter (chapter IX) the difficulties caused by the rule of the "nationality of the claim" are at times so serious that they cannot be overlooked.

122. The foregoing criticisms are not intended, however, to suggest that it is necessary or desirable to drop the rule itself. Provided that it is reformulated in terms which remedy its present deficiencies and shortcomings, the rule as such is still necessary and desirable in the present state of international relations. In reformulating the rule, it will be necessary to bear in mind two fundamental considerations: firstly, the injured interest or right in the cases of responsibility to which the rule applies is primarily that of the private individual and not that of the State; secondly, where the national State cannot claim a "general interest" in the injury resulting

<sup>100</sup> *I.C.J. Reports 1949*, p. 181.

<sup>101</sup> See Borchard, "The Protection of Citizens Abroad and Change of Original Nationality", *Yale Law Journal*, Vol. 43 (1934), pp. 359-392.

<sup>102</sup> Herbert W. Briggs (ed.), *The Law of Nations: Cases, Documents and Notes*, 2nd ed. (New York, Appleton-Century-Crofts, 1952), p. 735.

<sup>98</sup> See annex 2.

<sup>99</sup> Publications of the Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions*, series A/B, No. 76 (The *Panevezys-Saldutiskis Railway Case*), p. 16.

from the wrongful act or omission, the private individual must have remedies at his disposal for the purpose of bringing an international claim when once internal remedies have been exhausted. This second statement naturally involves the recognition of the international capacity of the individual to bring claims. As will be seen hereunder, however, this would not mean introducing any innovation in the practice of international claims.

#### 18. THE CAPACITY OF THE INDIVIDUAL OR PRIVATE PERSON

123. The problem of the direct right of access of individuals to international courts was raised and discussed in some detail when the Statute of the former Permanent Court of International Justice was being prepared. During the debate in the Committee of Jurists, two of its members, Loder and de la Pradelle, suggested that the Court should have competence to deal with disputes between States and individuals and that the latter should have direct access to the Court. One of the objections to this suggestion was based on the general argument that international cases are interstate disputes, private individuals not being subjects of international law.<sup>103</sup> Whatever may have been its validity at the time, the argument has by now become wholly untenable. There may still be some discussion concerning the nature and scope of the international rights which the individual is held to possess—in what sense or to what extent he is the subject of international law—but there can be no doubt that the recognition of those rights implies some degree of international personality.

124. Other arguments raised in the Committee of Jurists were that it was inconceivable for diplomatic negotiations to proceed between a private individual and a Government, and that a State would never permit itself to be sued before a Court by a private individual.<sup>104</sup> Here again, it is largely academic to inquire into the theoretical validity of these arguments in so far as they are clearly out of line with the present realities of international practice. In the International Prize Court established by The Hague Convention of 1907, private individuals were given direct access to the Court in the cases covered by the Convention if they fulfilled the conditions laid down in it.<sup>105</sup> The Central American Court of Justice, which functioned at Cartago, Costa Rica, from 1907 to 1917, could deal with the questions which private individuals of one of the five Central American countries "... may raise against any of the other contracting Governments, because of the violation of treaties or conventions, and other cases of an international character; no matter whether their own Government supports said claim or not; and provided that the remedies which the

laws of the respective country provide against such violation shall have been exhausted or that denial of justice shall have been shown".<sup>106</sup> But the most significant expression of this tendency is the practice of conferring *locus standi* upon private persons before the Arbitral Tribunals set up pursuant to articles 297 and 304 of the Treaty of Versailles (1919-1920), and especially their much more independent standing before the Arbitral Tribunal of Upper Silesia set up by the German-Polish Convention regarding Upper Silesia of 15 May 1922.<sup>107</sup> Further evidence of the same practical trend, although relating to disputes between private individuals and international organizations, is afforded by the capacity of individuals and other persons to institute proceedings in the Administrative Tribunals of the League of Nations<sup>108</sup> and the United Nations.<sup>109</sup>

125. Post-war practice does not disclose a uniform trend. The early treaties of peace did not revive the system established by the Treaty of Versailles; instead, they treat the problem of claims, and modes of settlement, as matters strictly between States.<sup>110</sup> The position is, however, different under the Convention on the Settlement of Matters arising out of the War and the Occupation signed on 26 May 1952 with the Federal German Republic. The Charter annexed to the Convention sets up an Arbitral Commission, direct access to which is open to the nationals or residents of the States or territorial entities referred to in the Charter and to bodies corporate constituted under the laws of those States and entities.<sup>111</sup> Although not strictly comparable in scope or object, the Treaty of 18 April 1951 to constitute the European Coal and Steel Community should be mentioned in this context (see also para. 80). In the Court set up by this Treaty, persons and bodies corporate have direct access for the different purposes provided for in chapter IV of the Treaty.<sup>112</sup>

126. Enough has been said to show that past international practice amply supports the recognition of the

<sup>106</sup> Article 2 of the Convention signed in Washington on 20 December 1907. See *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers 1776-1909*, compiled by William M. Malloy (Washington, U.S. Government Printing Office, 1910), Vol. II, p. 2400.

<sup>107</sup> Georges Kaeckenbeeck, *The International Experiment of Upper Silesia* (London, Oxford University Press, 1942), p. 811.

<sup>108</sup> Ranshofen-Wertheimer, *op. cit.*, pp. 259 ff.

<sup>109</sup> See General Assembly resolution 351 (IV). By resolution 957 (X) of 8 November 1955, the General Assembly adopted a procedure for the review of Administrative Tribunal judgements and amended the Statute of the United Nations Administrative Tribunal so as to allow Member States, the Secretary-General "... or the person in respect of whom a judgement has been rendered by the Tribunal (including anyone who has succeeded to that person's rights on his death) ..." to appeal from the judgement and to ask the Committee established by that resolution to request an advisory opinion of the International Court of Justice on the matter.

<sup>110</sup> See for example Treaty of Peace between the Allied and Associated Powers and Italy (10 February 1947), *United Nations Treaty Series*, Vol. 49, and the Treaties of Peace with Hungary and Romania of the same date, *United Nations Treaty Series*, Vol. 41, p. 135 and Vol. 42, p. 3, respectively.

<sup>111</sup> See articles 6 and 11 of the Charter, *The American Journal of International Law*, Supplement, Vol. 49 (1955), pp. 116-118.

<sup>112</sup> *Ibid.*, Supplement, Vol. 46 (1952), pp. 117 ff.

<sup>103</sup> See the observations of Mr. Arturo Ricci-Busatti, Baron Des-camps and Mr. Raul Fernandes in: Permanent Court of International Justice—Advisory Committee of Jurists—*Procès-Verbaux of the Proceedings of the Committee* (The Hague, Van Langenhuyens en Brothers, 1920), pp. 208, 209 and 215 respectively.

<sup>104</sup> See the observations of Lord Phillimore and Mr. Elihu Root, *ibid.*, pp. 206 and 207 respectively.

<sup>105</sup> See article 4 of the Convention in *The Hague Conventions and Declarations of 1899 and 1907*, ed. Carnegie Endowment for International Peace (New York, Oxford University Press, 1915), pp. 189-190.

right of interested private individuals to appear in the capacity of claimants before an international tribunal. The idea in itself is therefore, in principle, quite practicable. At its New York session (1929), the Institute of International Law expressed the view that "...there are certain cases in which it may be desirable to grant to private persons the right of direct recourse to an international tribunal, under conditions to be determined, in respect of their disputes with States".<sup>113</sup> Many writers who have dealt with the manifold aspects of the problem share the same view.<sup>114</sup>

127. The only questions to be settled then are in what cases, and subject to what conditions, individuals or private persons are to have this capacity to bring international legal action. Should the individual be regarded as having this capacity in all cases or only in those in which the State of the nationality does not possess a "general interest" in the injury caused by the wrongful act or omission? Should he have the capacity in all or only in some cases of responsibility for injury to the person or property of an alien?<sup>115</sup> So far as the conditions are concerned which must be fulfilled before the individual can exercise this capacity, some of the possible prerequisites are: (a) that the State whose nationality he possesses must have declined to present the claim; (b) that the said State consents to, or does not oppose the recognition of this capacity by the State of residence; (c) that the State of nationality supports the claim or is in some other way a party to the proceedings; (d) that only the immediate victim of the injury (or, as the case may be, his heirs or beneficiaries) can present the claim; (e) that the alien in question must possess a nationality, and, if he possesses two or more nationalities, must fulfil certain special conditions (to be defined).<sup>116</sup>

128. To sum up: whatever may be the case or cases in which the individual is to be regarded as having this capacity, and whatever may be the conditions to which its exercise is to be subordinated, the recognition of the right to institute proceedings would not imply a denial of the general principle under which the State has authority to protect its nationals abroad. Indeed, in much the same way it had to be admitted, as another principle, that diplomatic protection cannot be exercised in favour of an alien without his consent, lest (as has happened

<sup>113</sup> *Annuaire de l'Institut de droit international* (1929), Vol. II, p. 267.

<sup>114</sup> See in particular: L. Fleury, *L'accès des particuliers aux tribunaux internationaux* (1932); Schule, *Le droit d'accès des particuliers aux juridictions internationales* (1934); Kaeckenbeeck, *op. cit.*

<sup>115</sup> The Committee of the League of Nations for the study of international loan contracts recommended the setting up of an International Loans Tribunal to which groups of shareholders would have direct access. See *Report of the Committee for the Study of International Loan Contracts*, League of Nations Publications, II. *Economic and Financial*, 1939.II.A.10 (document C.145.M.93.1939.II.A), p. 26.

<sup>116</sup> With regard to stateless persons (and to refugees who lack the protection of their national State and are therefore in an identical situation), these conditions should be examined with a view to conferring on an international organization, which might be the United Nations High Commissioner for Refugees, the right of diplomatic protection which hitherto has been exercised exclusively by States.

in the past) a State exercise this right for purposes other than protection.

#### 19. THE CAPACITY OF INTERNATIONAL ORGANIZATIONS

129. It will be recalled that the advisory opinion, given at the request of the General Assembly by the International Court of Justice, concerned the question whether the United Nations has "...the capacity to bring an international claim... with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him". This, of course involved answering the fundamental question whether international organizations, and the United Nations in particular, had an international personality. With reference to this point the Court stated that "...the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane". The Court went on to examine whether "the sum of the international rights of the Organization comprises the right to bring the kind of international claim described" in the Assembly's request for an opinion. On this latter question, the Court held that Member States "...have endowed the Organization with capacity to bring international claims when necessitated by the discharge of its functions".<sup>117</sup>

130. The next question which the Court had to decide was: In the event of one of its agents, in the performance of his duties, suffering injury in circumstances involving the responsibility of a State, has the United Nations the capacity to bring an international claim with a view to obtaining the reparation due in respect of the damage caused to the Organization? The Court held that: "It cannot be doubted that the Organization has the capacity to bring an international claim against one of its Members which has caused injury to it by a breach of its international obligations towards it", adding that it was impossible to see how the Organization could obtain reparation unless it possessed capacity to bring an international claim.<sup>118</sup> In their oral statements, the representatives of the Secretary-General related this question to the international right of the Organization to protect its agents, arguing that the violation of that right gave rise to a claim for reparation which the Organization could bring at the international level.<sup>119</sup>

131. The Court, however, considered the right to protect the Organization's agents in connexion with the question concerning the reparation of the damage caused to the victim or to persons entitled through him. In the

<sup>117</sup> See *Reparation for injuries suffered in the service of the United Nations. Advisory Opinion: I.C.J. Reports 1949*, pp. 179 and 180; and *Reparation for injuries suffered in the service of the United Nations: Oral Statements by Dr. Ivan S. Kerno, Agent, and A. H. Feller, Counsel, on behalf of the Secretary-General of the United Nations, 7-8 March 1949*, pp. 22-27.

<sup>118</sup> See *I.C.J. Reports 1949*, p. 180.

<sup>119</sup> See *Reparation for injuries suffered in the service of the United Nations: Oral Statements by Dr. Ivan S. Kerno, Agent, and A. H. Feller, Counsel, on behalf of the Secretary-General of the United Nations, 7-8 March 1949*, pp. 32-36.

opinion of the Court, the traditional rule that diplomatic protection is exercised by the national State did not involve answering that question in the negative. This rule, the Court said, "... rests on two bases. The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach. This is precisely what happens when the Organization, in bringing a claim for damage suffered by its agent does so by invoking the breach of an obligation towards itself. Thus the rule of the nationality of claims affords no reason against recognizing that the Organization has the right to bring a claim for the damage referred to in question I (b)." This reasoning led the Court to the conclusion that the Organization also had the capacity, when claiming an adequate reparation, to include in its assessment the damage suffered by the victim or by persons entitled through him.<sup>120</sup>

132. Finally, let us examine the opinion given by the Court concerning question II submitted to it by the General Assembly, namely, how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national? The Court held that, in view of its affirmative reply on point I (b), when the victim had a nationality, cases could clearly occur in which the injury suffered by him might engage the interest both of his national State and of the Organization. In such an event, competition between the State's right of diplomatic protection and the Organization's right of functional protection might arise. The Court held, however, that there was no rule of law which assigned priority to the one or the other, or which compelled either the State or the Organization to refrain from bringing an international claim. The risk of competition between the Organization and the national State could only be reduced or eliminated either by general convention or by agreements entered into in each particular case. The Court also considered the case where the agent concerned had the nationality of the defendant State. In that case, as the claim of the Organization was not based on the nationality of the victim but on his status as agent of the Organization, the Court considered that the traditional rule was not applicable.<sup>121</sup>

133. The foregoing gives only a general idea of the problems which may arise when the United Nations or some other international organization exercises its right to bring an international action. Closer examination would reveal other aspects of the problem, and also the degree of development which post-war practice has reached with regard to the capacity of these subjects of international law to bring claims in the different cases of responsibility in which their interests or rights are injured. When this subject is studied more fully, it will certainly become apparent how necessary it is to formulate rules which will improve upon present practice; but at this stage it is sufficient to note, in particular, the suggestion which is being made more and more frequently of late, namely, that of conferring on the United Nations

the capacity to appear before the International Court of Justice when the latter is performing its international judicial functions.<sup>122</sup> This suggestion, which could equally apply to other international organizations, can be supported by three fundamental reasons: the capacity which nearly all these organizations have to appear before national courts; the capacity of the United Nations, and of the specialized agencies which are duly authorized, to request advisory opinions from the International Court of Justice; and the Court's own unqualified recognition of international personality of the United Nations in the advisory opinion referred to above.

## CHAPTER VI

### Diplomatic protection and the international recognition of the essential rights of man

134. In traditional international law the "responsibility of States for damage done in their territory to the person or property of foreigners" frequently appears closely bound up with two great doctrines or principles: the so-called "international standards of justice", and the principle of the equality of nationals and aliens. The first of these principles has been invoked in the past as the basis for the exercise of the right of States to protect their nationals abroad, while the second has been relied on for the purpose of rebutting responsibility on the part of the State of residence when the aliens concerned received the same treatment and were granted the same legal or judicial protection as its own nationals. Although, therefore, both principles had the same basic purpose, namely, the protection of the person and of his property, they appeared both in traditional theory and in past practice as mutually conflicting and irreconcilable.

135. Yet, if the question is examined in the light of international law in its present stage of development, one obtains a very different impression. What was formerly the object of these two principles—the protection of the person and of his property—is now intended to be accomplished by the international recognition of the essential rights of man. Under this new legal doctrine, the distinction between nationals and aliens no longer has any *raison d'être*, so that both in theory and in practice these two traditional principles are henceforth inapplicable. In effect, both of these principles appear to have been outgrown by contemporary international law.

#### 20. THE "INTERNATIONAL STANDARD OF JUSTICE"

136. As noted in chapter V, traditional international law had recognized a State's right to bring a claim against another State in respect of the injury caused to the person or property of its nationals. The right of "diplomatic protection", which is the name usually given to this prerogative, therefore proceeds from a State's right to protect its nationals abroad. The former Permanent Court of International Justice stated in one of its earlier judgements:

<sup>122</sup> See Eagleton, "International Organization and the Law of Responsibility", *Recueil des cours de l'Académie de droit international*, 1950, I, p. 421.

<sup>120</sup> See *I.C.J. Reports 1949*, pp. 181-184.

<sup>121</sup> *Ibid.*, pp. 185-186.

"It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels."<sup>123</sup>

137. In one of its last judgements (cited in para. 119) the same Court related the "right of diplomatic protection", to a State's "right to take up a claim and to ensure respect for the rules of international law".<sup>124</sup>

138. Writers of the traditional school have endorsed this view of the right of diplomatic protection, which they consider as a sort of safeguard against the non-observance of the international obligations which a State has towards aliens. Borchard, for example, states in this connexion:

"While the right of every State to exercise sovereignty and jurisdiction within its territory over all persons within it is recognized, foreign nations retain over their citizens abroad a protective surveillance to see that their rights as individuals and as nationals receive the just measure of recognition established by the principles of municipal and international law. Non-interposition is the rule only so long as States are careful to observe their international duties. Diplomatic protection, therefore, is a complementary or reserved right invoked only when the State of residence fails to conform with this international standard."<sup>125</sup>

139. Borchard, like all the other exponents of the traditional doctrine, considers the right of diplomatic protection as the right of a State to require from other States that they respect the person and property of foreigners in the manner prescribed by international law.

140. The connexion between the right of diplomatic protection and the principle of the "international standard of justice" has been fully endorsed by international practice, including international case law. In the *Neer* case, the General Claims Commission (United States and Mexico) held "that the propriety of governmental acts should be put to the test of international standards". And in the *Hopkins Case*, the same Commission, elaborating upon this idea, said:

"... it not infrequently happens that under the rules of international law applied to controversies of an international aspect a nation is required to accord to aliens broader and more liberal treatment than it accords to its own citizens under municipal laws... There is no ground to object that this amounts to a discrimination by a nation against its own citizens in favour of aliens. It is not a question of discrimination but a question of difference in their respective rights and remedies. The citizens of a nation may enjoy many rights which are withheld from aliens, and, conversely, under international law, aliens may enjoy rights and

remedies which the nation does not accord to its own citizens."<sup>126</sup>

141. In several of its decisions, the Permanent Court of Arbitration was guided by this idea in determining the measure of protection to which aliens are entitled with respect to their property; and the Permanent Court of International Justice too, in some of its judgements, relied on the same idea in upholding the principle of respect for "vested rights", "a principle which, as the Court has already had occasion to observe, forms part of generally accepted international law".<sup>127</sup> In none of these cases, however, was the "international standard of justice" contemplated as the extensive principle which it is sometimes considered to be. Verdross, for example, takes the view that the "international standard of justice" is contained in the "generally accepted principles of international law" (*droit international commun*).<sup>128</sup>

142. Some codifications also mention the legal doctrine of the international standard of justice. Article 5 of the Harvard Research draft, for example, provides: "A State has a duty to afford to an alien means of redress for injuries which are not less adequate than the means of redress afforded to its nationals". The comment to the article, however, states that "The object of article 5 is to indicate the minimum measure of the State's obligation... The redress afforded to nationals may be so inadequate that it will not satisfy the State's international obligation... The subjection of the alien to the local law and remedies is necessarily based upon the assumption that the local law and remedies measure up to the standard required by international law."<sup>129</sup> The article and the comment both refer to the application of the "standard" in a particular situation, rather than to its general application; they refer, in fact, to the rule of the exhaustion of local remedies, which will be examined in the next chapter. The principle of the international standard of justice is expressed in general terms, however, in article 2 of the draft adopted in first reading by the Third Committee of the Hague Conference, which says:

"The expression 'international obligations' in the present Convention means (obligations resulting from treaty, custom or the general principles of law) which are designed to assure to foreigners in respect of their persons and property a treatment in conformity with the rules accepted by the community of nations."<sup>130</sup>

143. The records of the discussions at the meetings of the Third Committee seem to indicate that the terms "the rules accepted by the community of nations" were intended to give the widest and most general expression to the principle in question.<sup>131</sup>

<sup>126</sup> Eagleton, *The Responsibility of States in International Law*, pp. 84 and 85.

<sup>127</sup> Schwarzenberger, *op. cit.*, pp. 99 to 103.

<sup>128</sup> Alfred Verdross, "Les règles internationales concernant le traitement des étrangers", *Recueil des cours de l'Académie de droit international*, 1931, III, pp. 330 ff.

<sup>129</sup> Harvard Law School, *op. cit.*, pp. 147 and 148, and *The American Journal of International Law*, Supp., Vol. 23 (1929), p. 147.

<sup>130</sup> Annex 3.

<sup>131</sup> League of Nations publication, *V. Legal*, 1930.V.17 (document C.351(c).M.145(c).1930.V), pp. 159 to 161.

<sup>123</sup> Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 2 (The Mavrommatis Palestine Concessions), p. 12.

<sup>124</sup> *Ibid.*, *Judgments, Orders and Advisory Opinions*, series A/B, No. 76 (The Panevezys-Saldutiskis Railway Case), p. 16.

<sup>125</sup> Borchard, *The Diplomatic Protection of Citizens Abroad*, p. 28.

144. In the Americas, too, the right of a State to protect its nationals has received general acceptance but it is subordinated to another principle, the principle of the equality of nationals and aliens. But as will be seen below, this latter principle, whether in its theoretical formulation or in its practical application, does not necessarily imply the complete repudiation of the traditional rules of international law which are intended to protect aliens.

## 21. THE PRINCIPLE OF THE EQUALITY OF NATIONALS AND ALIENS

145. The abuses which had occurred in the exercise of diplomatic protection by certain States led, understandably, to a reaction against the very principle which used to be invoked as the foundation of the responsibility of the State. The Argentine jurist, Carlos Calvo, referring to this state of affairs, proclaimed the doctrine which has since been pleaded in answer to international claims based on the violation of the "international standard of justice". In his opinion, "Aliens who establish themselves in a country are certainly entitled to the same rights of protection as nationals, but they cannot claim any greater measure of protection."<sup>132</sup> Calvo's novel thesis was endorsed by the First International Conference of American States (Washington, 1889-1890), when it recommended "the adoption as principles of American international law, of the following:

"(i) Foreigners are entitled to enjoy all the civil rights enjoyed by natives; and they shall be afforded all the benefits of said rights in all that is essential as well as in the form or procedure, and the legal remedies incident thereto, absolutely in like manner as said natives.

"(ii) A nation has not, nor recognizes in favour of foreigners, any other obligations or responsibilities than those which in favour of the natives are established, in like cases, by the constitution and the laws."<sup>133</sup>

146. The principle was reaffirmed in identical terms on several later occasions and incorporated into international agreements. Thus, the Convention on Rights and Duties of States, signed at the Seventh International Conference of American States (Montevideo, 1933), provides in its article 9:

"The jurisdiction of States within the limits of national territory applies to all the inhabitants.

"Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals."<sup>134</sup>

147. It will be noted that the fundamental idea underlying this principle is that aliens are entitled to "equal

protection". This idea has its origin in the rules of municipal law which have been applied to them in their capacity as mere aliens in transit or as residents. It is noteworthy that the constitutions and the legislation of the American countries, and the inter-American conventions which relate to the status of aliens, treat aliens as on a footing of equality with nationals for the purposes of the enjoyment of civil rights and individual guarantees.<sup>135</sup> Analogous rules providing for equality of legal and judicial protection are laid down in the Draft Convention on the Treatment of Foreigners prepared as a basis of discussion by the League of Nations Economic Committee for the International Conference on Treatment of Foreigners, which was held in Paris in 1929 under the auspices of the League.<sup>136</sup> The principle of "equality of nationals and aliens" thus constitutes, at the international level, an expression of the efforts made in municipal law to ensure to aliens the same protection as is enjoyed by nationals.

148. With reference to this last point, it may of course be said that the fundamental problem is the measure or extent of such protection. The principle of equality was interpreted as follows in the report of the Sub-Committee of the League of Nations Committee of Experts (Guerrero report):

"The maximum that may be claimed for a foreigner is civil equality with nationals. This does not mean that the State is obliged to accord such treatment to foreigners unless that obligation has been embodied in a treaty. We thereby infer that a State goes beyond the dictates of its duty when it offers foreigners a treatment similar to that accorded to its nationals."<sup>137</sup>

149. Such interpretations of the principle of equality and the corresponding practical applications of it, explain why adverse criticisms have been so frequently levelled at the principle itself. It has been said, for example, quite inaccurately that "Strictly speaking, this doctrine would prevent all recourse on the part of injured aliens to their own States for assistance, since no national can appeal for redress for a wrong suffered at home to any authority outside his own country", and, similarly, that "the equality standard implies that, in order to obtain compensation for injury suffered by one of its nationals abroad, a State must prove discrimination against him as a foreigner".<sup>138</sup>

150. The principle of equality between nationals and aliens, as a principle of international law, should not produce any such results or other similar results that have been attributed to it, so long as it is interpreted and applied in accordance with the purpose and scope for

<sup>135</sup> See in this connexion article 5 of the Convention on the Status of Aliens (Havana, 1928), and articles 1 and 2 of the "Bustamante Code", in *The International Conferences of American States, 1889-1928*, pp. 415 and 327 respectively.

<sup>136</sup> League of Nations publication, *II. Economic and Financial, 1928.II.14* (document C.174.M.53.1928.II), p. 11. The Paris Conference did not reach agreement on the text of a convention. See League of Nations Publications, *II. Economic and Financial, 1930.II.5* (document C.97.M.23.1930.II) *passim*.

<sup>137</sup> *Ibid.*, *V. Legal, 1927.V.1* (document C.196.M.70.1927.V), p.94.

<sup>138</sup> See P. E. Corbett, *Law and Society in the Relations of States* (New York, 1951), pp. 179 and 181.

<sup>132</sup> Charles Calvo, *Le droit international*, 5th ed. (Paris, Marcel Rivière, 1885), Vol. VI, p. 231.

<sup>133</sup> See Recommendation on "Claims and Diplomatic Intervention", *The International Conferences of American States, 1889 to 1928* (New York, Oxford University Press, 1931), p. 45.

<sup>134</sup> *The International Conferences of American States, First Supplement, 1933-1940*, p. 122. See also annex 5, articles 1 and 2.

which it was conceived. This is the approach taken in the Convention Relative to the Rights of Aliens, signed at the Second International Conference of American States (Mexico, 1902), which explicitly says that claims through the diplomatic channel can be made "in the cases where there shall have been on the part of the Court, a manifest denial of justice, or unusual delay, or evident violation of the principles of international law".<sup>139</sup> In its "project" on diplomatic protection, the American Institute of International Law later took the same line.<sup>140</sup> The same conception of the principle of equality is to be found in the *Déclaration sur les données fondamentales et les grands principes du droit international moderne*; approved by the Académie diplomatique internationale, the Union juridique internationale and the International Law Association. Article 30 of this Declaration provides that "aliens may in no case claim rights greater than those of nationals", but qualifies this formula with a proviso concerning the "minimum rights" which all civilized countries have a duty to ensure.<sup>141</sup> Interpreted in this manner, the principle of equality between nationals and aliens does not preclude the right of a State to protect its nationals abroad nor does it disregard the essential rights of man.<sup>142</sup> If the purpose of the "international standard of justice" is to protect these "minimum" rights, then the principle of equality is not incompatible with international law. The question will repay further study, in the various forms in which it appears in the present stage of development of international law.

## 22. SYNTHESIS OF THE TWO PRINCIPLES: THE INTERNATIONAL RECOGNITION OF THE ESSENTIAL RIGHTS OF MAN

151. As has been stated earlier in this report, the international recognition of the essential rights of man constitutes one of the most outstanding achievements of our epoch. This political and legal phenomenon is bound also to affect materially the aspect of international responsibility with which this chapter is concerned. The questions of diplomatic protection and the position of aliens is the subject of a declaration adopted by the Inter-American Conference on Problems of War and Peace (Mexico City, 1945) which reads as follows:

"International protection of the essential rights of man would eliminate the misuse of diplomatic protection of citizens abroad, the exercise of which has more than once led to the violation of the principles of non-intervention and of equality between nationals and aliens, with respect to the essential rights of man."<sup>143</sup>

152. In the first place, the declaration has the clear object of making it impossible for diplomatic protection to be used in a manner inconsistent with the principle

of non-intervention, or with the principle of the equality of nationals and aliens so far as the essential rights of man are concerned. But it does not go any further: the Conference simply meant to eliminate the *improper use* of diplomatic protection; it did not mean either to abolish that protection itself or to deny the State the right to protect its nationals abroad. The "international protection" of the essential rights of man was the means by which the Conference hoped its intentions would be realized. We shall examine at a later stage the methods which have been resorted to in order to counteract the dangers of abuse which are inherent in the direct exercise of diplomatic protection (chapter IX); for the moment we shall deal with that protection in so far as it is relevant to the specific subjects of this chapter.

153. The institution of diplomatic protection, and the principle underlying it, do not appear to constitute the most efficient means of protecting the rights and interests of aliens. In the first place, although diplomatic protection, being one of the functions of the national State, should constitute a duty on its part, history and international practice show that it has never been treated as such. Except for a very few writers, the bulk of legal opinion has never considered diplomatic protection as a duty of the State of nationality. Borchard himself describes it rather as a *moral* duty "which is unenforceable by legal methods".<sup>144</sup> Neither national nor international practice has recognized it as a duty. It is purely and simply a right which the State may exercise, or choose not to exercise, in its absolute discretion. Conclusive evidence of this is provided by the fact that, on occasions, the State concerned has refused to grant protection although requested to do so by the interested party and although the claim was justified; on the other hand, there have been cases in which no application had been made and yet protection was exercised, sometimes even against the will of the interested party, and this for purely political reasons far removed from the purposes of the institution of diplomatic protection. Small States not infrequently choose not to exercise this right for fear of creating a difficult situation in their relations with the powerful State against which the claim is being made.<sup>145</sup>

154. For its part the principle of the "international standard of justice", whether it is taken on its own merits or as a complement of diplomatic protection, has always suffered from a fundamental defect: its obvious vagueness and imprecision. None of the international bodies which have accepted and applied the principle has been able to define it: either no attempt to do so has been made, or, in the few cases where it has been made, or, in the few cases where it has been made, it has been with little success. They have usually merely referred to it as a ground for their decision, or applied it to particular cases on which they tried to build up a general rule by means of inductive reasoning. When invoked

<sup>139</sup> Annex 5, article 3.

<sup>140</sup> Annex 7, article 3.

<sup>141</sup> Annex 10.

<sup>142</sup> See Maúrtua, *loc. cit.*, p. 557; Accioly, *Derecho internacional público* (Rio de Janeiro, 1945), Vol. I, pp. 370-371; Podestá Costa, *loc. cit.*, pp. 207 ff.

<sup>143</sup> *Inter-American Conference on Problems of War and Peace, Mexico City, February 21-March 8, 1945, Report submitted to the Governing Board of the Pan American Union by the Director-General* (Washington, Pan American Union, 1945), p. 69.

<sup>144</sup> Borchard, *The Diplomatic Protection of Citizens Abroad*, pp. 29 and 30.

<sup>145</sup> For actual cases, see Dunn, "The International Rights of Individuals", *Proceedings of the American Society of International Law* (1941), pp. 14, 16 and 17.

directly by the State, the international standard of justice presents even greater disadvantages. One of its most determined advocates admits that "powerful States have at times exacted from weak States a greater degree of responsibility than from States of their own strength".<sup>146</sup> The origin of the "standard" may be traced to the sort of reasoning which gave rise to the system of capitulations or extraterritoriality that was for long imposed upon the peoples of Asia and Africa. The consequent discrimination in favour of the foreign groups of the population, and the infringement of the principle of equality among nations, became repugnant to public opinion and to legal thinking in the countries concerned. In all these respects, therefore, the "standard" is seen to be a distinctly imperfect rule and one which is only of very relative usefulness. Except in the case of a violation of the essential rights of man, i.e. of the *minimum* rights recognized by all countries, it is manifestly difficult to apply; its application is actually impossible in the majority of cases of responsibility.

155. The principle of equality between nationals and aliens is likewise inadmissible, if its interpretation, or its practical application, should conflict with international law. It is certainly inadmissible in its extreme form—as an absolute principle which is not subject to any limitations whatsoever. For the same reason it is inapplicable if the conduct of the organs of the State does not respect those rules and safeguards which in all countries protect the person and property of individuals. The fact that nationals suffer equally from such a situation cannot constitute a valid excuse for a State to evade its international responsibility. However, apart from these cases, it would appear difficult, both legally and politically, to accept treatment giving preference to and implying privileges in favour of aliens. Aliens cannot rationally expect a privileged status as compared with nationals, especially when no greater obligations and responsibilities are required of them; in fact, they have fewer obligations and responsibilities than nationals.

156. Now, both the "international standard of justice" and the principle of equality between nationals and aliens, hitherto considered as antagonistic and irreconcilable, can well be reformulated and integrated into a new legal rule incorporating the essential elements and serving the main purposes of both.<sup>147</sup> The basis of this new principle would be the "universal respect for, and observance of, human rights and fundamental freedoms" referred to in the Charter of the United Nations and in other general, regional and bilateral instruments. The object of the "internationalization" (to coin a term) of these rights and freedoms is to ensure the protection of the legitimate interests of the human person, irrespective of his nationality. Whether the person concerned is a citizen or an alien is then immaterial: human

beings, as such, are under the direct protection of international law.<sup>148</sup>

157. It will be easily seen how, from a purely legal point of view, both of the two traditional principles have been rendered obsolete by the development of international law. The "international standard of justice" was evolved and obtained recognition at a time when ideas differed from those which prevail at present: international law recognized and protected the essential rights of man in his capacity as an alien, or, in other words, by virtue of his status as a national of a certain State. The principle of equality between nationals and aliens, in its turn, was formulated in order to counteract the consequences of the difference in status which the law attached to nationals and aliens. Both principles had therefore the same basis: the distinction between two categories of rights and two types of protection. That distinction was recognized by the first principle but denied by the second. The distinction itself, however, disappeared from contemporary international law when that law gave recognition to human rights and fundamental freedoms without drawing any distinction between nationals and aliens.

158. The fact, however, that these two traditional principles are no longer applicable does not necessarily imply that the new legal system must ignore their essential elements and their basic purposes. On the contrary, the "international recognition of human rights and fundamental freedoms" constitutes precisely a synthesis of the two principles. In fact, from a study of the instruments in which these rights and freedoms have received international recognition, and of the two great declarations and other international instruments defining these rights and freedoms, it becomes evident that all of them accord a measure of protection which goes well beyond the *minimum* protection which the rule of the "international standard of justice" was meant to ensure to aliens. Moreover, in all these documents there is no reference to any case or circumstance in which aliens enjoy a legal status more favourable than that of nationals. In reality, the idea of equality of rights and freedoms constitutes the very essence of these instruments.

159. Accordingly, it would be illogical, in law as in practice, to endeavour to maintain either of the two traditional principles in a codification of the law of international responsibility. Both principles have become obsolete and to press the case for either of them would be tantamount to ignoring one of the political and legal realities which is most clearly apparent in the contemporary world situation.

## CHAPTER VII

### Exoneration from responsibility and attenuating and aggravating circumstances

160. Traditional theory and practice made no formal or clear distinction between grounds of exoneration from responsibility properly so-called and the extenuating or aggravating circumstances which might attend the breach or non-observance of an international obligation. Schwar-

<sup>146</sup> Borchard, *The Diplomatic Protection of Citizens Abroad*, p. 178.

<sup>147</sup> See in this connexion Jessup, *A Modern Law of Nations*, p. 102; and *Survey of International Law in relation to the Work of Codification of the International Law Commission* (memorandum submitted by the Secretary-General), (United Nations publication, Sales No.: 1948.V.1(1)), p. 47.

<sup>148</sup> See Maúrtua, *loc. cit.*, p. 558.

zenberger correctly points out that international jurisprudence does not speak with one voice on the question whether "absolute responsibility or culpability is required in the case of delictual acts or omissions."<sup>149</sup> The problem is certainly by no means simple, but it cannot be ignored in the future codification of the principles of international law which govern responsibility. It will be recalled that when the question of the imputability of certain acts or omissions of the State was examined (chapter IV), it was seen that responsibility sometimes depends on the presence of some factor other than the act which originally gave rise to responsibility. Any one of these factors may influence the conduct of the State in such a way that it may be said to affect the extent of the responsibility actually imputable to the State.

161. One of the objects of this chapter is to consider whether in all cases the choice lies strictly between absolute responsibility and absence of responsibility—the only choice admitted by the theory of "objective responsibility"—or whether it is possible also to speak of exonerating, attenuating and aggravating circumstances.

### 23. THE RULE OF THE EXHAUSTION OF LOCAL REMEDIES

162. One of the principles most firmly laid down in international law is that there is no international duty to make reparation, and hence no right to bring an international claim, so long as local remedies have not been exhausted. While the principle itself has never been disputed, its practical application has provoked some difference of opinion with regard to its true content and scope. The first problem is that of the "effectiveness" of the local remedies, either as a means of obtaining the reparation which is sought or else for the purpose of determining the moment as from which the State is involved in international responsibility. Secondly, and this problem is closely linked with the first, at what point, or in what circumstances, can local remedies be said to have been "exhausted"? Thirdly, does the condition of the exhaustion of local remedies constitute a mere procedural formality, or is it rather a substantive condition upon which the very existence of the State's international responsibility hinges? It may well be that the problem is more theoretical than practical, but it must be examined here because its implications may affect other aspects of the law of international responsibility.

163. The problem of the effectiveness of local remedies has usually been stated thus: Are the remedies granted by the State adequate to ensure the satisfactory reparation of the damage sustained and, consequently, to exonerate it from international responsibility? The case-law of arbitral tribunals and commissions does not provide any precise definition of what is meant by "adequate" or "effective" remedies. The reason is that the problem which has usually arisen is the second of those mentioned above, namely: At what point, or in what particular circumstances, can local remedies be said to have been "exhausted"? The same is largely true of codifications. In its "project" on the responsibility of Governments, the American Institute of International Law held that

each Government is obliged "to maintain on its own territory the internal order and governmental stability indispensable to the fulfilment of international duties".<sup>150</sup> In the draft adopted at its Lausanne session (1927) the Institute of International Law was perhaps more specific when it referred to the wronged individual having at his disposal "effective and sufficient means to obtain for him the treatment due him", and to an "effective means of obtaining the corresponding damages".<sup>151</sup> Another source, the Harvard Research draft, says that a State has no other duty than that of affording to an alien "means of redress for injuries which are not less adequate than the means of redress afforded to its nationals".<sup>152</sup> It will be noted that these attempts at a definition use terms and specify conditions which, in their turn, require more precise definition. The crux of the problem is really finding a criterion valid for all cases which can serve to determine whether the means of redress available, both in name and in fact, are sufficiently adequate and effective to justify the State's exoneration from international responsibility. Regarded in this way, the question is simply one aspect of the general problem examined in the previous chapter; in other words, is the effectiveness of these local remedies to be judged by reference to the rule of the "international standard of justice" or by reference to the principle of equality between nationals and aliens?<sup>153</sup> If that is the case, it will be sufficient to make use of the legal theory developed in that chapter.

164. This last consideration apart, it should be noted that the question of the "effectiveness" of local remedies is intimately connected, and may at times coincide, with the question of knowing at what point, or in what circumstances, those remedies should be considered as "exhausted". This other problem is naturally of much greater significance in practice and it can arise in two different sets of circumstances, although only one of them (the second) is directly relevant for our purposes. For example, can the local remedies rule be invoked in a case in which States have agreed to submit any disputes between them to arbitration or to some other method of settlement? Certain decisions have replied to this question in the negative. In other decisions, however, the reply was in the affirmative; thus in the *Salem* case (1932), the Tribunal rejected a plea that the mere existence of an agreement of this kind implied an intention to waive the local remedies rule.<sup>154</sup> Actually, it seems, no definite answer valid for all cases can be given. It would be necessary to determine whether the particular dispute is included among those covered by the arbitration agreement and, if so, whether that agreement meant, explicitly or implicitly, to waive the application of the local remedies rule in those disputes. In other words, the application of the local remedies rule will necessarily depend not only on the purpose and scope of the agreement, but also on the circumstances of each particular case.

<sup>150</sup> See annex 7, article I.

<sup>151</sup> See annex 8, article XII.

<sup>152</sup> See annex 9, article 5.

<sup>153</sup> See in this connexion the comment to article 5 of the Harvard Research draft, quoted in section 20 of the previous chapter.

<sup>154</sup> Briggs, *op. cit.*, p. 636.

<sup>149</sup> Schwarzenberger, *op. cit.*, p. 243.

165. The situation which really concerns us is, however, a different one. In the *Panevezys-Saldutiskis Railway case* (1939), the Permanent Court of International Justice held as follows:

“There can be no need to resort to the municipal courts if those courts have no jurisdiction to afford relief; nor is it necessary again to resort to those courts if the result must be a repetition of a decision already given.”<sup>155</sup>

166. The Harvard Research draft expresses a similar view when it says that a State is responsible if an injury to an alien results from its non-performance of a contractual obligation which it owes to the alien “...if local remedies have been exhausted without adequate redress”.<sup>156</sup> In marked contrast with this view of the rule, the draft of the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law (*Guerrero report*) says:

“6. The duty of the State as regards legal protection must be held to have been fulfilled if it has allowed foreigners access to the national courts and freedom to institute the necessary proceedings whenever they need to defend their rights.”<sup>157</sup>

167. Inter-American instruments have adopted a different and, in a way, intermediate position. In its resolution concerning the “International Responsibility of the State”, the Montevideo Conference (1933) reaffirmed:

“... that diplomatic protection cannot be initiated in favour of foreigners unless they exhaust all legal measures established by the laws of the country before which the action is begun. There are excepted those cases of manifest denial or unreasonable delay of justice which shall always be interpreted restrictively, that is, in favour of the sovereignty of the State in which the differences may have arisen.”<sup>158</sup>

168. In substantial agreement with this approach, although different in its language, the American Treaty on Pacific Settlement (Pact of Bogotá, 1948) provides as follows:

“Article VII. The High Contracting Parties bind themselves not to make diplomatic representations in order to protect their nationals, or to refer a controversy to a court of international jurisdiction for that purpose, when the said nationals have had available the means to place their case before competent domestic courts of the respective State.”<sup>159</sup>

169. In the face of these diverse interpretations of the rule, at what point, or in what circumstances, can local remedies be truly said to have been “exhausted”? The two criteria which have been suggested in the Harvard draft and the case-law of the Permanent Court—one, that

the reparation for the injury must be adequate and the other, that local remedies are of no avail—both have the disadvantage of leaving the appraisal of the situation to the discretion of the claimant State. While it is true that the whole purpose and the justification of the rule lie in a desire to ensure the satisfactory reparation of the injury by internal means, yet none of the interested parties must be in a position to decide this point unilaterally. For similar reasons, it would be open to objection to say (as the Guerrero report says) that the rule is satisfied when the alien concerned has been given full access to the local courts and these have given their decision, irrespective of whether in that decision, or in the procedure leading to it, an act or omission has been committed which constitutes a patent denial of justice. It is the third interpretation of the rule (the inter-American one) which seems the most practical and useful. It does not seem incompatible with the essential purpose of the rule under discussion to require the alien to exhaust all the local remedies, subject to a proviso concerning cases of denial of justice, or to require the State not to exercise diplomatic protection in any form if its nationals had free access to the local courts. In any case, such a requirement is not incompatible with the view that the rule should be interpreted as being subject to the condition of the adequacy of reparation. If the reparation does not fulfil this condition, then either some form of denial of justice will have occurred, in which event an international claim can be brought, or else the case will be one of those (and they are relatively frequent) in which the municipal law of no country has been able to offer any protection more effective than that which it is hoped to secure through treating the claim as an international claim. Since, in the final analysis, it is a question to be weighed in each particular case whether the reparation is adequate, the respondent State could raise the local remedies rule as a preliminary issue before the tribunal or body dealing with the case and the latter could rule on it as a preliminary point. In this way, the validity of the rule itself would be upheld and at the same time it would not be left to the discretion of either State to decide, unilaterally, whether an international claim lies.

170. The third and last of the problems mentioned at the beginning of this section is whether the rule concerning the exhaustion of local remedies constitutes a mere procedural requirement which must be complied with before an international claim can be brought, or whether it is, rather, a condition *sine qua non* of international responsibility. Briefly expressed, the question is whether the requirement is purely procedural or else a substantive condition on which the very existence of international responsibility depends. Let us first examine the case-law on the subject.

171. In a decision which dealt—indirectly—with the question, the Permanent Court of International Justice stated that international responsibility is established as between two States as soon as a violation of a right of one State can be attributed to the other; in these circumstances denial of justice whether resulting from a lacuna in the judicial organization or from the refusal of administrative or extraordinary methods of redress designed to supple-

<sup>155</sup> Publications of the Permanent Court of International Justice, *Judgements, Orders and Advisory Opinions*, series A/B, No. 76, p. 18.

<sup>156</sup> See annex 9, article 8.

<sup>157</sup> See annex 1.

<sup>158</sup> See annex 6.

<sup>159</sup> *Annals of the Organization of American States*, Vol. I, No. 1 (1949), p. 91.

ment its deficiencies, does not exercise any influence on the responsibility ensuing from the wrongful act.<sup>160</sup> However, in another judgement (cited in para. 165) the Court explicitly acknowledged that the rule "subordinates the presentation of an international claim" to the exhaustion of the remedies afforded by municipal law.<sup>161</sup> In the *Finnish Ships Arbitration Case* (1934) the Tribunal held in substance: (a) that State responsibility is incurred as a result of a breach of international law, provided the breach constitutes a direct act of the Government of that State; and (b) that although the act in question gives rise to international responsibility an international claim does not lie unless and until local remedies have been exhausted.<sup>162</sup>

172. This view is shared by legal opinion almost unanimously. Eagleton, for example, states that the rule of local redress is the dividing line between the substantive and the procedural aspects of responsibility. According to him, liability exists from the moment in which the internationally illegal act is established, and it is always a direct responsibility owed by one State to another; but when it is a matter of the methods by which the responsibility may be discharged, diplomatic interposition is justified only when local remedies have been resorted to.<sup>163</sup> Starke deals with the problem by relating it to the question of imputability, and states that the rule appears as a combination of substantive and of procedural law, viewed from each aspect of the situation which forms the basis of claim.<sup>164</sup>

173. The problem is indeed intimately connected with that of imputability, but the really important question is to determine what international consequences are to ensue from the admission of an interstate responsibility which cannot be enforced, i.e. if a claim cannot be brought so long as local remedies have not been exhausted. Legal opinion is unanimous on this last point: the rule implies a suspensive condition, which may be procedural or substantive, but to which the right to bring international claims is subordinated. Responsibility may or may not exist, as the case may be, but unless and until the said condition is fulfilled, the claiming State has only a potential right. Responsibility as such may be imputable, but the duty to make reparation cannot be claimed. Consequently, in pure legal theory, failure to exhaust local remedies may or may not be grounds for exoneration from international responsibility, according to circumstances, but it will always constitute a complete bar to the bringing of an international claim.

#### 24. THE WAIVER OF DIPLOMATIC PROTECTION: THE CALVO CLAUSE

174. The "waiver of diplomatic protection" may also

<sup>160</sup> Publications of the Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions*, series A/B, No. 74 (Phosphates in Morocco), p. 28.

<sup>161</sup> *Ibid.*, No. 76 (The Panevezys-Saldutiskis Railway Case), p. 18.

<sup>162</sup> Fachiri, "The local remedies rule in the light of the Finnish Ships Arbitration", *The British Year Book of International Law*, 1936, p. 33.

<sup>163</sup> Eagleton, *The Responsibility of States in International Law*, pp. 23-24, 77 and 98.

<sup>164</sup> Starke, *loc. cit.*, pp. 107-108.

constitute grounds for exoneration from international responsibility, or at any rate, condition the right of the State to bring an international claim. In spite of the abundant legal literature on the subject, which might tend to create a different impression, the problems involved are neither as numerous nor as complex as those which proceed from the local remedies rule. The simplest approach is to deal separately with the two possible cases: (a) the renunciation by the State itself of its right of diplomatic protection by agreement with the State of residence, and (b) the renunciation by the private foreign individual concerned of such protection, under the terms of a contract with the State of residence (*Calvo clause* properly so-called).

175. The first case naturally does not give rise to any serious difficulties. The practice became quite prevalent in the nineteenth century for States to conclude bilateral treaties limiting the right of diplomatic protection. The purpose, common to all those agreements, was to limit the exercise of that right to a few expressly specified situations. As a rule, a saving clause was inserted concerning cases of denial of justice, though different treaties interpret "denial of justice" very differently. None of the agreements, however, goes so far as to provide for a complete renunciation of the right of protection itself.<sup>165</sup> Article VII of "Pact of Bogotá" (cited in para. 168) might, in a way, be regarded as a provision of this kind if it is to be construed in the sense indicated. That article lays down that the contracting States "bind themselves" not to make diplomatic representations of any kind in order to protect their nationals "when the said nationals have had available the means to place their case" before the competent domestic courts.

176. This practice has occasionally been criticized. Thus the Institute of International Law, at its Neuchâtel session (1900), adopted a resolution recommending States to abstain from inserting in treaties such "reciprocal non-liability clauses" (*clauses d'irresponsabilité réciproque*). In the opinion of the Institute, "... these clauses err inasmuch as they exonerate States from their duty to protect their nationals abroad and from their duty to protect aliens in their territory".<sup>166</sup> Apart from the doubtful character of the alleged "duty to protect", there are really no serious grounds, whether legal or otherwise, for denying the validity and propriety of waiving a right which can perfectly well be renounced, so long as the renunciation does not affect the principle upon which diplomatic protection is based. An examination of the terms and the scope of the stipulations to which reference has been made will show that the principle in question is not affected by them. Their purpose is simply to limit the exercise of the right of diplomatic protection, not to abolish that right. As to the duty of the State to protect aliens in its territory, the State of residence is not exonerated from this duty by these stipulations which limit its international responsibility; the latter are meant, rather, to define that

<sup>165</sup> For examples of these treaties, see Alwyn V. Freeman, *The International Responsibility of States for Denial of Justice* (New York, Longmans, 1938), pp. 490-496.

<sup>166</sup> *Annuaire de l'Institut de droit international*, Vol. 18, p. 253.

duty in clear and precise terms, not only for the benefit of that State, but also for the benefit of an alien who may be injured by a wrongful act imputed to it.

177. Similar problems are involved in cases in which it is the foreign private individual who himself renounces diplomatic protection. The same arguments are really valid, but in this second category of cases there has been much greater objection to admitting such renunciation as grounds for exonerating a State from its responsibility. These objections to the *Calvo clause*, as this renunciation is usually called, are based on the frequently expressed views concerning the nature and scope of such "waiver clauses", as well as on the theory that an alien cannot renounce a right which belongs to his national State. As will be seen hereunder, none of these arguments has stood in the way of the recognition of the validity and efficacy of the *Calvo clause* in practice (including arbitrations).

178. The *Calvo clause* may, and in fact does take in practice, several forms. Sometimes it merely consists of a stipulation that the foreign individual concerned will be satisfied with the action of the local courts. In other cases, both the foreigner and the local Government concerned mutually undertake to submit any disputes which may arise between them to arbitrators appointed by both parties. On occasions, the *Calvo clause* embodies a more direct renunciation of diplomatic protection, as when it provides that disputes which may arise shall in no circumstances lead to an international claim, or else that the foreign individuals or corporate bodies are to be deemed to be nationals of the country for purposes of the contract. In several countries, there exist constitutional or legislative provisions whereby contracts entered into with aliens [by the State] are only valid if they include a clause of this type. In this latter case, the foreign individual's renunciation of diplomatic protection operates as a tacit clause, i.e., it is deemed to be an implicit term of any contract.<sup>167</sup> The most important point, however, is that, whatever form it may take, the *Calvo clause* invariably relates to a contractual relationship, and only operates with regard to disputes concerning the interpretation, application or performance of contracts.<sup>168</sup>

179. In spite of the limited content and scope of the *Calvo clause*, its inclusion in a contract is considered by certain codifications and by certain legal writers as conflicting, or as capable in certain circumstances of conflicting, with international law. Article 17 of the Harvard Research draft states:

"A State is not relieved of responsibility as a consequence of any provision . . . in an agreement with an alien which attempts to exclude responsibility by making the decisions of its own courts final; nor is it relieved of responsibility by any waiver by the alien

of the protection of the State of which he is a national."<sup>169</sup>

180. Freeman considers the *Calvo clause* as void *ab initio* in so far as it is framed so as to involve a complete waiver of the right of diplomatic protection—in other words, so as to reject the principle of responsibility for judicial activity which produces a denial of justice.<sup>170</sup> More recently, it has been stated that if the purpose of the *Calvo clause* is simply to require recourse to local remedies, then the clause is a mere confirmation of the rule which requires that these remedies must be exhausted before an international claim can be brought, but that, in so far as it may purport to constitute a waiver of the rights of a foreign State in international law, or to evade the jurisdiction of an international tribunal, the *Calvo clause* will be legally ineffective.<sup>171</sup>

181. This trend of legal opinion has had no influence on international case-law, which treats the *Calvo clause* as compatible with the rules of international law governing State responsibility. The most significant examples are afforded by the decisions in the *North American Dredging Co. case* (1926) and the *Mexican Union Railway, Ltd., case* (1930). In both cases, the Claims Commission conceded that a national cannot deprive the Government of his country of its indisputable right to claim international reparation for injury caused to him. Not infrequently, that Government has a greater interest in maintaining the principles of international law than in obtaining reparation for the injury sustained by its national, and it is evident that such national cannot tie the hands of his Government by means of a contractual stipulation. Nevertheless, both decisions held the *Calvo clause* to be valid and effective, and it is interesting to see the grounds on which this ruling was chiefly based. The Commission which decided the first of these two cases said:

"As civilization has progressed individualism has increased; and so has the right of the individual citizen to decide upon the ties between himself and his native country. . . . To acknowledge that under the existing laws of progressive, enlightened civilization a person may voluntarily expatriate himself but that short of expatriation he may not by contract, in what he conceives to be his own interest, to any extent loosen the ties which bind him to his country is neither consistent with the facts of modern international intercourse nor with corresponding developments in the field of international law and does not tend to promote goodwill among nations."<sup>172</sup>

The Commission added that the purpose of the *Calvo clause* might well be "to prevent abuses of the right to protection, not to destroy the right itself—abuses which are intolerable for any self-respecting nation and are prolific breeders of international friction."<sup>173</sup>

<sup>169</sup> See annex 9.

<sup>170</sup> Freeman, *op. cit.*, pp. 487-490.

<sup>171</sup> See K. Lipstein, "The Place of the Calvo Clause in International Law", *The British Yearbook of International Law*, 1945, pp. 130 *et seq.*

<sup>172</sup> Schwarzenberger, *op. cit.*, p. 74.

<sup>173</sup> *Ibid.*, p. 75.

<sup>167</sup> For examples of these various forms of the clause, see Eagleton, *The Responsibility of States in International Law*, pp. 168-169, and the comment to article 17 in Harvard Law School, *op. cit.*, pp. 203 ff., and *The American Journal of International Law*, Supp., Vol. 23 (1929), pp. 203 ff.

<sup>168</sup> See, in the same sense, Podestá Costa, *loc. cit.*, p. 216.

182. The weight of these arguments should not be underestimated, particularly if the rights which are waived are by their nature capable of being renounced: that is, in so far as the rights waived do not involve an interest or right of which the State may consider itself as the titular claimant in accordance with the views expressed on that question by the two Claims Commissions. But apart from these cases, there are no grounds whatsoever, other than the traditional doctrine concerning the subjects of international law, for denying the validity of the *Calvo clause*. It cannot now be contended, as the Harvard Research draft contended, that the responsibility [of a State] is determined "by international law or treaty" notwithstanding anything to the contrary "in its agreements with aliens".<sup>174</sup> If the individual or private person is the direct subject of certain international obligations and if he is held, regardless of his nationality, to possess international rights, it follows that he should be regarded as having the capacity to enter into an agreement with a foreign State concerning matters which do not affect the interests of third parties, and that any such agreements should be internationally valid and operative. For these reasons, the *Calvo clause*, within the limitations indicated, must continue to have the effect of denying jurisdiction to any international body before which the national State may bring a claim, or else that of exonerating the State of residence from international responsibility if the national State attempts to exercise diplomatic protection.

#### 25. OTHER EXONERATING, EXTENUATING OR AGGRAVATING CIRCUMSTANCES

183. It would be too long and complex, and indeed unnecessary for the essential purposes of the present chapter, to go into a detailed examination of other circumstances exonerating from international responsibility or of extenuating or aggravating circumstances. For this reason, instead of an analysis, a mere enumeration will be given here of the circumstances which legal opinion or practice have shown to be of most frequent occurrence. In this way it will be possible to see how far the distinction which the rules of municipal law draw as between the various circumstances affecting standards of liability is also applicable in international law.

184. The Preparatory Committee of The Hague Conference mentioned self-defence as one of the "circumstances in which a State is entitled to disclaim responsibility".<sup>175</sup> An analogous case in that of *force majeure* and necessity—though these have their own peculiar features—as factors to be taken into account in measuring the degree of responsibility to be imputed to the State which pleads one of these defences.

185. In the "Basis of Discussion" which it prepared at a later stage, the Committee said that a State was not responsible if the act concerned was occasioned by "immediate necessity of self-defence", but added:

"Should the circumstances not fully justify the acts which caused the damage, the State may be responsible to an extent to be determined."<sup>176</sup> Owing to their analogy with the case of self-defence, it may be considered that the extent of responsibility may also vary in cases of *force majeure* and necessity.

186. Perhaps the most important case of all those referred to in this section, as well as the most complex and the most controversial, is the case of injury caused to a foreign State or its nationals during internal disturbances in the State concerning which the problem of imputation of responsibility arises. In the first place, it has much in common with the cases referred to in the foregoing paragraph, especially that of *force majeure*. In the second place, as in the cases of State responsibility for the acts of private individuals, it is only the conduct of the State with regard to the original act (failure to exert due diligence, connivance, etc.) which can be imputed to it. There can thus be no doubt that the presence of this additional factor is necessary in order to involve the State in international responsibility, and that the mere occurrence of the event is not enough. The problem may take yet another form when the insurgent or revolutionary forces which have caused the injury succeed in taking over authority and become the Government of the State. The different problems and the various cases mentioned, as well as others which may occur in connexion with internal disturbances, show clearly that there can be no single uniform criterion for determining the extent of responsibility imputable to the State in these contingencies.

187. In the questionnaire of the Preparatory Committee of The Hague Conference reference was also made to reprisals, as follows:

"What are the conditions which must be fulfilled when the State claims to have acted in circumstances which justified a policy of reprisals?"<sup>177</sup>

The Committee itself, although it recognized the difficulties involved, formulated a Basis of Discussion in the following terms:

"A State is not responsible for damage caused to a foreigner if it proves that it acted in circumstances justifying the exercise of reprisals against the State to which the foreigner belongs."<sup>178</sup>

It will be seen how difficult it would be to accept today this view that reprisals may constitute grounds for exoneration from responsibility. Reprisals, as the term is generally understood in theory and in practice, imply a State conduct contrary to the rules of contemporary international law, and, more specifically, contrary to some of the provisions of the Charter of the United Nations and of certain regional agreements. It would be difficult to find in the present international order "circumstances justifying the exercise of reprisals", whereas it would be easy to point to existing rules and principles which condemn all reprisal measures.

<sup>174</sup> See annex 2, Basis of Discussion No. 24.

<sup>177</sup> League of Nations publication, *V. Legal, 1929.V.3* (document C.75.M.69.1929.V), p. 128.

<sup>178</sup> See annex 2, *Basis of Discussion No. 25*.

<sup>174</sup> Annex 9, article 2.

<sup>175</sup> League of Nations publication, *V. Legal, 1929.V.3* (document C.75.M.69.1929.V), p. 125.

188. The "project" of the American Institute of International Law concerning diplomatic protection deals with yet another case:

"The American republic to which the diplomatic claim is presented may decline to receive this claim when the person in whose behalf it is made has interfered in internal or foreign political affairs against the Government to which the claim is made. The republic may also decline if the claimant has committed acts of hostility towards itself."<sup>179</sup>

This case comes under the general heading of "serious faults on the part of the injured person" to which Bustamante refers. According to Bustamante, it follows from the fundamental principles of justice that real responsibility in this case lies with the person who, through his culpable act, brought about the injury.<sup>180</sup>

189. Extinctive prescription has also been considered as grounds for exoneration from responsibility, both by learned jurists and in the case-law. In 1925, the Institute of International Law said in one of its resolutions that practical considerations of order, of stability and of peace, long accepted in the case-law of arbitral tribunals, favoured the acceptance of the principle of limitation of actions in international law.<sup>181</sup> In the *Sarropoulos v. Bulgaria case* (1927), the Bulgarian-Greek Mixed Arbitral Tribunal held that "prescription, being an essential and necessary part of every legal system, deserves to be admitted in international law."<sup>182</sup> If prescription in general is to be admitted as part of international law, there can be no doubt that extinctive prescription, for its part, can perform in international relations a function as important as that which it fulfils in municipal law. Just as private individuals cannot remain subject to obligations indefinitely and under the permanent threat of legal action without any limitation of time, so the State likewise cannot be held responsible for an indefinite duration of time, or remain under the threat of an international claim which is subject to no limitation.

190. Finally, the non-recognition of a State or of a Government, and, by analogy, the severance or the suspension of diplomatic relations, have also been mentioned as possible grounds of exoneration from responsibility.<sup>183</sup> Generally speaking, in all these cases, the political factor is predominant. It follows that any answer which may be given on legal grounds to the problem would run the risk of being ineffective in practice. In any case, from a purely objective point of view, it does not seem correct to exonerate a State from its international responsibility simply because it or its Government has not been recognized by the claimant State, or because diplomatic relations with it are broken or suspended. As recognition has a declaratory effect, it is not possible to plead absence

of international personality as a defence to responsibility, on the theory that the State concerned lacks the capacity to be a subject of those obligations which international law imposes upon the State or the Government. For obvious reasons, the severance or interruption of diplomatic relations does not even raise this issue. Naturally, it may be difficult in practice to assert the international responsibility successfully, for recognition may be a condition that has to be fulfilled before a claim can be pursued; indeed, recognition may actually be the consequence of the claim. These are, however, purely procedural matters; they do not affect the principle of responsibility, if the act or omission itself constitutes the breach or non-observance of an international obligation.

191. From all the foregoing, it will be gathered that international law draws a distinction between exonerating grounds properly so called, and other grounds which may be considered as extenuating or aggravating circumstances. The case-law or arbitral tribunals affords abundant evidence that the distinction can be drawn. The mere fact that in certain cases of responsibility imputability depends on a State's failure to exercise due diligence, its connivance in the wrongful acts, or on other voluntary actions on its part, necessarily implies that the presence or absence of fault or culpability is a factor to be taken into consideration. Consequently, one could only speak of "objective responsibility" in the cases in which such factors are not present, so that the distinction just referred to would not apply: these would be the cases in which the alternative is clear-cut—either responsibility exists, in which event it is absolute, or else it is wholly absent. But even in these latter cases, the position is not absolutely clear. Let us suppose, for example, that the conduct of one of the organs of the State, which involves the latter in alleged responsibility, was the consequence of external pressure, and that this pressure was the deciding factor of the conduct. Could it be said in such a case that the responsibility would be the same as if the State concerned had been completely free to act?

## CHAPTER VIII

### Character, function and measure of reparation

192. In chapter III, which deals with the legal content of international responsibility, it was noted that international doctrine and practice equated this responsibility with the "duty to make reparation" for the injury sustained, this duty being the consequence of the breach or non-performance of an international obligation. Now as one inquires into the content of that duty, or the nature and extent of reparation, problems and difficulties of an exceptional complexity are disclosed. In no other aspect of the law of international responsibility is there a greater number of uncertain points; this is due to the variety of cases which have occurred in practice, to the lack of uniformity in the decisions rendered and to the varying interpretations placed upon the latter.

193. In the first place, reparation takes two different forms: reparation properly so called and "satisfaction". Reparation, in its turn, may take the form of restitution pure and simple, or else of damages, or yet again partly

<sup>179</sup> Annex 7, article VI.

<sup>180</sup> Bustamante, *Derecho internacional público*, Vol. III, p. 504.

<sup>181</sup> See *Annuaire de l'Institut de droit international*, Vol. 32, pp. 559-560.

<sup>182</sup> Schwarzenberger, *op. cit.*, pp. 246-247. See also article 9 of the draft approved in first reading by the Third Committee of The Hague Conference, in annex 3 below.

<sup>183</sup> See Bustamante, *Derecho internacional público*, Vol. III, pp. 503-504.

of restitution and partly of damages. Satisfaction, on the other hand, may be clearly distinguishable from reparation *stricto sensu*, but it may also have points of affinity with reparation or take the form of either restitution or damages. Moreover, irrespective of the specific form that reparation takes, a problem of substance is always involved, i.e. the purpose or object of reparation, either in general or in a particular case of responsibility. It will therefore be necessary to examine not only the form of reparation, but also the function which it performs in international law.

194. It will finally be necessary to consider, in connexion with the foregoing, what criteria are to be applied for the purpose of determining the character and the measure of reparation. In this respect, existing problems and difficulties are chiefly due to the traditional principles and rules from which the prevailing criteria are derived. From the point of view of pure legal theory, the character and the measure of reparation should depend on the extent of the injury caused and on the gravity of the act which involves the State in responsibility, as well as upon the purpose or object of reparation. The quantum of the reparation claim should be determined by the real owner of the right or interest which has been injured, or at least should be assessed in accordance with the damage sustained by the victim or his successors in interest. It will be seen that traditional doctrine and practice have adopted other criteria.

## 26. THE FORM OF REPARATION

195. One of the points of the questionnaire drawn up by the Preparatory Committee of The Hague Conference was the "Reparation for the damage caused".<sup>184</sup> Since the replies from Governments on this point were very divergent, the Committee felt that the best way of reconciling the various opinions was that of simply stating certain general principles. Accordingly, the Committee drafted its Basis of Discussion No. 29 as follows:

"Responsibility involves for the State concerned an obligation to make good the damage suffered in so far as it results from failure to comply with the international obligation. It may also, according to the circumstances, and when this consequence follows from the general principles of international law, involve the obligation to afford satisfaction to the State which has been injured in the person of its national, in the shape of an apology (given with appropriate solemnity) and (in proper cases) the punishment of the guilty persons.

"Reparation may, if there is occasion, include an indemnity to the injured persons in respect of moral suffering caused to them.

"Where the State's responsibility arises solely from failure to take proper measures after the act causing the damage has occurred, it is only bound to make good the damage due to its having failed, totally or partially, to take such measures.

"...

<sup>184</sup> League of Nations publication, *V. Legal, 1929.V.3* (document C.75.M.69.1929.V), p. 146.

"In principle, any indemnity to be accorded is to be put at the disposal of the injured State."<sup>185</sup>

196. It will be noted that the Preparatory Committee's Basis of Discussion mentions both the forms of reparation to which reference has been made: the "obligation to make good the damage suffered", i.e., *reparation* properly so called; and *satisfaction*, that is, "the obligation to afford satisfaction to the State which has been injured..." Both diplomatic practice and decisions of international courts also provide clearly distinguishable examples of these two forms of reparation.

197. With respect to reparation *stricto sensu*, international practice has drawn a sub-distinction between "restitution" (*restitutio in integrum*) on the one hand, and "pecuniary damages" (*dommages et intérêts*) on the other. Both are primarily concerned with the material wrong sustained, so that the extent to which each of them applies will necessarily depend on different factors and considerations. Generally speaking, restitution means the restoration of the state of affairs as it existed at the time of the occurrence of the act which caused the injury. Likewise, pecuniary damages are payable when restitution is no longer possible or when restitution would be insufficient to make adequate reparation for the injury.

198. International case-law has endorsed this distinction between the two types of reparation *stricto sensu*. The Permanent Court of International Justice, in its judgement on the *Chorzów Factory Case*, said:

"The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which would serve to determine the amount of compensation due for an act contrary to international law."<sup>186</sup>

On occasions, the agreements setting up claims commissions and tribunals make specific reference to these various forms of reparation; an example is article IX of the Convention concluded on 8 September 1923 which set up the General Claims Commission between the United States and Mexico.<sup>187</sup>

199. Satisfaction, on the other hand, is concerned

<sup>185</sup> See annex 2. The text is substantially a reproduction of the relevant part of the draft of the Institute of International Law. See annex 8, resolutions X and XI.

<sup>186</sup> Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 17, p. 47. In the case of the *Norwegian Shipping Claims* (1922) the Permanent Court of Arbitration held that "just compensation implies a complete restitution of the *status quo ante*." See Schwarzenberger, *op. cit.*, p. 248.

<sup>187</sup> "In any case the Commission may decide that international law, justice and equity require that a property or right be restored to the claimant in addition to the amount awarded in any such case for all loss or damage sustained prior to the restitution."

with moral or non-material wrongs, or with the moral or non-material consequences of the act which involves the State in international responsibility. For this reason, some of the common forms of satisfaction are: apology or amends of a diplomatic character; dismissal or punishment of the guilty official; abrogation of the measure which caused the injury. At times, however, a pecuniary compensation is paid, not as reparation for a material wrong, but rather as an additional apology or amends for the wrongful act which has been committed. Accordingly, satisfaction may be a special form of, though distinguishable from, reparation *stricto sensu*, but may also bear resemblances to and take some of the other forms of reparation. International practice, particularly diplomatic usage, affords many examples of these various kinds of satisfaction.<sup>188</sup>

200. Having described the forms of reparation, we shall now consider its purpose or object. In the case of reparation *stricto sensu*, whether restitution or pecuniary damages, there is not really any serious doubt: the purpose of reparation is purely and simply to restore pre-existing conditions or to compensate for the material injury which has been caused. In the case of satisfaction, on the other hand, whatever may be its specific form, the problem is not so simple. For where reparation takes the form of "satisfaction" and in consequence the State must offer a diplomatic apology, or else dismiss or punish an official, or pay pecuniary damages, then the object is not—not even in this last case—to make good the material damage, or at least that is not the only object. As indicated above, the basis of reparation in these cases is rather a moral or non-material wrong, or the moral consequence of the act which involves the State in responsibility. The reparation measures imposed upon Greece by the Conference of Ambassadors in the Janina-Corfu affair and upon the United States by the Commission which decided the *I'm Alone* case, and, in general, all the other examples of which the foregoing paragraph speaks, clearly indicate a purpose or object different from that of reparation properly so called.

#### 27. FUNCTION OF REPARATION MEASURES: PUNITIVE DAMAGES

201. Because reparation may not be concerned strictly with restoring the *status quo ante* or making compensation for the damage caused, it has been said that international practice has recognized the notion of "punitive", "vindictive" or "exemplary" damages. In this connexion, it is interesting to note that Anzilotti himself says that in every redress for a wrong "there is invariably an element of satisfaction and an element of reparation, the idea of punishing the wrongful act and that of making good the damage sustained; what varies, is, rather, the relative proportion of the two elements".<sup>189</sup> Some more recent writers, however, have understood punitive damages, i.e., reparation having a penal character, as something distinct

<sup>188</sup> See Jean Personnaz, *La réparation du préjudice en droit international public* (Paris, Librairie de Recueil Sirey, 1939), pp. 293 and 306; and Reitzer, *op. cit.*, pp. 210 ff.

<sup>189</sup> Anzilotti, *op. cit.*, p. 464.

from and independent of reparation in its broad sense. Thus Eagleton states:

"While it is true that few arbitral tribunals have avowedly awarded punitive damages, it is to be observed that, on the other hand, none of them go so far as to deny the right, under international law, to award such damages. Where they have explicitly rejected damages of this type it has been for reasons other than their illegality, as, for example, that the commission was limited by the treaty under which it operated."<sup>190</sup>

202. A trend of opinion along these lines has recently gained ground. Personnaz, agreeing in this respect with an opinion expressed by Basdevant, stresses the punitive character of satisfaction in certain instances, and the fact that in certain awards reparation takes the form of an actual pecuniary fine. Reitzer points out that, in diplomatic relations, reparations of this kind are very frequent and that, from time to time, there have been international judicial decisions along the same lines in which punitive damages have been awarded. Briggs, too, says that it is undeniable that many awards contain a strong punitive element, this being particularly true in cases of failure to apprehend, prosecute or punish adequately an individual who has injured an alien.<sup>191</sup>

203. There can be no doubt, however, that this trend of opinion is at variance with certain explicit rulings of arbitral tribunals and commissions. One of the best known is that of the Mixed Claims Commission in the *Lusitania Case*. Concerning this specific question of punitive damages, Umpire Parker stated that none of the precedents which had been cited pointed to any "money award by an international arbitral tribunal where exemplary, punitive or vindictive damages have been assessed against one sovereign nation in favour of another presenting a claim in behalf of its nationals".<sup>192</sup> The Commission held: "In our opinion the words 'exemplary', 'vindictive', or 'punitive' as applied to damages are misnomers. The fundamental concept of 'damages' is satisfaction, reparation for a loss suffered; a judicially ascertained *compensation* for wrong."<sup>193</sup>

204. Whiteman's interpretation of the case-law of arbitral decisions agrees with this view:

"... it is plain that international tribunals have hesitated, *eo nomine*, to pass judgement upon the actions of States in the form of punishment. Where a State is held responsible in damages by an international tribunal or through diplomatic channels, the wrong is not denominated a crime, but merely an international

<sup>190</sup> Eagleton, "Measure of damages in international law", *Yale Law Journal*, Vol. XXXIX (1929-1930), pp. 61-62.

<sup>191</sup> See Personnaz, *op. cit.*, pp. 312 and 327-329; Reitzer, *op. cit.*, pp. 210-212; Briggs, *op. cit.*, p. 745; see also, by the same author, "The Punitive Nature of Damages in International Law and State Responsibility for Failure to Apprehend, Prosecute or Punish", in *Essays in Political Science in Honor of W. W. Willoughby* (1937), pp. 339-353.

<sup>192</sup> Mixed Claims Commission, United States and Germany, *Consolidated Edition of Decisions and Opinions to June 30, 1925* (Washington, U.S. Government Printing Office, 1925), p. 27.

<sup>193</sup> *Ibid.*, p. 25.

delinquency which gives rise to the payment of compensatory damages."<sup>194</sup>

205. It is certainly a complex question how reparation in the cases mentioned above should be viewed in law; the traditional view of responsibility, and in particular of the function performed by reparation measures, is of little help in the quest for an answer. For it is not enough to inquire simply whether international diplomatic or judicial practice, or both, have admitted the idea of "punitive damages", that is, the idea of reparation as a penalty and intended as a punishment. This is only part—and not even the most difficult part—of the question, since practice seems to offer sufficient concrete evidence of the existence of a form of reparation that is intended to be, and hence is, in fact, punitive. The really crucial question now is whether or not this type of reparation should continue to be considered as a penalty directly or indirectly applicable to the State.

206. This is indeed the aspect of the problem which truly concerns us in the present stage of development of international law. When discussing the legal content of international responsibility, we found that criminal responsibility is now so well defined that it can be differentiated from civil responsibility which only implies a duty to make reparation pure and simple (chapter III). When dealing with the problem of imputation, we saw that imputability depended on the subject of the international obligation, the breach or non-observance of which gave rise to international responsibility (chapter IV). The next section will deal with the question of the passive subjects of responsibility, which may nowadays affect the nature and function of reparation. For the moment, however, we shall consider the penalties directly applicable to the individual in accordance with the prevailing doctrine concerning the imputation of international responsibility.

207. The trend of opinion referred to above interprets existing precedents as holding that punitive damages can be imposed on the State as such; this has indeed happened in practice, although sometimes the penalty consisted rather in the punishment of the individual who had caused the injury. Now, this has been precisely the reason why serious doubts have been expressed in the past concerning the punitive purpose of a reparation imposed directly upon the State. Maúrtua, for example, says that "State practice shows that a State has often claimed satisfaction or punitive damages from other States, which have been obliged to submit to them". He adds that "there are also cases in which arbitral tribunals have imposed indemnities so disproportionate to the material wrong that they contain, inherently, the idea of punishment." He concludes: "The truth is that it is not possible in international law to inflict punishment or penalties as understood in municipal criminal law."<sup>195</sup> Whiteman expresses the same opinion in more explicit terms: "where the original wrong is committed by an officer of the respondent Government, those charged with the set-

ting of the claim may feel that the people of the State as a whole should not be charged with additional damages for a wrong on the part of one or more officers, of which they had neither knowledge nor wrongful intent."<sup>196</sup>

208. The situation would, however, not be open to the doubts which have been expressed in the past, if, on the basis of the international *criminal* responsibility of the individual, punitive damages were thought of as a penalty or punishment directly imposed upon the guilty person. In this connexion Lauterpacht points out that, in cases where—so far as the State is concerned—there is a mere tortious responsibility, responsibility may well assume in the person or organ concerned a complexion of an international criminal liability. He adds:

"A corrupt or criminally minded judge who has inflicted upon an alien, through a deliberate or negligent miscarriage of justice, an unjust sentence of death or imprisonment; an official who has permitted the murderer of an alien to escape; a military officer who, when called in to shield an alien from the fury of a mob, joins in the murderous attack—all these persons could, consistently with principle, be held to have transgressed not only the law of their country but also a rule of international law directly binding upon them."<sup>197</sup>

These remarks are naturally without prejudice to the general question whether the State as such may be the object of penalties.<sup>198</sup>

209. This new approach would, in the cases of international responsibility dealt with in this codification, meet the objections which have been very properly expressed to the idea of making punitive measures appear as applying to a whole national community which is in no way a party to the wrongful act. Moreover, the punishment of the guilty individual would in itself be neither contrary to, nor inconsistent with, the traditional view which considered such punishment as one of the elements of "satisfaction". The innovation would be one of form rather than substance. It would moreover conform perfectly with the practice under international agreements that define and regulate the punishment of the so-called *delicta juris gentium*, under which the State undertakes to punish its own nationals; it would also be in conformity with the Convention on the Prevention and Punishment of the Crime of Genocide, in so far as it relates to "crimes against the peace and security of mankind". Consequently, Lauterpacht's suggestion would only be open to the single objection that it would imply an intrusion into matters which are exclusively within the domestic jurisdiction of the State. This objection is just as valid as that encountered by the idea of applying penal measures to the State; one way of meeting the "domestic jurisdiction" objection might be to make it a condition that the "punishable" act must also be treated as punishable by international law. In reality, once the possibility of the international *criminal* responsibility of the individual is admitted, there can be no objection to

<sup>194</sup> Marjorie M. Whiteman, *Damages in International Law* (Washington, U.S. Government Printing Office, 1937), Vol. I, p. 717.

<sup>195</sup> See Maúrtua, *loc. cit.*, p. 574.

<sup>196</sup> Whiteman, *op. cit.*, p. 717.

<sup>197</sup> Lauterpacht, *International Law and Human Rights*, p. 42.

<sup>198</sup> See chap. IV, section 12.

the punishment of persons guilty of wrongful acts involving the State in *civil* responsibility, if the acts in question constitute genuine international offences.

## 28. CRITERIA FOR DETERMINING THE CHARACTER AND MEASURE OF REPARATION

210. In the two previous sections we examined the different forms which reparation takes in international practice, as well as the function which it performs in the various cases of responsibility. We shall now examine the criteria to be applied for the purpose of determining the character and the measure of the reparation payable when international responsibility is imputable.

211. In the first place, what is the general method of determining the form or type of reparation to be claimed from or imposed on a State, when responsibility can be imputed to it? In logic, the reparation should correspond to the character of the obligation concerned; in other words, it should depend on the seriousness of the wrongful act, and, as the case may be, on the extent of the damage caused by the breach or non-observance of the obligation. These criteria, however, have not always guided international practice. In international relations, political and moral considerations are of special importance, generally carrying more weight than economic or other considerations or interests. In fact, economic considerations often play a secondary part, being in a way subordinate to such political and moral considerations as the "honour and dignity of the State" which has been wronged either directly or in the person of one of its nationals. On occasions, this consideration is so weighty that a claim is considered justified even though no material wrong has occurred. Sometimes, as happened in the case of the *I'm Alone*, amends of a pecuniary character are ordered, apart from the damages properly so-called for the wrong inflicted upon the State.<sup>199</sup>

212. So far as wrongs suffered by individuals are concerned, a somewhat peculiar criterion has been advanced. The former Permanent Court of International Justice, giving expression to an opinion predominant in international practice, said:

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

scale for the calculation of the reparation due to the State."<sup>200</sup>

It will be noted that according to this method of assessment reparation is regarded as "the reparation due to the State" and not to the individual or private person who has really suffered the injury; this is consistent with the idea expressed by the same Court to the effect that, when taking up the case of one of its subjects, "a State is in reality asserting its own rights". It is evident that this criterion is a purely artificial one.

213. Another traditional practice which has been severely criticized by legal writers is the inconsistency of assessing the reparation not in terms of the act which directly caused the damage or of its character and degree of seriousness, but rather by reference to the act or omission imputable to the State, i.e., the wrongful act which directly involves the State in international responsibility. Although in fact this criterion is not generally followed, it would be, strictly speaking, the only one applicable according to the traditional view that only a State's own acts or omissions can be internationally imputed to it. It was on this reasoning that the competent Commission relied in deciding the *Janes Case*, in which it was held that the "international delinquency", in respect of which \$12,000 were ordered to be paid as damages, was not constituted by the culprit's original wrongful act, but rather by the non-observance on the part of the Government of "its duty of diligently prosecuting and properly punishing the offender".<sup>201</sup>

214. Commenting upon this decision, Eagleton has pointed out that, aside from the difficulty of computing damages according to such a measure, it would appear to reduce the damages awarded to the injured alien to a negligible quantity. He points out that, although international responsibility is involved by the act or omission of the State, practice consistently measures the damage by the loss suffered by the alien from the original act (of individual or State agent). Therefore, he suggests that it should be admitted that the State is responsible for injuries to aliens, by whomsoever committed, and from the moment that the injury occurs.<sup>202</sup> Brierly, for his part, while criticizing the inconsistency of the traditional theory, maintains that the real purpose behind those decisions is that of imposing a reparation having an punitive character, and while it may not be at present expedient to make this purpose articulate, it would be neither just nor expedient to deny it.<sup>203</sup> Dunn, however, does not favour "penalizing wrongful conduct" on the part of a State, and prefers to look upon the problem as a matter of risk-allocation. Where a failure to prosecute is such that, if generalized, it would lead to conditions unfavourable to the customary course of intercommunity

<sup>199</sup> Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 17 (Case concerning the factory at Chorzów), p. 28.

<sup>201</sup> *Opinions of Commissioners under the Convention concluded on 8 September 1923 between the United States and Mexico (4 February 1926 to 23 July 1927)* (Washington, United States Government Printing Office, 1927), Vol. I, p. 108.

<sup>202</sup> See Eagleton, *The Responsibility of States in International Law*, p. 57.

<sup>203</sup> Brierly, *loc. cit.*, p. 49.

<sup>199</sup> See Joint Final Report on the case of the *I'm Alone*, in Whiteman, *op. cit.*, pp. 150-151; see also Anzilotti, *op. cit.*, p. 457 and Personnaz, *op. cit.*, p. 276.

relationships, then, for the purpose of determining reparation, international responsibility would be engaged.<sup>204</sup>

215. In view of the statements quoted above, there are thus two questions involved: that of the punitive character which may be attributed to the reparation imposed in these or similar circumstances; and the question what criterion is to be applied in measuring the damage sustained by a private foreign individual or his successors in interest, irrespective of the character of the reparation actually imposed. The first question has already been examined in the previous section and it is not necessary to revert to the remarks then made. With regard to the second question, it is true that in practice the criterion which is generally adopted is that of assessing the reparation (*stricto sensu*) by reference to the injury suffered, rather than by reference to the act or omission of the State which directly engages its international responsibility. But it is equally true that this practice is not consistent with the doctrine that only a State's own acts or omissions can be imputed to it. Consequently, it seems to be an inescapable corollary of this doctrine, which is a fundamental one in the law of international responsibility, that the reparation, whatever its form, can only be claimed in respect of damage arising out of the State's own acts or omissions. Naturally, on this basis, it would be very difficult to compute the reparation in cases (like that mentioned above) in which the injury is caused by one act and the responsibility of the State is the consequence of another act, and it is not a necessary implication of the connexion between the two that there has been culpable neglect, connivance or manifest complicity on the part of the organs of the State. And in the absence of such circumstances, how can one think of the State as being under a duty to make reparation for a wrong that arose out of an act which it did not commit? Accordingly, the first point to be settled will be whether the conduct of the State (the act or omission which is really imputable to it) truly implies complicity in the punishable act. Only if the reply is in the affirmative should its conduct be taken into consideration for the purposes of international responsibility. It will be noted that in effect the problem is the same as that which arises in cases of State responsibility for acts of private persons (and of officials acting in the capacity of private persons) rather than a problem of reparation.

216. One other question remains to be considered within the scope of this chapter. As a corollary of the principles and rules discussed above, particularly the principle that reparation relates to an injured interest or right the titular claimant of which is always the State, it is also the traditional view that it is the State which has the right to determine the reparation claim and not the private person who has directly suffered the damage or his successors in interest. As the Permanent Court of International Justice said in the judgement cited above: the damage suffered by an individual "can only afford a convenient scale for the calculation of the reparation due to the State". According to this view, the re-

sponsible State may either pay compensation to the injured individual or do so through the national State, as may be agreed or as may be directed by the international tribunal or body dealing with the claim; in both cases, however, "the individual does not acquire any title to the sum which is awarded, except under the assignment made in his favour".<sup>205</sup>

217. It will be readily seen that individuals are left in a very precarious position under such a system. By analogy with diplomatic protection, which is considered simply as a right vested in the State, this system for assessing reparation has the effect, from the point of view of the real victims of the injury, or the real beneficiaries, of converting reparation into a mere grant. In this respect, the system in question is incompatible with the doctrine that, in cases of "responsibility for damage done to the person or property of foreigners", it is the private individual and not the State (except where there is also an injury to its "general interest") who is the real titular subject of the injured interest or right. This doctrine was our basis for recognizing the individual's capacity to bring an international action in the cases indicated in chapter V; *a fortiori*, therefore, it is a sound basis for admitting his right to determine the reparation claim for the injury he has suffered. Actually, this is a right implicit in the individual's capacity to bring the claim in question in his own name. Besides, it should be noted that this would not mean any radical innovation in international practice, for there is the precedent of the Arbitral Tribunal for Upper Silesia, set up by the German-Polish Convention of 15 May 1922, where private claimants were allowed to specify the character and extent of the reparation which they considered adequate in respect of the injuries allegedly sustained by them.<sup>206</sup>

218. But apart from the inherently artificial character and intrinsic injustice of this system, and its manifest incompatibility with the doctrine that, in the cases indicated, the private person is the real titular claimant of the injured interest or right, the system is inconsistent with itself even within the traditional view. For how can it be reconciled with the rule that an international claim (and, hence, an international reparation) is not admissible so long as local remedies have not been exhausted, when the only possible applicant for these remedies is the private interested party. The answer might be that the local claim and the international claim are not identical, because the right of the individual in the local claim is not the same as that asserted by the State in the international claim. According to this latter view, the international claim is an entirely new claim different from that which may have been made through the recourse to local remedies. The following chapter will show, however, to what extent this is the correct legal view of the nature of international claims.

<sup>205</sup> Anzilotti, *op. cit.*, pp. 468—469. According to the Basis of Discussion of the Preparatory Committee of The Hague Conference quoted in para. 195, "In principle, any indemnity to be accorded is to be put at the disposal of the injured State".

<sup>206</sup> Kaeckenbeeck, *op. cit.*, pp. 55 to 56 and 503-504.

<sup>204</sup> Dunn, *The Protection of Nationals*, p. 187.

## CHAPTER IX

## International claims and modes of settlement

219. International responsibility and the consequent reparation for the damage caused by the wrongful act or omission are made effective by means of "international claims". Under the traditional doctrine, even where an international claim has its origin in an earlier claim under municipal law, and is in reality a mere continuation of the latter, it is considered as an entirely new and distinct claim. This artificial approach has of necessity given rise to both technical and political difficulties, which any future codification of this important branch of the law of responsibility should remove.

220. The most serious difficulties are those connected with the direct exercise of diplomatic protection. Claims presented through the diplomatic channel have frequently led to interventions of various kinds in the internal or external affairs of the respondent State. In order to counteract the risks inherent in the direct exercise of diplomatic protection, two fundamental principles of contemporary international law have been evolved: the principle that any threat or use of force in international relations is to be condemned; and the principle that States have a duty to submit any disputes arising between them to settlement by peaceful means. The present chapter will therefore deal chiefly with these means of settlement in so far as they have been used or can be used to settle disputes concerning cases of international responsibility. It is, however, necessary to examine first the legal character of international claims as well as the two principles just referred to, in so far as they have been applied or may be applicable.

## 29. THE "PUBLIC CHARACTER" OF INTERNATIONAL CLAIMS

221. According to traditional doctrine and practice, an international claim, whatever its initial cause or its object, always has a "public character", i.e., it involves a legal relationship between sovereign political entities. The fact that the original claimant was a foreign private individual and the respondent was the State of residence, and the fact that the reparation of the injury caused to the person or property of such alien continued to be the subject of the (now international) claim, were considered immaterial. The Permanent Court of International Justice, in a judgement cited before in this report, held as follows:

"... By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights..."

"The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant."

It will be recalled that the *Mavrommatis Palestine Concessions* case was at first a claim by a private person against Great Britain, but when Greece, the national

State of the private person in question, took up the case, "the dispute then entered upon a new phase; it entered the domain of international law, and became a dispute between two States".<sup>207</sup> In *Administrative Decision No. II* of the German-American Mixed Claims Commission, Umpire Parker observed that "though conducted in behalf of their respective citizens, Governments are the real parties to international arbitrations".<sup>208</sup>

222. Viewed in this light, international claims have a peculiar legal character. An international claim, even though it may have its origin in a claim under municipal law and have as its purpose the reparation of the same damage, is regarded as constituting an entirely new claim, distinct from the original one under municipal law. Since, strictly speaking, the State does not act in the name or on behalf of its injured national, but rather substitutes itself for him for the purposes of the claim, the State becomes logically the sole true claimant. Actually, we do not have to go outside the traditional view to show that this legal reasoning is somewhat inconsistent. If the international claim were indeed an entirely new claim, distinct from the one under municipal law which may have, or may have had, the same content or object, then the plea of *lis pendens* should not be admissible. Yet, as will be shown below, the converse is true.

223. In conformity with the local remedies rule, an international claim does not lie unless and until local remedies have been exhausted (chapter VIII, section 23). Accordingly, the right of the State to bring an international claim, that is, its right to "take up the case of one of its subjects", is contingent on the fulfilment of this condition. The international claim may therefore not only be identical in content and purpose with the original claim, but is actually so closely bound up with the latter that it cannot be proceeded with unless the original claim has been disposed of, that is, unless local remedies have been exhausted. It follows that if the original claim is *sub judice* the alien's national State is debarred from "resorting to diplomatic action or international judicial proceedings on his behalf", and in effect this is what happens under the local remedies rule. Too sum up, if an international claim really constituted an entirely new claim, distinct from the original claim under municipal law, it ought to be logically and technically possible to dispense with the condition postulated by the local remedies rule.

224. But apart from this technical inconsistency, there is another and in a way much more important point: the traditional view concerning international claims reflects the dominant part played by political factors, particularly on the procedural side of the law of international responsibility. In spite of the strictly legal character of these claims, and of the fact that in general they have no extra-legal implications, the appearance of the claimant State has given them a political tinge, a circumstance the consequences of which are plainly visible. In the comment

<sup>207</sup> Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 2, p. 12.

<sup>208</sup> Mixed Claims Commission, United States and Germany, *Consolidated Edition of Decisions and Opinions to June 30, 1925* (Washington, U.S. Government Printing Office, 1925), p. 8.

to article 18 of the Harvard Research draft, the following remarks are made in this connexion:

"The greatest difficulty in the matter of State responsibility has been not the inability to agree on general substantive rules governing the subject, but the fact that claiming States are not bound to resort to the judicial process and have on occasion constituted themselves plaintiff, judge, and sheriff in their own causes. This is one of the principal and justifiable grievances of certain States. The major objection to the present practice, notably from this point of view, is the absence of an obligatory legal method of determining issues of law. The present system contemplates the frequent use of political coercion of all types to enforce claims essentially legal in character. The whole field of pecuniary claims, more strictly legal in its nature than many of the other departments of international law, should not only on its substantive, but on its procedural side, be if possible divorced from politics and brought within a legal framework. No pecuniary claim, not involving an immediate threat to human life, should become the source of coercive political action. Every claim should, if not easily settled diplomatically, be submitted by convention, as automatically as possible, to an international court. International law would thus extend its beneficent regulatory power to a field in which politics now unfortunately often controls... The defendant nation should not be in the position of having to yield a legal case to political arguments or of availing itself of political strength to resist a legal claim. The cause of peace and normal international relations should not be impaired and hampered by the present easy conversion of a legal into a political issue. An agreement to submit legal pecuniary claims to a legal, i.e., judicial, method of settlement would be one of the greatest boons imaginable not only to the parties and peoples in interest but to the cause of peace. Here, in the field of State responsibility for injuries to aliens, lies a practical opportunity to counteract the elements of force and coercion by removing a most important field of international relations from the arena of politics to the realm of law."<sup>209</sup>

The foregoing remarks deal with the question essentially from the point of view both of the State and of the general interests of peace and the development of international relations, and mentions the effect which the traditional view has had on them. This subject will be discussed in the following section.

225. At this stage, however, we would like to stress the consequences or repercussions of the traditional view upon the alien's own interest, as well as upon that of his national State. With reference to this point, the Harvard Research comment says:

"...A claimant, having a perfect legal claim, is often dependent for relief largely upon the political strength or influence of his nation, on its political relations with the country complained against, and on the disposition and willingness of the Foreign Office to exert diplomatic efforts in his behalf. His claim

becomes subject to the exigencies of politics. The State of the injured alien is subjected to political pressure to espouse what may be a poor claim, often acts on insufficient evidence, and in prosecuting a claim is led to invoke the support of a whole people on behalf of a single citizen or corporation—a primitive form of collective action which survives in practically no other branch of public law. A people should not be involved in political entanglements arising out of an alleged legal injury to a citizen, if it can possibly be avoided."<sup>210</sup>

226. In chapter V, we pointed out the drawbacks of the theory that the State is always the sole titular claimant of the injured interest or right, even though the injury which gives rise to international responsibility was caused to the person or property of a private individual, and, in chapter VIII, we drew attention to the disadvantages of this theory in the matter of defining the character and measuring the extent of the reparation for such injury. Those are the disadvantages, from the point of view of the foreign private individual, which flow from the theory that an international claim is a new claim, distinct from the claim made by the alien by means of local remedies. But the drawbacks are equally serious from the point of the alien's national State. This "primitive form of collective action" which an international claim takes because of the public character attributed to it, implies the imposition upon a whole people of an unnecessary and unjustified burden.

### 30. THE DIRECT EXERCISE OF THE RIGHT OF DIPLOMATIC PROTECTION; THE DRAGO DOCTRINE; AND OTHER FORMULATIONS OF THE PRINCIPLE OF NON-INTERVENTION

227. So long as international law had not proclaimed the principle that disputes between States have to be resolved by peaceful means and methods of settlement, or the principle condemning all threat or use of force in international relations, international claims, and the character attributed to them, constituted the principal cause of abuse of the direct exercise of diplomatic protection. The experience of history, particularly in the Americas, illustrates that this abusive exercise of diplomatic protection may lead to a threat or even to the actual use of force against the respondent State, and so affect the general interests of peace and the normal development of international relations. While, therefore, the legitimate right of the claimant State to exercise diplomatic protection directly has not been denied, legal opinion has been progressively turning strongly against the various abusive forms of the exercise of that right.

228. The action taken in 1902 by three European Powers against Venezuela, for the purpose of recovering certain contractual debts, was the incident which led to one of the earliest formal protests against the abuse of the right of diplomatic protection. In a Note to the Argentine Minister in Washington who transmitted it to the United States Department of State, the then Minister of Foreign Affairs of the Argentine Republic, Luis M. Drago, pointed out that the capitalist who lends his money to a foreign State always takes into account the resources of

<sup>209</sup> Harvard Law School, *op. cit.*, pp. 217-218.

<sup>210</sup> *Ibid.*, p. 218.

the country and the probability, greater or less, that the obligations contracted will be fulfilled without delay. He added that all Governments hence enjoy different credit according to their degree of civilization and culture and their conduct in business transactions; and these conditions are measured and weighed before making any loan, the terms being made more or less onerous in accordance with the precise data concerning them which bankers always have on record. Moreover, the lender knows that he is entering into a contract with a sovereign entity, and it is an inherent qualification of all sovereignty that no proceedings for the execution of a judgement may be instituted or carried out against it, since this manner of collection would compromise its very existence and cause the independence and freedom of action of the respective Government to disappear. On the basis of these considerations, Drago went on to say in his Note:

“Among the fundamental principles of public international law which humanity has consecrated, one of the most precious is that which decrees that all States, whatever be the force at their disposal, are entities in law, perfectly equal to one another, and mutually entitled by virtue thereof to the same consideration and respect.

“The acknowledgement of the debt, the payment of it in its entirety, can and must be made by the nation without diminution of its inherent rights as a sovereign entity, but the summary and immediate collection at a given moment, by means of force, would occasion nothing less than the ruin of the weakest nations, and the absorption of their governments, together with all the functions inherent in them, by the mighty of the earth . . .

“ . . . We in no wise pretend that the South American nations are, from any point of view, exempt from the responsibilities of all sorts which violations of international law impose on civilized peoples. We do not nor can we pretend that these countries occupy an exceptional position in their relations with European Powers, which have the indubitable right to protect their subjects as completely as in any other part of the world against the persecutions and injustices of which they may be the victims. The only principle which the Argentine Republic maintains and which it would, with great satisfaction, see adopted, in view of the events in Venezuela, by a nation that enjoys such great authority and prestige as does the United States, is the principle, already accepted, that there can be no territorial expansion in America on the part of Europe, nor any oppression of the peoples of this continent, because an unfortunate financial situation may compel some one of them to postpone the fulfilment of its promises. In a word, the principle which she would like to see recognized is: that the public debt cannot occasion armed intervention nor even the actual occupation of the territory of American nations by a European power.”<sup>211</sup>

<sup>211</sup> See *Papers relating to the Foreign Relations of the United States, 1903* (Washington, Government Printing Office, 1904), pp. 1-5.

229. As was mentioned earlier in this report, the Third International Conference of American States (Rio de Janeiro, 1906) recommended to the Governments represented at the Conference “that they consider the point of inviting the Second Peace Conference, at The Hague, to examine the question of the compulsory collection of public debts, and, in general, means tending to diminish between nations conflicts having an exclusively pecuniary origin.”<sup>212</sup>

230. Convention II signed at the Peace Conference, The Hague (1907), “Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts” adopted the *Drago Doctrine* in part only. Article 1 of the *Porter Convention*, as Convention II is usually called, while giving expression to the obligation of the contracting parties “not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals”, provides for an important exception to this obligation. According to the second paragraph of that article, “this undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any *compromis* from being agreed on, or, after the arbitration, fails to submit to the award.”<sup>213</sup> This exception in effect authorized the use of armed force in certain given circumstances, some of which—such as the agreement on a *compromis*—were subject to the discretion of the claimant country.

231. The subsequent development of international law, however, has affirmed in an absolute manner this obligation not to resort to the threat or the use of force for the compulsory recovery of public debts or for the purpose of obtaining satisfaction for any other international claim. In the Americas, this development is reflected in other formulations of the principle of non-intervention. This principle was first expressly proclaimed in the Convention on Rights and Duties of States (Montevideo, 1933), article 8 of which provides: “No State has the right to intervene in the internal or external affairs of another.”<sup>214</sup> The Bogotá Conference (1948) was more explicit on this point and included in the Charter of the Organization of American States the following provision:

#### “Article 15

“No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted

<sup>212</sup> *The International Conferences of American States, 1889-1928*, pp. 135-136.

<sup>213</sup> *The Hague Conventions and Declarations of 1899 and 1907* ed. Carnegie Endowment for International Peace (New York, Oxford University Press, 1915), p. 89.

<sup>214</sup> *The International Conferences of American States, First Supplement, 1933 to 1940*, p. 122. See also the Additional Protocol Relative to Non-Intervention, supplemental to the Convention of Montevideo, signed at the Inter-American Conference for the Maintenance of Peace (Buenos Aires, 1936), *ibid.*, p. 191.

threat against the personality of the State or against its political, economic or cultural elements.”<sup>215</sup>

Similarly, the Charter of the United Nations, in its Article 2, paragraph 4, provides:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”

The language of both documents, and the purposes of the relevant provisions, are patently broad enough to include, in the prohibition of force, any action that implies a threat or use of force as a means of enforcing international claims.

### 31. THE DUTY TO RESORT TO PEACEFUL MEANS OF SETTLEMENT

232. The duty to resort to peaceful means for the settlement of international law evolved as a development parallel to the principle condemning the use or threat of force in international relations. In the matter of international claims, this duty supplements and is an advance upon that principle, and so mitigates the risk of abuse inherent in the direct exercise of diplomatic protection. In addition to the basic international treaties existing at present, both general and regional, which lay down that duty in respect of all international disputes, and to the bilateral and multilateral agreements containing analogous provisions, there are numerous treaties which specifically stipulate the peaceful settlement of international claims.

233. The foundations of the system of pacific settlement were laid, in the Americas, at the beginning of the twentieth century. By the terms of article 1 of the Treaty of Arbitration for Pecuniary Claims, signed at the Second International Conference of American States (Mexico City, 1902):

“The High Contracting Parties agree to submit to arbitration all claims for pecuniary loss or damage which may be presented by their respective citizens, and which cannot be amicably adjusted through diplomatic channels and when said claims are of sufficient importance to warrant the expenses of arbitration.”<sup>216</sup>

234. Two further Conventions, signed at the Third (Rio de Janeiro)<sup>217</sup> and Fourth (Buenos Aires)<sup>218</sup> International Conferences of American States, respectively, contain provisions to the same effect. Article 1 of the General Treaty of Inter-American Arbitration, signed in Washington in 1929, contains more elaborate provisions:

“The High Contracting Parties bind themselves to submit to arbitration all differences of an international character which have arisen or may arise between them by virtue of a claim of right . . . which it has not been possible to adjust by diplomacy and which are juridical

in their nature by reason of being susceptible of decision by the application of the principles of law.

“There shall be considered as included among the questions of juridical character:

“ . . .

“(d) The nature and extent of the reparation to be made for the breach of an international obligation.

“The provisions of this treaty shall not preclude any of the Parties, before resorting to arbitration, from having recourse to procedures of investigation and conciliation established in conventions then in force between them.”<sup>219</sup>

235. The many other international instruments which require international claims to be submitted to arbitration or to some other pacific mode of settlement are evidence of the extent to which the system has received general recognition.<sup>220</sup> In a sense, of course, the system receives its most important expression in the acceptance of the compulsory jurisdiction of the former Permanent Court of International Justice and, since 1946, that of the International Court of Justice, the jurisdiction of which comprises international disputes concerning “the nature or extent of the reparation to be made for the breach of an international obligation” (Article 36, paragraph 2 of the Statute of the Court). This acceptance can take the form either of a special convention signed by the parties or of a provision in a treaty, or of a unilateral declaration recognizing the jurisdiction of the Court as *ipso facto* compulsory.

236. But what is even more interesting is to note the frequent and successful operation of the system in practice. The following examples will suffice as illustrations. The majority of the nineteen cases decided by the Permanent Court of Arbitration relate to international claims. The same is true of the disputes which were submitted to the former Permanent Court of International Justice. Mixed claims tribunals and commissions have been very numerous. Apart from those set up under the Treaties of Peace of 1919-1920, sixty such tribunals functioned before the Second World War. Some, such as the various Claims Commissions between the United States and Mexico, and particularly the German-Polish Tribunal set up by the 1922 Convention, have dealt with thousands of claims.<sup>221</sup>

237. An analysis of the abundant precedents afforded by international practice discloses certain fundamental problems. Firstly, what mode of settlement should be employed or what body should be designated to deal with

<sup>219</sup> *Ibid.*, p. 458. See also Resolution XXXV on “Pecuniary Claims” adopted at the Inter-American Conference for the Maintenance of Peace (Buenos Aires, 1936) in *The International Conferences of American States, First Supplement, 1933 to 1940*, p. 165.

<sup>220</sup> See, in particular, *Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928-1948* (United Nations Publications, Sales No. 1949.V.3) and an earlier study by the Secretariat of the League of Nations, *Arbitration and Security—Systematic Survey of the Arbitration Conventions and Treaties of Mutual Security Deposited with the League of Nations* (League of Nations publication, *V. Legal, 1927.V.29* (document C.653.M. 216.1927.V) ).

<sup>221</sup> Hudson, *op. cit.*, chap. XVI.

<sup>215</sup> *Annals of the Organization of American States*, Vol. I, No. 1 (1949), p. 77.

<sup>216</sup> *The International Conferences of American States, 1889-1928*, p. 104.

<sup>217</sup> *Ibid.*, p. 132.

<sup>218</sup> *Ibid.*, p. 183.

the dispute? As the system does not exclude the direct exercise of diplomatic protection, it should be noted that negotiations between the interested parties are not only proper but are in fact the first step to be taken with a view to settling the claim. But when it is not possible to settle the claim by negotiation, the method which has proved the most appropriate in practice is that of arbitration. The particular kind of arbitral body to be used will depend upon the type of claim involved or perhaps even on other circumstances, but what is important is that disputes which are essentially juridical in character are to be submitted to a commission or tribunal for adjudication according to law. For obvious reasons, recourse to this mode of settlement includes the submission of the dispute to the International Court of Justice, if the dispute is so important or significant as to justify that course.

238. Another fundamental question is that of jurisdiction or competence. The bare duty to arbitrate may be nugatory if compulsory jurisdiction is not conferred upon a specified body. In other words, compulsory arbitration, by itself, only carries with it the undertaking to submit the dispute to this mode or settlement. It is a mere *pactum de contrahendo* and, for that reason, depends for its efficacy on the agreement by the parties concerning the arbitral body and the conditions governing its operation. The problem naturally does not arise if the agreement to arbitrate makes reference to a pre-existing tribunal, such as the International Court of Justice. Nor does it arise if the basic agreement which provides for arbitration specifies how the arbitral body is to be set up and function, as is the case under the system provided for in the General Act for the Pacific Settlement of International Disputes (1928) and the American Treaty on Pacific Settlement ("Pact of Bogotá"). The draft on "Arbitral Procedure" prepared by the International Law Commission at its fifth session (1953) also offers a set of provisions which satisfy an indispensable requirement for the improvement of the traditional system of compulsory arbitration.

239. Thirdly, there is the problem of the "law to be applied": By reference to what rules and principles should disputes concerning international claims be decided? Clearly, the rules and principles of international law are applicable, in so far as the parties have not agreed otherwise; they will be applicable even if the instrument governing the arbitral body does not explicitly so provide. Apart from these cases, practice has been most diverse. The relevant instruments sometimes refer to international law as applicable, in so far as the parties have not agreed *bono*, to the "general principles of justice and equity", to the "free judgement" of the tribunal, to judicial precedents, etc.; on occasion, two or more of these sets of rules or principles are prescribed as the "law to be applied". The factor which decisively determines what rules or principles should apply is undoubtedly the character or other material circumstance of the claim. Still, though this consideration should not be left out of account, the best system appears to be that under which claims are decided in conformity with Article 38 of the Statute of the International Court of Justice, i.e., in con-

formity with the rules and principles which emanate from the sources of international law, except where the parties agree that the case should be decided *ex aequo et bono*.

240. There are other problems and questions of equal importance, but this is not the context for discussing them. Perhaps the most topical is the question of the right of access to, or appearance before, the body responsible for deciding the claim; but this question has been dealt with earlier in this report, at least so far as its substance is concerned, in the chapter relating to the international capacity to bring a claim (chapter V, section 18).

## CHAPTER X

### Bases of discussion

241. As indicated in the introduction, in view of the character and purpose of this report the Rapporteur decided not to follow the usual practice of submitting a draft convention, but instead to present a summary of his researches and some of the conclusions reached in the form of "Bases of Discussion" (see chapter I, section No. 2). For this reason, the Bases do not cover all aspects of the questions dealt with in the report, nor do they constitute proposals in the strict sense of the term. Their purpose is rather to summarize general concepts and ideas, the Commission's function being to express an opinion on these with a view to settling the fundamental criteria and principles which are to govern the actual work of codification.

#### BASIS OF DISCUSSION No. I

##### *Legal content and function of international responsibility*

(1) Since, in contemporary international law, the acts and omissions which give rise to responsibility may either be simply unlawful, or else constitute punishable acts, the breach or non-observance of an international obligation may give rise either to *civil* responsibility, or to *criminal* responsibility, or to both.

(2) Acts or omissions which are merely unlawful only comport the duty to make reparation *stricto sensu*, whereas the responsibility for a punishable act implies a sanction, namely the punishment of the guilty party, without prejudice to the reparation of the injury, where applicable.

(3) Since, moreover, the soundness of the rules of international law depends upon the degree of protection they afford to the interests and rights recognized by that law, it follows that the principles governing the law of international responsibility should be so formulated that they protect the interests and rights recognized by international law in its present stage of development.

#### BASIS OF DISCUSSION No. II

##### *The active subjects of international responsibility*

(1) International responsibility being the consequence of the breach or non-observance of an international obligation, its imputability depends on who is the direct subject of the obligation.

(2) Accordingly, the following may be active subjects of international responsibility:

(a) States, in respect of acts or omissions of State organs, so far as the duty to make reparation for the injury caused is concerned; and, where applicable, *political subdivisions of States* and *semi-sovereign entities*, in so far as they have the capacity to contract international obligations directly;

(b) *Individuals*, including rulers, officials and private persons, in so far as an act or omission considered as a punishable act under international law can give rise to *criminal* responsibility;

(c) *International organizations*, in respect of acts or omissions of their organs so far as the duty to make reparation for the injury caused is concerned.

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

#### BASIS OF DISCUSSION No. III

##### *The passive subjects of international responsibility*

(1) Since the breach or non-performance of an international obligation may result in injury to some interest or right which is internationally recognized, it is the titular claimant of the injured interest or right who is the passive subject of responsibility.

(2) Accordingly, the following may be passive subjects of international responsibility:

(a) *Foreign private individuals*, if the injury affects their person or property;

(b) *States*, both in cases in which a State, as a legal entity, is the direct object of the injury and in cases in which it has a "general interest" in the injury caused to the person or property of its nationals;

(c) *International organizations*, if the damage affects the interests of the organization itself, or its administrative machine, or its property and assets, or the interests of which it is the guardian.

(3) The real owner of the injured interest or right should therefore be recognized, in principle, as having the capacity to bring an international claim for the damage sustained. In cases of responsibility for damage caused to the person or property of aliens, the national State's "general interests" in the damage caused should receive special consideration.

#### BASIS OF DISCUSSION No. IV

##### *Responsibility in respect of violations of the fundamental rights of man*

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

(2) In consequence, in cases of violation of civil

rights, or disregard of individual guarantees with respect to aliens, international responsibility will be involved only if internationally recognized "fundamental human rights" are affected.

#### BASIS OF DISCUSSION No. V

##### *Exoneration from responsibility; extenuating and aggravating circumstances*

(1) As in municipal law, so in international law one should recognize the existence of grounds and circumstances which exonerate from, or attenuate or aggravate, responsibility. As a general rule, the distinction depends on the diversity of the various factors which may attend the act giving rise to international responsibility.

(2) The following, among others, may be considered as exonerating circumstances:

(a) *Failure to resort to local remedies*, in the sense that, so long as these remedies have not been exhausted, an international claim will not lie and the duty to make reparation will not be enforceable;

(b) *Renunciation of diplomatic protection*, either by the State or by foreign private individuals. Renunciation of diplomatic protection by a private person constitutes an exonerating circumstance in so far as the *Calvo clause* does not refer to rights which, by their nature, are not capable of being renounced, or to questions in which the private person is not the only interested party.

(3) The admissibility of other exonerating, extenuating or aggravating circumstances will depend on the conduct which the State observed, or could or should have observed, with respect to the act which caused the damage.

#### BASIS OF DISCUSSION No. VI

##### *Character, function and measure of reparation*

(1) Reparation may take the form of restitution (*restitutio in integrum*), or, if restitution is not possible or would not constitute adequate reparation for the injury, of pecuniary damages.

(2) The purpose of reparation is not necessarily solely restitution or compensation for material damage. "Reparation" measures may also have a punitive function. In such cases the measures in question should be regarded as a penalty, applicable to the party guilty of the act giving rise to responsibility.

(3) The character and measure of reparation should be determined by reference to the extent of the damage caused and to the seriousness of the act giving rise to responsibility, and also by reference to the purpose which the reparation is to serve; it should be determined by the real owner of the injured interest or right, or at least assessed on the basis of the damage caused to the victim or to his successors in interest.

#### BASIS OF DISCUSSION No. VII

##### *International claims and modes of settlement*

(1) In the cases of responsibility for damage caused

to the person or property of foreign private individuals, the "international claim" should not be considered as a new claim, distinct from that brought before the local authorities, except where the national State makes a claim asserting its "general interest" in the reparation of the injury.

(2) Where an interstate claim is involved, such a claim shall, when diplomatic negotiations between the parties have been exhausted without result, be submitted to arbitration for final settlement, unless the parties agree on some other mode or procedure of settlement more appropriate to the specific character of the claim.

(3) In no event shall the direct exercise of diplomatic protection imply a threat, or the actual use, of force, or

any other form of intervention in the domestic or external affairs of the respondent State.

#### *Plan of work*

The topic of international responsibility is so broad, and involves such diverse factors, that it is not possible to proceed immediately with the codification of the entire topic. The Commission, as it has done in the case of other topics, should adopt a gradual approach, codifying first that part of the topic which is most ripe for codification and which, at the same time, should receive priority in conformity with the terms of resolution 799 (VIII) of the General Assembly. The "responsibility of States for damage caused to the person or property of aliens" would appear to fulfil these two conditions.

### ANNEXES

#### A. Codification under the auspices of the League of Nations

##### *Annex 1*

QUESTIONNAIRE NO. 4 ON "RESPONSIBILITY OF STATES FOR DAMAGE DONE IN THEIR TERRITORIES TO THE PERSON OR PROPERTY OF FOREIGNERS"<sup>222</sup> ADOPTED BY THE LEAGUE OF NATIONS COMMITTEE OF EXPERTS FOR THE PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW (GENEVA, 1926)

The Committee is acting under the following terms of reference:

(1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realizable at the present moment;

(2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and

(3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

The Committee has decided to include in its list the following subject:

"Whether and, if so, in what cases a State may be held responsible for damage done in its territory to the person or property of foreigners."

On this subject the Committee has the honour to communicate to the Governments a report presented to it by a Sub-Committee<sup>223</sup> consisting of M. GUERRERO, Rapporteur, and Mr. WANG CHUNG-HUI.<sup>224</sup>

The nature of the general question and of the particular questions involved in it appears from this report. The report contains a statement of one theory as to the principles governing State responsibility in the matters considered and of the particular solutions derived from these principles. The Committee considers that this statement indicates the questions to be resolved for the

<sup>222</sup> League of Nations publication, *V. Legal*, 1926.V.3 (document C.46.M.23.1926.V).

<sup>223</sup> M. De Visscher was also appointed on this Sub-Committee but he was unfortunately prevented from taking any part in the preparation of the report.

<sup>224</sup> Mr. Wang Chung-Hui signed the original text of the Sub-Committee's report. Having unfortunately not been able to attend the session of the Committee of Experts, he is not responsible for the actual text as annexed to the present document, this text containing amendments made by the Rapporteur in consequence of the discussion in the Committee.

purpose of regulating the matter by international agreement. All these questions are subordinate to the larger question, namely:

"Whether and in what cases a State is responsible for damage suffered by foreigners within the territories under its jurisdiction and to what extent the conclusions of the Sub-Committee should be accepted and embodied in a convention between States."

It is understood that, in submitting the present subject to the Governments, the Committee does not pronounce either for or against the general principles of responsibility set out in the report or the solutions for particular problems which are suggested on the basis of these principles. At the present stage of its work it is not for the Committee to put forward conclusions of this nature. Its sole, or at least its principal, task at present is to direct attention to certain subjects of international law the regulation of which by international agreement may be considered to be desirable and realizable.

In doing this, the Committee should doubtless not confine itself to generalities but ought to put forward the proposed questions with sufficient detail to facilitate a decision as to the desirability and possibility of their solution. The necessary details are to be found in the conclusions of M. Guerrero's report.

In the same spirit, the Committee begs to refer to M. Guerrero's report for the details when it submits to the Governments the following question, which is closely related to the main question brought to their attention above.

"Whether and, if so, in what terms it would be possible to frame an international convention whereby facts which might involve the responsibility of States could be established, and prohibiting in such cases recourse to measures of coercion until all possible means of pacific settlement have been exhausted".

In order to be able to continue its work without delay, the Committee will be grateful to be put in possession of the replies of the Governments before October 15th, 1926.

The Sub-Committee's report is annexed.

Geneva, January 29th, 1926.

(Signed) Hj. L. HAMMARSKJÖLD  
Chairman of the Committee of Experts  
VAN HAMMEL

Director of the Legal Section of the Secretariat

ANNEX TO QUESTIONNAIRE No. 4

Report of the Sub-Committee

M. GUERRERO  
Rapporteur  
Mr. WANG Chung-Hui

...

## VI

Conclusions <sup>225</sup>

The conclusions we are about to draw are the logical outcome of the principles by which we have consistently been guided in preparing this report—and which we hold to be the only possible basis for the elaboration of rules likely to secure the approval of all States.

Were we to depart from these guiding rules, were we to seek to codify principles regarding which the collective will is uncertain or actually divided, our endeavours would be useless; indeed, we should be encouraging the establishment of a series of continental systems and codifications of law—which already exist in outline—the sole result being to create unending sources of disagreement.

We should not lose sight of the fact that the object of our task is to establish rules which may be embodied in international conventions, and that these conventions, to be effective, require the consent of all, or nearly all, the countries of the world.

These are our conclusions:

1. Since international responsibility can only arise out of a wrongful act, contrary to international law, committed by one State against another State, damage caused to a foreigner cannot involve international responsibility unless the State in which he resides has itself violated a duty contracted by treaty with the State of which the foreigner is a national, or a duty recognized by customary law in a clear and definite form.

2. The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.

The recognized public character of a foreigner and the circumstances in which he is present in its territory entail upon the State a corresponding duty of special vigilance on his behalf.

3. A State is responsible for damage incurred by a foreigner attributable to an act contrary to international law or to the omission of an act which the State was bound under international law to perform and inflicted by an official within the limits of his competence, subject always to the following conditions:

(a) If the right which has been infringed and which is recognized as belonging to the State of which the injured foreigner is a national is a positive right established by a treaty between the two States or by the customary law;

(b) If the injury suffered does not arise from an act performed by the official for the defence of the rights of the State, except in the case of the existence of contrary treaty stipulations;

The State on whose behalf the official has acted cannot escape responsibility by pleading the inadequacy of its law.

4. The State is not responsible for damage suffered by a foreigner, as a result of acts contrary to international law, if such damage is caused by an official acting outside his competence as defined by the national laws, except in the following cases:

(a) If the Government, having been informed that an official is preparing to commit an illegal act against a foreigner, does not take timely steps to prevent such act;

(b) If, when the act has been committed, the Government does not with all due speed take such disciplinary measures and inflict such penalties on the said official as the laws of the country provide;

<sup>225</sup> As reproduced here, the conclusions of the report contain amendments made by M. Guerrero as a result of the discussion in the Committee of Experts.

(c) If there are no means of legal recourse available to the foreigner against the offending official, or if the municipal courts fail to proceed with the action brought by the injured foreigner under the national laws.

5. Losses occasioned to foreigners by the acts of private individuals, whether they be nationals or strangers, do not involve the responsibility of the State.

6. The duty of the State as regards legal protection must be held to have been fulfilled if it has allowed foreigners access to the national courts and freedom to institute the necessary proceedings whenever they need to defend their rights.

It therefore follows:

(a) That a State has fulfilled its international duty as soon as the judicial authorities have given their decision, even if those authorities merely state that the petition, suit or appeal lodged by the foreigner is not admissible;

(b) That a judicial decision, whatever it may be, and even if vitiated by error or injustice, does not involve the international responsibility of the State.

7. On the other hand, however, a State is responsible for damage caused to foreigners when it is guilty of a *denial of justice*.

*Denial of justice* consists in refusing to allow foreigners easy access to the courts to defend those rights which the national law accords them. A refusal of the competent judge to exercise jurisdiction also constitutes a *denial of justice*.

8. Damage suffered by foreigners in case of riot, revolution or civil war does not involve international responsibility for the State. In case of riot, however, the State would be responsible if the riot was directed against foreigners, as such, and the State failed to perform its duties of surveillance and repression.

9. The category of damage referred to in the preceding paragraph does not include property belonging to strangers which has been seized or confiscated in time of war or revolution, either by the lawful Government or by the revolutionaries. In the first case the State is responsible, and in the second the State must place at the disposal of foreigners all necessary legal means to enable them to obtain effective compensation for the loss suffered and to enable them to take action against the offenders.

The State would become directly responsible for such damage if, by a general or individual amnesty, it deprived foreigners of the possibility of obtaining compensation.

10. All that has been said in regard to centralized States applies equally to federal States. Consequently, any international responsibility which may be incurred by one of the member States of a federation devolves upon the federal Government, which represents the federation from the international point of view; the federal Government may not plead that, under the constitution, the member States are independent or autonomous.

11. Any dispute which may arise between two States regarding damage suffered by foreigners within the territory of one of the States must be submitted to an international commission of inquiry appointed to examine the facts.

If the report of the commissioners adopted by a majority vote does not result in the incident being closed, the parties concerned must submit the dispute to decision by arbitration or some other means of pacific settlement.

12. States must formally undertake not to resort in the future to any measure of coercion until all the above-mentioned means have been exhausted.

(Signed) Gustavo GUERRERO

Rapporteur

*Annex 2*

BASES OF DISCUSSION DRAWN UP IN 1929 BY THE PREPARATORY COMMITTEE OF THE CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW (THE HAGUE, 1930)<sup>220</sup> (ARRANGED IN THE ORDER THAT THE COMMITTEE CONSIDERED WOULD BE MOST CONVENIENT FOR DISCUSSION AT THE CONFERENCE)

## GENERAL PRINCIPLES

*Basis of discussion No. 2*

A State is responsible for damage suffered by a foreigner as the result either of the enactment of legislation incompatible with its international obligations, resulting from treaty or otherwise, or of failure to enact the legislation necessary for carrying out those obligations.

*Basis of discussion No. 7*

A State is responsible for damage suffered by a foreigner as the result of an act or omission on the part of the executive power incompatible with the treaty obligations or other international obligations of the State.

*Basis of discussion No. 12*

A State is responsible for damage suffered by a foreigner as the result of acts or omissions of its officials, acting within the limits of their authority, when such acts or omissions contravene the international obligations of the State.

*Basis of discussion No. 13*

A State is responsible for damage suffered by a foreigner as the result of acts of its officials, even if they were not authorized to perform them, if the officials purported to act within the scope of their authority and their acts contravened the international obligations of the State.

*Basis of discussion No. 14*

Acts performed in a foreign country by officials of a State (such as diplomatic agents or consuls) acting within the apparent scope of their authority are to be deemed to be acts of the State and, as such, may involve the responsibility of the State.

*Basis of discussion No. 15*

If by a special legislative or administrative measure a State puts an end to the right to reparation enjoyed by a foreigner against one of its officials who has caused damage to the foreigner, or if it does not permit the right to be enforced, the State thereby renders itself responsible for the damage to the extent to which the official was responsible.

*Basis of discussion No. 16*

A State is responsible for damage suffered by a foreigner as the result of acts or omissions of such corporate entities (communes, provinces, etc.) or autonomous institutions as exercise public functions of a legislative or administrative character, if such acts or omissions contravene the international obligations of the State.

*Basis of discussion No. 23*

Where a State is entrusted with the conduct of the foreign relations of another political unit, the responsibility for damage suffered by foreigners on the territory of the latter belongs to such State.

Where one Government is entrusted with the conduct of the foreign relations of several States, the responsibility for damage

suffered by foreigners on the territories of such States belongs to such common or central Government.

*Basis of discussion No. 5*

A State is responsible for damage suffered by a foreigner as the result of the fact that:

1. He is refused access to the courts to defend his rights;
2. A judicial decision which is final and without appeal is incompatible with the treaty obligations or other international obligations of the State;
3. There has been unconscionable delay on the part of the courts;
4. The substance of judicial decision has manifestly been prompted by ill-will toward foreigners as such or as subjects of a particular State.

*Basis of discussion No. 6*

A State is responsible for damage suffered by a foreigner as the result of the courts following a procedure and rendering a judgment vitiated by faults so gross as to indicate that they did not offer the guarantees indispensable for the proper administration of justice.

## APPLICATION TO SPECIAL QUESTIONS

## A. Concessions or contracts

*Basis of discussion No. 3*

A State is responsible for damage suffered by a foreigner as the result of the enactment of legislation which directly infringes rights derived by the foreigner from a concession granted or a contract made by the State.

It depends upon the circumstances whether a State incurs responsibility where it has enacted legislation general in character which is incompatible with the operation of a concession which it has granted or the performance of a contract made by it.

*Basis of discussion No. 8*

A State is responsible for damage suffered by a foreigner as the result of an act or omission on the part of the executive power which infringes rights derived by the foreigner from a concession granted or a contract made by the State.

It depends upon the circumstances whether a State incurs responsibility when the executive power has taken measures of a general character which are incompatible with the operation of a concession granted by the State or with the performance of a contract made by it.

## B. Debts

*Basis of discussion No. 4*

A State incurs responsibility if, by a legislative act, it repudiates or purports to cancel debts for which it is liable.

A State incurs responsibility if, without repudiating a debt, it suspends or modifies the service, in whole or in part, by a legislative act, unless it is driven to this course by financial necessity.

*Basis of discussion No. 9*

A State incurs responsibility if the executive power repudiates or purports to cancel debts for which the State is liable.

A State incurs responsibility if the executive power, without repudiating a State debt, fails to comply with the obligations resulting therefrom, unless it is driven to this course by financial necessity.

<sup>220</sup> League of Nations publication, *V. Legal, 1929.V.3* (document C.75.M.69.1929.V), pp. 19-159.

## C. Deprivation of Liberty

*Basis of discussion No. 11*

A State is responsible for damage suffered by a foreigner as the result of the executive power unwarrantably depriving a foreigner of his liberty. The following acts in particular are to be considered unwarrantable: maintenance of an illegal arrest; preventive detention, if it is manifestly unnecessary or unduly prolonged; imprisonment without adequate reason, or in conditions causing unnecessary suffering.

## D. Insufficient protection afforded to foreigners

*Basis of discussion No. 10*

A State is responsible for damage suffered by a foreigner as the result of failure on the part of the executive power to show such diligence in the protection of foreigners as, having regard to the circumstances and to the status of the persons concerned, could be expected from a civilized State. The fact that a foreigner is invested with a recognized public status imposes upon the State a special duty of vigilance.

*Basis of discussion No. 17*

A State is responsible for damage caused by a private individual to the person or property of a foreigner if it has failed to show in the protection of such foreigner's person or property such diligence as, having regard to the circumstances and to any special status possessed by him, could be expected from a civilized State.

*Basis of discussion No. 18*

A State is responsible for damage caused by a private individual to the person or property of a foreigner if it has failed to show such diligence in detecting and punishing the author of the damage as, having regard to the circumstances, could be expected from a civilized State.

*Basis of discussion No. 19*

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

*Basis of discussion No. 20*

If, by an act of indemnity, an amnesty or other similar measure, a State puts an end to the right to reparation enjoyed by a foreigner against a private person who has caused damage to the foreigner, the State thereby renders itself responsible for the damage to the extent to which the author of the damage was responsible.

## E. Damages resulting from insurrections, riots or other disturbances

*Basis of discussion No. 21*

A State is not responsible for damage caused to the person or property of a foreigner by its armed forces or authorities in the suppression of an insurrection, riot or other disturbance.

The State must, however:

(1) Make good damage caused to foreigners by the requisitioning or occupation of their property by its armed forces or authorities;

(2) Make good damage caused to foreigners by destruction of property by its armed forces or authorities, or by their orders, unless such destruction is the direct consequence of combatant acts;

(3) Make good damage caused to foreigners by acts of its

armed forces or authorities where such acts manifestly went beyond the requirements of the situation or where its armed forces or authorities behaved in a manner manifestly incompatible with the rules generally observed by civilized States;

(4) Accord to foreigners, to whom damage has been caused by its armed forces or authorities in the suppression of an insurrection, riot or other disturbance, the same indemnities as it accords to its own nationals in similar circumstances.

*Basis of discussion No. 22*

A State is, in principle, not responsible for damage caused to the person or property of a foreigner by persons taking part in an insurrection or riot or by mob violence.

*Basis of discussion No. 22 (a)*

Nevertheless, a State is responsible for damage caused to the person or property of a foreigner by persons taking part in an insurrection or riot or by mob violence if it failed to use such diligence as was due in the circumstances in preventing the damage and punishing its authors.

*Basis of discussion No. 22 (b)*

A State must accord to foreigners to whom damage has been caused by persons taking part in an insurrection or riot or by mob violence the same indemnities as it accords to its own nationals in similar circumstances.

*Basis of discussion No. 22 (c)*

A State is responsible for damage caused to foreigners by an insurrectionist party which has been successful and has become the Government to the same degree as it is responsible for damage caused by acts of the Government *de jure* or its officials or troops.

*Basis of discussion No. 22 (d)*

A State is responsible for damage caused to the person or property of a foreigner by persons taking part in a riot or by mob violence if the movement was directed against foreigners as such, or against persons of a particular nationality, unless the Government proves that there was no negligence on its part or on the part of its officials.

## CIRCUMSTANCES UNDER WHICH STATES CAN DECLINE THEIR RESPONSIBILITY

*Basis of discussion No. 1*

A State cannot escape its responsibility under international law by invoking the provisions of its municipal law.

*Basis of discussion No. 24*

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

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

*Basis of discussion No. 25*

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

*Basis of discussion No. 26*

An undertaking by a party to a contract that he will not have recourse to the diplomatic remedy does not bind the State whose national he is and does not release the State with which the contract is made from its international responsibility.

If in a contract a foreigner makes a valid agreement that the local courts shall alone have jurisdiction, this provision is binding upon any international tribunal to which a claim under the contract is submitted; the State can then only be responsible for damage suffered by the foreigner in the cases contemplated in bases of discussion Nos. 5 and 6.

*Basis of discussion No. 27*

Where the foreigner has a legal remedy open to him in the courts of the State (which term includes administrative courts), the State may require that any question of international responsibility shall remain in suspense until its courts have given their final decision. This rule does not exclude application of the provisions set out in bases of discussion Nos. 5 and 6.

### NATIONAL CHARACTER OF CLAIMS

*Basis of discussion No. 28*

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

Persons to whom the complainant State is entitled to afford diplomatic protection are for the present purpose assimilated to nationals.

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

### COMPENSATION FOR DAMAGES

*Basis of discussion No. 29*

Responsibility involves for the State concerned an obligation to make good the damage suffered in so far as it results from failure to comply with the international obligation. It may also, according to the circumstances, and when this consequence follows from the general principles of international law, involve the obligation to afford satisfaction to the State which has been injured in the person of its national, in the shape of an apology (given with the appropriate solemnity) and (in proper cases) the punishment of the guilty persons.

Reparation may, if there is occasion, include an indemnity to the injured persons in respect of moral suffering caused to them.

Where the State's responsibility arises solely from failure to take proper measures after the act causing the damage has occurred, it is only bound to make good the damage due to its having failed, totally or partially, to take such measures.

A State which is responsible for the action of other States is bound to see that they execute the measures which responsibility entails, so far as it rests with them to do so; if it is unable to do so, it is bound to furnish an equivalent compensation.

In principle, any indemnity to be accorded is to be put at the disposal of the injured State.

### CHARACTER OF THE AGREEMENT TO BE CONCLUDED

*Basis of discussion No. 31*

The high contracting parties recognize that the provisions set out below are in accordance with the principles of international law as at present in force; they acknowledge their obligatory character and declare their intention to comply therewith.

### JURISDICTION

*Basis of discussion No. 30*

*Special protocol*

A claim made by a State in respect of damage suffered by one of its nationals and based on the provisions of the convention to which the present protocol is attached shall, failing amicable settlement and without prejudice to any other method of settlement in force between the States concerned, be submitted for decision to the Permanent Court of International Justice.

### Annex 3

TEXT OF ARTICLES ADOPTED IN FIRST READING BY THE THIRD COMMITTEE OF THE CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW (THE HAGUE, 1930) <sup>227</sup>

*Article 1*

International responsibility is 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 on the territory of the State.

*Article 2*

The expression "international obligations" in the present Convention means (obligations resulting from treaty, custom or the general principles of law) which are designed to assure to foreigners in respect of their persons and property a treatment in conformity with the rules accepted by the community of nations.

[The Drafting Committee proposed to replace the words in parentheses by the following words:

" . . . obligations which result from treaties as well as those which are based upon custom or the general principles of law . . . " ]

*Article 3*

The international responsibility of a State imports the duty to make reparation for the damage sustained in so far as it results from failure to comply with its international obligation.

*Article 4*

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

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

*Article 5*

A State cannot avoid international responsibility by invoking (the state of) its municipal law.

[The Drafting Committee proposes to suppress the words in parentheses.]

*Article 6*

International responsibility is incurred by a State if damage is sustained by a foreigner as a result either of the enactment of legislation incompatible with its international obligations or of the non-enactment of legislation necessary for carrying out those obligations.

*Article 7*

International responsibility is incurred by a State if damage is

<sup>227</sup> League of Nations publication, *V. Legal, 1930.V.17* (document C.351(c)M.145(c).1930.V).

sustained by a foreigner as a result of an act or omission on the part of the executive power incompatible with the international obligations of the State.

#### Article 8

1. International responsibility is incurred by a State if damage is sustained by a foreigner as a result of acts or omissions of its officials, acting within the limits of their authority, when such acts or omissions contravene the international obligations of the State.

2. International responsibility is likewise incurred by a State if damage is sustained by a foreigner as a result of unauthorized acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State.

International responsibility is, however, not incurred by a State if the official's lack of authority was so apparent that the foreigner should have been aware of it and could, in consequence, have avoided the damage.

#### Article 9

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

(1) That a judicial decision, which is not subject to appeal, is clearly incompatible with the international obligations of the State;

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

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

#### Article 10

As regards damage caused to foreigners or their property by private persons, the State is only responsible where the damage sustained by the foreigners results from the fact that the State has failed to take such measures as in the circumstances should normally have been taken to prevent, redress, or inflict punishment for the acts causing the damage.

### B. Codification by inter-American bodies

#### Annex 4

RECOMMENDATION CONCERNING "CLAIMS AND DIPLOMATIC INTERVENTION" ADOPTED AT THE FIRST INTERNATIONAL AMERICAN CONFERENCE (WASHINGTON, 1889-1890)<sup>228</sup>

The International American Conference recommends to the Governments of the countries therein represented the adoption, as principles of American international law, of the following:

(1) Foreigners are entitled to enjoy all the civil rights enjoyed by natives; and they shall be accorded all the benefits of said rights in all that is essential as well as in the form or procedure, and the legal remedies incident thereto, absolutely in like manner as said natives.

(2) A nation has not, nor recognizes in favor of foreigners, any other obligations or responsibilities than those which in favor of the natives are established, in like cases, by the constitution and the laws.

<sup>228</sup> *The International Conferences of American States, 1889-1928*, p. 45.

#### Annex 5

CONVENTION RELATIVE TO THE RIGHTS OF ALIENS<sup>229</sup>  
SIGNED AT THE SECOND INTERNATIONAL CONFERENCE OF AMERICAN STATES (MEXICO CITY, 1902)

First: Aliens shall enjoy all civil rights pertaining to citizens, and make use thereof in the substance, form or procedure, and in the recourses which result therefrom, under exactly the same terms as the said citizens, except as may be otherwise provided by the Constitution of each country.

Second: The States do not owe to, nor recognize in favor of, foreigners, any obligations or responsibilities other than those established by their Constitutions and laws in favor of their citizens.

Therefore, the States are not responsible for damages sustained by aliens through acts of rebels or individuals, and in general, for damages originating from fortuitous causes of any kind, considering as such the acts of war, whether civil or national; except in the case of failure on the part of the constituted authorities to comply with their duties.

Third: Whenever an alien shall have claims or complaints of a civil, criminal or administrative order against a State, or its citizens, he shall present his claims to a competent Court of the country, and such claims shall not be made, through diplomatic channels, except in the cases where there shall have been on the part of the Court, a manifest denial of justice, or unusual delay, or evident violation of the principles of International Law.

#### Annex 6

RESOLUTION ON "INTERNATIONAL RESPONSIBILITY OF THE STATE" ADOPTED AT THE SEVENTH INTERNATIONAL CONFERENCE OF AMERICAN STATES (MONTEVIDEO, 1933)<sup>230</sup>

The Seventh International Conference of American States, RESOLVES:

1. To recommend that the study of the entire problem relating to the international responsibility of the state, with special reference to responsibility for manifest denial or unmotivated delay of justice be handed over to the agencies of codification instituted by the International Conferences of American States and that their studies be co-ordinated with the work of codification being done under the auspices of the League of Nations.

2. That, notwithstanding this, it reaffirms once more, as a principle of international law, the civil equality of the foreigner with the national as the maximum limit of protection to which he may aspire in the positive legislations of the states.

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

4. The Conference recognizes, at the same time, that these general principles may be the subject of definition or limitations and that the agencies charged with planning the codification shall

<sup>229</sup> *The International Conferences of American States, 1889-1928*, p. 91.

<sup>230</sup> *The International Conferences of American States, First Supplement, 1933-1940*, pp. 91 and 92.

take into account the necessity of definition and limitations in formulating the rules applicable to the various cases which may be provided for.

### C. Codification by private bodies

#### *Annex 7*

#### PROJECTS ON "RESPONSIBILITY OF GOVERNMENTS" AND "DIPLOMATIC PROTECTION" PREPARED BY THE AMERICAN INSTITUTE OF INTERNATIONAL LAW (1925) PROJECT NO. 15: RESPONSIBILITY OF GOVERNMENTS

Whereas it is expedient to determine the responsibility of American Republics with regard to foreigners for damages which they may suffer on the territory of those republics.

The latter have agreed to conclude the following convention:

##### *Article I*

The Government of each American Republic is obliged to maintain on its own territory the internal order and governmental stability indispensable to the fulfillment of international duties.

##### *Article II*

As a consequence of the rule formulated in the preceding article, the Governments of the American Republics are not responsible for damages suffered by foreigners, in their persons or in their property for any reason whatsoever, except when the said Governments have not maintained order in the interior, have been negligent in the suppression of acts disturbing this order, or, finally, have not taken precautions so far as they were able to prevent the occurrence of such damages or injuries.

#### PROJECT NO. 16: DIPLOMATIC PROTECTION

Whereas the cases in which diplomatic claims may be made are matters interesting them in a special manner,

The American Republics have concluded the following Convention:

##### *Article I*

The American Republics do not recognize in favor of foreigners other obligations or responsibilities than those established for their own nationals in their constitutions, their respective laws, and the treaties in force.

##### *Article II*

In accordance with the present convention, every American Republic has the right to accord diplomatic protection to its native or naturalized citizens.

The conditions under which an American Republic may grant diplomatic protection depend entirely on its internal legislation.

##### *Article III*

Every nation has the right to accord diplomatic protection to its nationals in an American Republic in cases in which they do not have legal recourse to the authorities of the country, or if it can be proved that there has been denial of justice by the said authorities, undue delay, or violation of the principles of international law.

##### *Article IV*

Denial of justice exists:

(a) When the authorities of the country where the complaint is made interpose obstacles not authorized by law in the exercise by the foreigner of the rights which he claims;

(b) When the authorities of the country to which the foreigner has had recourse have disregarded his rights without legal reason, or for reasons contrary to the principles of law;

(c) When the fundamental rules of the procedure in force in the country have been violated and there is no further appeal possible.

##### *Article V*

Every American Republic has the power to protect not only its own nationals but those of other countries when the latter have entrusted it with diplomatic representation or the supervision of their interests in the country where the claim is made.

##### *Article VI*

The American republic to which the diplomatic claim is presented may decline to receive this claim when the person in whose behalf it is made has interfered in internal or foreign political affairs against the Government to which the claim is made. The republic may also decline if the claimant has committed acts of hostility towards itself.

##### *Article VII*

A diplomatic claim is not admissible when the individual in whose behalf it is presented is at the same time considered a national by the law of the country to which the claim is made, in virtue of circumstances other than those of mere residence in the territory.

##### *Article VIII*

In order that a diplomatic claim may be admissible, the individual in whose behalf it is presented must have been a national of the country making the claim at the time of the occurrence of the act or event giving rise to the claim, and he must be so at the time the claim is presented.

##### *Article IX*

Every American Republic has the right to accord diplomatic protection not only to its nationals but also to the companies, corporations, or other juridical persons who, according to its laws, are of the nationality of the country.

##### *Article X*

American Republics are expressly forbidden to protect their nationals through diplomatic channels when the rights involved have been acquired by means of a voluntary or forced cession made subsequent to the act giving rise to the claim.

##### *Article XI*

All controversies arising between American Republics regarding the admissibility of a diplomatic claim under the present convention shall be determined by arbitration or by the decision of an international court when not settled by direct negotiation.

#### *Annex 8*

#### DRAFT ON "INTERNATIONAL RESPONSIBILITY OF STATES FOR INJURIES ON THEIR TERRITORY TO THE PERSON OR PROPERTY OF FOREIGNERS"<sup>231</sup> PREPARED BY THE INSTITUTE OF INTERNATIONAL LAW (1927)

The Institute of International Law expresses the hope of seeing sanctioned in the practice of the law of nations the whole of the following rules concerning the international responsibility of States by reason of injuries caused upon their territory, in time of peace, to the persons or property of foreigners.

##### I

The State is responsible for injuries caused to foreigners by any action or omission contrary to its international obligations,

<sup>231</sup> Harvard Law School, *op. cit.*, pp. 228-230.

whatever be the authority of the State whence it proceeds: constitutional, legislative, governmental, administrative, or judicial.

This responsibility of the State exists even when its organizations act contrary to the law or to the order of a superior authority.<sup>232</sup>

It exists likewise when these organs act outside their competence under cover of their status as organs of the State and making use of means placed at their disposal as such organs.

This responsibility of the State does not exist if the lack of observance of the obligation is not a consequence of a fault of its organs, unless in the particular case a conventional or customary rule, special to the matter, admits of responsibility without fault.

## II

The State is responsible for the act of corporate bodies exercising public functions on its territory.

## III

The State is not responsible for injurious acts committed by individuals except when the injury results from the fact that it has omitted to take the measures to which, under the circumstances, it was proper normally to resort in order to prevent or check such actions.

## IV

Aside from cases where international law would call for a treatment of a foreigner preferable to that of a national, the State should apply to foreigners against injurious acts emanating from individuals, the same measures of protection as to its nationals. Foreigners should in consequence have at least the same right as the latter to obtain indemnity.

## V

The State is responsible on the score of denial of justice:

- (1) When the tribunals necessary to assure protection to foreigners do not exist or do not function.
- (2) When the tribunals are not accessible to foreigners.
- (3) When the tribunals do not offer the guaranties which are indispensable to the proper administration of justice.

## VI

The State is likewise responsible if the procedure or the judgement is manifestly unjust, especially if they have been inspired by ill-will toward foreigners, as such, or as citizens of a particular State.

## VII

The State is not responsible for injuries caused in case of mob, riot, insurrection or civil war, unless it has not sought to prevent the injurious acts with the diligence proper to employ normally in such circumstances, or unless it has not acted with like diligence against these acts or unless it does not apply to foreigners the same measures of protection as to nationals. It is especially obligated to give to foreigners the benefits of the same indemnities as to nationals with regard to communes or other persons. The responsibility of the State by reason of acts committed by insurgents ceases when it recognizes the latter as a belligerent party, and in all cases in regard to States which have recognized them as such.

The question of the degree to which a State is responsible for acts of insurgents, even when recognized as a belligerent party, in case they have become the government of the country, is reserved.

<sup>232</sup> The text of the second paragraph should be understood in the sense that the responsibility of the State exists whether its organs have acted in conformity with or contrary to the law or even the order of a superior authority. (Extract from the *procès-verbal* of 1 September 1927).

## VIII

The principles stated in articles 3 and 4 govern also the international obligation resting upon the State to guarantee the rights foreigners have with regard to it by virtue of its internal law.

## IX

A federal State is responsible for the conduct of the individual States, not only if it is contrary to its own international obligations, but also if it is contrary to the international obligations incumbent upon those States. It cannot escape this responsibility by invoking the fact that its constitution does not give it the right to control the particular States nor the right to require them to discharge their obligations.

Likewise a protecting State is responsible for the conduct of a protected State so far as the latter is bound to execute the international obligations of the protecting State, or so far as the latter represents the protected State towards third States wronged by it and employing the right to press their claims.

## X

The responsibility of the State includes reparation for injuries suffered in so far as they are the consequences of a failure to observe an international obligation. It includes moreover, when need be, according to the circumstances and the general principles of the law of nations, a satisfaction to be given to the State which has been wronged in the person of its nationals, by way of more or less formal apologies and, in appropriate cases, punishment of the guilty, either disciplinary or otherwise.

## XI

The damages include, when applicable, an indemnity for the injured persons as reparation for the moral suffering they have experienced.

When the responsibility of the State results solely from the fact that it has not taken the required steps after the accomplishment of the injurious act, it is only bound to make reparation for the injury resulting from the total or partial omission of these measures.

A State responsible for the conduct of other States is bound to see to the execution by them of the payments entailed by this responsibility and chargeable to them; if it is not possible for it to do so, it is bound to grant an equivalent compensation.

In principle the indemnity to be granted should be placed at the disposal of the wronged State.

The questions relating to the calculation of damages and to the relations of injured persons to their State and to the State against which the claim is brought are reserved.

## XII

No demand for reparation can be brought through diplomatic channels of a State so long as the wronged individual has at his disposal effective and sufficient means to obtain for him the treatment due him.

Nor can any demand for reparation take place if the responsible State places at the disposal of the wronged individual an effective means of obtaining the corresponding damages.

## FINAL VOEU

The Institute expresses the hope that by international conventions, where they do not already exist, the States will bind themselves in advance to submit all disputes concerning international responsibility of the State resulting from injuries caused on their territory to the persons and property of foreigners, first, to an international commission of inquiry, if that is necessary for an examination of the facts; next, to a process of conciliation; finally, if that does not succeed, to a judicial procedure before the Permanent Court

of Arbitration, the Permanent Court of International Justice, or any other international court of justice, for a definitive solution.

The Institute also expresses the hope that States will abstain from every coercive measure before having had recourse to the preceding measures.

### *Annex 9*

DRAFT CONVENTION ON "RESPONSIBILITY OF STATES FOR DAMAGE DONE IN THEIR TERRITORY TO THE PERSON OR PROPERTY OF FOREIGNERS"<sup>283</sup> PREPARED BY HARVARD LAW SCHOOL (1929)

#### *Article 1*

A state is responsible, as the term is used in this convention, 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.

#### *Article 2*

The responsibility of a state is determined by international law or treaty, anything in its national law, in the decisions of its national courts, or in its agreements with aliens, to the contrary notwithstanding.

#### *Article 3*

A state is not relieved of responsibility because an injury to an alien is attributable to one of its political subdivisions, regardless of the extent to which the national government, according to its constitution, has control of the subdivision. For the purposes of this article, a dominion, a colony, a dependency, a protectorate, or a community under mandate, which does not independently conduct its foreign relations, is to be assimilated to a political subdivision.

#### *Article 4*

A state has a duty to maintain governmental organization adequate, under normal conditions, for the performance of its obligations under international law and treaties. In the event of emergencies temporarily disarranging its governmental organization, a state has a duty to use the means at its disposal for the performance of these obligations.

#### *Article 5*

A state has a duty to afford to an alien means of redress for injuries which are not less adequate than the means of redress afforded to its nationals.

#### *Article 6*

A state is not ordinarily responsible (under a duty to make reparation to another state) until the local remedies available to the injured alien have been exhausted.

#### *Article 7*

(a) A state is responsible if an injury to an alien results from the wrongful act or omission of one of its higher authorities within the scope of the office or function of such authority, if the local remedies have been exhausted without adequate redress.

(b) A state is responsible if an injury to an alien results from the wrongful act or omission of one of its subordinate officers or employees within the scope of his office or function, if justice is denied to the injured alien, or if, without having given adequate redress to the injured alien, the state has failed to discipline the officer or employee.

#### *Article 8*

(a) A state is responsible if an injury to an alien results from its non-performance of a contractual obligation which it owes to the alien, if local remedies have been exhausted without adequate redress.

(b) A state is not responsible if an injury to an alien results from the non-performance of a contractual obligation which its political subdivision owes to an alien, apart from responsibility because of a denial of justice.

#### *Article 9*

A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.

#### *Article 10*

A state is responsible if an injury to an alien results from its failure to exercise due diligence to prevent the injury, if local remedies have been exhausted without adequate redress for such failure. The diligence required may vary with the private or public character of the alien and the circumstances of the case.

#### *Article 11*

A state is responsible if an injury to an alien results from an act of an individual or from mob violence, if the state has failed to exercise due diligence to prevent such injury and if local remedies have been exhausted without adequate redress for such failure, or if there has been a denial of justice.

#### *Article 12*

A state is responsible if an injury to an alien results from an act of insurgents, if the state has failed to use diligence to prevent the injury and if local remedies have been exhausted without adequate redress for such failure.

#### *Article 13*

(a) In the event of an unsuccessful revolution, a state is not responsible when an injury to an alien results from an act of the revolutionists committed after their recognition as belligerents either by itself or by the state of which the alien is a national.

(b) In the event of a successful revolution, the state whose government is established thereby is responsible under article 7, if an injury to an alien has resulted from a wrongful act or omission of the revolutionists committed at any time after the inception of the revolution.

#### *Article 14*

A state is responsible if an injury to an alien results from an act, committed within its territory, which is attributable to another state, only if it has failed to use due diligence to prevent such injury.

#### *Article 15*

(a) A state is responsible to another state which claims in behalf of one of its nationals only in so far as a beneficial interest in the claim has been continuously in one of its nationals down to the time of the presentation of the claim.

(b) A state is responsible to another state which claims in behalf of one who is not its national only if

(1) The beneficiary has lost its nationality by operation of law, or

<sup>283</sup> Harvard Law School, *op. cit.*, pp. 140 ff.

(2) The interest in the claim has passed from a national to the beneficiary by operation of law.

*Article 16*

(a) A state is not responsible if the person injured or the person on behalf of whom the claim is made was or is its own national.

(b) A state is not relieved of responsibility if injury is sustained by a foreign corporation, or if a claim is made on behalf of a foreign corporation, because one or more of the shareholders of such corporation possessed or possesses its nationality.

(c) A state is not relieved of responsibility as a consequence of any provision in its own law that an alien should be considered its national for a particular purpose.

*Article 17*

A state is not relieved of responsibility as a consequence of any provision in its own law or in an agreement with an alien which attempts to exclude responsibility by making the decisions of its own courts final; nor is it relieved of responsibility by any waiver by the alien of the protection of the State of which he is a national.

*Article 18*

Any dispute between states parties to this convention, with respect to the interpretation or application of the provisions of this convention, which is not settled by negotiation and which is not referred to arbitration under a general or special arbitration treaty, shall be referred to the Permanent Court of International Justice, and may be brought before the Permanent Court of International Justice by either party to the dispute.

*Annex 10*

DECLARATION ON THE FOUNDATIONS AND LEADING PRINCIPLES OF MODERN INTERNATIONAL LAW<sup>234</sup>

Approved by the International Law Association, the Académie diplomatique internationale, and the Union juridique internationale

SECTION V

*Duties of States*

*Article 25.* The State is under a duty to: .....

(b) Maintain a political and legal organization which enables all persons residing in its territory to exercise the rights and to enjoy the benefits which, in accordance with the sentiment of international justice, are at present a necessity for all civilized peoples.

<sup>234</sup> Alejandro Alvarez, *Exposé de motifs et déclaration des grands principes du droit international moderne*, 2nd ed. (Paris, Les Editions Internationales, 1938), pp. 49 ff.

SECTION VI

*International rights of the individual*

*Article 28.* Every State shall afford to every individual in its territory full and complete protection of the right to life, freedom and property, without any discrimination based on nationality, sex, race, language, or religion.

*Article 29.* Every State shall in addition recognize the right of every individual in its territory to practise freely, both in public and in private, any faith, religion or belief the practice of which is not repugnant to public order and decency.

SECTION VII

*Rights and duties of aliens: the responsibility of States: diplomatic intervention*

*Article 30.* Aliens are entitled to the same treatment as nationals in so far as private rights and the safeguards of criminal law are concerned.

Aliens may in no case claim rights greater than those of nationals, except if the country in which they reside does not afford to its inhabitants, in a permanent manner, the minimum rights referred to in article 25 (b) and in articles 28 and 29.

*Article 31.* Every alien is governed by the laws, and subject to the authorities, of the country in the territory of which he resides.

*Article 32.* Every State shall be responsible for whatever damage its authorities cause, whether by some act or by failure to act, to nationals of another State.

This responsibility shall, however, be neither less nor greater than that owed to its own nationals, an exception being made in the cases contemplated by article 25 (b) and by articles 28 and 29, or in any case in which the rights of an alien under international law have been violated or ignored.

*Article 33.* States may, by convention, extend or restrict, as between them, the responsibility laid down in the foregoing articles.

*Article 34.* If an alien suffers some damage attributable to the authorities or to private persons in the country in which he finds himself, and considers that the said damage involves that country in responsibility, then his remedy is to apply to the authorities of that country. The State of which he is a national may only make a diplomatic intervention on his behalf if there is denial of justice.

Any dispute which may arise concerning the existence or otherwise of denial of justice shall be settled by an international jurisdiction.

*Article 35.* Any State which unjustly causes a prejudice to another State is under duty to make reparation for the same.

The question whether the prejudice was caused unjustly shall come within the competence of international jurisdiction.

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