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Summary record of the 372nd meeting

Topic:
State responsibility

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372nd MEETING

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Chairman: Mr. F. V. GARCÍA-AMADOR.

Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

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

1. The CHAIRMAN invited the Commission to consider the bases for discussion contained in Chapter X of his report on International Responsibility (A/CN.4/96).

Chapter X: Bases for discussion

2. Mr. FRANÇOIS said that he rather doubted whether the criminal responsibility of States really existed. The Special Rapporteur himself had stated in his report (p. 26): " While international criminal responsibility *per se* is outside the scope of the present codification, there are important reasons why it should not be ignored completely in the study of some at least of the cases of responsibility with which this codification is concerned ". Even if the topic were restricted to the specific issue on the lines laid down by the Hague Conference on the Codification of International Law of 1930, the new principle must be taken into account, and the Commission must consider whether the principle of the criminal responsibility of the State existed, since its decision would be likely to affect the question with which it was to deal.

3. The idea that the international community could inflict punishment on a State had been contested on the grounds that the imposition of penalties was a matter exclusively for the sovereign State as the representative on earth of divine right, and that the international community was not a super-State. He did not accept that view, because a State might very well be threatened with punishment as a preventive measure in the interests of the maintenance of peace. The basis for the former view was probably that of revenge (*lex talionis*), whereas the latter was designed to prevent a breach of the rules of international law. He could therefore accept in principle the idea of the criminal responsibility of States, but was very dubious whether international law recognized it in practice. There had been cases in which the criminal responsibility of States had been accepted, notably the *I'm Alone* case[1] but there had been many more cases in which the principle had been contested and courts and arbitral tribunals had refused to inflict punishment on States on the ground that the international community was not empowered to do so. In the *Carthage* case[2] between Italy and France before the Permanent Court of Arbitration, France had demanded that the court impose a symbolic fine of one franc, but the Court had refused, on the ground that it was a sufficient penalty for the court to hold that the State in question had been at fault and that any other penalty would exceed the purpose of international jurisdiction.

4. The state of law had probably not altered after the Nuremburg Trials. In fact, precisely the reverse was true. At Nuremburg the issue had been not the criminal responsibility of a State, but the responsibility of authors of criminal acts even when they had been organs of the State. In other words, the Court had denied the criminal responsibility of States and had reintroduced the criterion that " the King can do no wrong ". Mr. Scelle had argued[3] that that criterion had become obsolete, but, with respect, his interpretation had not been quite complete. That criterion did not mean that the King could not commit illegal acts, but merely that such acts could not be imputed to the King or State, but only to the King's advisers or the organs of State. The whole concept of ministerial responsibility rested on that criterion, and it had in fact been applied at the Nuremburg trials. It was not nceessary to impute criminal acts to the State, and perhaps not even desirable, since that would envenom relations between States. He himself preferred a system dealing only with civil responsibility, completed by the acceptance of criminal responsibility on the part of private persons, officers or organs of State. That implied a return to the criterion laid down by the Preparatory Committee of the Codification Conference at The Hague (1929):

> Responsibility involves for the State concerned an obligation to make good the damage suffered in so far as it results from failure to comply with the international obligation. It may also, according to the circumstances, and when this consequence follows from the general principles of international law, involve obligation to afford satisfaction to the State which has been injured in the person of its national, in the shape of an apology (given the appropriate solemnity) and (in proper cases) the punishment of the guilty persons.

5. Mr. SCELLE said that he entirely agreed with Mr. François and accepted the criticism that he had not fully expressed his thought in his previous remarks. He agreed that as a concept the criminal responsibility of States could not exist. Since the State as a personality was a legal fiction, it could not have criminal responsibility, but merely objective responsibility as liable to make reparation where an individual could not do so. That was the doctrine of the entire younger school of French jurists, none of whom would accept the criminal respon-

[1] Whitman, *Damages in International Law*, Washington, 1937, 1943.

[2] *Revue générale de droit public*, 1913.

[3] A/CN.4/SR.371, para. 33.

sibility of States. According to that doctrine, the State as a personality disappeared and was replaced in criminal responsibility of by a minister, a private person, a member of an association, or even a commercial concern. The *personne morale* was a convenient legal fiction, and there was no need to give it a personality, much less inflict punishment upon it. He therefore went rather farther than Mr. François, but the basis of his thought was the same.

6. Mr. AMADO said that he, like Mr. Scelle, had been surprised to find reference to the criminal responsibility of States in the Special Rapporteur's report. No doubt the Special Rapporteur had not wished to overlook any of the new trends in international law, but the concept of the criminal responsibility of States was inconceivable. All international jurisprudence militated against such a concept. The leading judgment had been that in the *Carthage* case, 16 May 1913 [4] and had been couched in the following language:

> In case a Power should fail to fulfil its obligations, whether general or special, to another Power, the statement of this fact, especially in an arbitral award, constitutes already a serious penalty.

A supporting judgment had been that of the Mixed Claims Commission (United States and Germany) in the *Lusitania* case,[5] as follows:

> This Commission is without power to impose penalties for the use and benefit of private claimants when the Government... has exacted none.

The arbitral award of 31 July 1928 on the *Naulilaa* incident [6] provided another precedent, in which the Court had refused to accept a Portuguese claim for penal damages against Germany for violation of the neutrality of Angola and in compensation for violations of Portuguese territory.

7. The obligation to make reparation in fact took the form of restitution and the restoration of the original state of affairs (*restitutio in integrum*) by the abrogation of the law or decree inconsistent with international law, although that form of restitution was not always possible. Reparation might also be in the form of moral satisfaction, in the shape of an apology given with the appropriate solemnity or a salute to the flag. It might also take the form of domestic sanctions by the administrative or disciplinary punishment of the officials responsible, or else the payment of a pecuniary indemnity. The latter was the normal form of reparation, as had been shown by the Permanent Court of Arbitration in its judgment of 11 November 1912 in the case relating to the Turkish war indemnity to Russia.[7]

The various responsibilities of States are not distinguished from each other by essential differences; all resolve themselves or finally may be resolved into the payment of a sum of money, and international custom and precedent accord with these principles.

8. That the payment of pecuniary damages was really almost the only way of obtaining reparation might be deplorable, but it was a fact. A State could not be imprisoned; it could only be asked to pay damages and to exhaust all local remedies. He, therefore, entirely agreed with the views expressed by Mr. Scelle and Mr. François.

9. Mr. KRYLOV agreed that it was impossible to speak of the criminal responsibility of States. It should be observed, however, that in basis for discussion No. 2 the Special Rapporteur had attributed criminal responsibility only to individuals. He himself would have preferred that the question even of the criminal responsibility of individuals be left aside for the time being, and that the Commission confine itself to the topic of the civil responsibility of States for damage caused to the person or property of aliens.

10. The Commission had already done a great deal of work on the criminal responsibility of individuals. That work might, however, be carried considerably further. It had been somewhat impeded by the political rigidity of Vyshinsky and the attitude of the United States. Mr. Spiropoulos had worked hard on the subject, although he himself did not agree with every line of Mr. Spiropoulos' reports.[8]

11. In his personal view, the distinction drawn between active and passive subjects of international responsibility was undesirable; he could see no value in the term " passive subjects ". The person whose interest or right had been injured was not passive; at the most, he was unfortunate, but was defending himself. Unless the terminology was definitely required, the distinction was purposeless.

12. Mr. SANDSTRÖM observed that Mr. François had raised the same problem as Mr. Krylov—namely, whether the criminal responsibility of the individual was a concept which existed in contemporary international law. The Commission's draft Code of Offences against the Peace and Security of Mankind [9] had deliberately omitted the question of whether the principles underlined at the Nuremburg trials were principles of existing international law. It was doubtful whether the criminal responsibility of individuals existed before any code had laid down penalties for offences.

13. Sir Gerald FITZMAURICE had no criticism to make of basis for discussion No. 2 as it was clearly not confined to the question of the responsibility of States, since individuals and international organs were referred to in paragraph 2. If the Commission accepted the proposal by the Special Rapporteur that codification should be confined to the law on the responsibility of States for damage caused to the person or property of aliens, the other questions would not arise at that stage in the Commission's work.

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[4] G. G. Wilson, *The Hague Arbitration Cases, Boston and London, 1915*, p. 366.

[5] Mixed Claims Commission (United States and Germany), *Administrative Decisions*, Washington, 1925, p. 31.

[6] Briggs, *The Law of Nations, Cases, Documents and Notes*, New York, 1938, pp. 677-679.

[7] G. G. Wilson, *The Hague Arbitration Cases*, Boston and London, 1915, p. 307.

[8] A/CN.4/25, A/CN.4/44, A/CN.4/85.

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

14. The penal element undoubtedly came into the question, as States had obligations, under traditional international law, in certain circumstances and as part of the reparation due to other States, to punish officials and private persons in case of breach or non-observance of an international obligation. The State might even have to pay what were called exemplary damages, but that did not necessarily imply criminal responsibility. Nearly all countries had a system of inflicting damages over and above the pecuniary extent of the injury where courts held that a moral element was involved. That, however, was a process in civil law, and the person against whom exemplary damages were assessed did not thereby become a criminal. True, there had been cases in international jurisprudence, such as the *I'm Alone* case, in which damages had been inflicted over and beyond strict *restitutio in integrum*, but all such cases came within the ambit of the civil responsibility of the State and had not thereby been transformed into the nature of a criminal responsibility.

15. Mr. SPIROPOULOS observed that he had already remarked at the previous meeting[10] that the question of criminal responsibility of individuals had been dealt with by the Commission in connexion with the Draft Code of Offences against the Peace and Security of Mankind. As that Code was still before the General Assembly, the topic should not be dealt with again until the Assembly had given a decision on it.

16. The Commission had deliberately excluded the question of the criminal responsibility of States when it had discussed that code, and he himself had argued against Vespasiano Pella's view in connexion with the code rather than with the Nuremburg trials.

17. Sir Gerald Fitzmaurice had said that in civil law there existed a system of inflicting damages exceeding the extent of the injury. As a theory, the idea of punishing a State for criminal responsibility was not an absurdity, as Pella had shown. The idea was conceivable as a consequence of a war and exemplary damages might, in theory, be levied against the State, not as a legal fiction, but as a collectivity. The Commission, however, should not enter into that topic at the present stage.

18. Mr. SCELLE drew attention to the confusion caused by the misuse of the terms " active subjects " and " passive subjects " of international responsibility in, at any rate the French text of, bases for discussion Nos. II and III. The French meaning of those terms was the exact opposite of that attributed to them. The " sujet passif " was the State that was obliged to pay reparation, whereas the " sujet actif " was the State in person who received the reparation. He himself had been completely misled in his first reading of the report and he suggested that a note should be added pointing out that difference in terminology.

19. Mr. KRYLOV remarked that that was precisely why he had advocated avoiding such terminology.

20. Sir Gerald FITZMAURICE said that the same criticism applied to the English text.

21. Mr. LIANG, Secretary to the Commission, said that the terminology in question would probably not appear in any rules that the Special Rapporteur submitted to the Commission. It was not necessary to introduce controversial terminology in the text of articles, although the distinction might be useful in a doctrinal analysis of concepts and to clarify fundamental ideas. Another example of unusual terminology was the term " real owner ", in basis for discussion No. III, paragraph 3; the correct term for the victim of an injury would be " beneficiary ".

22. Mr. ZOUREK thought that the criticisms already voiced arose from the fact that in certain respects the report on international responsibility went farther than was strictly required by the nature of the topic, for it concerned aspects of international responsibility in general. He shared the objections, in particular those raised by Mr. François,[11] with regard to the principle advanced in respect of the criminal responsibility of States. The theory had not been recognized in international law, nor had it been adopted by the Commission in its Draft Code of Offences against the Peace and Security of Mankind. Moreover, it had little practical value, for in cases where theoretical damages might be contemplated, the individuals or the State causing the injury would in fact never be in a position to make adequate reparation, let alone to pay a collective fine. The case of the Nazi regime was a case in point.

23. With regard to basis for discussion No. II, a question to be decided was whether the international responsibility of the State was engaged solely in the case of a fault (*culpa*) on the part of an organ of the State or whether it could be enlarged to include the theory of risk. In that connexion he recalled Mr. Amado's reference[12] to that theory. The basis for discussion he had mentioned seemed to start from the idea that international responsibility was the consequence of a breach or non-observance of an international obligation, which amounted to acceptance of the theory of causality. As to the question whether proof of fault should be required in all cases, no decision could be taken without a thorough examination, which should take into consideration the various categories of damage.

24. The system proposed in basis for discussion No. III certainly went farther than was permitted by existing international law. The idea that foreign private individuals might be passive subjects of international responsibility if the injury affected their person or property was a major innovation. He doubted whether the recognition of that concept would prove to have practical value, because in fact it would always be the State that would bring an international claim for the damage sustained—save, of course, in cases where a convention made special provision for an individual to bring such a claim. It was also a principle that States would not be able to accept. The existing system, as defined by the International Court of Justice in the cases mentioned in the report, was that only the State was recognized as a passive subject of

[10] A/CN.4/SR.371, para. 10.

[11] See paras. 2-4, above.

[12] A/CN.4/SR.370, para. 47.

international responsibility in all cases, not merely in those in which it had a " general interest ". For those reasons, he could not support the adoption of the principle.

25. Faris Bey el-KHOURI said that the reason why the criminal responsibility of a State entailed by the breach or non-observance of an international obligation was not recognized in international law was the practical difficulty of imposing an adequate penalty. In cases of aggression by a State resulting in injury to persons or property of another State, the individual authors of the injury could not make reparation, for they were acting under the obligations of municipal law. It was a basic principle of jurisprudence, however, that criminal offenders should be punished, and in such cases, since the whole community was the guilty party, punishment should be meted out to the State in the only form in which a penalty could be applied, which was a fine in money. That concept was perfectly defensible in international law, for a State was a legal entity; it was moreover, in accordance with the Charter of the United Nations. There was nothing revolutionary in such an approach, and the Commission should take a firm stand in establishing that concept.

26. Mr. SANDSTRÖM observed that the question of the subjects of international responsibility had wide implications. He doubted whether adoption of the principles enunciated would in fact operate to the benefit of the private individuals concerned. In the first place, the legal procedure entailed would be extremely expensive; moreover, it was difficult to conceive an international claim for damage being made by a private individual without the support of the State of which he was a national.

27. Mr. Zourek had raised an extremely important point with regard to the application of the theories of risk and fault as criteria for establishing international responsibility. The trend in municipal law seemed to favour the idea that there was no need to prove fault in order to impute responsibility, a principle that was applied in Scandinavian countries in respect of industrial accidents, particularly those occurring in dangerous occupations. An analagous responsibility in the international field was perfectly conceivable in the case, for instance, of damage inflicted by atomic bomb tests, as witness the damages paid by the United States Government to Japanese fishermen after the Bikini atoll explosion.

28. Mr. SPIROPOULOS said that acceptance of the principle enunciated in paragraph 3 of basis for discussion No. III would entail a complete modification of international relations. Under existing international law, in cases of violation of the rights of a private individual, the State concerned had the right to intervene. If, however, the individual were to be regarded as the real owner of the injured interest or right and as having the capacity to bring an international claim for the damage sustained, an international convention establishing the compulsory jurisdiction of an international organ would be required. Otherwise a State could always intervene, with the result that the private individual would receive no satisfaction. The concept therefore had a purely theoretical value. The proposed change, which would have widespread international repercussions, might be possible at some future date, but its practical implementation would call for the prior establishment of a system. There was no gainsaying the fact that in existing practice the State was the real owner of the injured interest or right.

29. The question of responsibility without fault was a basic point of vital importance that must be dealt with. The Hague Codification Conference had not taken it up, although the German author Strupp had devoted some attention to it.[13]

30. Mr. KRYLOV said that the question of the criteria of fault and risk mentioned by Mr. Zourek and Mr. Sandström was an important one that must not be disregarded. Some twenty years previously, he himself had written a monograph on the question of responsibility, in which he had studied the major cases in international law that had occurred during the nineteenth century. Following the German authors, he had concluded that the only satisfactory criterion that could be applied was the principle of fault. In passing, he might mention that the court of arbitration at Geneva in 1872 in the *Alabama* case[14] had implicitly based its finding on that concept. His studies had led him to the conclusion that in questions of the responsibility of States, the theory of risk, although applicable in administrative and municipal law, was not a satisfactory basis. The only adequate criterion was the concept of fault.

31. Mr. SANDSTRÖM said that the question was not necessarily the simple one of choosing between the two alternatives of the criteria of fault and risk. It was possible to conceive of a mixed system, such as existed in civil jurisprudence in most countries, and a domestic system based on responsibility without fault might well be applicable in the international field.

32. Mr. SALAMANCA said that, in addition to the continental theory of fault, with its implication of intention, the Anglo-Saxon theory of direct risk, applicable to the injury caused, should also be considered. That theory was based on three principles—intention, responsibility without fault, and causality, of which the second and third were the most important. The application of the Anglo-Saxon theory in the international field would result in an extension of the responsibility of the State, whereas, according to the theory of fault, State responsibility was restricted. In the latter case, the State might be accused of negligence as a result of the breach or non-observance of an international obligation resulting in injury to some internationally recognized interest or right; but, if it were to argue that the injury inflicted could not have been foreseen or prevented, its position would certainly be final. In cases under civil municipal law, the theory of direct risk was more satisfactory, but in international law with regard to responsibility he would prefer the concept involving a more restricted responsibility.

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[13] Karl Strupp: *Das Völkerrechtliche Delikt.*

[14] A. de Lapradelle & N. Politis: *Recueil des arbitrages internationaux*: Vols. II and III.

33. One or other of the criteria, however, must be adopted, for the question was of major importance. The consensus of opinion in the Commission seemed to favour the theory of fault, and, on the international level, his own preference would be for that criterion, largely on account of the numerous well-established precedents which would form an essential basis for decisions in specific cases. In international law there were far fewer precedents in the case of the principle of direct risk. There was no doubt that the Commission should clearly establish the distinction between the two concepts and, in its choice, it would go to the very heart of the question of state responsibility.

34. With regard to basis for discussion No. IV—Responsibility in respect of violations of the fundamental rights of man—the Special Rapporteur's view that the draft conventions on human rights had profoundly affected the situation had found favour in some countries. It was not only a question, however, of the determination of the " fundamental rights of man "; what was also involved was the establishment of a special international authority to deal with cases of alleged violation of rights. That question, in fact, had already been raised. In that connexion, the problems that had faced the Commission in its consideration at its second session of the question of international criminal jurisdiction would arise anew, and it would certainly be found that such questions were of purely theoretical interest and had no practical value. As he had pointed out at the previous meeting,[15] although there might be general recognition of the " fundamental rights of man ", in the field of implementation there were wide divergencies. Issues of national sovereignty were involved, and he failed to see how the principle put forward in paragraph 2 could possibly be given practical implementation in existing world conditions.

35. Faris Bey el-KHOURI, referring to basis for discussion No. IV, observed that since the French Revolution the main fundamental human rights had been embodied in the constitutions of most countries. The enunciation of those rights in constitutions was, however, regarded as a basis for legislation and not for administrative action. Furthermore, the constitutional guarantees of human rights, in his part of the world at least, did not apply to aliens, whose treatment was governed largely by conventions based on the principle of reciprocity. He did not think, moreover, that those who had drawn up the Universal Declaration of Human Rights had had in mind that the rights should be applied to aliens. Thus, the idea contained in basis for discussion No. IV that fundamental human rights should form an integral part of international law was an innovation and could not be regarded as reflecting existing law.

36. Mr. FRANÇOIS said that paragraph 1 of basis for discussion No. IV constituted a very important innovation which might help to bridge the gap between the continental and the Latin American conceptions of the treatment of aliens, which had been the main reason for failure to reach agreement on that question at the 1930 Codification Conference at the Hague.

37. He could not agree with Faris Bey el-Khouri that the human rights embodied in constitutions were only for the guidance of legislators or that they did not apply to aliens. The desire to improve the status of stateless persons had, as a matter of fact, been one of the reasons for the establishment of the Universal Declaration of Human Rights. He rather doubted, however, whether the principles contained in basis for discussion No. IV had any immediate practical value. The Universal Declaration had no legal force, and attempts to evolve general conventions on human rights had not so far borne any fruit. A convention on human rights had admittedly been adopted in Europe, but its chief value lay in the fact that it established a tribunal to deal with complaints—a tribunal whose jurisdiction had so far been accepted by very few States. In any case, to settle disputes a tribunal must have clear criteria on which to base its judgments, and those laid down in the convention were vague—too vague, in fact, to be of much use to the Commission.

38. There appeared to be a contradiction between paragraphs 1 and 2 of the text. According to paragraph 1, the State was under a duty to ensure to aliens the enjoyment of the same civil rights and to make available to them the same individual guarantees as enjoyed by its own nationals, the fundamental rights of man being then offered as a minimum standard for those rights and guarantees. Paragraph 2, however, went on to say that " In consequence in cases of violation of civil rights, or disregard of individual guarantees, with respect to aliens, international responsibility would be involved only if internationally recognized 'fundamental human rights' are affected ". With respect to aliens, however, the State, according to paragraph 1, was internationally responsible for more than the observance of fundamental human rights.

39. Sir Gerald FITZMAURICE said that he too was somewhat puzzled by paragraph 2, which seemed to imply a much wider application of the test of violation of human rights than was possible. An international wrong might be committed without any fundamental human right having been violated.

40. The idea contained in the basis for discussion was very interesting, but called for some investigation. The international standard of administration of justice and the rule of international law in its respect was fairly clear—namely, that a State discharged its international responsibility towards an alien or a foreign State in matters of justice if it gave the alien national treatment, always provided that the usual practice of justice in the State concerned was in conformity with international standards. The standard had never been satisfactorily defined, however. International tribunals, though often basing their findings on the failure of the treatment under dispute to conform to the international standard of justice, refrained from specifying what the standard was. Undoubtedly in countries where justice was administered in such a way or where the law was such that fundamental human rights were not observed, it was

[15] A/CN.4/SR.371, para. 20.

extremely probable that the international standard of justice was either departed from or not achieved. The two concepts of " international standard of justice " and " observance of fundamental human rights " might be found not completely to coincide. The international standard having been set hitherto at a rather low level, cases might arise where fundamental human rights had been denied, and yet it would be difficult to claim that the international standard of justice had not been achieved. On the other hand, cases might arise where no denial of human rights was involved, but where there had nevertheless been a departure from the international standard of justice.

41. Mr. ZOUREK said that basis for discussion No. IV sought a solution for a very thorny problem in what he regarded as a good direction. The draft covenants on human rights were, however, only in course of elaboration by the United Nations, and, in the absence of such general instruments, he, like Mr. François,[16] feared that the ideas enunciated in the text would not provide any basis for settling cases in practice. Naturally, when the draft covenants were ratified, they would constitute a very valuable contribution to the question of state responsibility. Until then, however, the Commission, while taking into account the ideas on which the draft covenants were based, must draw on other principles, and in particular that of the equality of aliens and nationals, which had often been stressed in international instruments and conferences. The question had been thoroughly dealt with in the report, where the history of the thesis was traced from the first International Conference of American States in 1889-1890, the Convention on Rights and Duties of States signed at Montevideo in 1933, the " Bustamante Code ", the Convention on the Status of Aliens signed at Havana in 1928, the Draft Convention on the Treatment of Foreigners prepared by the League of Nations Economic Committee for the international conference on that subject in 1929, and finally the report of the sub-committee of the League of Nations Committee of Experts (Guerrero report), in which it was stated that " the maximum that may be claimed for a foreigner is civil equality with nationals ".

42. Sir Gerald FITZMAURICE, referring to basis for discussion No. V, wondered whether the terms used in the title, and in particular the term " exoneration ", were entirely appropriate. Failure to resort to local remedies was not necessarily an exonerating circumstance. In some cases, as the Special Rapporteur himself had pointed out, it could mean that no international wrong had been committed at all. There were two types of cases involved: those in which the right to bring a claim on the international plane was suspended or deferred until all local remedies had been exhausted, and the other cases in which there could not be any question of an international wrong until local remedies had been exhausted. The classic example of such a case was a claim of denial of justice in domestic courts. In such an instance, no international wrong had been committed until the denial of justice in a lower court had not been remedied or had been repeated in the higher courts. In such cases, the question of exoneration simply did not arise. He wondered too whether it was quite correct to refer to the renunciation of diplomatic protection as an exonerating circumstance. The fact that a private person could not invoke the protection of his government affected not so much the responsibility of the State against which he had a claim, as the right of the State of which he was a national to bring a claim. But such matters were mere questions of terminology.

43. As far as substance was concerned, he must confess to some doubts regarding the proposals with respect to the " Calvo clause ". As he understood the international law on the subject, private persons and companies were free to, and often did, include a clause in contracts by which they undertook not to invoke the aid of their governments. Such a clause could not, however, be binding on the government of the State of which the person or company was a national, should that State consider that a wrong calling for international intervention had been committed. If the Special Rapporteur meant to suggest that a State had a right to intervene only when it had some direct interest in a claim, in other words, only in cases where it had suffered an injury distinct from that done to its national, his formulation constituted an excessive restriction of the right of a State to intervene. States frequently had an interest in making a diplomatic claim, even when they had suffered no injury distinct from that suffered by their national. As a matter of fact, all States might be said to have a general interest in the treatment of aliens. He felt that it must be recognized that States might have an interest other than a direct pecuniary interest in a claim, and hence have a right to intervene.

44. Mr. SALAMANCA, recalling his previous remarks[17] on *a priori* diplomatic protection with reference to mutual security agreements, suggested that the question might be studied in connexion with basis for discussion No. VI. Since the amount and form of compensation were specified in such agreements, any reparation awarded by an international tribunal would have to coincide exactly with the terms of the agreement, and no additional damages could be given as in municipal civil liability cases. The agreements in question, which were quite numerous, had a considerable bearing on the question of international responsibility. They eliminated the individual as a subject, limiting responsibility to that of State to State. They settled the measure of reparation, the quantity of reparation which the protecting State must pay the investors and the form in which it must be paid. They also eliminated the question of the punitive function of reparation.

45. Mr. ZOUREK said that he was not in favour of taking the punitive function of reparation into account. Any penalty, in the exceptional cases in which it was imposed, was not a penalty in the penal sense but rather a conventional sanction for the equivalent of moral prejudice.

46. He wondered whether the three criteria given in

[16] See para. 37, above.

[17] A/CN.4/SR.371, para. 21.

paragraph 3 for fixing the character and measure of reparation were not too exacting. Incidentally, the statement in the last sentence of the paragraph—" it should be determined by the real owner of the original interest or right "—referred, he assumed, to the quantity of the claim rather than to the actual quantity of reparation. Injured parties frequently submitted exaggerated claims in order to leave some margin for negotiation.

47. Referring to paragraph 1 of basis for discussion No. VII, he remarked that case law was consistent on the point that an " international claim " was to be regarded as a new claim in all cases and not merely in the one mentioned at the end of the paragraph.

48. Sir Gerald FITZMAURICE agreed with Mr. Zourek on the last point, which was perhaps more of theoretical than of practical interest. He would have thought that an " international claim " must almost inevitably be a new claim, since a totally different field of law came into play. A decision on a claim brought by a private person under municipal law might be correct under that law and not under international law, or, if one took a monistic view of law, correct under one section and incorrect under another section of law. Perhaps the Special Rapporteur had merely stated his idea in rather too sweeping a fashion.

49. Mr. LIANG, Secretary to the Commission, pointed out that the Spanish original used two different terms in paragraphs 1 and 2: first an " international claim " and then " a claim of one State against another ". The difference was not so clearly brought out in the English text.

50. According to traditional international law, an international claim could only be a claim of one State against another. That was borne out by the title of the claims before the United States and Mexican Mixed Commission, which ran: " United States versus Mexico (Hopkins case) ", " United States versus Mexico (Janes case) ", and so on. From the way the Special Rapporteur approached the subject in his report, it might be argued that he meant claims of an international character—that was, claims containing an international element—but in the text of the basis for discussion it was clear that an " international claim " and an " inter-state claim " meant the same thing. In his opinion, the problem could not be solved until the Commission had settled the question of whether or not it was the individual that brought the claim against a State.

51. Whether the international claim was a new one or not depended on the approach adopted. According to traditional international law, even when a claim brought by a State was based on a claim brought by an individual before the local courts, the State's claim was not only new, but entirely independent of the local court case.

52. Mr. AMADO pointed out that, according to accepted doctrine, international responsibility was always a relation between one State and another. International responsibility was based on the supposition that a State claimed satisfaction for some injury done to it. Such injury could be either a direct wrong—such as violation of the rights of the flag, a breach of international law—breach of a treaty, for example, or an injury suffered by a national. According to the judgment of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case [18] it was an elementary principle of international law that a State was entitled to protect its nationals who had suffered injury through acts contrary to international law committed by another State from which they had failed to obtain satisfaction through ordinary channels. A similar view was expressed by Max Huber in his arbitral award [19] of 1 May 1925 on United Kingdom claims in the Spanish Zone of Morocco —namely, that once the State to which the claimant belonged made a diplomatic intervention on behalf of its national, quoting either conventional rights or principles *juris gentium* applying apart from treaties on the rights of aliens, a new claim of one State against another was born.

53. Mr. SPIROPOULOS said that he did not think there was any need for a prolonged discussion of the question. The formulation of basis for discussion No. VII would have to be modified in the light of the Commission's conclusions regarding basis for discussion No. III. According to those conclusions, it was evident that the State's claim was quite distinct from that of the individual and must be based on an alleged violation of international law. He did not see how any other view was possible without accepting the Special Rapporteur's thesis that the individual should be allowed to carry his claim on to the international plane.

The meeting rose at 1.05 p.m.

[18] *Publications of the Permanent Court of International Justice*, Series A, No. 2, 1924.

[19] United Nations publication: *Reports of International Arbitral Awards*, Vol. II, 1949, p. 633.

373rd MEETING

Friday, 22 June 1956, at 10 a.m.

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

Present:

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