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Summary record of the 415th meeting

Topic:
State responsibility

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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.

attempted to lay down substantive rules as to what constituted fundamental human rights. It was hardly necessary to say that that was a very controversial question; as had already been pointed out, the Universal Declaration of Human Rights had no binding force, and general agreement had not yet been secured regarding the draft covenants. If the International Law Commission now attempted to list what were, in its opinion, fundamental human rights, it would be duplicating the work that was still continuing on the convenants. In his view, therefore, it would be preferable to delete article 6 and simply retain the reference to "internationally recognized fundamental human rights" in article 5.

6. He also shared the doubts that had been expressed regarding article 9, relating to acts of expropriation. Even if that question was at first sight less controversial than the definition of fundamental human rights, one aspect of it, namely, the question of nationalization, still gave rise to such conflicting views that the Institute of International Law had thought fit to make an entirely separate study of it. He was therefore inclined to think that article 9 should be deleted too.

7. Thus abridged, the draft would not be revolutionary, but would still be of considerable practical value as a statement of certain guiding principles governing the future development of international law in that field.

8. Sir Gerald FITZMAURICE thought the Commission would not be surprised to hear that he could not agree with much of what had been said at the previous two meetings. He was not referring to what had been said regarding the interpretation of the Charter and the use of force; with much of that he personally could agree, though he doubted its relevance to the subject of State responsibility unless that subject was equated with the whole of international law. In theory, of course, that could be done, but as he would attempt to show later, such a course would, in his view, be unfruitful.

9. He was referring rather to the political statements that had been made. While he had no intention of answering them in detail, that was not because there was no answer—quite the contrary. By no means all the complaints were on one side, as could be seen by anyone who studied the cases relating to the treatment of foreigners that had come before international claims commissions and arbitral tribunals. He defied anyone to read, for example, the *Cotesworth and Powell* case[2] —to quote an instance that did not concern any of the countries from which members of the Commission were drawn—without being shocked at the kind of treatment sometimes meted out to foreigners. In virtually all such cases the injured State had refrained from forcible intervention, and had had recourse to diplomatic intervention only; and he thought that anyone who studied the cases would be bound to agree that the decisions reached by the claims commissions and arbitral tribunals were fully justified.

10. The question of State responsibility had been depicted by some members as one in which the relevant rules of law had been invented in comparatively recent times for the sole purpose of enabling certain Powers to dominate others. No one who was familiar with the history of the subject could seriously uphold that view. The rules relating, for example, to the denial of justice were centuries old; thus they could be found, stated in very modern terms, in *De Bello, de Represaliis et de Duello,* a treatise written by the Italian jurist Giovanni da Legnano, three hundred years before Grotius. Obviously, at that time there had been no question of Great Powers, in the sense in which that term was now understood, or of one State seeking to impose its rules of law on another. The reason why the rules had been evolved was that the treatment of foreigners in most European countries had, in those days, been such as to give rise to numerous altercations and disputes. It was, he submitted, perfectly natural that centuries later, when they had come in contact with other countries where foreigners were treated in that way, the European countries should have applied the same rules that, in an earlier age, had enabled them to settle such problems satisfactorily among themselves.

11. There was at least one remark of Mr. Matine-Daftary's with which he entirely agreed, namely, that there could hardly be a subject which it would be less propitious to try to codify at the present time. As had been only too evident, the subject was one which immediately touched off strong emotional charges, and the tendency to approach it from a political and ideological standpoint, entirely inappropriate in a commission of jurists, appeared to be irresistible. At the eighth session Sir Gerald agreed[3] that the subject should be codified if possible, but that was before he had heard speeches of the type and tone delivered at the previous two meetings. If those speeches reflected the spirit in which the Commission intended to deal with the subject, it would be preferable to abandon it altogether until such time as it could revert to it under more favourable circumstances.

12. Turning to the Special Rapporteur's clear and interesting report on a complex subject which raised some of the most difficult theoretical questions to be found in international law, he recalled that its author had specially requested the Commission's comments on four main questions, namely, the basis of State responsibility, the denial of justice and his treatment of that matter in connexion with fundamental human rights, breaches of contract and the State's responsibility for the acts of ordinary private individuals (413th meeting, para. 38).

13. Regarding the first question, he felt it would be a mistake to try to equate the subject of State responsibility with the whole of international law, since the sole result of doing so would be the truism that a State which violated international law incurred responsibility for doing so. In cases where individuals suffered injury on foreign territory, two questions arose: the first, whether the acts amounted to a breach of international law; and the second whether the circumstances were such that responsibility could be imputed to the State on whose territory the injury was caused. It was, in his view, the second question which was of the real essence of the subject of "State responsibility". Indeed, he sometimes felt it would be desirable to abandon that term and speak only of "the problem of imputability".

14. That problem in itself had many aspects: for ex-

[2] John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, D.C., U.S. Government Printing Office, 1898), Vol. II, pp. 2050 ff.

[3] *Yearbook of the International Law Commission, 1956,* Vol. I. (United Nations publication, Sales No.:1956.V.3, Vol. I), 370th meeting, paras. 51 and 52.

ample, what were the circumstances, if any, in which responsibility could be imputed to one Government for the acts of another, for acts or events in territory which had not been under its control at the relevant time, for acts of persons, such as revolutionaries, who were not, or not entirely, under its control, for acts of particular judicial or administrative organs of the State, and so on? Those questions of imputability could arise even where no question of aliens or alien property was involved, but the fact that they arose mainly in connexion with the treatment of aliens had led to a tendency to identify the two subjects, although they were in essence separate.

15. He sympathized with the Special Rapporteur's efforts to avoid the question of *culpa* or "fault", which was not only a difficult one but was frequently of little importance in practice, either because the "fault" was not contested, or because, even if the necessity for it was contested, there was no serious dispute in the given case that responsibility existed. He did not, however, think that the Commission could altogether avoid the question, which arose precisely with regard to the type of case it was now considering, namely, where the acts of officials or private individuals caused injury to aliens or alien property. In the last analysis, it could not, he thought, be maintained that a State could be held responsible where no "fault" was involved. To take an example from the field which the Commission had recently been considering, supposing an ambassador went out incognito, committed a misdemeanour and was arrested without revealing his identity, the receiving State could not possibly be held responsible for an undoubted breach of diplomatic immunity, since no "fault" could be said to exist.

16. The Special Rapporteur had raised a slightly different question, whether responsibility could arise as a result of objective risk, in other words, if no breach or non-observance of international law was involved. His answer to that question was an emphatic negative. The theory of risk prevailed under certain systems of municipal law, but could not be held to extend to international law. The International Court of Justice had dealt with that very question in the *Corfu Channel case,* and had concluded that there must be a clear breach or non-observance of international law and some element of fault; and Mr. Krylov, one of the dissenting judges, had specifically agreed with that conclusion[4]. The Special Rapporteur appeared to suggest that the tribunal had come to a contrary conclusion in the *Trail Smelter Arbitration* (1938-1941) between the United States and Canada,[5] but the tribunal's decision had in fact been based on the assumption that a breach of international law had occurred, on the basis of the principle *sic utere tuo ut alienum non laedas;* and that if there had been no breach there would have been no responsibility.

17. Summing up his views on the first point on which the Special Rapporteur sought the Commission's advice, therefore, he said that, in his view, responsibility arose when the facts were such as to lead to a finding that there had been a breach or non-observance of international law, and when the circumstances were such that the responsibility for such facts could be imputed to the State.

18. Turning to the second point, he observed that it at once raised the controversial question whether it was a complete and sufficient answer to a charge of maltreating foreigners to say that they were treated in exactly the same way as nationals. The suggestion which the Special Rapporteur had made with a view to reconciling the two opposing schools of thought in that respect merited careful attention. In his own view, which was endorsed by most of the writers and the great majority of decisions in cases which had come before a claims commission or an arbitral tribunal, the law was very clear. There was, he thought, no doubt that, *prima facie,* it was sufficient to treat foreigners in the same way as nationals; but that rule was founded on the assumption that the treatment of nationals would conform to certain minimum standards of law and justice. Thus, supposing that the laws of a particular country provided redress against physical injury only in the event of death or disability, could it be seriously maintained that, in the event that an alien received a serious injury which did not cause death or disability, the State concerned could legitimately claim that he was not entitled to any redress, since its own nationals were in the same position? The difficulty was to define what was meant by a minimum standard of law and justice.

19. The Special Rapporteur's draft articles 5 and 6 had been criticized on the ground that there was no universally received definition of human rights, but, in his view, the Special Rapporteur was not suggesting that there was, but only that by recourse to the concept of human rights it might be possible to provide such a definition. Thus far he was therefore in considerable sympathy with the Special Rapporteur's attempt, although he did not entirely agree with the wording he proposed. It was possible to conceive of cases where there had been no breach of fundamental human rights, but in which it was nevertheless an insufficient answer to say that aliens received the same treatment as nationals. It might therefore be necessary to go a little further than the Special Rapporteur had done. In particular, it seemed that the wording of article 4, paragraph 3, was too restrictive: if a judicial decision or court order had been manifestly unjust, it should not also be necessary to show that the decision or order would have been different if it had not been for the foreign nationality of the person concerned; the word "and" after "manifestly unjust" should therefore be replaced by "or". There was a great mass of authority for the view that, where palpable injustice had occurred, the responsibility of the State was involved, even if there had been no special discrimination.

20. As regards the clauses relating to breach of contract, he said that, in the light of an intensive study which he himself had had occasion to make into that very difficult question, he had found that imputability was usually recognized in such cases only where there was some element of a delictual character over and above the simple breach of contract, for example, if the breach had been purely arbitrary. In the great majority of cases, the matter was rather one of diverging views as to interpretation and application of the contract; and as the contract was concluded under private law, a claim alleging breach or repudiation of it must first be dealt with in the local courts. Only if that resulted in a denial of justice, as that term was understood in international law, could State responsibility arise, and then in consequence of the denial of justice, not of the original breach of the contract. He therefore fully endorsed the basic

[4] *Judgment of 9 April 1949: I.C.J. Reports 1949,* p. 4.

[5] United Nations, *Reports of International Arbitral Awards, Vol. III* (United Nations publication, Sales No.: 1949.V.2), pp. 1911 ff.

principle underlying article 7, even if its drafting could be improved.

21. Nor did he dissent from the Special Rapporteur's approach to the question of public debts in article 8.

22. The general principle laid down in article 9 regarding acts of expropriation was also unexceptionable, but the article did not touch, for example, on the possibility of discrimination against foreign interests. Nor did it define what was means by "justified on grounds of public interest". He did not wish to refer to any particular cases, but he felt that anyone who studied the cases of expropriation that had arisen since the Second World War would be struck by the fact that they had frequently been aimed specifically against foreign interests, even against the interests of a particular foreign country; moreover, it was often questionable whether the grounds of public interest which had been advanced were not a cloak for political considerations. Another point which was not referred to in the Special Rapporteur's text was that such cases had often entailed the repudiation of a contract or concession, contrary to its clear terms. Unless the article could be considerably expanded and elaborated in order to cover all those points, he was inclined to agree with Mr. François that it should be deleted.

23. Finally, regarding acts of ordinary private individuals and internal disturbances, he was in very general agreement with the Special Rapporteur. In principle, the State did not incur direct or even indirect responsibility for the acts of ordinary private individuals. It did, however, incur responsibility for certain acts or omissions of its own in connexion with the act of an individual. For example, if a burglar entered a foreigner's house and injured him or his property, the State was not responsible, provided it maintained a normally efficient system of public order and justice; it was only responsible if its system of public order did not provide the normal measure of protection which anyone living in a country was entitled to expect the authorities to provide, or if its authorities failed to try and arrest the offender and mitigate, as far as possible, the results of his act. The former hypothesis was covered by the Special Rapporteur's draft article 10, but the latter, he thought, was not.

24. Similarly article 11, relating to internal disturbances, dealt with one aspect of the matter but not with another. It dealt with the case where, internal disturbances having broken out, the authorities failed to take the normal steps to prevent or punish acts which caused injury to the person or property of aliens. It did not, however, deal with the question of responsibility for the actual occurrence of the internal disturbance. It was, of course, a general rule that a State was not responsible for the mere occurrence of civil disturbances, which could happen even in the best regulated States; but if it could be shown that the authorities knew, or had reason to suspect, that disturbances would occur, and then failed to take police or other measures to prevent them or to mitigate their effects, they might be liable for all the consequences.

25. Mr. TUNKIN said that, as far as the Soviet Union was concerned, the part of the problem of State responsibility under consideration was practically a matter of past history. Before speaking, therefore, he had wished to hear the views of his colleagues from those parts of the world where the problem was one not only of economic but also of political significance, affecting sometimes the very independence of States. Mr. Padilla Nervo, Mr. Pal, Mr. El-Erian and others had raised certain fundamental points regarding the responsibility of a State for damage suffered by foreign nationals; he thought the views they had expressed deserved careful consideration. For his part, he would confine himself at that stage of the discussion to a few general comments regarding the Special Rapporteur's interesting and learned report.

26. The problem of State responsibility reached down to the very foundations of contemporary international law. It was therefore essential to bear in mind the recent developments in international relations and international law, which were due to the progress of human society. Two events were of particular importance in that connexion: first, the emergence and growth of a new socialist economic system, with the result that the co-existence of two different economic systems, both on a world-wide scale, had now to be reckoned with; and second, the attainment of independence by a great many former colonial and dependent territories, a process which was still continuing.

27. It was not only the geography of international law that had changed, as Mr. Pal had pointed out, but its economic foundation. Present-day international law could not be a system of legal rules imposed by States belonging to one economic system on States belonging to another; world-wide international law could not contain rules which were incompatible with the principles of one of the two main economic systems. As Mr. Padilla Nervo had rightly pointed out, the countries on whom international law had formerly been imposed in order to facilitate their exploitation were now called upon to partake in its formulation. The further development of international law should be on a basis of peaceful competition and collaboration between all States, irrespective of their political, economic or social systems. International law was one means to ensure their peaceful co-existence.

28. Those considerations dictated a certain approach to the problem in question. Aliens must not be regarded as a privileged group enjoying special privileges. The fundamental principle was that they must be subject to the law of the country of their residence. Individuals, whether nationals or aliens, were not, in fact, subjects of international law at all; as Mr. Verdross had said in his excellent treatise on international law, individuals as a general rule were *"nicht völkerrechtsunmittelbar"* (not directly under international law)[6]. The Special Rapporteur appeared to hold a different view, since he said in his commentary that human beings as such enjoyed the direct protection of international law. That view, which was reflected in many of the draft articles, was, in his opinion, unacceptable.

29. There were, of course, differing views regarding the scope of relations which could be regulated by international law. Kelsen's view was that it was not juridically impossible for all matters which were the domestic concern of the State to be regulated by international law. But if it was said that something was juridically possible, it did not necessarily mean that it was really possible. There were fundamental factors at work which made it impossible for contemporary general international law to regulate some matters which were, and

[6] Alfred Verdross, *Völkerrecht*, 3rd ed. (Vienna, Springer-Verlag, 1955), p. 77.

should remain, within the domestic jurisdiction of a State. Those matters certainly included internal relations pertaining to different economic systems. But changes in the economic system of a State might affect aliens. Present-day international law could not develop unless it was clearly recognised that it was not its role to try and regulate the internal economic relations of States belonging to two fundamentally different economic systems.

30. Turning to the question of when a State incurred international responsibility, he found himself largely in agreement with Mr. Ago and the Special Rapporteur, as well as with some remarks of Mr. Edmonds. He agreed that responsibility could only arise from some act or omission which violated the international obligations of the State; the principle of "fault" should be accepted as a general principle underlying the Commission's whole treatment of the subject. In article 1, however, the Special Rapporteur referred to "some act or omission on the part of its organs or officials"; not all organs of the State and not all its officials could represent the State as a subject of international law, and the question of local remedies accordingly appeared to arise in that connexion.

31. He also agreed with the Special Rapporteur that the expression "international obligations of the State" should be construed to mean obligations resulting from any of the sources of international law. There was, however, some confusion in the report as to what were the real sources of international law. He agreed with Mr. Matine-Daftary that, in practice, there were only two such sources, namely, conventions and the customary rules of international law. He fully agreed with Mr. Amado that before any question of responsibility could arise it must be possible to point to some rule of international law which had been violated. That would mean, for instance, leaving out of account any problem of human rights.

32. He agreed with the Chairman that the first question to decide was the scope of the study. Since the violation of any rule of international law raised the question of State responsibility, the subject might be said to cut across the whole field of international law. It was obviously impossible, however, for the Commission to review the whole of international law, and indeed the subject had not been referred to the Commission in that form. He accordingly supported the view of previous speakers that the Commission should leave out all substantive rules and deal only with State responsibility in the strict sense of the term.

33. The CHAIRMAN, speaking as a member of the Commission, congratulated the Special Rapporteur on a valuable report which set out clearly the problems that the Commission had to face.

34. With regard to the sources of the international obligations, the violation of which involved the responsibility of the State, he agreed that it would be preferable, as in previous drafts concerning the same field, to refer to the rules of general international law without attempting to codify the fundamental rules, the violation of which would involve the responsibility of the State. He was glad to note that the Special Rapporteur intended to deal, in his next report, with the question how international responsibility arose, a question bound up with the question of the exhaustion of local remedies. If the Commission could agree on the principle that a State could not be made responsible for an unlawful act until all local remedies had been exhausted, it would have taken a step forward. Generally speaking, he thought it hardly possible for a State to be held responsible when a case had only passed through the lower courts, although there were exceptions to that rule, for example if it was clear from precedents that the aggrieved party had no chance of obtaining redress by taking the case further, or if the injury had been caused by persons who enjoyed diplomatic immunity.

35. On the difficult problem of denial of justice, he agreed with Sir Gerald Fitzmaurice that the Special Rapporteur had perhaps interpreted the concept too narrowly. He could recall a number of cases in which courts had deliberately refused to apply the correct law to an alien. In one case, for instance, a court had refused to apply Czech law (at a time when the Austrian Code of 1811 had still been in force in Czechoslovakia) on the ground that it could not know what laws were in force behind the "iron curtain".

36. He viewed with great sympathy the course chosen by the Special Rapporteur in seeking a legal basis for international responsibility in the rules concerning the international protection of human rights, and thought that a solution might one day be found on those lines, but doubted whether at the moment there was a sufficient legal basis for such a solution. The Universal Declaration of Human Rights was not a legal instrument, the proposed covenants on human rights were still under discussion, and the only international instrument stipulating specific legal obligations that had as yet been adopted was the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome in 1950, which applied only to a small number of countries. He accordingly agreed with Mr. François that the question should be held over for the time being. In the absence of applicable rules of international law, the only basis on which the status of aliens could rest was the principle that they should be accorded the same treatment as nationals in that particular respect.

37. As far as the question of expropriation was concerned, he did not consider that the term could cover "nationalization", which was entirely different from expropriation not only in scope but also by reason of its economic basis. Nationalization, in fact, was the term used to describe the transfer of whole branches of the economy from private to collective ownership. If that definition of the term "expropriation" were admitted, the Commission should easily be able to reach agreement on the principle.

38. Mr. AGO noted the emergence of two trends in the course of the illuminating discussion on the Special Rapporteur's report. Some speakers had been more concerned with the essentially technical and legal side of international responsibility, and had put forward suggestions which would be of great value if the subject was to be dealt with in greater detail; others had emphasized the political aspects of certain questions which had been dealt with by the Special Rapporteur, and which concerned only indirectly the question of responsibility.

39. As far as he could see, the Commission had the choice of three courses. Firstly, it could adopt the radical course of stating that, for various reasons, the subject was not ripe for codification. Secondly, it could deal with the subject covered by the report in all the aspects touched on by the Special Rapporteur, following the tendency, found in many works on international respon-

sibility for damages suffered by foreigners, to widen the subject to include all the substantive rules regarding the treatment of aliens. There was, of course, nothing to prevent the Commission's adopting that course, but he himself doubted the wisdom of undertaking such a wide task, which would involve considering and defining all the obligations of States towards aliens before studying the consequences of violations thereof, and settling not only the technical and legal problems involved but the political ones as well though the latter might not present such insuperable difficulties as some supposed. Thirdly, the Commission could, as advocated by the Chairman, leave all the matters concerning the definition of the obligations of the State as to the conditions of aliens, and confine itself to the examination of the questions within the framework of responsibility proper, i.e., of the consequences of an international illicit act committed in the field under consideration.

40. Of those three courses, Mr. Ago preferred the third, which would enable the Commission to do a useful job without engaging in a debate on the treatment of aliens, a subject on which it might prove sometimes impossible to reach agreement, and which, in any case, could usefully be allowed to evolve further before attempting to codify it. One thing that was clear, however, was that the Special Rapporteur must have clearer directives than had so far emerged from the discussion.

41. If the third course were adopted, the articles already drafted by the Special Rapporteur would need to be considerably amplified. Among the many points to be considered was, for example, the question at what moment responsibility arose. In the specific case of denial of justice, was the international illicit act imputable to the State from the time of the court judgment, or did it date back to the time when the wrong was initially inflicted? The question was no minor one, for the extent of the reparation due might depend on the answer.

42. Other points to be considered were the possibility of imputing to a State an international illicit act committed by another State, the question of "fault" as a condition of responsibility, and that of the circumstances which excluded the wrong character of an act and, therefore, responsibility, for example, the consent of the aggrieved party, or self-defence. It would also be necessary to study the question of the prior exhaustion of local remedies, and the conditions to which the exercise of diplomatic protection was subject. Finally there was the question whether the duty to make reparation implied the obligation to make full restitution, or if the payment of an equivalent compensation could be admitted, and whether the obligation to grant reparation was the only consequence of an illicit act in the field under consideration.

43. A separate question, on which it was too early to take any decision, was the form that the Commission's contribution should take. That naturally depended on the scope given to the subject. His own impression was that the subject was not one on which an international convention could be conveniently concluded at that stage. A draft code, on the other hand, would be most valuable.

44. Mr. BARTOS observed that on some aspects of international responsibility rules of international law undoubtedly existed, but they were of a very general nature. On other aspects there were precise rules, but they were accepted by some States and only tolerated by others. A subject so controversial and still in course of evolution did not lend itself to codification in the strict sense of the term, and the Commission should accordingly combine the work of codification with the encouragement of the progressive development of the law in the matter. The Special Rapporteur was accordingly to be congratulated on having emphasized the progressive element in his report, though he had perhaps been ill-advised in presenting relative innovations as constituting existing, recognized law. There were still many points on which international acceptance must be obtained before it would be possible to talk of rules of law.

45. He agreed with Mr. Tunkin and Mr. Ago on the need to give the Special Rapporteur clear instructions for his future work, but thought it preferable to entrust a committee with the task of elaborating them. Any attempt to go into further detail as a Commission would merely mean a prolongation of the debate on the present divergent lines.

46. Mr. LIANG, Secretary to the Commission, agreed on the need to define the scope of the subject before considering it further. There were a number of questions with which it had been confused, but from which it could, and should, be clearly distinguished. When the subject had been discussed in the Sixth Committee of the General Assembly, some delegations had had the impression that it was identical with the question of the rights and duties of States. That impression was, however, easy to dispel. In law schools in the United States of America, the subject was often dealt with under the heading of international claims, although there were obviously many inter-State claims, territorial ones for instance, which raised no question of State responsibility. Borchard had entitled his masterly treatise: "The Diplomatic Protection of Citizens Abroad". The question of diplomatic protection, however, could be conceived of as one of State policy, rather than of international law.

47. Mr. François had been quite right in remarking that the treatment of aliens had been included in the list of topics adopted by the Commission at its first session, but that list had been adopted after only a cursory examination. The topic had been included, presumably, because it had been the subject of previous international action leading to the Convention on the Status of Aliens, signed at the Sixth International Conference of American States (Havana, 1928), and of an abortive International Conference on the Treatment of Foreigners, held at Paris under the auspices of the League of Nations in 1929 just prior to the Conference for the Codification of International Law at The Hague, which dealt *inter alia* with the question of State responsibility. The draft convention prepared as a basis for discussion for the Paris 1929 Conference did not deal directly with the question of international responsibility, but mainly emphasized the economic aspect of the treatment of aliens. In Europe, the subject of the status of aliens was dealt with in treatises on private international law, which was considered as nothing but municipal law. In fact, the status of aliens as discussed in those treatises was deemed one of the matters essentially within the domestic jurisdiction of States.

48. Thus, although the question of international responsibility might include aspects of the treatment of aliens, it was really quite a distinct subject, and was essentially concerned with the obligation to make reparation.

49. Mr. AMADO considered the Secretary's remarks most pertinent to the discussion. It was essential to avoid confusion as to the exact nature of the subject. The subject was not really worthy of the attempts to enlarge it that had been made by some members of the Commission. International responsibility was virtually nothing more than a question of damages, a pecuniary matter.

50. There being no rules on the question and hardly any international instruments, the only basis for a codification was case law. In such a situation it was pointless to discuss whether or not "fault" was a pre-requisite of responsibility. The first thing to do was to compile a digest of the main arbitral awards involving State responsibility, for until the Commission knew what case law had to offer its discussions were bound to be academic.

51. He therefore proposed that the Commission should briefly review the articles drafted by the Special Rapporteur, and request him to prepare, in the light of the discussion, a third report, to which the digest he had just mentioned would be attached.

52. He wished to emphasize the following points: that the important question of denial of justice would only arise when all local remedies had been exhausted; that State responsibility could be envisaged only in connexion with claims made in good faith, i.e., when the aggrieved party had "clean hands"; and that an injury to an individual did not necessarily constitute an injury to the State of his nationality—the latter was free to close its eyes to the incident, if it wished.

The meeting rose at 1.5 p.m.

416th MEETING

Thursday, 13 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 invited the Commission to conclude the general debate on Mr. García Amador's report (A/CN.4/106).

2. Mr. SPIROPOULOS said that the very profound differences on questions of principle which had become apparent during the discussion were quite understandable. The Special Rapporteur had, naturally enough, introduced certain innovations. Since those innovations, which were to be found mainly in chapters III and IV of his report, raised certain substantive questions relating to the violation of fundamental human rights, non-performance of contractual obligations and acts of expropriation, which did not strictly come under State responsibility, the remarks made by certain speakers on that score were to some extent justified.

3. He agreed with Sir Gerald Fitzmaurice on the advisability of limiting the study to rules of a more or less procedural nature. To consider every possible violation of an obligation involving the responsibility of the State would, as Mr. Tunkin had rightly pointed out (415th meeting, para. 32), entail covering the whole field of international law. It was, however, very difficult to draw a clear dividing line between the procedural and the substantive.

4. Articles 1 to 4 and 10 to 12, dealt with in chapters I, II and V of the report, were, he thought, fully relevant to the question of international responsibility. Articles 5 and 6, on the other hand, though dealing with the very important subject of respect for fundamental human rights, were not. It would accordingly be better to omit them, and take up their study when international instruments had made respect for fundamental human rights the legal duty of all States.

5. Similarly, he was not in favour of pursuing the study of articles 7, 8 and 9 at that stage in the Commission's work. Though relevant to the question of State responsibility, they dealt with special problems, and there were many other special problems equally worthy of study.

6. He therefore proposed that the Commission adopt as its immediate programme of work on the subject of State responsibility, the matters dealt with in articles 1 to 4 and 10 to 12, together with the questions left out of account by the Special Rapporteur but which he proposed to study in his next report (A/CN.4/106, para. 3). The problem of indirect responsibility suggested by Mr. Ago (415th meeting, para. 42) might also be studied. Such a decision could be taken without prejudice to the question of considering at a later stage the substantive matters dealt with in chapters III and IV of the report.

7. Mr. EL-ERIAN, referring to the problem of the scope of the subject, remarked that, as Mr. Ago had pointed out (415th meeting, para. 39), there were three courses open to the Commission. The first was to confine its study to international claims involving State responsibility for injuries sustained by foreigners, and exclude the other cases of State responsibility to which the Secretary had referred (*ibid.*, para. 46-48); the subject would then be more or less synonymous with the law of procedure with respect to international claims. Clearly, if so narrow a view were taken, many questions which speakers had found occasion to raise would be irrelevant.

8. The second course was to codify, in addition to the procedural rules, the substantive rules of international law with respect to the treatment of aliens. Such a course would, however, hardly be in accordance with General Assembly resolution 799 (VIII), which referred solely to the "principles of international law governing State responsibility".

9. Incidentally, since some members of the Commission had been taxed with introducing extraneous elements into the subject, it was interesting to note that much the same questions had been raised during the discussion of the Special Rapporteur's first report at the Commission's eighth session. Sir Gerald Fitzmaurice, for instance, had suggested that attention should be devoted 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", justifying his suggestion on the ground that "to a large extent, international intercourse depended for its smooth flow on clearly formulated rules", and adding that "a code on that topic that would reconcile the different points of view and find general acceptance would be of real benefit".[1] There could, therefore, hardly be

[1] *Yearbook of the International Law Commission, 1956, Vol. I* (United Nations publication, Sales No.: 1956. V.3, Vol. I), 370th meeting, para. 52.