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Summary record of the 512th meeting

Topic:
State responsibility

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512th MEETING*Wednesday, 10 June 1959, at 9.45 a.m.*

Chairman: Sir Gerald FITZMAURICE

State responsibility (A/CN.4/96, A/CN.4/106, A/CN.4/111, A/CN.4/119)

[Agenda item 4]

1. The CHAIRMAN recalled that at its 505th meeting the Commission had agreed to devote one meeting during the week to the topic of State responsibility. He welcomed Professor Louis B. Sohn and Professor Richard R. Baxter, who had prepared the Harvard Law School draft on the subject.¹

2. Mr. LIANG, Secretary to the Commission, recalled that during the discussion on State responsibility at its eighth session (1956), he had informed the Commission about the collaboration between the United Nations Secretariat and the Harvard Law School in the preliminary work on that topic.² As he had indicated at the time, he had largely been responsible for initiating the co-operation inasmuch as he had suggested that the Harvard draft of 1929,³ prepared in anticipation of the Conference for the Codification of International Law held at The Hague (1930) by Professor Edwin M. Borchard with the help of an Advisory Committee, might be revised and that a new draft would be of great service to the Commission. Though the draft now circulated was not the final version, he was sure that members would be interested in reading it and would find it useful for reference and comparison with the draft contained in the Special Rapporteur's fourth report (A/CN.4/119).

3. He was glad to have persuaded the Harvard Law School to have taken up the work and he was certain that the Commission would welcome the opportunity of availing itself of that type of outside collaboration.

4. The CHAIRMAN invited Professor Sohn to make an introductory statement about the Harvard draft.

5. Professor SOHN, thanking the Commission for giving him an opportunity of presenting the draft, said that, as indicated by the Secretary, it formed the continuation to some extent of the work inaugurated in 1928. During the 1920's and 1930's the Harvard Law School Research in International Law had been keenly interested in the codification of international law. After the war, a personal connexion had been established between the Commission and the Harvard Law School through the membership of Professor Manley O. Hudson on the Commission; and, on the latter's retirement, Professor Milton Katz, Director of International Legal Studies at Harvard, had given some thought to how the relationship between the two bodies might be maintained. Mr. Liang's suggestion had therefore been welcomed by the Harvard Law School.

6. The work had been undertaken by himself and Mr. Baxter under the general supervision of Professor Katz

and with the help of an Advisory Committee composed of professors and practising lawyers. The authors of the draft were particularly grateful for the advice of Mr. García Amador, the Commission's Special Rapporteur on the topic. In many instances he had pointed out departures from existing law or gaps: for example, the thesis he had propounded in his third report (A/CN.4/111) concerning the sufficiency of justification had largely inspired article 4 in the Harvard draft. In addition, he had made a large number of useful suggestions, as had Mr. Liang, who had also taken part in the meetings of the Advisory Committee.

7. The draft, which was the ninth, had not yet reached final form and there might be two more versions, depending on the progress made in preparing the comment. The final text would consist of three parts: a draft convention, explanatory notes of the draftsmen and statements of existing law. Originally, the intention had been to bring Professor Borchard's text up-to-date in the light of more recent practice but, on careful examination, it had been found to be incomplete and the very massive volume of material had had to be reviewed again. Hence, the work had progressed slowly but he hoped that the treatise contemplated would be completed in two years.

8. As the Commission's experience would no doubt confirm, it was difficult to establish exactly where codification ended and the progressive development of international law began. In order to secure consistency between the different articles and for reasons of equity or logic, it had been found necessary to depart from certain widely accepted rules, such as those relating to the nationality of the claim. In other cases, the practice differed so widely that it could only be harmonized by means of a compromise which was virtually a new rule.

9. The new Harvard draft, in keeping with what appeared to be the Commission's intention, was concerned solely with the responsibility of the State for official acts or omissions; it did not deal with the responsibility of international organizations or with responsibility for the violation of treaties in general.

10. The structure of the Harvard draft was simple. Article 1 sought to state in general terms the subject of State responsibility as such, and it was subsequently amplified and defined in the succeeding articles. The method might be a novel one, but perhaps would be found useful.

11. He said that in certain respects the draft departed from existing law. The Harvard draft of 1929 had contained different rules about exhaustion of local remedies which had depended on the kind of official action taken. The authors of the present text, considering that doctrine had developed in a different direction since that time, had embodied in article 1 a general rule concerning the exhaustion of local remedies equally applicable in all situations. Nor had they been content merely to lay down the rule that the State was responsible for its wrongful acts under international law; they had, in addition, specified the most important categories of such acts. Furthermore, the draft provided that States were responsible for acts which were intentional and directed against aliens as well as for acts which were due to negligence. The authors believed that the time had not yet come to attempt to codify the principle of liability without fault, though he noted that the International Atomic Energy Agency had displayed interest in the possibility of such a codification.

¹ Harvard Law School, *Convention on the International Responsibility of States for Injuries to Aliens* (Preliminary Draft with Explanatory Notes), Harvard Law School, 1959.

² *Yearbook of the International Law Commission, 1956*, Vol. I (United Nations publication, Sales No.: 1956.V.3, Vol. I), 370th meeting, para. 16.

³ Harvard Law School, *Research in International Law, II. Responsibility of States* (Cambridge, Mass., Harvard Law School, 1929).

12. The new Harvard draft included provisions concerning denial of justice without using that term but enumerating the type of cases in which justice could be said to have been denied. Emphasis had been placed on injuries to and arrest of individuals, but special clauses dealt also with injury to property rights and contractual rights. An express provision had been included concerning the barring of claims by lapse of time, though the time was intentionally not specified. In addition, the draft contained provisions limiting the alien's right to claim in cases where he had expressly waived the right or where he had knowingly accepted the risk involved in taking up residence in the foreign State. Finally, the draft contained elaborate provisions on damages.

13. The authors of the draft had followed Mr. Scelle's views⁴ and had given high priority to direct claims by individuals, though subject to certain limitations. They had not felt bound by the traditional view—now largely abandoned—that individuals could not present their claims directly. However, even on that issue it had not proved necessary to depart too far from existing doctrine.

14. The CHAIRMAN thanked Professor Sohn for drawing the Commission's attention to a number of extremely interesting features in the Harvard draft.

15. Mr. GARCIA AMADOR, Special Rapporteur, expressing his gratitude to the Harvard Law School for its hospitality and help in his own work on State responsibility, regretted that no other private institution in the Americas was as yet studying the topic. It was unfortunate that, although the General Assembly's request for a codification of the principles of international law governing State responsibility dated back to 1953 (resolution 799 (VIII)) and although the subject was of great importance, little progress had as yet been made by the Commission. He hoped that the Commission would be able to devote a considerable part of its next session to the topic.

16. If the study of the subject were to gain in depth and scope it was essential to obtain further information on certain particularly controversial matters. Commenting on his first report (A/CN.4/96) members of the Commission had said that the opening clauses of the draft code should expressly define the circumstance in which a State incurred international responsibility for certain acts. His second report (A/CN.4/106) dealt with the matter in a somewhat summary manner, indicating that reparation for injuries resulting from acts that were not a violation of international law could be settled by reference to the general obligation of States to protect the rights of aliens. Subsequently, he had studied in greater detail the whole question of the abuse of rights as well as precedents with a view to elaborating a coherent system. His concept of the natural limitation on the exercise of rights by States had been reflected in the second paragraph of article 2 of the Convention on the High Seas adopted by the United Nations Conference on the Law of the Sea in 1958:⁵ that development could provide a basis for future work on State responsibility. The doctrine of abuse of rights was an essential feature of certain aspects of State

responsibility, and the only way in which the limitations on the exercise of the rights of the State could be determined was to decide in what instances States had failed to carry out their obligations under international law. By means of inquiry along those lines it would be possible to differentiate between "wrongful" and "arbitrary" acts of the State, the former being breaches of contractual obligations, the latter the improper performance of an act that would otherwise have been lawful. That important doctrine had not been discussed by the Commission, which had considered State responsibility in terms of violation of international law and of omission. He had pointed out that in the modern world it was difficult to elaborate a theory of objective responsibility based on the concept of omission. For example, States conducting nuclear tests were exercising a right recognized in international law. Hence it would be easier to frame coherent and exact rules on the basis of a doctrine of abuse of rights.

17. His fourth report was devoted to a detailed study of the most controversial chapter in his second report, chapter IV, in which, as requested by the Commission, he had examined the problem in the light of traditional theory and the conclusions of The Hague Conference. The fourth report sought to cover most hypotheses as well as certain problems not previously discussed. He had drawn upon experience since the Second World War and had made a distinction between general contractual relations governed by municipal law and those governed by new instruments subject to international law. He had drawn an analogy with treaties and the principle of *pacta sunt servanda*. Though the theory was an old one, his presentation was new. He had also devoted considerable space to the nature and content of acquired rights. All those problems were of great topical importance.

18. The CHAIRMAN said that the delay in taking up the topic of State responsibility was not due to any lack of appreciation on the Commission's part of the great practical and theoretical importance of the subject.

19. Commenting on the question of State responsibility, he said that the cruder forms of maltreatment of aliens and denial of justice might be regarded as becoming more rare. On the other hand, the possibilities of injuries to aliens or foreign corporations were increasing and he was pleased to see that the new Harvard draft gave a good deal of space to the forms of injury which had been overlooked in the past.

20. He was extremely interested in the Special Rapporteur's remarks about the doctrine of abuse of rights which should be instrumental in developing the whole theory of State responsibility. The notion of "arbitrariness" (A/CN.4/119, chapter I, section 5) was essential in that it could serve to distinguish certain acts from others in such matters as deportation, which in itself was not a violation of international law. In certain circumstances the grant of nationality in the absence of a genuine link between the State and the individual was an abuse of rights and, as had been stated by the International Court of Justice in its judgement in the *Nottebohm Case* (second phase),⁶ might preclude the presentation of a claim by that State on behalf of the individual. He would not, however, go so far as to say (as the new Harvard draft seemed to) that the State of nationality could never present a claim on behalf of a national who had only slender links with that State. It might be more correct to say that the State was

⁴ *Yearbook of the International Law Commission, 1956*, Vol. I (United Nations publication, Sales No.: 1956.V.3, Vol. I), 371st meeting, paras. 31 *et seq.*

⁵ United Nations Conference on the Law of the Sea, *Official Records, Vol. II: Plenary Meetings* (United Nations publication, Sales No.: 58.V.4, Vol. II), annexes, document A/CONF.13/L.53, p. 136.

⁶ *I.C.J. Reports 1955* (Liechtenstein v. Guatemala).

prima facie entitled to make its claim, but that the other State was free to declare that the circumstances did not oblige it to be a defendant having a liability to the plaintiff State in regard to the person concerned.

21. The provision in the new Harvard draft barring a State from claiming on behalf of a person who had waived or settled the claim was unduly categorical. There had been cases where individuals had waived their claims, but the Government of the State of nationality had refused to give up the claim, because a point of general principle and public policy had been involved. For example, where a wrong was done to a ship and to a person on board, the flag State might wish to press the claim, even if the individual decided to waive his claim.

22. He was not surprised to see that no definition had been attempted of the "standards of justice generally recognized by civilized States", an expression which occurred frequently in the draft. Although acts not in conformity with those standards were a constant subject of international claims, it was extremely difficult to establish an objective definition.

23. Lastly, he thought that article 3 of the Harvard draft, which defined what judicial or administrative decisions adverse to aliens were wrongful, did not fully cover certain possible situations. While admittedly a decision which violated international law or a treaty would be wrongful, international law or the treaty in question might not contain a rule governing the specific issue adjudicated. Again, the standard of justice applied generally in the State concerned might not be on a par with the standards recognized by civilized States. Such cases might be uncommon, but he thought they should be covered in the draft.

24. Mr. TUNKIN said that some of the problems raised in the Harvard draft and in the Special Rapporteur's reports related not so much to State responsibility properly so called as to the rights of aliens, especially those relating to property. Some of those problems were closely connected with the existence in the world of two different economic systems. The Harvard draft proceeded in that respect from the principles of the capitalist system of private property expressing practically the point of view of the United States. The rules proposed in that draft concerning the expropriation of the property of aliens were based on the principle of the sanctity of private property. In the third and fourth decades of the twentieth century, the question of State responsibility had been discussed from one point of view only, and the existence of a new economic system had been practically ignored. At that time, certain States might have hoped that the new system would disappear or that they would be able to impose certain rules on the only socialist State then in existence. At the present juncture, however, it was inconceivable that the principles of one system should be accepted as general international law. It would therefore be desirable, if not indispensable, to plan unofficial studies of the question so as to take into account the point of view of the institutions of socialist States. Furthermore, institutions and jurists in the new States of Asia and Africa would also be interested in contributing to such studies. He hoped it was not too late to remedy the situation.

25. Mr. MATINE-DAFTARY observed that the discussion of the Special Rapporteur's draft had been postponed not only owing to lack of time, but also because the draft was based on purely European standards of

justice. The Special Rapporteur had found it difficult to find a criterion and had decided to base his draft on fundamental human rights; it had been pointed out during the debates at the ninth session that he was suggesting that the International Law Commission should undertake work which the Commission on Human Rights had been trying to carry out for ten years. That basis was therefore unrealistic, and the Harvard Law School and the Special Rapporteur should endeavour to find a formula which would be more acceptable to all States. The seminar on human rights for Asian countries (Seminar on judicial and other remedies of the abuse of administrative authority) organized by the United Nations in Kandy, Ceylon, which he had attended in May 1959, had shown that a great deal of work remained to be done in that field, since under the existing systems of many States even the nationals of those countries could not claim damages. The principle that aliens should receive the same treatment as the nationals of a country seemed to be a praiseworthy one, but if the Special Rapporteur's draft was based on fundamental human rights, which were so far only proclaimed in the Universal Declaration of Human Rights—an instrument which had no binding force—it was hard to see what useful work the Commission could accomplish in the matter. Moreover, new countries which were coming into being were extremely conscious of their newly-won independence and were anxious to eradicate all vestiges of the colonial system; under the circumstances, it was only natural that aliens in those countries should go through a transitory period of liquidation. In his opinion, therefore, Mr. García Amador's draft should be regarded as a study which would be of use to the Commission on Human Rights; when the General Assembly of the United Nations adopted the draft International Covenants on Human Rights, the International Law Commission could begin to deal with the matter. Until then, its consideration of the question would be purely academic.

26. Mr. ERIM wished to draw the attention of the authors of the Harvard draft and of the Special Rapporteur on State responsibility to one specific subject. In the relevant article of the Harvard draft, the right of protection of the State concerned was confined exclusively to its nationals. However, that provision had already been exceeded in positive international law by the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950,⁷ to which fifteen countries were parties. For the first time in the history of international law, a State which had allegedly violated human rights could be brought by an individual—even by one of its own nationals—before an international jurisdiction, if it was a party to the Convention. It should be borne in mind that the Convention made no distinction between nationals and aliens, and in fact two cases relating to the protection of aliens had been brought before the European Commission on Human Rights. Moreover, hundreds of cases had been brought to the notice of the European Commission by individuals, although the jurisdiction of the Commission was optional in such cases. Furthermore, the European Court of Human Rights, possessing jurisdiction in the matter of all complaints not settled by the European Commission, had come into existence, since nine States had recognized its jurisdiction as compulsory. Therefore, he would draw

⁷ United Nations, *Treaty Series*, vol. 213 (1955), No. 2889, p. 222.

the attention of the representatives of the Harvard Law School to a development within Europe: the responsibility of States was not only a matter of "protection of the rights and interests of nationals". It was more than that: for those States which, in addition to accepting the jurisdiction of the European Court of Human Rights, had also accepted the right of individual petition, the individual could protest against a violation of his rights without invoking the diplomatic protection of his own State.

27. Mr. BARTOŠ said that, while recognizing that the Harvard draft was the fruit of much hard work, he had a general objection to the method used in its preparation. Most of the existing drafts on State responsibility were based on former rules concerning the "status of aliens"; it should be borne in mind, however, that in the history of the development of social institutions those rules had been elaborated concurrently with the development of the colonial system. He endorsed both the thesis advanced by Mr. Tunkin and the considerations expressed by Mr. Matine-Daftary, which were perhaps even more pertinent. The Harvard draft and the Special Rapporteur's draft were based on an inequality between the States which had become prosperous through imperialism and those which had recently won their independence and enjoyment of the right to self-determination. It was obvious that upon liberation from colonialism the economic basis of that system had not disappeared all at once.

28. The International Law Association at its forthcoming congress intended to discuss the question of modernizing the rules governing the compensation of expropriated aliens together with the question of the rights of States which were in the process of eliminating the effects of the vestiges of colonialism. In that connexion, he recalled that the matter had arisen in the history of the Latin American States, when Spanish concessions in those countries had been liquidated. In those days, private acquired rights had been recognized, but in modern times, even in capitalist States, views had changed. The right of property had first been regarded as a *jus naturae*, but certain constitutions enacted after the Second World War placed limitations on that right.

29. When the question of equitable compensation was raised, there was a tendency to forget that prior compensation might be involved. Expropriation without compensation was held by some to be a violation of human rights, but some States which believed that they had those property rights did not admit that others had similar rights.

30. International law could not be divided into strictly separated compartments. The right of self-determination having been admitted into international law, the community of nations should recognize that countries which had thrown off the yoke of colonialism were also entitled to liberate themselves from the economic burdens of that system. He did not mean to imply that newly liberated States should always expropriate aliens without compensation, but rather that in some cases expropriation was not necessarily wrongful. A codification of the rules on the subject should take into account the realities of modern international life; therefore a purely technical draft based on the principle of acquired rights—which were not even recognized in all capitalist States—was unsatisfactory. To demand compensation for social reform in effect deprived States of the sovereign right to carry out reforms. The principal fault

of the system set forth in the Harvard draft was that it placed aliens on an equal footing with nationals in cases where that equality operated in favour of aliens, but allowed them to plead "acquired rights" in cases where they were called upon to make sacrifices to social reform.

31. With regard to the concept of "standards of justice generally recognized by civilized States", he said he did not agree with the view that civilization could be regarded as the attribute of any single group of States. So long as that view was held, it would be impossible to codify general rules of international law concerning State responsibility and any rules prepared on that basis would be unacceptable to the international community at large.

32. Mr. VERDROSS considered that the Commission should separate its consideration of the two subjects referred to in the title of the Harvard draft, namely, international responsibility in general, and the rights of aliens. If, for example, consideration was given to the acts for which States were responsible and to the consequences of wrongful acts by States, without particular reference to aliens—whose rights would be studied separately—it would be much easier to reach agreement on a generally acceptable draft.

33. Mr. AGO said the new Harvard draft would be a valuable contribution both to the work of the Commission and to the development of the international law relating to State responsibility.

34. Commenting on the organization of the draft, he agreed with the view of Mr. Verdross. Professor Sohn had conceded that the draft had had to depart somewhat from the system adopted in the 1929 draft by Borchard. In his (Mr. Ago's) view, it would be desirable in future work to depart even further, for the mixture of the law of State responsibility and the law concerning the treatment of aliens was still to be found in the new Harvard draft, even though it was the declared intention of the authors to separate the two.

35. The question of State responsibility was a general one and was not necessarily linked to the treatment of aliens. A State was responsible every time it committed an international wrong, in other words, a violation of a rule of international law, whether or not there was injury to an alien. The test of the State's responsibility was not the injury to the alien, but the violation of an obligation. Therefore, he found it difficult to agree with the definition given in the very first article of the Harvard draft, which provided that: "A State is responsible for an act or omission which is attributable to that State, which is wrongful under international law, and which causes an injury to an alien". In that provision the final relative clause impaired what was otherwise a definition of State responsibility.

36. On the other hand, the effects of having dealt with the question of the treatment of aliens from the standpoint of responsibility was even more apparent in the draft's definitions of wrongful acts and omissions. The authors were forced to state in a negative way what should have been laid down in positive terms as principles governing the obligations of States towards aliens.

37. The discussion had indicated that there were two conceptions in the Commission concerning the definition of the obligations of States with respect to the treatment of aliens. In his opinion the two conceptions were much closer to each other than they appeared to be. With regard to the so-called "western" view, he would

venture to say that writers on the subject sometimes had a tendency to confuse the real position in customary and statutory law with their personal aspirations. He felt sure that a careful examination of the international case-law would show that it frequently consisted of no more than a certain irreducible minimum to which there could not be much objection.

38. On the other side, he had the impression that in countries which had a socialized economy there was sometimes a tendency to overlook the fact that, even within the framework of their principles, certain rights could not be denied to aliens, and that there were certain institutions typical of the "western" view which were perfectly adaptable to their system.

39. Mr. LIANG, Secretary to the Commission, said, with reference to Mr. Tunkin's statement (see para. 24 above), that the Secretariat had always made strenuous efforts to provide the Commission with adequate reference or comparison material from different regions. For example, he had been pleased to learn, in 1957, that the then newly established Asian-African Legal Consultative Committee had on its programme the study of questions appearing on the agenda of the Commission, and the members of the Commission would remember that it had invited that Committee to send in any material reflecting the legal thinking in Asian and African countries on questions of interest to the Commission (see A/3623, paras. 21, 23 and 24; and A/3859, para. 73). Unfortunately, no such material had so far been received from that quarter.

40. Again, the Secretariat attached great importance to the discussion in Latin America of matters of interest to the Commission. He recalled that he had reported to the Commission on such matters discussed at the third meeting of the Inter-American Council of Jurists held at Mexico City in 1956 and that he had also undertaken to make a report concerning the forthcoming fourth meeting of that body at Santiago, Chile.

41. Such elaborate and long-range studies as that represented by the Harvard draft were of great value to the work of the Commission. In that connexion he observed that in the very first Harvard Research drafts, on subjects discussed at the Codification Conference held at The Hague in 1930, the authors had made it clear that the drafts were representative of the point of view of United States lawyers, and although no such *caveat* appeared in the present draft, it could be reasonably assumed—and he was sure—that no claim was made that it was representative of international legal thinking.

42. He wished to make it clear that the Harvard draft had been prepared entirely on the responsibility of its authors under the general auspices of the Harvard Law School and that there had been no responsibility on the part of the United Nations Secretariat so far as the financing and the substance of the draft were concerned.

43. The Secretariat expressed the hope that similar efforts would be made in States where a different legal concept of general international law prevailed and that before long the Commission would have available similar works for purposes of comparison.

44. As to the point raised by Mr. Verdross (see para. 32 above), he recalled that in 1957 the Commission had held a full discussion, in connexion with Mr. García Amador's first report, on the interrelationship of the question of State responsibility and the question of the treatment of aliens.

45. As he had ventured to submit on the former occasion, the treatment of aliens as a subject for codification would cover a wider field than State responsibility. Furthermore, it might be looked upon as a question within the sphere of the unification of municipal law, and he recalled that the International Conference on Treatment of Foreigners, held at Paris in 1929, had attempted to draft a convention reconciling certain aspects of the municipal law of the States relating to the status of aliens.

46. He was attracted by Mr. Ago's position (see para. 34 above) that the matter to be codified under the caption of responsibility of States should be the material on the obligations of States, with respect to the treatment of aliens, at the international law level. The point of view envisaged in Mr. García Amador's first report had also been that in order to determine State responsibility, the obligations of States would first have to be defined.

47. Mr. EL-KHOURI observed that the draft presented to the Commission would add to the reputation of the Harvard Law School for scholarly work. However, it seemed to him that the draft was based on principles which were out-moded and which were reminiscent of the capitulations system applied in the territories of the Ottoman Empire in the nineteenth century, where aliens were almost a privileged class as compared with nationals. In modern times, most of the guarantees envisaged in the draft for aliens had been incorporated in the legislation of civilized States in respect of their nationals and there was no longer any need for special legislation in respect of aliens. He did not think, for example, that immigrants should expect to enjoy a status better than that of the people among whom they came to live.

48. He suggested that the draft on State responsibility to be prepared by the Commission should be based on the principle that aliens should not receive worse treatment than the nationals of the State of residence. The Commission should aim at a draft which could be readily accepted by most States, including the new States, and which would not discourage States from admitting aliens, for that was what would happen if provisions were drafted that were too onerous.

49. Mr. AMADO said that the draft was a work which deserved respect and which was in the best traditions of the Harvard Law School. In listening to the discussion he had been thinking of the decisions in some of the leading cases, and of the writings of learned jurists, which related to the question under discussion and which he had expected would be the basis of the Harvard draft.

50. He would say in all frankness that if the Commission departed in its future draft from those earlier sources, its work would not be a serious contribution to the international law on the question. He recalled that when State responsibility had first been discussed in the Commission—at its eighth session—he had expressed strong objection to the ambitious project of the Special Rapporteur, who had wished to include the question of criminal responsibility. He was very grateful to Mr. García Amador for having dropped that project.

51. Today he wished to appeal to the Special Rapporteur to leave aside also the question of human rights and he wished to suggest to him that the best approach would be to elaborate the rule concerning the reparation of injury, which was the established principle, and then proceed to link that rule to the treatment of aliens.

52. The Harvard draft stated, in the explanatory note to article 1, that "orthodox theory holds that when a State espouses a claim of its national, it is actually protecting its own rights rather than those of the individual". That was what, in his view, should have been the tendency of the draft prepared by the Harvard Law School. The explanatory note, however, went on to say, with reference to the judgement of the International Court of Justice in the *Nottebohm Case*, that "the views of the International Court are difficult to reconcile with the increased emphasis that has been placed in recent years upon the protection of human rights and of the individual under international law".

53. If some real progress was to be made in the codification of the law relating to State responsibility, certain limits would have to be laid down and a determined effort would have to be made to avoid being drawn into extraneous subjects, however attractive they might be. The problems of human rights should be treated within a human rights framework and if the Commission permitted itself to venture into that field, he had no doubt that Mr. Tunkin as a Soviet jurist—and Soviet jurists were among the most positivist of contemporary jurists—would wish the different concepts of property in the capitalist and socialist systems to be mentioned.

54. He urged the Special Rapporteur, whose purposes he did not question, to make his draft, first and foremost, a distillation of case-law and not an excursion into idealism.

The meeting rose at 1.5 p.m.

513th MEETING

Thursday, 11 June 1959, at 9.55 a.m.

Chairman: Sir Gerald FITZMAURICE

State responsibility (A/CN.4/96, A/CN.4/106, A/CN.4/111, A/CN.4/119) (continued)

[Agenda item 4]

1. The CHAIRMAN invited the Commission to continue the debate on the topic of State responsibility, with reference to the new Harvard draft presented at the previous meeting (512th meeting, paras. 5-13).

2. Mr. ZOUREK said the new Harvard draft, which reflected the thinking of United States scholars on State responsibility for injuries to aliens, was a useful work that would become even more useful when it was supplemented by the promised statement of the existing law. He agreed that that kind of consultation with scientific circles should continue and be expanded by consultation with scientific institutions in other countries, in particular in countries with different legal systems, notably the socialist countries and the countries of Latin America, Asia and Africa. The question of State responsibility was so broad that all legal systems had to be taken into account in preparing a work that would be generally acceptable.

3. In his view, the Commission's first task in dealing with the question of State responsibility should be to define the cases in which the State was responsible. It was only after it had disposed of that general question that it could take up the special case of responsibility for injuries to aliens.

4. The Harvard draft seemed in some respects to depart from well-established rules of international law.

For example, it recommended the recognition of the right of the individual to reparation although, as Mr. Amado had recalled at the previous meeting (512th meeting, para. 52), the accepted rule of international law was that the right to reparation belonged to the State, and that rule had been upheld in the fairly recent judgement of the International Court of Justice in the *Nottebohm case*.

5. He also noted, as had the Chairman (see 512th meeting, para. 20), that the rule concerning the nationality of the claim was to a large extent abandoned in the draft. In general, the draft seemed to be based on premises that were not recognized in the international law concerning State responsibility. In his view, the fundamental proposition should be that where there was no international obligation, there was no international responsibility, and that principle was not adhered to in the draft.

6. There were several references in the draft to the standards of justice generally recognized by civilized States, but those standards were nowhere defined. He was confident that a thorough study of that notion would show that, fundamentally, it was devoid of meaning. The term was merely reminiscent of the capitulations system; it was time that the invidious distinction between civilized and uncivilized States should be dropped. The expression "rules common to the principal legal systems of the world" would be preferable.

7. Professor Sohn had said (see 512th meeting, para. 7) that the work constituted only a preliminary draft. He (Mr. Zourek) suggested that in preparing their final draft the authors should re-examine very carefully those passages which departed too much from principles that could be accepted by all States irrespective of their social and economic system. While it was true that departures from established rules and proposals for new rules were admissible, it should not be forgotten that general international law was the only legal basis for co-operation and fair competition between States with different social and economic systems and for the solution of the disputes resulting therefrom. Consequently, before giving up an established principle of international law, codifiers should carefully consider whether what they were proposing was for better or for worse.

8. The CHAIRMAN said that some members had seemed to take the view that practically all the law relating to the treatment of aliens was a product of colonialism. That, of course, was quite incorrect historically as everyone knew who had read e.g. the chapter on the historical and legal foundations of the law relating to the denial of justice in Alwyn V. Freeman's standard work.¹

9. The law relating to the treatment of aliens had come into being, long before the era of colonialism, out of conditions in Europe soon after the Middle Ages, when foreigners had had very little status and in many cases no rights before the law or access to the court.

10. Professor SOHN expressed his appreciation to the Commission for its discussion of the Harvard Law School's preliminary draft. Some important points had been raised which would be taken into account in the preparation of the final draft. Without wishing to enter into a debate, he would avail himself of the opportunity to express some views on the more general questions that had been raised.

¹ Alwyn V. Freeman, *The International Responsibility of States for Denial of Justice* (New York, Longmans, 1938).