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Summary record of the 566th meeting

Topic:
State responsibility

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missions were sometimes appointed to carry out purely ceremonial functions, as indicated by the Special Rapporteur in paragraph 4 of his report, article 3 in its present form could certainly not apply to them.

77. Mr. SCELLE agreed with Mr. García Amador that the Commission had embarked upon a hazardous venture since it would take a great deal of time to decide which elements in each article of the 1958 draft were applicable to special missions. Such missions had a precise purpose and were appointed by mutual consent between States; since their functions could be extended by agreement, the definition of " special mission " had to be extremely flexible. He favoured the formula suggested by Sir Gerald Fitzmaurice which would obviate the need for a detailed examination of each of the articles.

78. Sir Gerald FITZMAURICE explained that his suggestion had been designed to further the purpose of Mr. Jiménez de Aréchaga's memorandum, which was to save the Commission from having to carry out a detailed analysis for which it had not time. The *mutatis mutandis* formula would have covered those instances where an article of the 1958 draft was applicable in principle but could not in its actual language be applied literally to special missions.

79. He had suggested that the Commission examine which articles of the 1958 draft were inapplicable to special missions in the belief that it could carry out the examination rapidly.

80. After a procedural discussion, the CHAIRMAN put to the vote the proposal that the Commission should modify its earlier decision concerning the method to be followed and that it should cease to examine *seriatim* the articles of the 1958 draft which in the Special Rapporteur's opinion were not applicable to special missions.

The proposal was rejected by 13 votes to 6, with 1 abstention.

The meeting rose at 1.5 p.m.

566th MEETING

Monday, 20 June 1960, at 3 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)

[Agenda item 3]

1. The CHAIRMAN invited the observer for the Inter-American Juridical Committee to address the Commission.

2. Mr. GÓMEZ ROBLEDO, observer for the Inter-American Juridical Committee, thanked the Commission for giving him the opportunity of addressing it. He wished it to be understood that he did not claim to act as spokesman on the present occasion for all his colleagues on the Inter-American Juridical Committee.

3. It was significant that, until the Tenth Inter-American Conference held at Caracas in 1954, the Inter-American Juridical Committee had not been entrusted with the codification of the principles of international law governing State responsibility, nor had any of its members suggested that it should undertake that task. That reluctance to deal with the subject was certainly not due to any lack of material nor to any lack of interest in codification as such; it was due purely and simply to the difficulties inherent in the topic itself.

4. There was an obvious connexion between General Assembly resolution 799 (VIII) of 7 December 1953, which requested the International Law Commission to undertake the codification of the principles of international law governing State responsiblity, and resolution CIV of the Tenth Inter-American Conference of 1954, which recommended to the Inter-American Council of Jurists, and hence to its permanent committee, the Inter-American Juridical Committee of Rio de Janeiro, " the preparation of a study or report on the contribution the American continent has made to the development and to the codification of the principles of international law that govern the responsibility of the State " (cited in A/CN.4/124, paragraph 101). The purpose of that resolution, as rightly indicated in the secretariat memorandum on co-operation with other bodies (*ibid.*, paragraph 102) was to transmit to the International Law Commission, for its use, material describing the contribution made by the American continent to that field of international law.

5. It had soon become apparent to the Inter-American Juridical Committee that the resolution in question narrowed down its terms of reference and at the same time entrusted it with a task of immense scope and difficulty.

6. The Committee's terms of reference under resolution CIV were limited to the study of the contribution that the American continent had made in the past to the development and codification of the principles governing state responsibility. Those terms of reference did not enable the Committee to make a constructive or creative contribution of its own.

7. At the same time, the Committee considered that the study in question, which was to be limited to the past, should take into account all the existing material on the subject in the American continent, and that material was particularly vast in regard to the law of claims.

8. Faced with those difficulties, the Committee had hoped that either the International Law Commission or the competent inter-American organs would limit its task, possibly to the law of claims, the field in which the contribution of the American continent had been particularly original. If so, the question arose whether the

Committee should confine its work to treaties and decisions of the numerous Mixed Claims Commission or should also examine the abundant literature on the subject. With regard to decisions of claims commissions, however, there would be little purpose in the Committee reproducing, for the benefit of the International Law Commission, material which already existed in the well-known works of Borchard and Feller, for example.

9. Moreover, the Inter-American Juridical Committee was particularly concerned that its work should not overlap with that of the International Law Commission. The jurists of America were devoted to their regional tradition but held that the principles of American international law should apply to those questions only which were capable of a truly regional solution. In all other matters, they felt bound by the general principles of the law of nations, and the Inter-American Juridical Committee had always acted in that spirit. For example, in connexion with certain matters of maritime law which had been submitted to it, the Committee had simply recommended the governments of the American States to accede to the Brussels Convention on the subject, no action being called for at the regional level.

10. In the absence of any delimitation of the subject by the bodies concerned, the Inter-American Juridical Committee had decided in effect to limit the scope of its work to the law of claims, not only because of the abundance of the material available on the subject but also because of its unique regional features. The Committee felt that more universal questions, such as the circumstances which gave rise to state responsibility, and the problem of imputability, were not appropriate subjects for regional organs of codification. The same was true of certain other important problems, such as that of the responsibility which might result from nuclear tests. In all those matters, the International Law Commission had a greater and broader competence.

11. There was, however, a further difficulty. It was an unfortunate but undeniable fact that the contribution of the American continent to the development of the law of claims was by no means uniform. There was a distinct cleavage between the views held on the subject of the law of claims in the United States of America, on the one hand, and in the Latin American republics on the other, in regard to three important matters: the position of aliens, the international validity of the waiver of diplomatic protection (Calvo clause) and the problem of the denial of justice.

12. So far as the position of aliens was concerned, the doctrine of an international minimum standard of justice had been uniformly opposed in the Latin American countries, which observed the principle of the equality of nationals and aliens. Under that principle, aliens could claim at most (as a maximum, not as a minimum), equality of treatment with nationals. The doctrine of an international minimum standard, whatever its merits in the abstract, was regarded as out of place in the historical, social and political context of America. The republics of America had reached a high level of civilization and their moral unity, proclaimed at the Lima Conference in 1938, presupposed a high degree of mutual confidence. In the circumstances, the principle of the equality of treatment was the principle best suited to a community bound by such close ties as that of the American peoples.

13. That cleavage between the views held in all good faith by two schools of thought was related to the different approach taken towards the same problems in highly industrialized and capital-exporting countries on the one hand, on the other, in countries which were still struggling with the problems of industrialization and the raising of standards of living. The latter countries naturally did not wish to be hampered in the application of those economic measures which they were obliged to take in the interests of their development, but which in more prosperous countries would have seemed unduly drastic or even unjustified.

14. Similar considerations explained the introduction into the legislation of certain Latin American countries (in the case of Mexico into the Constitution itself) of provisions under which aliens were deemed to accept a waiver of the diplomatic protection of their governments in regard to certain specific claims. The waiver of diplomatic protection, known as the Calvo clause, did not of course apply to claims in respect of acts against the life or freedom of aliens; it applied specifically to claims arising out of the alien's ownership of immovable property, and more especially to rights under a state concession for the exploration or exploitation of mineral resources or petroleum products.

15. The action taken in the matter in the countries in question was nothing more than the exercise of the right of eminent domain over the resources of the subsoil. Those resources had for a time in the past been regarded as vested in the owner of the land, under the influence of an unwarranted extension of the individualist concept of property. In the case of Mexico, that mistake had been put right by the provisions of the Mexican Constitution of 1917.

16. There was no doubt in the minds of most Latin American jurists regarding the validity of the Calvo clause not only in municipal law but also in international law. In their view, the waiver of diplomatic protection debarred *ab initio* the claim by the government of the alien concerned to protect its national. The contrary view, however, was held by those jurists elsewhere who adhered to the opinion that the individual was merely an object, and was never a subject, of international law and that his actions, however freely agreed to, were irrelevant to the admissibility of diplomatic protection — an opinion which appeared to be based on a complete disregard of the human factor.

17. The cleavage was equally marked in regard to denial of justice. In that connexion, the ques-

tion arose whether the expression " denial of justice " applied only to court decisions or could be held to apply also to decisions of other bodies. A further question arose whether denial of justice should be interpreted in its literal sense as the denial to an alien of access to the ordinary processes of law or whether it should be held to include those cases usually described as malicious discrimination and manifest injustice of a judicial decision.

18. In the opinion of most Spanish-American jurists, it was essential to limit the concept of denial of justice to those obvious cases which were covered by the strict meaning of the expression, without introducing any subjective elements. That restrictive definition of denial of justice, which was accepted by certain European writers such as De Vischer,[1] had been embodied in article VII of the American Treaty on Pacific Settlement (Pact of Bogotá, 1948),[2] by virtue of which the Contracting Parties bound themselves not to make diplomatic representations in order to protect their nationals when those nationals had had available the means to place their case before the competent domestic courts. However, he drew attention to the fact that the provision in question had been the subject of a reservation by the United States of America.

19. The different viewpoints of United States jurists on the one hand and Spanish-American jurists on the other did not, however, account for the whole American contribution to the subject. Brazil occupied a distinct position which had led to that country, with its great diplomatic and legal tradition, being described as a third America. The views held by Brazilian jurists were perhaps closer to those held in other countries of Latin America than those held in the United States but represented nonetheless a completely separate approach to the same problems. That fact had been made clear, for example, by the attitude of Brazil towards the Drago doctrine at the second Hague Peace Conference in 1907, and by the writings of Brazilian jurists who denied the existence of an American international law, as propounded by such writers as the Chilean Alvarez.

20. Faced with the divergence on views in the matter, the Inter-American Juridical Committee had undertaken to enumerate a number of principles which in its view formed part of Latin American international law as well as, in certain aspects, of American international law. Those principles were reproduced in the Secretariat memorandum on the subject of co-operation with other bodies (A/CN.4/124, para. 108). Of the six principles enumerated, the United States jurist who was a member of the Committee had accepted principles I, II and IV.

21. Principle I referred to non-intervention, which had been accepted as a fundamental principle by all American States in the 1936 protocol signed at Buenos Aires [3] and had been incorporated in article 15 of the Charter of American States. Principle II proclaimed in its first sentence the well-known Drago doctrine, while the second sentence virtually repudiated the so-called Porter amendment to that doctrine. It was interesting to note that the United States member of the Committee had accepted principle II without reservations. As to the following three principles, the United States member had accepted principle IV but had given only a qualified acceptance to principles III and V (*ibid.*, paragraph 112). The main difference of opinion arose, however, in regard to principle VI, which referred to denial of justice *(loc. cit., in fine)*.

22. In view of the existing differences of opinion, it might well be asked whether it would not be preferable that the inter-American bodies should not attempt to codify the law of claims for the time being. The patient work of diplomacy might in the course of time bring closer together the opposing views in the matter better than the polemics of international discussion. An invaluable contribution could also be made by the work of learned bodies. In that connexion, he had been interested to note that the most recent Harvard Draft on the subject of state responsibilities (draft No. 11) contained, in paragraph 5 (*a*) of its article 22, what seemed to him a recognition of the validity of the Calvo clause.

23. Lastly, he stressed that the law of claims belonged to a period of transition. International law was irresistibly advancing towards the international protection of human rights and the recognition of the individual as a subject of the law of nations. The attainment of those objectives, by means of the adoption by all States of covenants on human rights, would bring to an end present controversies on the law of claims. An international minimum standard of justice would be laid down for human beings in general; in case of violation of the standard thus laid down, the person concerned, whether alien or national, could appeal to the competent international body. When that process was completed, diplomatic protection would cease to exist as a distinct legal institution.

24. He hoped that his remarks would be of assistance to members of the Commission and that the co-operation between the Commission and the Inter-American Juridical Committee would continue to develop fruitfully.

25. The CHAIRMAN invited Professor Sohn, of the Harvard Law School, to address the Commission.

26. Professor SOHN said that he was grateful to have an opportunity of explaining the main

[1] "La responsabilité des Etats", in *Bibliotheca Visseriana*, vol. II, 1924, pp. 99 *et seq.*

[2] United Nations *Treaty Series*, vol. 30, p. 87.

[3] League of Nations *Treaty Series*, vol. CLXXXVIII, p. 32.

changes in the new (1960) draft prepared by the Harvard Law School of the convention on the subject of international responsibility of States for injuries to aliens.

27. In response to a suggestion made by Mr. Alfaro, the first sentence in article 1 had been revised in order to make it clear that the Draft related only to the responsibility of States under international law and not to their possible responsibility under municipal law; in addition, the article now specified that the standard " under international law " was applicable to all elements of State responsibility not only to the determination of the wrongfulness of an act but also to the question whether the act was attributable to the State and had caused an injury. Those amendments rendered the definition clearer and more consistent with the general theory of State responsibility.

28. Other important changes had been introduced in the light of the Commission's discussion at its previous session.[4] For example, several members had criticized the phrase " standards of justice recognized by civilized States ". That criticism had been accepted in spite of the fact that a similar phrase was used in article 38 of the statute of the International Court; instead, the new draft used the words " principles generally recognized by municipal legal systems ", which would perhaps be more acceptable, particularly in view of the recent emergence of many new States that were jealous of the standing of their domestic law. That modification had meant certain changes in the definitions of wrongful acts, for instance in articles 6 and 8. Three important categories of situations were envisaged : First, a clear and discriminatory violation of local law, in which case the standard of national treatment was applied. Secondly, an unreasonable departure from the principles of justice generally recognized by municipal legal systems, resulting in the application of the so-called " minimum treatment standard ", as laid down for instance in more explicit form in article 6 (*b*). Thirdly, a clear breach of a particular obligation under international law or of a special obligation under a treaty voluntarily concluded. In addition, the authors of the draft had sought to define more explicitly certain other wrongful acts, in which task they had been assisted by recent definitions of human rights and developments of international law, as well as conventions on the treatment of military forces stationed abroad, concluded by both western countries and people's democracies.

29. In attempting to define as precisely as possible wrongful acts relating to the arrest of an alien or judicial decisions, they had not used the expression " denial of justice " — which had been mentioned by Mr. Gómez Robledo — because it was so controversial. Some members of the Inter-American Juridical Committee had attached a very narrow meaning to that expression. Other international lawyers, on the other hand, believed that it comprised all violations of human rights.

30. First place had been given in the Draft to acts committed against the person of individuals or improper procedure by tribunals or administrative authorities. The provisions relating to the destruction of property, the taking of property and the violation of contracts had caused the greatest difficulty and had been attacked both for going too far and for not going far enough, so perhaps the authors had succeeded in finding a middle way.

31. In the light of some of the comments received, certain changes had been made in article 10. In paragraph 1, the taking of property not for a public purpose clearly recognized as such by a law of general application in effect at the time of the taking had been defined as wrongful since it would be clearly discriminatory under domestic law. In paragraph 3, the authors of the draft had followed the suggestion made by Sir Gerald Fitzmaurice, who had said that there were other methods of taking property as dangerous as outright taking. They had also defined the meaning of the word " property " more explicitly, closely following the provisions of the treaty of peace with Italy.[5]

32. As a concession to those who believed that acquired rights needed special protection, a new provision had been added in article 12, paragraph 1 (*a*), but no general provision concerning the protection of acquired rights had been inserted because the concept was too broad and eluded precise definition. The authors had therefore preferred the alternative method of enumerating the rights that should be protected from ordinary interference. However, the Commission would note that article 3 was drafted in very general terms, the effect of which was that the State would be responsible not only for the acts or omissions defined in articles 5 to 12 but also if without sufficient justification it caused injury to aliens by intentional acts or by lack of due care that created unreasonable risks of injury. In other words, in addition to the acts explicitly enumerated as wrongful, the draft also covered those arising from intent or negligence.

33. Article 26 concerning claims barred by lapse of time embodied what might perhaps be regarded as a novel concept in international law, but one now regarded as justified. It would of course apply in limited cases only, and though open to criticism on grounds of vagueness he doubted whether it could be improved.

34. Article 32 on damages for taking and deprivation of use or enjoyment of property had been simplified, as had article 35 which now provided for damages of a single kind.

35. Article 25 had aroused very critical comment, on the ground that a provision allowing

[4] *Yearbook of the International Law Commission*, 1959, vol. I (United Nations publication, Sales No. 59.V.1, vol. I), 512th and 513th meetings, pp. 147 to 154.

[5] United Nations *Treaty Series*, vol. 49, p. 4.

States to waive claims of individuals was inconsistent with the fundamental principles underlying the draft. However, its authors had not felt justified in departing from the traditional concept established by a long history of diplomatic relations and also recognized in numerous settlements recently concluded.

36. Nor did the authors feel able to meet the view expressed by some that provision should be made either in the draft or in an additional protocol allowing individuals direct access to the International Court of Justice or to some other special tribunal competent to receive international claims. In their opinion, the matter would best be left to a diplomatic conference if one were ultimately convened to consider the question of state responsibility.

37. Another complaint made against the draft was that it failed to make clear which elements were *de lege lata* and which *de lege ferenda*. The authors had not been convinced by the injunction that they should set down existing law without seeking to reconcile conflicting judicial decisions and practice or remove inconsistencies in the law itself, and as the practice of any individual State did not necessarily have to be consistent and might develop independently of that of other States,they had as codifiers sought to present a draft that was self-consistent. They intended to explain in detail in a commentary how and where they had departed from existing law, and hoped to circulate that detailed commentary in 1961.

38. In conclusion he thanked the Commission's Secretary and its Special Rapporteur on state responsibility for their help.

39. Mr. GARCÍA AMADOR, Special Rapporteur, hoped that the Commission would maintain and intensify its collaboration with the Inter-American Council of Jurists and that it would establish similar co-operation with other regional bodies such as the Asian-African Legal Consultative Committee which had included the topic of state responsibility in its agenda.

40. At the risk of repeating some of the points made by the observer for the Inter-American Juridical Committee he wished to remind the Commission of certain elements in the doctrine of State responsibility which had originated in the Latin American continent. First, there was the Drago doctrine and other expressions of the principle of non-intervention in the exercise of diplomatic protection, which had been embodied in a number of international instruments, both regional and general in scope.

41. Secondly, there was the Calvo clause, whereby in certain specific cases the alien, under the terms of a contract entered into with the State of residence, waived diplomatic protection. The clause had been used extensively and its validity had been recognized by some international claims commissions.

42. Thirdly, there was the principle of equality between nationals and aliens which, as opposed to the notion of the " international standard of justice ", formed the cornerstone of Latin American doctrine concerning state responsibility. Since introducing his first report (A/CN.4/L.96) he had strongly advocated a reconsideration of those two principles in the light of the fact that they had in a sense now been surpassed by the international recognition (in the Charter of the United Nations and in international declarations) of the fundamental rights of man.[6]

43. Turning to the new draft prepared by the Harvard Law School, he said that it differed fundamentally on certain points from the Harvard Draft of 1929 [7] and reflected certain new developments and trends in the theory of state responsibility. He had emphasized in his reports the shortcomings of the traditional view of state responsibility, particularly concerning the subject or owner of the interest injured for the purpose of reparation. He had indicated the way in which the traditional doctrine had been inconsistent with reality and even with itself. There was no reason why the Commission should feel bound by that traditional doctrine, even though it had been upheld by the Permanent Court of International Justice and by the new Court at The Hague as well as by arbitral tribunals.

44. Again, he had insisted in his reports on the capacity of the individual to bring an international claim for injuries that by no means necessarily affected the interests of the State of nationality, and had advocated that a practice initiated by the Central American Court of Justice in 1907 should receive every encouragement.

45. The recognition by the new Harvard Draft of the capacity of individuals to bring claims was in the nature of progressive development of international law. The 1929 draft had contained no references at all to the future possibility of extending such a right to aliens; the only provision it contained concerning disputes was article 18, which provided that disputes (between States) which were not settled by negotiation and not referred to arbitration under a general or special arbitration treaty should be referred to the Permanent Court of International Justice. In article 1, paragraph 2 (*a*), of the new draft, however, the right of an alien to present an international claim was unequivocally stated, and section F (Presentation of claims by aliens) devoted three lengthy articles to the procedure to be followed in such cases. In 1929, the capacity of individuals to bring claims before international instances would have seemed inconceivable, but since then a number of international instruments had been concluded in which the idea of individual recourse had gradually gained recognition. Since the Second World War, for example, many important international concessions agreements concluded by Asian and African countries provided for arbitration and had established the capacity of a foreign individual

[6] *Yearbook of the International Law Commission*, 1956, vol. I (United Nations publication, Sales No. 1956.V.3, vol. I), 370th meeting, esp. paras. 29 *et seq.*

[7] *Ibid.*, vol. II, document A/CN.4/96, p. 229.

or company to submit disputes concerning the interpretation of those agreements to arbitration.

46. The trend he had referred to could not be ignored and illustrated the extent to which reality, rather than abstract notions, could serve as a basis for changing rules in the codification of international law. Needless to say, the recognition of the capacity of aliens to present international claims was subject to the rule concerning the exhaustion of local remedies. The new trend, however, had the important advantage of not excluding diplomatic protection, but of avoiding the abuses of such protection as far as possible and of avoiding a stumbling block which had given rise to many disputes in the past.

47. Another respect in which the new Harvard Draft was a great improvement over the 1929 draft was that, whereas the earlier text had contained no mention whatsoever of the generally recognized doctrine and practice in the matter of circumstances extenuating responsibility, and had not exempted States from responsibility in cases where the act or omission had taken place in such circumstances, the idea was firmly established in the new draft. Thus, article 3 provided that certain acts by the State should not be considered wrongful under certain conditions, and article 4 *(Sufficiency of justification)* enumerated the main causes or circumstances exonerating a State from responsibility.

48. Yet another respect in which the new Harvard Draft departed from the traditional system set forth in the 1929 text concerned the principle of the exhaustion of local remedies. Under article 6 of the 1929 draft, a State was not " ordinarily " responsible (under a duty to make reparation to another State) until the local remedies available to the injured alien had been exhausted. In article 1, paragraph 2, of the new draft, however, the exhaustion of local remedies was made a condition *sine qua non* of the admissibility of an international claim; that provision gave the principle its full scope under international law.

49. He believed that many other points could be mentioned to prove that the new Draft was a considerable step forward in relation to the 1929 text. While so far as certain provisions were concerned it might not be thought entirely compatible with recent political, economic and social developments, those points might be considered during the Commission's next session, when the subject would be studied in greater detail. In conclusion, he expressed his gratitude to the Harvard Law School for the invaluable co-operation it had extended to him in his work in his capacity as Special Rapporteur on the topic.

50. Sir Gerald FITZMAURICE expressed his great appreciation of the interesting statements that had been made and of the work done by the Harvard Law School. Any criticism that he might feel obliged to make should not be construed as lack of awareness of the magnitude and difficulty of the task.

51. With regard to the changes in the law of state responsibility that had been referred to by all the speakers, he quite agreed that the Commission must be progressive and that there were certain trends towards advancement. He would not go so far as to say, however, that any part of the traditional law on the matter had become obsolete or been overtaken by the modern trends.

52. The capacity of the individual to present an international claim was a major stumbling block. In practice, whatever rights might be extended to individuals, it was difficult to make the right effective except through the action of States. The only rare exceptions to that rule occurred where special provisions had been made by international convention. For example, under the European Convention for the Protection of Human Rights,[8] 1950, individuals who considered that they had been mistreated by their own government could put their case to the Commission or Court of Human Rights through the machinery provided for in the Convention. It should be borne in mind, however, that the right had been rendered effective by the signature of a specific convention binding on the parties. In the absence of such treaty provisions, an individual would find it difficult to obtain redress by means of an international claim without governmental assistance, unless there was a considerable development in international law. Accordingly, traditional law in the matter was by no means obsolete.

53. He had considerable misgivings concerning the wording of article 24 *(Waiver, compromise, or settlement of claims of claimants and imposition of nationality)* of the new Harvard Draft. A State could not be precluded from continuing a claim if it so wished, for it might be interested in the question of principle involved. Whereas an individual could renounce his own interest in the claim, he was not competent to impose that waiver on his government. If the authors of the Draft had not intended to affect the position of the government in that connexion, they should have said so explicitly, since article 24 read together with article 1 did not give that impression.

54. He further observed that references were made throughout the Draft to " international law or a treaty ". He appreciated the reason of the authors for inserting that phrase so often; presumably their intention was to ensure that the clauses concerned were not confined to the specific points mentioned. Nevertheless, one of the main purposes of a code on state responsibility was to specify the acts affecting aliens which constituted a breach of international law and involved the responsibility of States. The reference to treaties, moreover, raised an even more fundamental point, since where a breach of a treaty was involved, the real wrong from the international point of view was the breach of the treaty, and not the mistreatment of an alien. For example, if the parties to a commercial treaty agreed to grant each other certain trade and tariff concessions, and one party

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

failed to grant the rights concerned, an individual might be affected or injured, but the real cause of action would be the breach of treaty, not international responsibility for injuries to aliens. If a treaty between two States was violated by one State, the rights of the other State and, hence, those of its subjects and citizens, were impaired, and in such a case the injury to the alien was an indirect consideration.

55. He believed that the new texts of articles 6 *(Denial of access to a tribunal or an administrative authority)* and 8 *(Adverse decisions and judgements)* constituted an improvement over the corresponding articles of the Harvard Draft of 1959 in that the words " and discriminatory " had been introduced (" if it [i.e., the denial of access or the adverse decision] is a clear and discriminatory violation of the law of the State "); that wording, in his opinion, came close to attaching international responsibility to a State for a decision which was merely incorrect. National courts were not infallible, and the nationals of the State concerned might also fall victim to wrong decisions; the key point was that there should be no animus against the alien as such and the important word in the provision as now drafted was " discriminatory ". To take the point further, there seemed to be no reason why discrimination should not be made the test; there seemed to be no reason to refer to violation of the law of the State concerned, since a denial of justice would exist in the event of discrimination.

56. Apart from the introduction of the notion of discrimination, he did not think that the new articles 6 and 8 were in fact anim provement over the corresponding articles of the 1959 Harvard Draft. The earlier articles had gone into greater detail, but the present article 8 was open to criticism on the grounds that paragraph (*a*) should be essentially confined to the notion of discrimination, that paragraph (*c*) contained the reference to international law and treaties and that paragraph (*b*) was incomplete. A number of other causes could result in denial of justice and involve the State's responsibility. The cause of corruption, for instance, mentioned in the 1959 draft, had been omitted from the present article 8; but discrimination and corruption could not be regarded as the same concept. Furthermore, the earlier Draft had referred to judgements clearly departing from the standards of justice generally recognized by civilized States; while that somewhat variable concept might be said to be covered by the phrase " principles of justice generally recognized by municipal legal systems ", he thought that the earlier wording was preferable. The phrase used in the 1959 text " if it [the judgement] clearly departs from the standards of justice generally recognized by civilized States " had been criticized mainly on the grounds that the word " civilized " was equivocal; he personally preferred the words " generally recognized standards of justice ". When the matter had been discussed at the previous session, Mr. Žourek had suggested the phrase " rules common to the principal legal systems of the world ",[9] and that phrase seemed to be preferable to the reference to " municipal legal systems ".

57. In conclusion, he reiterated that those and other criticisms of the new draft should not be ascribed to any lack of appreciation of the improvements that had been made over the 1929 draft.

The meeting rose at 6.10 p.m.

[9] *Yearbook of the International Law Commission*, 1959, vol. I, 513th meeting, para. 6.

567th MEETING

Tuesday, 21 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 565th meeting)*

[Agenda item 5]

1. The CHAIRMAN invited the Commission to resume its discussion on the question whether article 3 *(Functions of a diplomatic mission)* of the 1958 draft on diplomatic intercourse and immunities [1] was applicable to special missions and recalled that the Special Rapporteur had proposed the exclusion of that article from the provisions applicable to special missions.

2. Mr. JIMÉNEZ DE ARÉCHAGA said that the provisions of article 3 applied to special missions, although only within the scope of the specific tasks assigned to such missions.

3. Mr. MATINE-DAFTARY said that he agreed with the idea put forward by Mr. Jiménez de Aréchaga but considered that it should be incorporated in a special article, since article 3 could not be amended. The Commission should agree on a provision to the effect that the functions of a special mission were determined in each case by agreement between the two States concerned.

4. Mr. ERIM said that it was essential to find some formula which would make it possible to apply the various provisions of the 1958 draft to special missions. In his opinion, any of the functions described in the sub-paragraphs of article 3 could be entrusted to a special mission. Those sub-paragraphs gave a description of diplomatic duties in general, and provided the cornerstone of the whole diplomatic function, whether *ad hoc* or permanent.

5. Mr. TUNKIN suggested that it should be left to the two States concerned to determine the

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