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Summary record of the 568th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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that special missions could have an unlimited number of staff.

72. Mr. ERIM, agreeing with Mr. Jiménez de Aréchaga, said that a formula should be found which would preclude that interpretation.

73. Mr. TUNKIN thought it was impossible, unnecessary and even dangerous to try to formulate a legal rule to cover every case. The acceptance of a special mission was the result of consent between the sending and receiving States, and the question of the size of the staff would be settled by the States concerned, if it was raised at all. The provisions of article 10 were appropriate in the case of permanent missions, but the implication of specific consent concerning the size of the staff would unnecessarily complicate arrangements for special missions.

74. Mr. ŽOUREK, supporting the Special Rapporteur's view, pointed out that paragraph 5 of the commentary to article 10 specifically stated that in the opinion of some members that clause did not express a recognized rule of international law. The Commission had included the article as a practical measure for permanent missions; but neither from the technical nor the practical point of view should the provision be regarded as applicable to a special mission sent to the receiving State for a limited period.

75. Mr. BARTOŠ, while agreeing that no special rule concerning the size of staff of special missions was needed, observed that in practice States were sometimes obliged to agree that special missions should not exceed a certain number. Countries which received many delegations might be faced with practical difficulties in such matters as hotel accommodation, particularly at certain seasons; nevertheless, since the matter was governed by mutual consent, there was no need to make specific provisions on the subject.

76. Mr. YASSEEN thought that a decision to render the article applicable to special missions might upset the differentiation between permanent and special missions. In connexion with article 10, the difference lay in the fact that a special mission would usually comprise a large number of experts, because it would be unable to keep in touch with the home government throughout the period of its assignment, whereas a permanent mission could avail itself of the services of local experts or send for experts from the sending State.

77. The CHAIRMAN noted that the majority of the Commission considered that article 10 of the 1958 draft was not applicable to *ad hoc* diplomacy and that the principle of consent underlying the acceptance of the special mission would cover all practical considerations relating to its size.

The meeting rose at 1.10 p.m.

568th MEETING

Tuesday, 21 June 1960, at 3.30 p.m.

Chairman: Mr. Luis PADILLA NERVO

State responsibility (A/CN.4/96, A/CN.4/106, A/CN.4/111, A/CN.4/119, A/CN.4/125) *(resumed from the 566th meeting)*

[Agenda item 3]

1. Mr. VERDROSS commended the work done on the subject of state responsibility by the Inter-American Juridical Committee and the Harvard Law School. The new revised Harvard Draft would be of great assistance to the Commission when it came to consider the Special Rapporteur's draft, article by article.

2. At the present stage, he would confine himself to a few general remarks, elaborating upon his brief comments on the subject at the eleventh session.[1]

3. In the first place, as had been stressed by Sir Gerald Fitzmaurice (566th meeting, paragraph 52), the old-established principle that international responsibility operated as between States and not as between a State and an individual was not based on an obsolete doctrine; it formed part of the general international law as recognized by the highest judicial authority in the world, the International Court of Justice. The new tendency to admit that individuals could have rights at the international level was merely an exception to that rule, an exception based on certain conventions such as the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950.[2]

4. A State which presented a claim in respect of an injury sustained by one of its nationals was not acting " on behalf of a person who is its national ", as was stated in paragraph 2 (*b*) of article 20 of the new Harvard Draft. The State making the claim asserted its own right. As had been stated on several occasions both by the former Permanent Court and by its successor, the International Court of Justice, it was the rights of that State under international law which had been violated in the person of one of its nationals.

5. The formula thus accepted by the International Court was not of purely academic interest; it produced certain important practical consequences. In the first place, a State was not obliged to present a claim at the request of its injured national. For example, the Swiss Foreign Office (Political Department) had repeatedly stressed that Switzerland was under no obligation to submit a claim at the request of one of its injured

[1] *Yearbook of the International Law Commission*, 1959, vol. I, 512th meeting, paragraph 32.

[2] United Nations *Treaty Series*, vol. 213, p. 221.

nationals and that it could take into consideration the public interest before deciding whether to put forward a claim.

6. Another practical consequence of the formula adopted by the International Court was that a State could only make a claim if the injured person had been its national at the time of sustaining the injury. The statement to the contrary in paragraph 6 of article 23 of the Harward Draf did not therefore reflect the existing position in international law.

7. No doubt, existing international law could be changed and the Special Rapporteur had suggested that changes should be introduced so as to divorce international claims from political considerations. Changes in that direction might represent useful progress, but was the international community prepared to accept such changes in existing international law ? Furthermose, by what means could those changes be brought about ?

8. Speaking only on the second of those questions, he said that apparently Professor Sohn believed that it would suffice to adopt a provision in an international convention to the effect that individuals were entitled to present international claims. In fact, however, the mere statement of that right in an international convention would not be sufficient to make the individual a subject of international law. It would be necessary in addition to place at the disposal of the individual international procedure machinery to assert his rights. So long as such an international procedure was not made available to individuals, their so-called international " rights " could not be said to be positive rights in general international law.

9. It might be objected that States themselves could only submit a claim to an arbitral tribunal or to an international court if they had agreed to submit to arbitration or to judicial settlement. Even where no such agreement existed, however, the States had had always available an international procedure to assert their rights : they could resort to diplomatic negotiations, appeal to a United Nations organ or even have recourse to economic reprisals. Such remedies were not available to individuals. Accordingly, if it was really desired to give individuals the right to present international claims, it was essential to make available to them international processes for submitting such claims. Otherwise, individuals would be given expectations but not true rights at international law.

10. Lastly, he considered the task before the Commission. He hoped that it would be possible to devote the next session to a thorough study of the Special Rapporteur's reports on state responsibility. He felt, however, that it would be preferable to consider in the first place international responsibility as such; it would then be possible to apply the rules of international responsibility to the law concerning the treatment of aliens. Both the Harvard Draft and the draft submitted by the Special Rapporteur endeavoured to deal at the same time with two branches of international law : the international responsibility of States and the law governing the treatment of aliens. It was obvious, however, that international responsibility could arise not only in relation to the treatment of aliens but in the whole wide field of international law. Accordingly, it was essential that the Commission, before dealing with the applicabilities of the rules governing international responsibility to the treatment to aliens, should first formulate and codify the rules governing the international responsibility of States as such.

11. Mr. AGO thanked the observer for the Inter-American Juridical Committee and Professor Sohn for their valuable statements and for the work accomplished by that committee and the Harvard Law School in the study of state responsibility, which was one of the most important and difficult subjects of international law.

12. He recalled the misgivings he had expressed when it had been suggested that the Commission should devote some attention at the present session to the topic of state responsibility. He had said that a short discussion would do less than justice to that important topic and that the Commission should devote to it most of its time at one of its future sessions (561st meeting, paragraph 51).

13. In the brief time available, it would be impossible for him to deal with the many important points raised by the observer for the Inter-American Juridical Committee and by Professor Sohn, and he would have to concentrate on a few points chosen almost at random. In doing so, he would naturally comment more on the points on which he differed than those on which he agreed.

14. He wished to say first, however, that he had been very favourably impressed by the tendency of the Inter-American Juridical Committee to interpret the expression " denial of justice " strictly. For his part, he was convinced that a claim for violation of international law by reason of denial of justice to an alien could be brought only if the alien concerned had been denied access to fair judicial process; it would be extremely dangerous to endeavour to apply the concept of denial of justice to cases in which free access to the courts and guarantees of fair process had not been denied but the actual decision rendered was criticized as contrary to the law, or manifestly unjust. The attempt to appraise the merits of a decision adverse to an alien would inevitably transform international justice into a process of appeal from decisions of national courts. In addition, the door would be opened to all manner of controversies which should be avoided. Any decision was open to criticism, and lawyers were familiar with the critical analysis of decisions of municipal courts. It was unthinkable that the mere fact that a decision could be criticized should open the door to an international claim just because an alien was involved. Justice was rendered by human beings and was therefore suject to human error. All that international law required was that a decision should be rendered with the normal standard safeguards, in cases concerning aliens.

15. With regard to the Harvard Draft, he said that the conclusion of the law of state responsibility and the law concerning the treatment of aliens was still to be found in its revised text. The comments which he had made on the draft submitted at the previous session[3] therefore also applied to the new draft.

16. It was true that, in practice, the subject of state responsibility had developed to a considerable extent in connexion with the treatment of aliens. The fact, however, remained that the question of the responsibility of the State for injuries to aliens was only one chapter of the general topic of state responsibility.

17. He could not therefore accept the definition given in article 1, paragraph 1, of the new Harvard Draft (" A State is internationally responsible for an act or omission which, under international law, is wrongful, is attributable to that State, and causes an injury to an alien "). He was certain that the authors of the draft had not intended to say that the international responsibility of States only arose in connexion with the treatment of aliens, but the definition lent itself to that construction.

18. His main criticism, however, related to the confusion he had already mentioned. The various provisions of the draft described as wrongful a number of acts affecting the position of aliens. That approach was the consequence of the fact that the treatment of aliens, instead of being considered positively, was considered from the angle of state responsibility, an approach which had the defect of presenting the rules of international law concerning the treatment of aliens in a negative form, in other words of describing many acts as wrongful, whereas it would be much more logical to express in a positive form what were the State's obligations in the matter of the treatment of aliens. The responsibility of the State was but the consequence of the violation of any of these obligations.

19. With regard to the section concerning the presentation of claims by aliens, he pointed out that an injury sustained by an alien at the level of municipal law did not necessarily justify an international claim. An international claim did not lie unless the particular act or omission, regardless of whether it violated or did not violate municipal law, constituted a breach of an international obligation under a convention or under customary international law towards the alien's State of nationality. Where no such breach of international law existed, a claim could not be brought under international law.

20. It was particularly dangerous to focus attention on the injury sustained by the individual. A tendency might result to ignore the fact that the alien's State of nationality must itself have sustained an injury at international law. The Permanent Court of International Justice had repeatedly ruled that the State presenting an international claim asserted its own rights and not those of its national: the State concerned asserted its right to ensure respect for the rules of international law in the person of its nationals.[4] That doctrine represented existing international law, and to ignore it would constitute not progressive development of international law, but a retrograde step.

21. As to the question of enabling an alien individual to submit an international claim directly, he felt considerable misgivings. The example of the European Court of Human Rights was not altogether valid. That court was a joint court of certain European countries, access to which was open to individuals who wished to make claims, as a rule against the very State of which they were nationals. It did not deal with international claims by States arising out of violations of international law.

22. He advised caution with regard to the question of the exhaustion of local remedies, dealt with in article 19 of the new Harvard Draft. He was somewhat disturbed by the statement in paragraph 1 of that article that local remedies would be deemed to have been exhausted if the claimant had employed all remedies made available to him by the respondent State " without obtaining the full redress to which he is entitled under this convention ". An alien was entitled to access to judicial process; he was also entitled to be treated without discrimination, but he was not entitled to obtain a fovourable decision in any case. A State had an international duty to ensure that a fair judicial process was open to aliens, but no duty to ensure that the process necessarily resulted in the recognition of every claim of aliens as well-founded.

23. Lastly, he was grateful to Professor Sohn for his promise that the Harvard Law School would give a precise indication of what it considered to be the existing law in the matter. It was recognized that the Harvard Draft proposed, in many of its provisions, changes in the existing law; the Commission would be greatly assisted in its work if a clear differentiation were made between those provisions of the draft which, on the one hand, constituted a restatement of existing international law and those which, on the other hand, constituted proposed changes in the law.

24. Mr. ERIM said he would confine remarks to a problem he had raised at the previous session-namely, the right of individuals (aliens and nationals) to apply to an international court for redress against a State.[5] He had raised the problem then because of the new development introduced by the adoption of the European Convention for the Protection of Human Rights

[3] *Yearbook of the International Law Commission*, 1959, vol. I, 512th meeting, paragraphs 33 to 38.

[4] *Cf.* citation in *Yearbook of the International Law Commission*, 1956, vol II, document A/CN.4/96, paragraph 98.

[5] *Yearbook of the International Law Commission*, 1959, vol. I, 512th meeting, paragraph 26.

and Fundamental Freedoms of 1950 and by the more general consideration that most civilized States were anxious to close any gaps in the law, so that it afforded the fullest possible protection for the individual, and were tending more and more to become States governed by the rule of law.

25. He welcomed the advance, albeit modest, in the new Harvard Draft, article 22, paragraph 2 of which gave a claimant the right to present his claim directly to a competent international tribunal if the State alleged to be responsible had conferred on that tribunal jurisdiction over such a claim. Though the provision still adhered to the traditional doctrine that a State could not be made a party to proceedings before an international tribunal unless it had previously consented to accept that tribunal's jurisdiction, a provision of that kind if incorporated in an international convention would at least be binding on the signatory States and therefore would mark some progress.

26. It was not yet a general practice. But academic legal bodies could be in advance of practice and promote the progressive development of law. In view of the fact that fifteen European States had already accepted the jurisdiction of the European Commission and also of the European Court of Human Rights, at least a permissive clause allowing for direct access by individuals to international tribunals should be included in any draft on state responsibility drawn up by the Commission.

27. Mr. LIANG, Secretary to the Commission, said it was very gratifying that the Commission should have found it possible to devote at least some time to the topic of state responsibility in pursuance of the decision taken at the previous session.[6] He wished to present a few observations on the new Harvard Draft, and the scholarly statement made by Mr. Gómez Robledo.

28. The Commission would have noted from the introduction that Professors Baxter and Sohn had been entirely responsible for the new Harvard Draft but that they had had the advice of a learned advisory committee as well as that of Professor Milton Katz. He (Mr. Liang) had also put forward certain views.

29. With regard to the Draft itself he only wished on the present occasion to point out the disadvantage of departing from well-established terminology. For instance, the phrase " denial of justice " had now been replaced by certain articles that might be criticized either for saying too much or too little and which could not be interpreted by reference to the vast corpus of case-law on the denial of justice. He could not see the force of the objection to the retention of the expression. Nor could he understand why the authors of the draft should have done away with the expression " standard of treatment ", whether " national standard " or " international law standard " or " human rights standard ". A standard was not the same as a principle or a rule and could be measured by the judicial process. Moreover, the Universal Declaration of Human Rights used the expression " standard of conduct ".

30. Though he was somewhat sceptical about the possibility of providing an exposition of existing law he welcomed the promise made in the Draft. The authors had at their disposal all the resources of the Harvard Law School. With regard to the Harvard drafts of earlier years, he said that many students of international law thought the commentaries drawn up to support the conclusions more valuable than the black-lettered texts themselves. He did not think that an exposition of existing law substantiated by judicial decisiong and by practice, together with reasons for changing the existing law, could be comprised in " explanatory notes ", and he hoped that what the authors of the Harvard Draft had in mind was something very much more detailed and comprehensive.

31. He agreed with Mr. Ago that the new Harvard Draft incorporated changes in the existing international law; that fact should be made clear so that there was no misunderstanding about its nature. In a sense it might be compared to certain principles of international law which had been formulated as a result of a series of discussions initiated by Judge Manley O. Hudson before the end of the last war, and those principles, entitled " International Law of the Future " [7] had exerted some influence on the formulation of the Charter of the United Nations. He thought that the present draft should be clearly designated as part of the international law of the future.

32. He thought it encouraging that state responsibility was being considered by a number of scientific bodies including the Institute of International Law which had on its present agenda the following topics : local remedies, diplomatic protection and nationalization. There was no ground whatever for eschewing such an important subject because it had political implications.

33. Commenting on some of Mr. Gómez Robledo's very illuminating remarks, he said they had been particularly valuable because in section II of his (Mr. Liang's) own report (A/CN.4/124) he had of necessity been concise and had not attempted to state in detail the various views expounded in the Inter-American Council of Jurists. One of the most important points brought out by Mr. Gómez Robledo was the need to consider state responsibility not only from the legal, but also from the political, economic and sociological points of view. The whole subject should not be left to exposition and research by agents or counsel of governments alone, who were somewhat limited in their approach, but should be studied from every angle, as had been done by F. S. Dunn in his

[6] *Ibid.*, 515th meeting, paragraph 45.

[7] *The International Law of the Future: Postulates, Principles and Proposals*, Washington, D.C., Carnegie Endowment for International Peace, 1944.

well-known book [8] and by Professor Shea in his book on the Calvo clause.[9] It was to be hoped that further authoritative works of that type would be published in the future.

34. Without discussing in detail the substantive issues touched upon by Mr. Gómez Robledo, who had been so informative about the cleavage of views in the Inter-American Juridical Committee, he pointed out that the various doctrines concerning state responsibility held by Latin American jurists were not necessarily confined to that continent. He recalled a speech which he had heard at The Hague Codification Conference of 1930 in defence of a single standard, that of the equality of treatment for nationals and aliens. The speaker had argued that both from the legal and from the logical points of view it was impossible to see how a State could object to such a standard since persons going to live in a foreign country went there of their own free will and in full knowledge of the economic and social conditions. That being so, there was no reason whatever why the State of residence should be held to bear a heavier responsibility for the protection of aliens than it had for the protection of its own nationals. That speech had not been delivered by a representative of a Latin American country, but by the Chinese delegate. Nevertheless, it must be recognized that Latin American jurists had made a great contribution to the theory of state responsibility. Such authorities as Drago and Calvo were mentioned in the most elementary treatises of international law in use in China for the past fifty years. More recently there had been the studies of Guerrero, Podestá Costa and Accioly, as well as the noteworthy contributions of Mr. García Amador and Mr. Jiménez de Aréchaga. He still vividly remembered the statement made at the Codification Conference of 1930 by Mr. Guerrero, when the latter had emphasized that the first problem to be solved in connexion with state responsibility was how to define the concept of an international obligation.

35. He believed that state responsibility as a subject lent itself to being studied from the sociological angle advocated by certain contemporary proponents of the philosophy of law such as former Dean Roscoe Pound of the Harvard Law School, who had elaborated the theory of "social engineering" that sought to reconcile interests by weighing the claims of the interested parties in the light of sociological considerations.

36. It was a pity that through lack of time the Inter-American Council of Jurists, both at its session at Mexico City and at its session at Santiago de Chile, had been unable to undertake a thorough study of state responsibility. The same had been true of the International Law Commission which he hoped at future sessions would be able to examine that important topic in greater detail.

37. Mr. PAL associated himself with the tributes paid to the authors of the Harvard Draft and thanked Mr. Gómez Robledo for pointing out some of the difficulties of the subject. Indeed, any proper evaluation of the proposed measures would necessarily present features of social reality which could be observed only in given historical situations. He thought that the Commission should devote a whole session to discussing the topic of state responsibility which, for lack of time, it had not as yet been able to do despite the importance of the subject. There were certain obvious disadvantages in discussing it in a piecemeal way during two or three meetings at each session, the main one being that such cursory comments were likely to assume a somewhat political and emotional tinge.

38. As he had not had the opportunity to study the new Harvard Draft carefully, it would be presumptuous on his part to attempt a detailed comment on it. Cursory comments on the other hand might unwittingly do injustice to the authors. By way of example one could refer to the comment made — and apparently rightly made — by Sir Gerald Fitzmaurice in the course of his observations regarding the frequent use by the authors of the expression "international law or treaty". Sir Gerald had observed that the reference to treaties in the relevant provisions raised a fundamental point, for in such a case the real wrong was the breach of the treaty and not the maltreatment of the alien. Professor Sohn, however, already at the previous session had indicated that his draft was restricted to responsibility for injuries to aliens and that violations of treaties as such did not fall within its scope. So it was quite within the competence of the present draft to deal even with what would be only a secondary wrong, if that was caused as a secondary consequence to an alien. Similarly, departures from the 1929 draft had also been pointed out by Professor Sohn himself at the previous session.

39. He agreed with Mr. Ago and Mr. Verdross that great caution was needed in accepting the view that the desired progress in the field was in the direction of allowing individuals to become subjects of international law. There were, indeed, many new historical factors not yet adequately assimilated in the requisite legal thinking in that respect. He drew attention particularly to the recent trend of change in the economic structure throughout the world and in the place of individual initiative in it, and pointed out its important bearing on the question. He welcomed Professor Sohn's promise that each article would be supported by an explanatory note and would be accompanied by a statement of the existing law. He suggested that the explanatory note should contain an explanation of the growth with a brief survey of the conditions responsible for the change, if any. That would help to point out the inner necessity of the law and would make it operate not as an obstacle but as the necessary channel through

[8] Frederick S. Dunn, *The Protection of Nationals: A Study in the Application of International Law*, Baltimore, The Johns Hopkins Press, 1932.

[9] Donald R. Shea, *The Calvo Clause, a Problem of Inter-American and International Law and Diplomacy*, Minneapolis, University of Minnesota Press, 1955.

which the co-ordinated energies were to flow. In the sphere of international law, law-making aimed at producing a consciousness of the ends would be more helpful to progress than the mere assertive provision of means.

40. Mr. TUNKIN associated himself with earlier speakers in congratulating the authors of the Harvard Draft on their elaborate project and Mr. Gómez Robledo on his extremely interesting statement on the trends of opinion among Latin American jurists on the topic of state responsibility. The Commission unfortunately had no time to discuss the Draft in detail, so that his observations would of necessity be very general.

41. As he had pointed out at the previous session,[10] the Harvard Draft represented a specific point of view, but its practical value for the Commission's work in the matter was questionable. In approaching the codification and progressive development of international law, the primary consideration must be the laws of the development of human society, which conditioned the main lines of the development of international law. From that point of view, he wished to make two main observations on the Harvard Draft.

42. In the first place, the provisions of the Draft relating to property were formulated in disregard of the fact that two fundamentally different economic systems now existed in the world and also in disregard of the disintegration of the colonial system. For example, paragraph 2, article 10 *(Taking and deprivation of use or enjoyment of property)*, which laid down certain standards for compensation, in effect reproduced the corresponding provisions of the Code Napoléon of 1804 in its concern for the sanctity of private property. While such provisions might still exist in the municipal law of some countries, it was absolutely inadmissible, in view of the co-existence of two economic systems, to postulate the principle as a rule of international law. Secondly, the concept of the individual as a subject of international law was also unacceptable.

43. His remarks should not be held to mean that he did not regard the Harvard Draft as a valuable exploratory work, representing a definite point of view; but it was to him an increasing source of anxiety that if the Commission continued to work on the same lines it would be difficult to expect practical results in the codification of the international law on the subject.

44. The scope and nature of the draft that the Commission would ultimately present to the General Assembly were by no means clear. The reason for that, in his opinion, was that two distinct subjects — state responsibility proper and the treatment of aliens — had been mixed together.

45. The structure of the Draft also seemed to be open to criticism. The Special Rapporteur had used as a point of departure the question of fundamental human rights, and his earlier reports in fact amounted to statements of those rights. But it was obvious that fundamental human rights as set forth in the draft international covenants on human rights had not yet become an institution of international law. Moreover, though starting from that basis, the Special Rapporteur had in some cases departed from it and tended to perpetuate the obsolete concept of the privileged status of aliens.

46. In conclusion, he hoped that the Commission at its next session would find time to examine the main points of the subject.

47. Mr. ŽOUREK recalled that, when state responsibility had been discussed at the previous session, he had observed that the then Harvard Draft departed in some essential respects from the well-established rules of international law.[11] Many members of the Commission had made constructive criticisms on some points of the 1959 draft, and the representatives of the Harvard Law School had said that they would take the observations into account in their final draft. While he had not had time to study the new draft exhaustively, he had compared it with the 1959 draft, and had been somewhat disappointed by the absence of change in the methods used and in the basic principles contained therein.

48. It was doubtful, to say the least, whether a satisfactory codification of the rules of one of the most difficult branches of international law could be based on the Harvard Draft, since several of its provisions contained totally unacceptable theses. For example, paragraph 2, article 3 *(Categories of wrongful acts and omissions)* stated that the wrongfulness of a certain act or omission might be the result of the fact that the law of the State concerned did not conform to international standards; but the notion of " international standards " did not exist in international law, nor, for that matter, was it defined in the Draft. In several passages, also, the expression " the principles of justice generally recognized by municipal legal systems " was used; in view, however, of the wide difference between the principal economic and juridical systems of the word in that respect, it would be very difficult to agree on generally recognized principles of justice. Furthermore, the Draft seemed to be based on the idea that aliens had a privileged position in economic matters; while it stated that the position of aliens should not be less favourable than that granted to the nationals of the State concerned, at some points the vague concept of generally recognized principles of justice was mentioned, as though it were a definable entity. Finally, under paragraph 6 of article 23 *(Espousal of claims and continuing nationality)* a State could present a claim on behalf of a person who had become a national of that State subsequent to the injury. Those were some of the most outstanding examples of the departures made by the authors of the draft from

[10] *Yearbook of the International Law Commission*, 1959, vol. I, 512th meeting, paragraph 24.

[11] *Ibid.*, 513th meeting, paragraph 4.

the terra firma of existing rules of international law.

49. The rules in the Harvard Draft were based on one economic and legal system, and no attempt had been made by the authors to work out provisions capable of being applied at the international level to all States, whatever their economic and social structure. The unilateral nature of the Draft therefore made it impossible for the Commission to use it as a basis. Viewed as a work of research and as simply an indication of the line of thought prevailing in the United States of America, it might prove of some use for codification purposes, but it could not be used as a guide by the Commission. If the Commission used it as a guide, its debates on the topic would be bound to end in disagreement. He had been glad to hear, however, that the Harvard Law School was thinking of preparing a commentary to the Draft, in which it would distinguish between existing law and purely theoretical proposition. The only practical course was to return to the rules and fundamental principles of international law in the matter, and to distinguish between cases where an injury to an alien did not constitute a breach of international law, and cases where the State of residence was internationally responsible for injuries sustained by an alien.

50. Mr. GARCÍA AMADOR, Special Rapporteur, replying to Mr. Tunkin's comments on his study and on the methods he had used, observed that his reports contained detailed explanations of the difference between the two subjects of state responsibility properly so called and the legal status of aliens. The clear distinction between the two had never been questioned in a public or private codification, and he was therefore surprised that the matter should have been raised by a member of the International Law Commission. The two subjects could indeed be regarded as aspects of the same question: the legal status of aliens was the substantive aspect, while the other aspect consisted in the conditions and circumstances in which States must assume responsibility. The Commission's clearly defined task was to codify the conditions and circumstances in which a wrongful act causing injury to an alien was imputable to a State. A careful study of his reports would show that their scope was fundamentally confined to such codification and that the subject of the legal status of aliens was touched upon only in connexion with the explanation of the difference between the two questions.

51. Nor could he agree with Mr. Tunkin that human rights and fundamental freedoms were not generally recognized at the international level. As early as 1956, before Mr. Tunkin had become a member of the Commission, the majority of the Commission had seemed to be in favour of basing a general approach to the question of state responsibility for injuries caused to the person or property of aliens on the concept of human rights.

52. In commenting on the new Harvard Draft, Mr. Tunkin had stressed the need to find a new concept in keeping with the " principle of peaceful co-existence " of the two economic systems of private and socialist property. That need was undeniable, and he would submit that the difference of opinion between Mr. Tunkin and himself on the matter was perhaps not so great. In his fourth report, for example (A/CN. 4/119), he had studied the questions of expropriation and compensation in the light of new developments in the social function of private property. The importance attached to the social function of property rights was not, however, an exclusive attribute of socialist States; it was evident in most States as at present organized. Again, he was surprised that Mr. Tunkin laid such stress on the alleged disregard of one legal system of property and yet showed such reluctance to admit the concept of internationally recognized human rights, which was a universal concept and an integral part of the principles of the United Nations.

53. Mr. BARTOŠ agreed with the views expressed by earlier speakers that the new Harvard Draft laid down desiderata for guaranteeing the interests of aliens without taking into account the fundamental developments that had taken place in social institutions throughout the world and the new legal concepts expressed in many United Nations documents. For example, the Universal Declaration of Human Rights and the draft international covenants on human rights contained a number of limitations which were disregarded in the Harvard Draft. Article 17, paragraph 2, of the Universal Declaration merely stated that no one should be arbitrarily deprived of his property, and article 29, paragraph 2, stated that, in the exercise of his rights and freedoms, everyone should be subject only to such limitations as were determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. The Harvard Draft, however, did not take into account the " limitations determined by law ". Furthermore, he agreed with Mr. Žourek that in some of its provisions the Draft disregarded established rules of international law-for example, in the provision enabling a State to present a claim on behalf of a person who had become its national after the injury.

54. The Harvard Draft could therefore be regarded only as a codification of United States case-law, which in effect extended the right of intervention but failed to take into account the interests of other States. With all due respect for the concept of state responsibility, he considered that certain limitations must be provided to allow for developments that had taken place in the municipal law of many States: since the Code Napoléon, for instance, the French law relating to property rights had been changed very greatly.

relating to property rights had been changed very greatly.

55. The Commission's thanks were due to the authors of the Harvard Draft and also to the Inter-American Juridical Committee, whose observer had given an illuminating description of the views held by various American jurists. Nevertheless, for a really profound study of the foundations of state responsibility the Commission could not use the Harvard Draft as a guide. The consequences of the existence of several economic and legal systems must be taken into account, and he welcomed the Special Rapporteur's assurance that he would study new developments closely for his future texts.

56. The CHAIRMAN expressed the Commission's thanks to Professor Sohn and to Mr. Gómez Robledo for their valuable contributions to the Commission's work. The all-too-brief exchange of views prompted by their statements would undoubtedly be most useful in future discussions. It was to be hoped that when the Commission came to study the subject of state responsibility in detail, those exchanges of views would be borne in mind and also that the mutually beneficial collaboration between the Commission and the Harvard Law School and the Inter-American Juridical Committee would continue.

The meeting rose at 6.5 p.m.

569th MEETING

Wednesday, 22 June 1960, at 9.30 a.m.

Chairman: Mr. Luis PADILLA NERVO

Ad hoc diplomacy (A/CN.4/129, A/CN.4/L.87, A/CN.4/L.88, A/CN.4/L.89) *(resumed from the 567th meeting)*

[Agenda item 5]

1. The CHAIRMAN invited the Commission to consider whether article 11 *(Offices away from the seat of the mission)* of the 1958 draft was applicable to special missions.

2. Mr. SANDSTRÖM, Special Rapporteur, said that he had proposed (A/CN.4/129, paragraph 15) that article 11 should be excluded from the list of provisions applicable to special missions because the article dealt with a question affecting specifically permanent missions.

3. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed that article 11 did not apply to special missions.

It was so agreed.

4. Mr. SANDSTRÖM, Special Rapporteur, said that article 12 *(Commencement of the functions of the head of the mission)* of the 1958 draft did not, as it stood, apply to special missions. The effective date of the commencement of the functions of the head of a permanent mission affected such matters as precedence; in the case of special missions, the date of commencement, though less important, might occasionally be of consequence.

5. He therefore proposed that, in the draft on special missions, article 12 should be mentioned as one of the provisions which could on occasion serve for special missions.

6. The CHAIRMAN said that, if there were no objection, he would take it that the Commission accepted the Special Rapporteur's proposal concerning article 12, with his explanation.

It was so agreed.

7. Mr. SANDTRÖM, Special Rapporteur, said that article 13 *(Classes of heads of mission)* of the 1958 draft was not relevant to special missions, except those sent on ceremonial occasions. He proposed that article 13 and article 14 should be dealt with in the same manner as article 12.

8. Mr. MATINE-DAFTARY pointed out that article 13 was of interest for itinerant envoys.

9. Mr. JIMÉNEZ DE ARÉCHAGA drew attention to articles 2, 3 and 4 of the Regulation of Vienna.[1] The provisions of those articles, taken together, made it clear that diplomatic officials on extraordinary missions, who were the subject of article 3, must belong to one of the three classes of heads of mission. The provisions of article 13 had therefore applied to special envoys at least since 1815.

10. Mr. SANDSTRÖM, Special Rapporteur, agreed with Mr. Jiménez de Aréchaga on that point.

11. With regard to article 14, he said that its provisions clearly concerned permanent missions, for it dealt with the question of reciprocity in the exchange of heads of mission. Special missions were of an occasional character and were not reciprocal. For those reasons, he proposed that article 14 should be dealt with in the manner which he had indicated.

12. Mr. TUNKIN said that, in practice, the two States concerned never entered into an express agreement regarding the class to which the head of a special mission was to belong. Accordingly, article 14 was not applicable to special missions; there was no reason to oblige States to enter into an agreement in advance on the class of the head of a special mission.

13. Of course, when the receiving State consented to receive the special mission, the agreement would in fact, explicitly or implicitly, include an agreement on the duration and purpose of the mission and also on its head. Article 14, however, referred to the special procedure applicable to

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[1] *Official Records of the General Assembly Thirteenth Session, Supplement No. 9* (A/3859), footnote 29.