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Summary record of the 414th meeting

Topic:
State responsibility

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lems it dealt with had interested him for years. The Special Rapporteur had concentrated, in accordance with the Commission's recommendation, on the question of the responsibility of the State for damage caused in its territory to the person or property of aliens, a very important aspect of the problem, and one which had been given long consideration by doctrine. Its codification would be a most useful task. Though it was an aspect that lent itself to separate treatment, it was, as the Special Rapporteur had himself discovered, impossible to study it without raising all the fundamental problems and defining all the concepts connected with the general notion of State responsibility.

62. International responsibility might be defined as the situation which arose as a consequence of an unlawful fact imputable to a State as a subject of international law. An unlawful fact existed when there had been non-performance by a State of an international obligation owed by that State or, which amounted to the same thing, violation by the State of the subjective right of another State. For the purpose of determining whether non-performance or violation had occurred, several elements had to be considered. The first was the objective element, that of conduct contrary to the State's international obligations. The obvious conclusion to be drawn from that concept, which some authors at times tended to overlook, was that there could be no violation unless there was an international obligation capable of being violated, in other words, unless there was a rule of international law laying down the obligation in question. The second, subjective, element was that the fact must be imputable to a subject of international law. That involved first and foremost the necessity of the presence of a capable subject, and at the same time the question of whom the commission of a wrong against an alien was imputable in the case of a non-self-governing country or a State under military occupation: was it imputable to the country or State itself or to the administering or occupying Power? That raised the problem of indirect international responsibility. At all events the principle was that, in order to bear responsibility, a country must legally possess the capacity to commit unlawful facts. Furthermore, for a fact to be imputable there must have been some action or omission by an organ of the State. Lastly, there must be the psychological element of fault, a notion to which both Mr. Verdross and Mr. Padilla Nervo had referred, and which was considered by the Special Rapporteur in connection with the rule of "due diligence". In that connexion the various gradations of fault must be borne in mind, from *culpa levis* to *culpa lata*, and the extreme case where it was no longer a question of *culpa* but of *dolus*. Finally, once the prerequisites of responsibility had been laid down, there was yet another element to be considered, that of the circumstances, the unlawfulness of the fact and hence the responsibility, for example, the consent of the injured party, self-defence, etc.

63. A further question, with which the Special Rapporteur had dealt more fully in his first report, was that of the aspects of international responsibility: whether an unlawful international fact produced no other consequences than a duty on the part of the guilty State to make reparation, or whether, at least in certain cases, it conferred on the injured State the right to inflict a penalty on the guilty State. Thus there arose the problem of the punishable or penal consequences of an unlawful international fact, and such institutions as reprisals had to be taken into consideration.

64. In his report the Special Rapporteur dealt separately with unlawful facts committed by legislative, executive and judicial organs. In that connexion, Mr. Ago said that only in rare instances did international law require the performance of a specific act by a specific organ, so that failure by that organ to perform the specific act immediately constituted a breach of an international obligation. As Professor Anzilotti had pointed out, in the case of many obligations it was not specified exactly how they should be fulfilled, and international law left the State some discretion to decide whether such fulfilment should be ensured by the legislature, by the courts or through administrative practice.

65. In that connexion, another question was whether the rule that no claim could be lodged until local remedies had been exhausted was merely a rule of procedure, or a prerequisite for responsibility.

66. Finally, in connexion with the more advanced theory which regarded the violation of fundamental human rights as a source of international responsibility, as well as the subject covered by chapter IV of Mr. García Amador's report, Mr. Ago would merely point out that there could be no international responsibility where there was no genuine legal international obligation binding on States.

The meeting rose at 1 p.m.

414th MEETING

Tuesday, 11 June 1957, at 3 p.m.

Chairman: Mr. Jaroslav ZOUREK.

State responsibility (A/CN.4/106) *(continued)*

[Agenda item 5]

GENERAL DEBATE *(continued)*

1. The CHAIRMAN invited the Commission to continue its general discussion of Mr. García Amador's second report (A/CN.4/106) on the responsibility of the State for injuries caused in its territory to the person or property of aliens.

2. Mr. PAL associated himself wholeheartedly with what had been said by previous speakers in appreciation of the Special Rapporteur's erudite and illuminating report. Of course, that did not mean he was in complete agreement with the Special Rapporteur's views. Frankly speaking, he found himself in disagreement with some of his fundamental principles: it would be very difficult for him to accept, for instance, articles 6 and 9 and his principles of vicarious responsibility, nor could he accept his view of the binding character of the so-called traditional rules in the field of State responsibility.

3. The Special Rapporteur's entire argument was based on the principle that every State had the right to protect its nationals abroad, and that all the other States had a corresponding duty. That right, however, was not unlimited; it certainly did not extend to the exertion of pressure on weaker States in order to secure a privileged position for its own nationals. Much depended on the circumstances in which the nationals went abroad. For example, if it was in the pursuit of commercial enterprise, then freedom in that pursuit could be held to imply as a necessary corollary that the alien newcomer chose to cast in his lot with the citizens of the State in which he had decided to trade, and to expose himself to whatever political vicissitudes occurred there.

Nor did the rule that a State was bound to respect the property of aliens necessarily lead to the consequences portrayed in the Special Rapporteur's draft article 9, since that rule, even in its traditional form, was subject to the proviso that extensive interference in private property was sometimes necessary, either for purposes of taxation, police measures, public health or public utility, or in order to carry out fundamental changes in the political or economic structure of the State or far-reaching social reforms, and that in all such cases the State concerned might have the sole right to fix its own compensation terms for the damage done and to employ its own agencies for that purpose. International law would certainly do better not to restrict the already very limited freedom the State enjoyed in that respect.

4. Those, however, were questions of detail to which he would refer during detailed consideration of the report. In the meantime he would confine himself to some general comments. In that respect he associated himself with every word that Mr. Padilla Nervo had spoken. "The international responsibility of States" was indeed almost co-extensive with international law itself. In the vast field covered by the subject, many threatening and urgent problems had arisen since the Second World War, but none graver than that posed by the nuclear bomb tests to which the most powerful nations had resorted in their quest for the mirage of security. By their stubborn indifference to the terrible hazards of such tests, not only for present generations but for generations yet unborn, the States that had conducted those tests, in disregard of the protests of the weak and helpless peoples at whose doors they were held, had shown scant respect for international responsibility, and the only heartening sign was the reaction their insensate attitude had provoked among common people everywhere. The question that now arose was how best to bring home to the States concerned their international responsibility in that respect. If they seriously contended that such tests were essential to their security, and in any case involved relatively insignificant hazards, surely it was only fitting that they should ask their own people to face such hazards by holding the tests on their own doorsteps, not on those of other nations. And if the Commission was prepared to show such concern about an isolated individual's possible future plight on foreign soil, ought it not to concern itself a little with the appalling dangers that already threatened millions of people in their own homes?

5. Turning to that part of the field that had been surveyed by the Special Rapporteur, Mr. Pal recalled that, in his first report (A/CN.4/96), Mr. García Amador had given an account of the past efforts at codification of the subject, and had referred to certain traditional doctrines prevailing in the international field. His own comments were not directed against the account which the Special Rapporteur had given in that respect, but were aimed at reshaping the Commission's thinking while discussing the subject. Earlier efforts at codification dated from the days of the League of Nations and had almost coincided with two vital events, both of which had materially affected the so-called traditional view.

6. In the first place, in Asia, the end of the First World War had touched off the latent impulses of a gigantic force: huge masses of poverty-ridden colonial slaves had entered the political arena in search of independence. As a result, the geography of international law, in Westlake's phrase, had undergone considerable alteration; international law was no longer the almost exclusive preserve of the peoples of European blood, "by whose consent it exists and for the settlement of whose differences it is applied or at least invoked."[1] Now that international law must be regarded as embracing other peoples, it clearly required their consent no less; and that fact must be steadily borne in mind in attempting to determine to what extent alien property or alien interests in the newly freed countries merited the protection that international law could afford.

7. Secondly, in Europe, the end of the First World War had been marked by great political upheavals, one result of which had been the birth of a Great Power with a completely different ideology of social justice, involving completely different social and economic systems which endangered, among other things, the existing conception of private property. Now, if the system of international law was to be a neutral system within whose compass must be accommodated all existing social structures, clearly the Commission could not regard community life as bound up essentially with one particular set of principles governing the nature of society, but must recapture a frame of mind in which opposing views could be entertained without rancour, and unfamiliar ideas and ideologies judged less in relation to some abstract standard of truth than as a means of expressing widely-felt human needs.

8. The character and extent of the difficulty with which the Commission was faced would be apparent from a single example. The Special Rapporteur had accepted as a recognized principle of international law the right of aliens to possess and dispose of property, and the inviolability of such property except for public purposes, and then only on payment of full compensation by the State. Underlying that so-called traditional principle, however, was the assumption that it was not a legitimate "public purpose" for a State to abolish certain kinds of private property in general, and that the adequacy of compensation ought to be judged, not by the standard which the State in question deemed right in dealing with its own nationals, but by the standards accepted by other States which might have a fundamentally different outlook on social issues and might not realise its special difficulties. That assumption really involved another, namely, that the standard of right and duty which the European States had hitherto prescribed for themselves in their domestic affairs was the universally just standard, and that certain principles governing the nature of society provided the only sound basis for economic relations between States.

9. The Commission's task, however, was surely to seek a clear way of reconciling the just interests of all nations, remembering that all its efforts were directed towards providing a transitional solution, and that it could not therefore with impunity underrate the importance of caution.

10. Mr. BARTOS said it was his pleasant duty to congratulate the Special Rapporteur on his excellent report, and, in particular, to thank him for giving those members of the Commission who had not specialized in the subject a great deal of valuable information about certain source-material which was, he feared, relatively unknown to them.

11. As had been rightly stressed, the subject was a vast one. The League of Nations had worked on it without

[1] John Westlake, "The Native States of India", *The Law Quarterly Review*, Vol. XXVI, No. CIV (October 1910), p. 313.

avail for seven years, and even though there had been considerable progress as regards traditional views on the general question of the legal status of aliens, the question of State responsibility had certainly not become any easier or less complex in the intervening years. In the three weeks that remained to it, there could therefore be no question of the Commission's reaching final decisions, either on the general principles laid down in articles 1 to 3 of the Special Rapporteur's draft, or even on any of the special cases dealt with in the remaining articles.

12. Part of the difficulty lay in the great diversity of source-material. Where different sources reflected different conceptions or laid down different rules, it was necessary to have some criterion by which to judge whether a particular source had general validity or was valid only under certain conditions, in certain areas, or as between certain States. He would therefore like to know which of the different types of source referred to in Article 38 of the Statute of the International Court of Justice should be regarded as the main source for the work of codification on which the Commission was engaged. Clearly, the Special Rapporteur had very definite ideas of his own on that subject, and he was to be commended for having the courage of his convictions; but his ideas might not be shared by other members. The question was of great importance, since, once it was decided one way or another, much light would be thrown, not only on the basic questions of the scope and origin of the existing obligations and the nature of the acts that gave rise to responsibility, but also on such detailed questions as the admissibility of a plea of *force majeure*, the imputability of the acts of ordinary private individuals, reparation for moral as well as physical injury and so on.

13. In Mr. Bartos's view, international conventions, which bound only the signatory States, could only be relevant to the extent that they reflected general international practice. He stressed the word "general", since he, personally, would have certain reservations about proceeding on the basis of "general" Latin American practice unless it coincided with practice in other parts of the world. The same remarks applied to the "general principles of law recognized by civilized nations"; those could only be determined by careful study of the whole field of case-law, and not just selected cases from one particular region. Judged by those criteria, there was at least one rule about which there could be no doubt, namely, that a State was responsible for injuries caused by acts which contravened its international obligations; for Article 36, paragraph 2d of the Statute of the International Court of Justice, which was based on that rule, had been accepted by all Members of the United Nations without reservation. Referring to the Court's judgment in the *Corfu Channel case*, he said he had considerable doubts whether a like responsibility existed in the event of negligence on the part of the State concerned.

14. The first question to decide, therefore, was what constituted the main source, and although that question could be decided on the basis of the Special Rapporteur's report, he doubted very much whether it could be finally decided at the current session.

15. Mr. MATINE-DAFTARY congratulated the special Rapporteur on his interesting and well-documented report; with due respect to Mr. García Amador, however, the articles which he proposed as a result of his studies failed, in large measure, to reflect the existing practice and present-day circumstances.

16. The Special Rapporteur had had a thankless task, because what the Commission was in effect trying to do was to transplant rules of municipal law into the field of international law, and the rules of municipal law relating to civil responsibility differed greatly from one country to another. Moreover, it was a singularly unpropitious moment for such a task, since distrust and suspicion reigned everywhere, and almost all countries, both great and small, in their efforts to ward off the supposed threat of subversion, had recourse to emergency laws and regulations whose effect amounted in practice to a denial of common law. In his view, it was no exaggeration to say that, no sooner had individual rights and freedoms been guaranteed by the constitutions of almost all countries, than the advent of the atomic era had rendered them almost illusory.

17. It was difficult to see how the Commission could give aliens a degree of protection in international law which even nationals no longer enjoyed under municipal law. The Special Rapporteur's text was therefore largely utopian: the work of a learned and idealistic scholar which, like many similar works before it, was likely to receive a cool welcome from responsible statesmen.

18. In trying to bridge the gulf between the theory of "due diligence"—to which he related the theory of an international standard of justice—and the Latin American theory of the equality of nationals and aliens, the Special Rapporteur had sought to take into account current preoccupation with national security and national economic interest. As in the case of most compromises, that had inevitably led him into inconsistency and ambiguity. For example, article 1, paragraph 2, stated that the international obligations of a State resulted from *any* of the sources of international law, whereas article 5, paragraph 1, referred only to fundamental human rights recognized and defined "in contemporary international instruments". Again, article 7 permitted the repudiation or breach of a contract or concession where such action was justified on grounds of public interest or of economic necessity, or where it did not involve discrimination between nationals and aliens, while article 8 permitted the repudiation or cancellation of public debts in similar cases. Again, it was an accepted principle in civilized countries that a State's responsibility to private persons for acts or omissions by its officials was limited to cases where such officials had acted within the limits of their competence; that principle was recognized in article 3, paragraph 1, but violated in paragraph 2. Again, article 4 stated that a denial of justice should be deemed to have occurred if an alien was prevented from exercising any of the rights specified in article 6, paragraph 1; under article 6, paragraph 2, however, the exercise of such rights could be subjected to such limitations or restrictions as the law expressly prescribed for reasons of internal security, economic well-being and so on, and the reservation constituted by that paragraph, expressed as it was in somewhat elastic terms, appeared also to be inconsistent with article 2, which prohibited a State from enacting legislative provisions which were incompatible with its international obligations. Finally, the rights listed in article 6, paragraph 1, included the right to a public hearing and the right to be tried without delay, or to be released, but the sub-paragraphs in which those rights were referred to did not come within the scope of paragraph 2: in other words they were absolute and subject to no limitation or restriction whatsoever; yet it was common knowledge that in practice these rights

were often illusory, even for nationals, owing to the slow working of justice in all civilized countries and the requirements of public order which sometimes made public hearings inadvisable.

19. Careful study showed that, as the Special Rapporteur himself had said, articles 5 and 6 were the keystone of the whole draft. That put the Commission in a somewhat difficult and embarrassing situation. The Universal Declaration of Human Rights was not a binding instrument, and unfortunately all knew that it had not resulted in any increased respect for human rights in practice. The draft international covenants on human rights would be binding instruments, but the Commission on Human Rights had not yet secured their adoption by Governments. He felt it would be unwise for the International Law Commission to poach on the Commission on Human Rights' preserves until the two draft covenants had been adopted, in other words, until the present atmosphere of international mistrust had given way to one of international confidence.

20. In his view, the Special Rapporteur would have done better to hold fast to the perfectly defensible Latin American theory of the equality of nationals and aliens. That would have been more in accordance with the spirit of the United Nations Charter and its condemnation of any discrimination on grounds of race, sex, language or religion. How and by what tribunal did the Special Rapporteur propose that a State be condemned for "manifest negligence" a somewhat elastic term—in taking the measures normally taken to prevent, or punish, acts of ordinary private individuals? As far as punishment was concerned, the courts were rightly jealous of their independence of the Government, and adhered firmly to the basic rule of imputability, which would be extremely difficult to apply in the cases of negligence referred to in the draft.

21. Iran, like many other Eastern countries, needed foreign, technical and financial assistance for its great programme of national development and reconstruction. With that end in view, it had recently enacted a law which gave foreign capital full legal protection on exactly the same basis as domestic capital. Iranian hospitality was a national tradition, and in practice foreigners received better treatment than nationals. His country did not, however, wish by international treaty to place them above the law, since that would bring back too vividly the bitter memories of the capitulations system.

22. Mr. YOKOTA expressed deep appreciation of the Special Rapporteur's treatment of one of the most important and most difficult subjects in international law and general approval of his choice of topic and method of approach.

23. On the question of the basis of international responsibility, he said that he could not agree with the Special Rapporteur's conclusion that, because the traditional theories of "causality", "fault", "risk" and so forth were so academic, an inquiry into them would not produce any practical results or solutions conductive to the codification of the subject (A/CN.4/106 chap. I). He did not regard the theories as entirely academic; indeed, they were of significance for the solution of actual cases.

24. Complicated as the question was, he did not think that the problems attending it would prove insuperable if the proper approach were adopted. It was pointless to try and discover a single universal principle underlying the responsibility of States, for none existed. In most cases, however, international responsibility arose out of a fault. And, conversely, it was a well-established principle of international law that whenever a fault was imputable to a State its international responsibility was engaged. As stated in article 1, paragraph 4, of the resolution adopted by the Institute of International Law at its Lausanne session in August-September 1927 (A/CN.4/96, annex 8), no responsibility of the State existed "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". He hoped that the Commission would attempt to solve the problem on those lines.

25. With regard to violations of fundamental human rights constituting a source of international responsibility, Mr. YOKOTA approved, in principle, both of the approaches adopted by the Special Rapporteur and of his conclusions. At the same time, he fully understood the anxiety aroused in other members of the Commission by the Special Rapporteur's somewhat ambitious proposals. The only reasonable solution was to reconcile as far as possible the "international standard of justice" with the principle of the equality of nationals and aliens before the law. Since both principles had sound foundations and were to a large extent accepted by States, it would be unwise to adopt one and sacrifice the other. Opinions, it was true, might be divided as to what constituted fundamental human rights, but it should not be impossible to agree on a minimum. In that case article 5, paragraph 2, of the Special Rapporteur's draft would be acceptable.

26. Mr. EDMONDS said that no one familiar with legal writing could fail to be impressed with the magnitude of the task undertaken by the Special Rapporteur and the sincerity of purpose with which he had ventured into what, to some extent at least, was an uncharted field. In proposing specific articles for consideration, the second report of the Special Rapporteur provided the Commission with the opportunity to discuss certain special questions.

27. Mr. Edmonds said that he would reserve the presentation of his position on the questions raised by those articles until they came before the Commission individually. In the meantime he would only comment on general principles.

28. It was difficult for him to accept the view that certain fundamental rights had been recognized and had become familiar in international law. Though they had undoubtedly been much discussed, and to some extent formulated in specific terms, he knew of no instance, apart from the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in 1950 by the Member States of the Council of Europe, where they had ever been accepted internationally, for, as the Commission was aware, the United Nations covenants on human rights had not progressed beyond the drafting stage. The adoption of articles 5 and 6 of the Special Rapporteur's draft would not be warranted by existing principles of international law. It was not the task of the Commission to speculate on what international law should be; the Commission's terms of reference were to codify existing rules.

29. Again, though the idea of liability without fault

might be accepted in special cases, he would not go so far as to say that it was acceptable in all cases, or generally recognized, and with regard to this matter also, he thought that the Commission should confine itself to codifying existing principles.

30. Mr. KHOMAN also congratulated the Special Rapporteur on the excellent spadework he had done for the Commission's task of codification. The ground on which he had had to venture was uncertain and strewn with controversial principles and difficulties of interpretation. Thanks to his report, however, the Commission now had a clear, if complex, picture of the legal situation with regard to international responsibility.

31. He could not fail to note the progressive tendency of the report, and the Special Rapporteur's fidelity to the ideals of his nation and continent. But while he admired and supported the developments he advocated in the matter of responsibility and the juridical status of aliens he feared that they would meet with some opposition if submitted in that form to Governments. For example, though it was the tradition in south-east Asia, and in Thailand in particular, to recognize the rights of aliens and accord them facilities for engaging in trade, he thought it would be unwise to attempt to extend those rights and facilities, thereby widening the field of potential State responsibility.

32. It was largely a matter of striking the right balance between opposite trends. The very notion of the protection of foreigners and the broader problem of State responsibility was born in Europe, and might be said to have sprung from necessity, and especially from the conditions which existed then in Europe, where at one time so many restrictions had been placed on aliens. The reaction against that unsatisfactory state of affairs had led to the other extreme—the system of capitulations. Thailand had gone through that stage too, with the difference that the right of aliens to be governed by their own laws had been freely accorded by and not extorted from, its Government.

33. While in favour of ensuring everything essential to the personal safety and dignity of aliens, he considered that a balance must be struck between their interests and those of the State in which they resided, and that special account should be taken of the potential threat to a State's security offered by the presence of an unduly large proportion of aliens within its territory.

34. Mr. EL-ERIAN paid a tribute to the Special Rapporteur for his systematic and scholarly report, which provided an excellent basis for the Commission's discussions. He fully approved the Special Rapporteur's view that special priority should be given to the subject of international responsibility. The Special Rapporteur, with the approval of the Commission, had rightly adopted a gradual approach to so complex a problem.

35. However, while not underestimating the importance of the special topic he had selected, i.e. the responsibility of the State for injuries caused in its territory to the person or property of aliens, Mr. El-Erian could think of other aspects of international responsibility that merited prior study. Since a new international order had been established in 1945 by the signature of the Charter of the United Nations, there had been flagrant violations of its principles, and in particular of the cardinal principle of the prohibition of the use of force against the territorial integrity or political independence of any State, on the pretext of so-called police action. The principles of Chapter XI, on responsibility towards Non-Governing Territories, had also been ignored, on the plea that, the chapter being merely a declaration, the obligations it enunciated were moral and not legal ones. Problems such as those should be given priority, with a view to defining clearly the responsibility of States in that connexion.

36. The responsibility of States towards aliens was closely bound up with the question of the status of aliens, and was, as Jessup had pointed out,[2] one of the most highly developed branches of international law. In the development from the position in antiquity when the foreigner was outside the domain and protection of the law, and in Ancient Greece, when non-Greeks or barbarians had been regarded as born enemies and potential slaves, to a more enlightened attitude which led to the recognition and regulation of the juridical status of aliens in international law, Moslem law, by the tolerant treatment and legal protection it accorded to non-Moslems, had, as Nussbaum had remarked,[3] made a significant contribution. The nineteenth century, however, had seen the emergence of two regrettable trends. The first had found expression in the system of capitulations, under which certain States were compelled to accord to aliens privileges that put them beyond the realm of law and outside the jurisdiction of the territorial State, and, by a complete reversal of the previous position, it became the ambition of the State's own nationals to enjoy equality of rights with aliens. The second trend had been towards making the question of the rights of aliens a pretext for intervention in the domestic affairs of States, a trend particularly marked in the Near East and Latin America. Finally, however, the legal rules established at The Hague Convention of 1907[4] and in previous international instruments, and later incorporated in the United Nations Charter, had prohibited such practices.

37. Codification of the subject of international responsibility was no easy task, despite the clearly defined principles emerging from the vast body of case law produced by the numerous claims commissions and arbitral tribunals. Care must be taken to eliminate unjustified and harmful political considerations, and to counteract the tendency prevalent in "power politics" to place the smaller countries on a subordinate footing. There were three points to be borne in mind in codifying the subject. First, it should not be based solely on traditional international law, but should reflect the essential principles of the United Nations Charter. It should also be grounded on recognition of the inherent right of peoples to own and develop their own natural resources, as formally enunciated in General Assembly resolution 626, (VII). Finally the codification should provide legal rules that were consistent with the new international order established by the Charter, and not merely ensure the protection of vested interests or the maintenance of the *status quo,* which might prove to be harmful

[2] Philip C. Jessup, "Responsibility of States for Injuries to Individuals", *Columbia Law Review,* Vol. XLVI, No. 6 (November, 1946), p. 904.

[3] Arthur Nussbaum, *A Concise History of the Law of Nations* (New York, The Macmillan Company, 1947), p. 27.

[4] Convention for the Pacific Settlement of International Disputes. See *The Hague Conventions and Declarations of 1899 and 1907,* 2nd ed., ed. James Brown Scott, Carnegie Endowment for International Peace (New York, Oxford University Press, 1915), pp. 41–81.

to friendly relations among peoples and would not serve the cause of international peace and co-operation.

38. As far as the individual articles were concerned, article 4, in his opinion, covered cases to which the term "denial of justice", in the traditional sense, did not apply. The concept of "denial of justice" was normally used only with reference to juridical procedure and the law of international claims—a question which the Special Rapporteur had decided not to deal with in the draft.

39. While agreeing in principle with the idea of the equality of the rights of nationals and aliens, he feared that any attempt to work out rules of international law on that basis would encounter many difficulties. Such equality, as he understood it, related to the question of protection and fundamental guarantees on such matters as the possession of legal personality and capacity, and the enjoyment of fundamental rights and freedoms. The very broad connotation given to the concept in articles 5 and 6 was not, he thought, in accordance with international law. It was a customary rule of international law that there were limits to the rights that the State must accord to aliens in the field of civil and commercial law, especially property rights. In view of the economic importance of land, for example, the right to own it was, in the municipal law of many States, reserved for their nationals, and such a provision had never been regarded as contrary to international law. Similarly, certain professions or trades were closed to aliens as a matter of labour policy or national interest, and some countries allowed only their nationals to own shipping. Thus, there were many exceptions to the general principle of equality of nationals and aliens. Indeed, it might be argued that it was inherent in the very concept of nationality that nationals should have special duties towards the State and corresponding special rights.

40. In article 9, to which he would revert later, he had been gratified to find an enunciation of the right of States to expropriate property for reasons of national interest.

The meeting rose at 6 p.m.

415th MEETING

Wednesday, 12 June 1957, at 9.30 a.m.

Chairman: Mr. Jaroslav ZOUREK.

State responsibility (A/CN.4/106) *(continued)*

[Agenda item 5]

GENERAL DEBATE *(continued)*

1. The CHAIRMAN said that, before inviting the Commission to continue its general discussion of Mr. García Amador's report (A/CN.4/106), he wished to direct its attention to the scope of the task which the Commission had been invited to undertake. The Special Rapporteur's views on that question were already clearly indicated in article 1, paragraph 2, of his draft, which read:

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

Moreover, in his comment on article 1, the Special Rapporteur expressed the opinion that the Commission's draft:

> "should be self-sufficient and should not constitute a merely subsidiary instrument which leaves the final solution of the problems to the very principles and rules of international law which it is supposed to assemble and formulate in an ordered and systematic form."

2. He appreciated the reasons which had led the Special Rapporteur to attempt to cover the entire subject of the legal status of aliens in all its substantive aspects, instead of contenting himself with the technical rules that were usually regarded as exhausting the subject of State responsibility. He wondered, however, whether the Commission could really undertake that task, every part of which fairly bristled with difficulties. In his opinion, the Commission should study only the circumstances in which the State could be held responsible for an act which gave rise to damages and a claim from a foreign State, without engaging in a study of of the rules governing the juridical condition of foreigners on the territory of the State. He recalled, moreover, that the treatment of aliens figured separately on the list of topics which the Commission had, at its first session in 1949, provisionally selected for codification.[1]

3. Mr. FRANÇOIS said that he fully associated himself with what the Chairman had said. He personally was strongly in favour of limiting the scope of the task with which the Commission was faced.

4. He paid a tribute to the Special Rapporteur for his remarkable report, which in general he was glad to endorse. In commenting on the report, some members of the Commission had, in his view, strayed far beyond the confines of the subject. The question of tests of nuclear weapons, for example, seemed to have very little bearing on the subject of State responsibility, at least if one accepted the comparatively restrictive interpretation of that term that had been adopted in 1930 by the Conference for the Codification of International Law and, now, by the Special Rapporteur. He entirely agreed with the Special Rapporteur that a State's responsibility could be said to be involved only when some specific international obligation had been violated. The substance of such obligations, however, was, in his view, a matter that lay outside the scope of the draft, which was concerned rather with the question: given certain obligations, in what cases was the State responsible in the event of their breach or non-observance?

5. Though many of the criticisms that had been directed against his draft were unjustified, the Special Rapporteur had to some extent provoked them by including matter that was not germane to the subject as thus defined. It was a measure of his courage that he had grappled with questions that had been mainly responsible for the failure of the 1930 Codification Conference, and had sought to bridge the gap between the two theories or principles which had then clashed. In Mr. François's view, draft article 5 was perfectly acceptable, and the whole difficulty lay in article 6, which

[1] *Official Records of the General Assembly, Fourth Session, No. 10,* para. 16.