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Summary record of the 370th meeting

Topic:
State responsibility

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including international organizations" or "States, including organizations of States". The two entities could not be dealt with as if they were exactly the same thing. It would prove extremely difficult to draft and discuss articles with the twofold application to States and international organizations in mind, and the results of such a procedure might be rather unfortunate. Perhaps the best course would be to draft the articles with reference to treaties between States and then see what changes were required in order to apply them to treaties to which international organizations were parties. A special section might even be set aside for international organizations.

67. Mr. SPIROPOULOS explained that he was in full agreement with the idea of drafting a detailed code. He had merely questioned the advisability, from the standpoint of the Commission's work, of including certain detailed and theoretical definitions.

The meeting rose at 6.25 p.m.

370th MEETING

Tuesday, 19 June 1956, at 9.30 a.m.

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Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Radhabinod PAL, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

The law of treaties (item 3 of the agenda) (A/CN.4/101) (*continued*)

1. The CHAIRMAN invited the Special Rapporteur to reply to the observations by members on his questions [1] and proposals.

2. Sir Gerald FITZMAURICE, Special Rapporteur, said that the Commission appeared to be generally agreed that codification of the law of treaties should not take the form of a convention. His own views on the matter coincided with those of the Secretariat.

3. As regards his second question he was again in general agreement with the Secretariat. While sympathizing with those who had expressed a preference for something precise and short, he thought that, if the Commission was to do more than draft a few very general articles, there was really no alternative but to go into some detail, since significance was bound to be attached to whatever was omitted. He was, however, conscious of the fact that the set of articles was perhaps too long and that there were ways in which it might be condensed.

4. The desirability of including definitions was a point on which he had thought of requesting the views of members of the Commission. He regarded it as a matter of expediency rather than of principle. Some terms which occurred frequently would need to be defined in order to avoid wearisome repetition of certain qualifications in the articles. Other definitions, however, might prove on further examination to be unnecessary. In one sense, he agreed with those who held that the term "State" did not require definition. However, the view put forward by Faris Bey el-Khouri [2] that semi-sovereign and protected entities had no treaty-making capacity rather suggested that it did. He was afraid that he could not agree with that view. In the interests of semi-sovereign entities it was most desirable that they should be free to enter into treaty relations with other countries. And to make that possible, the doctrine that such entities could repudiate past agreements on changing their status must be rejected; otherwise States would be reluctant to conclude treaties with them.

5. The definitions of ratification and accession might be omitted, but in that case certain ideas they contained must be brought into the articles in some other form. The definition of accession had been included to make clear a fact that was not always realized—namely, that it was a course open only to States not signatories to a treaty. Similarly, the definition of ratification had been included to make clear that it was a process gone through only when a treaty had previously been signed. It was not the treaty that was ratified, but the signature.

6. His third question was largely a matter of presentation, on which no final decision need be taken until the work was much more advanced. He was inclined, after hearing the discussion, to omit the articles in question and leave the fundamental principles of treaty law to be elaborated later; otherwise, as some speakers had pointed out, the Commission would certainly be asked why it had not included other principles regarded as equally fundamental.

7. It appeared to be generally agreed that the code should cover every kind of genuine treaty instrument and international agreement, including exchanges of notes and agreed memoranda. Indeed, it would be a great mistake to omit what were now the most frequent forms of agreement, particularly in bilateral negotiations. The only problem was that the language of the articles might be somewhat strained in the endeavour to make them apply to such diverse forms of agreement. It was, in fact, for that reason that he had envisaged devoting a special section to particular classes of instrument. The two approaches might, however, be combined. Since, as

[1] A/CN.4/SR.368, para. 47.

[2] A/CN.4/SR.369, para. 30.

Mr. François had pointed out,[3] much of the law of treaties, especially that relating to validity, applied to all instruments irrespectively, some articles could cover all forms of instrument. In other cases, such as the methods of concluding and terminating treaties, separate articles might be required for certain types of instrument. He proposed to examine the question further.

8. The problem of the concept of a treaty in the municipal law of States had been raised by Mr. François,[4] in particular with reference to the situation in the Netherlands. There might, admittedly, be countries where even the issue of a *communiqué* containing a bare reference to the fact that agreement had been reached with another State was subject to prior approval of the legislature. He did not think, however, that the Commission need worry much about such cases. He had sought to provide for them by a saving clause in article 2, paragraph 4, which made it clear that the code did not in any way affect the status of an instrument in relation to the constitutional requirements of particular States regarding the treaty-making Power. The code left countries entirely free to define a treaty in whatever manner they wished for the purposes of their own law.

9. In describing treaty-making as an executive act on the international plane, he had realized that he was touching on a highly controversial question. The Commission should, however, hesitate before accepting, without great qualification, the theory that a country could not validly become party to a treaty if its constitutional requirements were not complied with in the process of becoming a party. The doctrine that failure to comply with constitutional requirements necessarily and invariably invalidated a country's ratification of a treaty was a dangerous one. Were it adopted, no State could ever be sure that a treaty had been finally ratified by another State, since it would have no means of ascertaining whether every constitutional requirement had been fulfilled. And governments would be able to withdraw from inconvenient treaty obligations whenever it suited them, by alleging some irregularity in the process of ratification.

10. He took a similar view of the difficult problem of reservations to treaties and would be most reluctant to accept the system established by the International Court in its advisory opinion on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.[5] Such a system, though working satisfactorily in a few cases, would, in general, be extremely difficult to apply. Mr. Zourek had contended that, in view of the current practice of adopting conventions by majority vote, the States in a minority must be allowed to enter reservations.[6] Such reservations must, however, figure in the convention if the minority States were not to be placed in the privileged position of being able to reintroduce for their own benefit points on which they had been overruled. States thus overruled were, after all, free to refuse to sign the convention. The system which he advocated appeared to be regarded by some members as extremely rigid. In point of fact it departed very appreciably from what was known as the traditional system and allowed considerable latitude. For instance, though the general doctrine that reservations should be permitted in the circumstances described by Mr. Zourek could not be accepted, some reservations not affecting the substance might be permissible.

11. Reference had also been made to the doctrine of *rebus sic stantibus*,[7] which was particularly relevant to the revision and termination of treaties. The brief allusion to the doctrine in his report would need elaboration. The question was one of those on which the Commission might, he thought, make a proposal *de lege ferenda*, all the more so as the question of revision of treaties was to some extent not covered by existing law. The doctrine of *rebus sic stantibus* was, however, justly regarded with suspicion and the Commission would be ill-advised to accept the claim that a country could free itself of its treaty obligations merely by alleging changed circumstances. If, on the other hand, circumstances had changed so fundamentally that the whole basis of the treaty had been destroyed, the doctrine might be reasonably invoked. In any case, the problem would not require consideration for some time.

12. On the question whether the code should cover treaties made by and with international organizations, the general feeling of the Commission appeared to be that it should. That international organizations possessed of international personality had treaty-making capacity was beyond question. Agreements such as those between the United Nations and most of its Members on privileges and immunities were undoubtedly international instruments and should be covered by the code. But, as Mr. François had pointed out,[8] the question was relatively young. He accordingly proposed to draft the code with reference to States only, but bearing constantly in mind the question of its application to international organizations. The Commission could then judge whether the various articles might be adapted to apply to international organizations, or whether a special section would be required.

13. Agreements between governments and individuals or non-political bodies, on the other hand, could not be covered by the code, despite the resemblance they bore in a few cases to international agreements. Their diversity was such that to attempt to deal with them would lead to endless confusion. He was convinced that the Commission should confine its conception of a treaty to an agreement made between entities possessed of international personality. Not that he wished thereby to imply that individuals and private companies had no international rights under their agreements with States. It was merely that the rights arose in a different way and could not be regarded as founded on a treaty.

14. The CHAIRMAN said that the statement by the Special Rapporteur admirably reflected the views of the Commission.

[3] A/CN.4/SR. 369, para. 25.

[4] *Ibid.*, para. 26.

[5] I.C.J. Reports, 1951, pp. 15-69.

[6] A/CN.4/SR.369, para. 60.

[7] A/CN.4/SR.369, para. 35.

[8] *Ibid.*, para. 27.

The Chairman declared the discussion on the law of treaties closed.

State responsibility (item 6 of the agenda) (A/CN.496) (*continued*)

15. The CHAIRMAN, after inviting the Commission to consider the question of State responsibility and drawing attention to the report entitled " International Responsibility " (A/CN.4/96) prepared by himself as Special Rapporteur for the topic, asked the Secretary to outline the history of the item.

16. Mr. LIANG, Secretary to the Commission, recalled that at its sixth session the Commission, in pursuance of General Assembly resolution 799 (VIII), had decided to undertake the study of state responsibility at the earliest opportunity.[9] As part of the preparatory work for that study, the Harvard Law School Research Centre had kindly agreed, at the suggestion of the Secretariat, to revise the draft Convention on Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners, which had been prepared by Professor Borchard with the assistance of an advisory committee and published in 1929 by the Harvard Research. The task of revision had been entrusted to Professor Katz and Professor Sohn, working in collaboration with an advisory committee. He thought the Commission would agree that, just as the original draft had been of great assistance to the Codification Conference at The Hague in 1930 and to the learned world in general, a revised version might also be of great service both to the Commission and to the public. While the negotiations had been conducted with the consent of the Special Rapporteur, their present Chairman, Mr. García-Amador, the Secretariat was solely responsible for the arrangements. It was not, however, in any way responsible for the revised text itself, which, when completed in March 1957, would be published by the Harvard Law School. At the Secretariat's suggestion, Professor Katz and Professor Sohn had been invited by the Chairman to be present at the Commission's debates on the item.

17. The CHAIRMAN remarked that a revision of the Harvard draft convention, and more particularly of the commentary on it, would undoubtedly be of great assistance to the Commission.

18. If there were no comments, he would assume that the Commission had no objection to the arrangements made with the Harvard Law School or to the presence of two members of its staff during the Commission's discussion of the item. He wished to thank the Harvard Law School and the Legal Department of the Pan-American Union for the valuable assistance that they had afforded him in the preparation of his report.

19. Speaking as Special Rapporteur, he introduced his report on international responsibility (A/CN.4/96). At the outset he had asked himself whether international responsibility might be codified in the same way as any other topic in international law, since, necessarily, traditional principles of international law had been affected by recent practice and doctrine. Both theoretically and practically, international responsibility had undergone a profound transformation, and the traditional concept in international law must be re-examined in the light of the new trends. He had examined each fundamental aspect in that light.

20. The first question he had tackled had been the appreciation of the impact of historical and doctrinal development on the legal concept of responsibility itself. When that concept had been studied fifteen or twenty years previously, the idea had prevailed that international responsibility had been nothing more than the duty to make reparation for injuries occasioned by the breach or non-performance of an international obligation; in other words, the concept of responsibility had corresponded to that of liability under municipal law. Today, however, international responsibility covered both civil liability, in the strict sense of the term, and criminal responsibility, according to the nature of the obligation, the breach or non-performance of which gave rise to the responsibility.

21. It was true that General Assembly resolution 799 (VIII), in compliance with which the study had been undertaken, appeared to limit the scope of the inquiry to civil liability. His report, accordingly, omitted matters outside that field and matters already studied by the Commission. It had, however, to be recognized that criminal responsibility had been clearly defined in modern international jurisprudence, and when civil liability was examined, some cases might be found in which there was a basic element of criminal responsibility which had not hitherto been recognized. Whereas in previous studies attention had been concentrated on the duty to make reparation, in contemporary jurisprudence it was recognized that wrongful acts might be a matter of criminal responsibility from the point of view of international law. A decision would have to be taken on the action required in such circumstances. Although the concept of criminal responsibility had not been wholly absent from traditional international law, it had been found that some forms of reparation bordered on the characteristics of criminal responsibility, and that fact had been recognized even by such leading exponents of the traditional doctrine as Anzilotti. That matter too must be taken into consideration. That idea had been incorporated in basis for discussion No. 1—Legal content and function of international responsibility (A/CN.4/96, chapter X, p. 127). The Commission would not have to study criminal responsibility as such, but would have to bear in mind cases in which the responsibility for a punishable act implied punishment and also the reparation of the injury.

22. In considering basis for discussion No. II—The active subjects of international responsibility—it should be borne in mind that even if General Assembly resolution 799 (VIII) was interpreted strictly, it would be found, when an exclusive responsibility of States was studied, that in the modern concept of international responsibility accepted by the Commission some part of the responsibility for committing certain illegal acts might not be imputable to States exclusively. Two

[9] *Official Records of the General Assembly, Ninth session, Supplement No. 9* (A/2693), para. 74.

matters were involved: the duty to make reparation, and criminal responsibility. The latter was not imputable to States, but to individuals within the existing concept. Thus, even within a restricted interpretation of General Assembly resolution 799 (VIII), the Commission could not avoid the consideration of criminal responsibility if it wished fully to comply with the General Assembly resolution.

23. He had not included that topic in the bases for discussion, since it was mainly a theoretical concept, but he would point out that the concept that the individual was an active subject of international responsibility existed in some cases, as laid down by the rulings of the Court provided for by the Treaty of 18 April 1951 constituting the European Coal and Steel Community.[10] In such cases, if the individual was unable to recover damages from an official or employee, the Court might assess an equitable indemnity against the Community. That view had also been endorsed by both the 1951 and 1953 Committees on International Criminal Jurisdiction, when the French, Belgian and other delegations had proposed that the Court might hear cases involving civil liability suits against persons who had committed crimes against international law. The proposal had been made by obviously responsible delegations. It had not been accepted, because it had been deemed outside the scope of the Committee's terms of reference, but the idea itself had not been rejected in substance, and if the Commission wished its conclusions to square with international practice, it could not fail to contemplate the principle that individuals might be active subjects of international responsibility.

24. There were also many precedents for the international responsibility of international organizations, a concept which had been accepted since the time of the League of Nations. The idea embodied in paragraph 3 of basis for discussion No. II had been universally accepted, although objections had been raised in some cases.

25. In basis for discussion No. III he had raised the question of the passive subjects of international responsibility, or, in other words, the situation of the titular claimant of an injured interest or right. The traditional theory and practice had been established by, and had issued from, the same basic concepts as the concept of imputability. The basic idea had been that only the State was imputable, since international law prevailed solely between States and conferred interests and rights upon them. It had not, therefore, been conceived that when there was a breach or non-performance of an international obligation which resulted in injury, there could be any other titular claimant of the injured interest or right than the State.

26. In contemporary international law, in which full recognition had been given to the existence of other subjects of international responsibility, traditional theory and practice must be reconsidered in order to adapt them to the new state of affairs. Accordingly, he had listed as passive subjects of international responsibility foreign private individuals, States and international organizations. Undoubtedly, a foreign individual, as an individual, would be a passive subject of international responsibility only at a given moment — namely, when the circumstances set out in sub-paragraph 2 (*b*) were not present. Under that sub-paragraph, the State as a legal entity might be the direct object of the injury, but, as a State, it might also be affected as the State of the nationality of the foreign private individual who had been injured in person or property. The foreign individual might be the passive subject directly affected, but, in some circumstances, the injury might occur in such a way as to indicate a general state of danger—i.e., a number of occurrences gave grounds for assuming that the State concerned had a general interest in protecting the interests or rights of its nationals. That doctrine had been accepted in various arbitral awards, but was no longer the classic doctrine accepted by the International Court of Justice. The Court, imbued as it was with traditional practice and theory, had always identified the interest of foreign private individuals with that of the State of which they were nationals, and had refused to accept the idea that a foreign individual might be the titular claimant of an interest.

27. The same situation prevailed in the case of international organizations. He had reproduced almost literally the Court's advisory opinion in the case of Reparation for Injuries suffered in the service of the United Nations[11] in order to define the responsibilities which such organizations might incur.

28. The problem set out in paragraph 3 referred to that deriving from the capacity to bring an international claim for damages sustained. Logically, in international practice an individual would always have such a capacity when his own interest was injured, but that idea might not be acceptable in practice at the present stage of international law; it would therefore be better simply to state the principle so that it might apply in some circumstances and not in others. The guiding principle was that in cases of responsibility for damage to the person or property of aliens, " general interest " of the alien's State in the damage should receive special consideration. In other words, in cases in which not only the material interest of the alien was injured, but also the interest of the State of which he was a national, the State of his nationality might invoke " general interest " for circumstances in which the injury occurred. The case was an extremely complex one, and he had no fixed opinion, owing to the difficulties of reconciling all the new ideas of State responsibility with the capacity to bring an international claim.

29. In basis for discussion No. IV—Responsibility in respect of violations of the fundamental rights of man—he had tried to find a solution to perhaps one of the most important practical problems in international law with regard to international responsibility. In traditional international law there had always been a clash between the so-called " international standard of justice " and the principle of the equality of nationals and aliens. The

[10] *American Journal of International Law* (1952), Suppl. Vol. 46, p. 120.

[11] I.C.J. Reports 1949, p. 174.

former had been widely accepted and had been supported by various decisions of arbitral tribunals and commissions. An attempt had been made to establish the principle that aliens might enjoy and merit special respect from the State in which they resided or where they carried on their activities. The latter principle prevailed where there were certain fundamental human rights which constituted the rights guaranteed in all civilized countries. Especially in Latin America, the former came into conflict with the principle, embodied in all Latin American constitutions, and in many special laws, that nationals and aliens enjoyed equality of treatment. It had been stated that aliens should not have the right, nor expect, to receive preferential treatment over nationals. The problem had always related to the idea of drawing a distinction between nationals and aliens who, in some cases, might receive more rights and, in others, be placed on the same footing, as nationals under local law.

30. The " international standard of justice " had been the principle of the international recognition of individual rights, but it should be noted that those rights were accorded to the individual alien in his capacity as a national of another State. That rule had been established at a time when international law had not recognized any rights to individuals in any capacity other than that of alien, so long as that status was maintained. The same situation had obtained when the principle of equal treatment of aliens and nationals had prevailed.

31. A number of learned writers had dealt with the situation with regard to the international recognition of the rights of man as it had been recently defined by the United Nations Charter, and, in particular, by the Declaration signed at Bogotá in March 1948 and the Universal Declaration of Human Rights signed at Paris in December 1948. Those international instruments had given rise to an entirely new situation in which the same human rights as previously had been recognized, but the distinction between nationals and aliens had been wholly eliminated. The two traditional concepts had been fused together, and both had lost their individual justification. When the existence of a minimum of fundamental human rights was internationally recognized, the question whether an individual was a national of a State or an alien or a stateless person had ceased to matter, because the factor of nationality no longer came into consideration.

32. The declarations of rights which he had cited referred to a number of rights with which the Commission was not concerned and which were not essentially fundamental human rights. That difficulty might, however, be easily overcome if the Commission, when it came to prepare its first draft establishing the specific obligations forming international responsibility, stated precisely what were the essential and fundamental human rights that were actually germane to its purpose, and based its draft on actual practice—in particular, on cases of denials of justice.

33. The problem in basis for discussion No. V—Exoneration from responsibility; extenuating and aggravating circumstances—was rather more complicated. It was difficult to state precisely in every case what were the causes of exoneration from international responsibility, especially what were some of the extenuating and aggravating circumstances, and equally difficult to say whether they had been recognized or not in international law and practice, in particular cases of self-defence and *force majeure*. Some cases had been recognized as genuine causes for exoneration, but others merely as extenuating circumstances. The Commission might in any case establish a range of gradations, but that would give rise to serious difficulties. For the purposes of his report, he had simply drawn attention to the difficulties and confined himself to recognizing the general principle that such gradation might exist and be valid.

34. He had formulated sub-paragraph 2 (*a*)—Failure to resort to local remedies—in the simplest way; and that might give rise to difficulties of interpretation, especially with regard to the term " exhausted ". Some authorities construed " exhaustion " as the time at which all means of local redress had been tried and found inadequate. Others adhered to the opinion of the Permanent Court of International Justice that it was not necessary to resort to municipal courts if those courts had no jurisdiction to award relief, and that it was not necessary again to resort to those courts if the result must be a repetition of a decision already given.[12] The latter view was dangerous, as it permitted the party to prejudge the effectiveness of local remedies; but it was applied in practice. It had also been held that the resort to local remedies must be sufficient to guarantee effective reparation. That view would be dangerous if accepted without reservations, as it involved a matter of judgment.

35. The renunciation of diplomatic protection by the State had been a practice common towards the end of the nineteenth century and beginning of the twentieth century, although it had been deprecated by jurists. Thus the Institut de droit international at its Neuchâtel session (1900) had adopted a resolution recommending States to abstain from inserting in treaties " reciprocal non-liability clauses ".[13] The practice had almost died out. The criticism had rightly been made that, if the rights of an individual were concerned, it was not conceivable that the State should renounce protection of those rights when they were not the rights of the State itself. That was consistent with contemporary notions of international law. The State was now capable of renouncing nothing more than its own rights, but not the rights of its nationals which belonged to them, not as nationals, but as individuals. That point would have to be taken into consideration, because there would always be rights and interests reserved to the State itself as a collective and political entity, and there would always be cases of injuries to the interests of foreigners where a " general interest " of the State was also involved. A State might renounce diplomatic protection only when the material and moral damage was done to an interest of its own and not an interest of one of its nationals in his capacity as a private person.

36. In the case of renunciation of diplomatic protection

[12] Permanent Court of International Justice, Series A/B (Judgments, Orders and Advisory Opinions), No. 76, p. 18. *Panevezys - Saldutiskis Railway* case.

[13] *Annuaire de l'Institut de droit international*, Vol. 18, p. 253.

by foreign private individuals, the "Calvo clause" might be relied on in so far as it did not refer to rights which, by their nature, were not capable of being renounced, or to questions in which the private person was not the only interested party. In other words, the principle of renunciation of diplomatic protection by an individual was accepted, but with two restrictions or conditions — namely, that the rights were not those which by their very nature no human being might be permitted to renounce even if he wished to do so, for his economic interests or under pressure, and secondly, that the Calvo clause could not be extended to those rights where the private person was not the only interested party. That might occur when a foreign private party went to a country and signed a contract in which he renounced diplomatic protection covering all matters in it, and one of the matters involved in its execution was a "general interest" of the State of his nationality. In that case, the Calvo clause would not be valid, since it dealt only with the exclusive right of a private person which might be renounced, but did not apply with regard to an interest which was not solely the interest of that private person. That was logical enough, and, indeed, was based on the same logic as the case where a State renounced the diplomatic protection of foreign private persons when the State's interest alone was not involved, but also that of a foreign private person. He had found that method of formulating the principle most appropriate, together with the exceptions, to which he had attributed the same fundamental value.

37. Basis for discussion No. VI—Character, function and measure of reparation—was linked to basis of discussion No I—Legal content and function of international responsibility. But it also raised other questions in connexion with which traditional doctrine and practice might require substantial reconsideration in accordance with the latest developments in international law.

38. Paragraph 1 established two forms of reparation in the strict sense—restitution and pecuniary damages where restitution was not possible or would not be adequate. The principle had been generally recognized and applied in practice.

39. The difficulties arose in the punitive function of reparation measures referred to in paragraph 2, for the problem of penal damages was highly controversial. On the one hand, there was a refusal to admit that international practice recognized the penal character of reparations, and on the other, many authorities, whether in respect of judicial, diplomatic or arbitral practice, stated that, however they might be styled, reparations were in fact imposed with a punitive purpose, a striking case in point being that of the *I'm Alone*. That theory had been criticized on the grounds that the State or community should not be punished for an act committed by one of its officials, which led to an attempt to distinguish between restitution *stricto sensu*—i.e., damages—and reparation in its punitive aspect, the basis being the question whether the sanction should fall on the individual as an organ of the State or as a private person. In the traditional view, the action of the State was restricted to an acknowledgment of the act committed and, on occasion, punishment of the offender. The problem was one of presentation. In traditional practice, the acceptance of State responsibility led to a distinction being drawn between the civil responsibility assumed by the State and the penal responsibility borne by the individual, of which the latter must bear the direct consequences. That was the natural result of the recognition of State responsibility and the punishment of the offender, whether an official or a private individual.

40. In the determination of the extent of reparation, particularly of pecuniary damages, practice and international jurisprudence were not always based on the sole logical criterion, which was the character of the obligation concerned—i.e., the gravity of the wrongful act and the extent of the damage caused. Unfortunately, political considerations had come to play an important role, and the victim State considered that reparation should correspond not only to the material damage inflicted, but to the moral prejudice caused to the "honour and dignity of the State". Frequently, that view was expressed categorically, as in the case of the *I'm Alone*, when a pecuniary reparation was imposed, apart from the damages proper, for the wrong inflicted upon the State. That procedure was hardly consistent with contemporary trends in international law.

41. In another case, the Permanent Court of International Justice had found that "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" (A/CN4/96, p. 110). That was certainly an artificial distinction alien to modern ideas, for it amounted to raising the State to the status of a kind of superman, and the individual, even in the case of a wrongful act leading to his death, was diminished to the level of a mere accessory. The criterion was always the damage suffered by the State.

42. The inconsistency was seen also in the Janes case in Mexico, where, after the assassination of an alien, the court did not base reparation on the original wrongful act of the offender, but imposed a fine on the State for the non-observance of its duty (A/CN.4/96, p. 111). The sanction was not visited upon the individual wrongdoer, because it was held that he had no international personality. That procedure was both artificial and unjustifiable, for it was not based on the simple, logical assumption that reparation should be determined by reference to the gravity of the offence or the extent of the damage caused. Those reflections led to paragraph 3, which referred to the determination of the character and measure of reparation. In practice, the determining authority was the State which, since it had abrogated the claims of the individual, acted arbitrarily in assessing the amount of reparation.

43. Further inconsistencies in traditional procedure were found in basis for discussion No. VII—International claims and modes of settlement. Paragraph 1 referred to the new character of an international claim resulting from the transfer of the claim from the individual level to the State level, with its accompanying political aspects,

and to the difficulties thereby entailed. Those difficulties arising out of the traditional doctrine were stressed in the comment to article 18 of the Harvard Research draft, which he had quoted on page 118 of his report. It was an unfortunate fact that the questions of national prestige involved in disputes between States tended quite to lose sight of the interests of the individual concerned. Diplomatic history was rich in such examples, and it behoved the Commission to seek a solution of that problem of the continuity of claim.

44. No difficulties should arise in respect of paragraphs 2 and 3, for they were based on the principles of the United Nations Charter. Paragraph 2 referred to arbitration, unless the parties agreed to some other more appropriate mode of settlement, while paragraph 3, which was also directly inspired by the provisions of the Charter, excluded the direct exercise of diplomatic protection through a threat, or actual use, of force.

45. With regard to the plan of work, he proposed that, as in dealing with other topics, the Commission should proceed by stages. The first aspect of the whole topic of international responsibility should be the " responsibility of States for damage caused to the person or property of aliens ". That item was one of the greatest interest, and its choice was also in full accordance with the terms of General Assembly resolution 799 (VIII). Moreover, there was ample documentation dealing with cases involving State responsibility. The subject of international responsibility in respect of international organizations was not yet ripe for consideration.

46. Mr. AMADO said that the task before the Commission was the codification of the existing rules of international law in respect of international responsibility. All national doctrines recognized that codification could fill in the gaps and re-state the recognized law in a more precise form. To some extent that simplified the task. However, the works of the many distinguished authors who had ranged over that vast subject were illuminated by expressions of noble aspirations with regard to the rights of mankind, which, it must be admitted, did not facilitate the task that lay before the Commission.

47. His first public contact with the problem had been at Montevideo in 1933, at the Seventh International Conference of American States, where the traditional concepts of international law had reigned supreme — and in passing he would note the frequent and apposite use of the term " traditional " by the Special Rapporteur, who had even quoted Professor Anzilotti, one of those who had most developed the theory of risk according to which the responsibility of a State existed *per se*. That Conference marked the inauguration, under the aegis of the late President Roosevelt and Mr. Cordell Hull, of the new orientation of United States policy. It had been followed by other conferences, for which there had been rich material provided by the Institute of International Law, the Harvard Law School Research and the documents of the former Permanent Court of International Justice at The Hague. In those days, responsibility was regarded as an inter-State matter. It was held that reparation made by a State was the maximum sanction that could be imposed, and any idea that went farther than *restitutio in integrum* was completely excluded. Reparation always took the form of pecuniary damages. Since then, however, other elements, such as the many diverse aspects of human rights, had intervened and the Commission would have to study the extent to which those new factors affected its task of a precise codification of the topic of international responsibility.

48. Mr. HSU, while appreciating the awareness of the Special Rapporteur of the new concepts of international responsibility, felt that he (the Special Rapporteur) had nevertheless somewhat narrowed the field in his proposed plan of work. He agreed that the Commission should adopt a gradual approach to the subject, but did that not imply that the subject should receive the more specific title, " Responsibility of States for damage caused to the person or property of aliens ", which would be more appropriate to the restricted field envisaged?

49. Faris Bey el-KHOURI, while acknowledging the comprehensive approach to a very difficult subject made by the Special Rapporteur, drew attention to one aspect of international responsibility that should not be overlooked. It was illustrated by the claims submitted to the Federal Republic of Germany by the State of Israel in respect of damage inflicted upon those of its nationals who had been victims of Nazi ill-treatment during the war. Those acts had ben condemned by world opinion, and sanctions had been imposed at the Nuremburg trials. Two questions arose, however. Was there any place in the codification of state responsibility for claims made by co-religionists based on ill-treatment inflicted on religious grounds; and, secondly was a newly founded State justified in claiming on behalf of its nationals reparation for wrongful acts committed before its creation? The Commission should not overlook those considerations.

50. Sir Gerald FITZMAURICE congratulated the Special Rapporteur on his systematic and scholarly approach to a subject of great importance. The report would undoubtedly rank as a most valuable contribution to the knowledge and understanding of the subject.

51. The Special Rapporteur had raised the question of the fitness of the subject for codification. In one sense, the topic was eminently fit, for the problem of responsibility was one that arose frequently in inter-State relations; there was also, as the Special Rapporteur had himself pointed out, in the findings of the International Court of Justice, claims tribunals and similar bodies a great volume of case law on the subject. The Commission must not be blind to the fact, however, that—as the Hague Codification Conference in 1930 had discovered—the whole subject was one of extreme complexity. There where two major difficulties. In the first place, there was insufficient agreement on fundamentals; it might be said that there were two opposing schools of thought. In that respect, the report had made a valuable attempt to reconcile certain basic differences of opinion. Secondly, even if agreement on fundamental principles could be reached, the amount of detail involved was so great as inevitably to cause further differences.

52. The Commission should not be deterred by those difficulties, for the need for codification was outstanding. To a large extent, international intercourse depended for its smooth flow on clearly formulated rules; in particular, with regard to the treatment of aliens in the broadest sense of the term—i.e., with regard not only to their persons, but also to their property, commercial interests and the like. In the contemporary world, it was of great importance to promote an international approach to such topics as the supply of capital for the development of under-developed countries. Past experience had unfortunately acted as a deterrent against assuming the risks of such capital investment, and many of the difficulties had arisen from the lack of certainty of the rules governing the position of aliens and their interests. A code on that topic that would reconcile the different points of view and find general acceptance would be of real benefit.

The meeting rose at 12.55 p.m.

371st MEETING

Wednesday, 20 June 1956, at 10 a.m.

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Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Radhabinod PAL, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

State responsibility (item 6 of the agenda) (A/CN.4/96) (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of item 6 of its agenda—State responsibility. If any members wished to make any general observations on the report on International Responsibility (A/CN.4/96) they would, of course, be free to do so. It would, however, facilitate consideration of the topic if the bases for discussion were subsequently taken separately.

2. Mr. EDMONDS said that the report was a most thoughtful study which would provide an admirable basis for a thorough discussion of the topic; for the moment, he would confine himself to a brief general comment. As an American poet had observed, " New occasions bring new duties ", and the closer association of the peoples of the world that had been promoted by the remarkable advance of science during the present century had led to a changed world situation in which a new light had been thrown on international duties and responsibilities. While agreeing with Sir Gerald Fitzmaurice that the subject certainly lent itself to codification,[1] he had to admit that a cursory reading of the draft indicated a range that went far beyond the rules hitherto internationally recognized in that field. It might be that the Commission, by a bold pronouncement, should take a definite step forward. His own approach, however, would be much more cautious, for it must not be overlooked that the Commission would be adopting a code which must be generally acceptable at the present time and not a set of rules full of fair promise only for the future. Without suggesting that the Special Rapporteur had in any way been too forward-looking, he felt that circumspection was required in stating existing law and in formulating rules for adoption by States.

3. Sir Gerald FITZMAURICE, while reserving his position with regard to particular articles, said he would add one or two comments to the remarks that he had made at the previous meeting. He had been struck by the very point made by Mr. Edmonds, and could only endorse the wise recommendation of the Special Rapporteur in the final paragraph of his report (A/CN.4/96, page 31), that the Commission should adopt a gradual approach to the question of codification. As drafted, the report covered the whole field of international responsibility which, although impinging at certain points on the position of the individual, was almost co-terminous with international law. The topic of paramount importance in the Commission's programme was the responsibility of States.

4. The question then arose whether an attempt should be made to cover the whole field of State responsibility, which again was almost coterminous with international law. The primary consideration was not the general responsibility of all international obligations, but, in particular, the responsibility of States for damage caused to the person or property of aliens. To urge such a limitation was in no sense to detract from the value of the report, which would be of considerable use, if only in the demarcation of the field of study and in opening up a wider view of a most important subject.

5. Mr. KRYLOV said that he was glad to share the opinion of a previous and highly distinguished Special Rapporteur, Mr. Guerrero, in whose work the history of the subject could be studied in detail.[2] In approaching the problem of state responsibility, the question naturally arose what progress had been made in the study of the subject during the quarter of a century that had elapsed since the publication of Guerrero's work. During that time the topic of international responsibility had attracted three new elements.

[1] A/CN.4/SR.370, para. 51.

[2] G. Guerrero: *La Responsabilité internationale des Etats*, Académie diplomatique internationale, 1928.